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# PART 301—PROCEDURE AND ADMINISTRATION

## Information and Returns

RETURNS AND RECORDS

RECORDS, STATEMENTS, AND SPECIAL RETURNS

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301.7701(b)–3 Days of presence in the United States that are excluded for purposes of section 7701(b).
301.7701(b)–4 Residency time periods.
301.7701(b)–5 Coordination with section 877.
301.7701(b)–6 Taxable year.
301.7701(b)–7 Coordination with income tax treaties.
301.7701(b)–8 Procedural rules.
301.7701(b)–9 Effective dates of §§ 301.7701(b)–1 through 301.7701(b)–7.
301.7701(i)–0 Outline of taxable mortgage pool provisions.
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301.9100–14T Individual's election to terminate taxable year when case commences.
301.9100–15T Election to use retroactive effective date.
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301.9100–18T Election to include in gross income in year of transfer.
301.9100–19T Election relating to passive investment income of electing small business corporations.
301.9100–20T Election to treat certain distributions as made on the last day of the taxable year.
301.9100–21 References to other temporary elections under various tax acts.

AUTHORITY: 26 U.S.C. 7805.

Section 301.6011–2 also issued under 26 U.S.C. 6011(e).

Section 301.6011–3 also issued under 26 U.S.C. 6011.

Section 301.6011–5T also issued under 26 U.S.C. 6011.

Section 301.6033–4T also issued under 26 U.S.C. 6033.

Section 301.6036–1 also issued under 26 U.S.C. 6036.

Section 301.6037–2T also issued under 26 U.S.C. 6037.

Section 301.6050M–1 also issued under 26 U.S.C. 6050M.

Section 301.6061–1 also issued under 26 U.S.C. 6061.

Section 301.6081–2T also issued under 26 U.S.C. 6081(a).

Section 301.6103(c)–1 also issued under 26 U.S.C. 6103(c).

Section 301.6103(j)(1)–1 also issued under 26 U.S.C. 6103(j)(1).

Section 301.6103(j)(1)–1T also issued under 26 U.S.C. 6103(j)(1);

Section 301.6103(j)(5)–1 also issued under 26 U.S.C. 6103(j)(5).

Section 301.6103(k)(6)–1 also issued under 26 U.S.C. 6103(k)(6);

Section 301.6103(k)(6)–1T also issued under 26 U.S.C. 6103(k)(6);

Section 301.6103(k)(9)–1 also issued under 26 U.S.C. 6103(k)(9) and 26 U.S.C. 6103(q).

Section 301.6103(l)–1 also issued under 26 U.S.C. 6103(q).

Section 301.6103(l)(14)–1 also issued under 26 U.S.C. 6103(l)(14).

Section 301.6103(m)–1 also issued under 26 U.S.C. 6103(q).

Section 301.6103(n)–1 also issued under 26 U.S.C. 6103(n).

Section 301.6103(p)(2)(B)–1 also issued under 26 U.S.C. 6103(p)(2).

Section 301.6103(p)(2)(B)–1T also issued under 26 U.S.C. 6103(p)(2).

Sections 301.6103(p)(4)–1 and 301.6103(p)(7)–1T also issued under 26 U.S.C. 6103(p)(4) and (7) and (q),

Section 301.6104(a)–6(d) is also issued under 5 U.S.C. 552.

Section 301.6104(b)–1(d)(4) is also issued under 5 U.S.C. 552.

Section 301.6104(d)–1(d)(3)(i) is also issued under 5 U.S.C. 552.

Section 301.6104(d)–2 also issued under 26 U.S.C. 6104(d)(3).

Section 301.6104(d)–3 also issued under 26 U.S.C. 6104(d)(3).

Section 301.6104(d)–4 also issued under 26 U.S.C. 6104(e)(3).

Section 301.6104(d)–5 also issued under 26 U.S.C. 6104(e)(3).

Section 301.6109–1 also issued under 26 U.S.C. 6109 (a), (c), and (d).

Section 301.6109–3 also issued under 26 U.S.C. 6109.

Section 301.6111–1T also issued under 26 U.S.C. 6111.

Section 301.6111–2T also issued under 26 U.S.C. 6111(f)(4).

Section 301.6111–3T also issued under 26 U.S.C. 6111.

Section 301.6112–1T also issued under 26 U.S.C. 6112.

Section 301.6114–1 also issued under 26 U.S.C. 6114.

Section 301.6222(a)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6222(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6222(b)–3T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6223(a)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6223(a)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6223(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6223(b)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6223(c)–1T also issued under 26 U.S.C. 6223(c) and 6230 (i) and (k).

Section 301.6223(e)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6223(e)–2T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6223(f)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6223(g)–1T also issued under 26 U.S.C. 6223(g) and 6230 (i) and (k).

Section 301.6223(h)–1T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6224(a)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6224(b)–1T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6224(c)–1T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6224(c)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6224(c)–3T also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6226(a)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6226(b)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6226(e)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6226(f)–1T also issued under 26 U.S.C. C. 6230(k).

Section 301.6231(a)(6)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6231(a)(7)–1 also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6231(a)(7)–2 also issued under 26 U.S.C. 6230 (i) and (k).

Section 301.6231(a)(12)–1T also issued under 26 U.S.C. 6230(k) and 6231(a)(12).

Section 301.6231(c)–1 also issued under 26 U.S.C. 6231(c)(1) and (3).

Section 301.6231(c)–2 also issued under 26 U.S.C. 6231(c)(1) and (3).

Section 301.6231(c)–3T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(c)–4T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(c)–5T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(c)–6T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(c)–7T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(c)–8T also issued under 26 U.S.C. 6230(k) and 6231(c).

Section 301.6231(d)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6231(e)–1T also issued under 26 U.S.C. 6230(k).

Section 301.6231(e)–2T also issued under 26 U.S.C. 6230(k).

Section 301.6231(f)–1T also issued under 26 U.S.C. 6230 (i) and (k) and 6231(f).

Section 301.6233–1T also issued under 26 U.S.C. 6230(k) and 6233.

Section 301.6241–1T also issued under 26 U.S.C. 6241.

Section 301.6245–1T also issued under 26 U.S.C. 6245.

Section 301.6311–2 also issued under 26 U.S.C. 6311.

Section 301.6323(f)–(1)(c) also issued under 26 U.S.C. 6323(f)(3).

Section 301.6325–1T also issued under 26 U.S.C. 6326.

Section 301.6343–1 also issued under 26 U.S.C. 6343.

Section 301.6343–2 also issued under 26 U.S.C. 6343.

Section 301.6402–3 also issued under 95 Stat. 357 amending 88 Stat. 2351.

Section 301.6402–7 also issued under 26 U.S.C. 6402(i) and 6411(c).

Section 301.6404–2 also issued under 26 U.S.C. 6404.

Section 301.6404–3 also issued under 26 U.S.C. 6404(f)(3).

Section 301.6621–1 also issued under 26 U.S.C. 6230(k).

Section 301.6689–1T also issued under 26 U.S.C. 6689(a).

Section 301.7216–2, paragraphs (o) and (p) also issued under 26 U.S.C. 7216(b)(3).

Section 301.7502–1 also issued under 26 U.S.C. 7502.

Section 301.7502–1T also issued under 26 U.S.C. 7502(c).

Section 301.7502–2 also issued under 26 U.S.C. 7502.

Section 301.7507–1 also issued under 26 U.S.C. 597.

Section 301.7507–9 also issued under 26 U.S.C. 597.

Section 301.7508–1 also issued under 26 U.S.C. 7508(a)(1)(K).

Section 301.7508A-1 also issued under 26 U.S.C. 7508(a)(1)(K) and 7508A(a).

Section 301.7605–1 also issued under section 6228(b) of the Technical and Miscellaneous Revenue Act of 1988.

Section 301.7624–1 also issued under 26 U.S.C. 7624.

Sections 301.7701(b)–1 through 301.7701(b)–9 also issued under 26 U.S.C. 7701(b)(11).

Section 301.7701(i)–1(g)(1) also issued under 26 U.S.C. 7701(i)(2)(D).

Section 301.7701(i)–4(b) also issued under 26 U.S.C. 7701(i)(3).

Section 301.9000–1 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9000–2 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9000–3 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9000–4 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9000–5 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9000–6 also issued under 5 U.S.C. 301 and 26 U.S.C. 6103(q) and 7804;

Section 301.9100–1T also issued under 26 U.S.C. 6081.

Section 301.9100–2T also issued under 26 U.S.C. 6081.

Section 301.9100–3T also issued under 26 U.S.C. 6081.

Section 301.9100–4T also issued under 26 U.S.C. 168(f)(8)(G).

Section 301.9100–7T also issued under 26 U.S.C. 42, 48, 56, 83, 141, 142, 143, 145, 147, 165, 168, 216, 263, 263A, 448, 453C, 468B, 469, 474, 585, 616, 617, 1059, 2632, 2652, 3121, 4982, 7701; and under the Tax Reform Act of 1986, 100 Stat. 2746, sections 203, 204, 243, 311, 646, 801, 806, 905, 1704, 1801, 1802, and 1804.

Section 301.9100–8 also issued under 26 U.S.C. 1(i)(7), 41(h), 42(b)(2)(A)(ii), 42(d)(3), 42(f)(1), 42(g)(3), 42(i)(2)(B), 42(j)(5)(B), 121(d)(9), 142(i)(2), 165(l), 168(b)(2), 219(g)(4), 245(a)(10), 263A(d)(1), 263A(d)(3)(B), 263A(h), 460(b)(3), 643(g)(2), 831(b)(2)(A), 835(a), 865(f), 865(g)(3), 865(h)(2), 904(g)(10), 2056(b)(7)(c)(ii), 2056A(d), 2523(f)(6)(B), 3127, and 7520(a); the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3324, sections 1002(a)(23)(B), 1005(c)(11), 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1012(n)(3), 1014(c)(1), 1014(c)(2), 2004(j)(1), 2004(m)(5), 5012(e)(4), 6181(c)(2), and 6277; and under the Tax Reform Act of 1986, 100 Stat. 2746, section 905(a).

Sections 301.9100–9T, 301.9100–10T and 301.9100–11T also issued under 26 U.S.C. 1103 (g) and (h) and 6158(a).

Sections 301.9100–13T, 301.9100–14T and 301.9100–15T also issued under 26 U.S.C. 108(d)(8) and 1017(b)(3)(E).

Section 301.9100–16T also issued under 26 U.S.C. 463(d).

SOURCE: 32 FR 15241, Nov. 3, 1967, unless otherwise noted.

EDITORIAL NOTE: In the text of this part, integral section references are to sections of the Internal Revenue Code of 1954; decimal section references are to the Code of Federal Regulations.

References in the text to the ''Code'' are references to sections of the Internal Revenue Code of 1954.

## Information and Returns

RETURNS AND RECORDS

RECORDS, STATEMENTS, AND SPECIAL RETURNS

### § 301.269B–1 Stapled foreign corporations.

In accordance with section 269B(a)(1), a stapled foreign corporation is subject to the same taxes that apply to a domestic corporation under Title 26 of the Internal Revenue Code. For provisions concerning taxes other than income for which the stapled foreign corporation is liable, apply the same rules as set forth in §1.269B–1(a) through (f)(1)(i), and (g) of this Chapter, except that references to *income tax* shall be replaced with the term *tax*. In addition, for purposes of collecting those taxes solely from the stapled foreign corporation, the term *tax* means any tax liability imposed on a domestic corporation under Title 26 of the United States Code, including additions to tax, additional amounts, penalties, and interest related to that tax liability.

[T.D. 9216, 70 FR 43760, July 29, 2005]

### § 301.6001–1 Notice or regulations requiring records, statements, and special returns.

For provisions requiring records, statements, and special returns, see the regulations relating to the particular tax.

TAX RETURNS OR STATEMENTS

*General Requirement*

### § 301.6011–1 General requirement of return, statement or list.

(a) For provisions requiring returns, statements, or lists, see the regulations relating to the particular tax.

(b) The Internal Revenue Service may prescribe in forms, instructions, or other appropriate guidance the information or documentation required to be included with any return or any statement required to be made or other document required to be furnished under any provision of the internal revenue laws or regulations.

[T.D. 9040, 68 FR 4921, Jan. 31, 2003]

### § 301.6011–2 Required use of magnetic media.

(a) *Meaning of terms*. The following definitions apply for purposes of this section:

(1) *Magnetic media*. The term *magnetic media* means any media permitted under applicable regulations, revenue procedures or publications, or, in the case of returns filed with the Social Security Administration, Social Security Administration publications. These generally include magnetic tape, tape cartridge, and diskette, as well as other media (such as electronic filing) specifically permitted under the applicable regulations, procedures, or publications.

(2) *Machine-readable paper form.* The term ''machine-readable paper form'' means—

(i) Optical-scan paper form; or

(ii) Any other machine-readable paper form permitted under applicable regulations, revenue procedures, or Social Security Administration publications.

(3) *Person.* The term ''person'' includes any person that is required to file a return that is described in paragraph (b) of this section. Thus, the term ''person'' includes the United States, a State, the District of Columbia, a foreign government, a political subdivision of a State or of a foreign government, or an international organization. In addition, in the case of an affiliated group of corporations filing a consolidated return, each member of the affiliated group is a separate person.

(b) *Returns required on magnetic media.* (1) If the use of Form 1042–S, 1098, 1098–E, 1098–T, 1099 series, 5498, 8027, W-2G, or other form treated as a form specified in this paragraph (b)(1) is required by the applicable regulations or revenue procedures for the purpose of making an information return, the information required by the form must be submitted on magnetic media, except as otherwise provided in paragraph (c) of this section. Returns on magnetic media must be made in accordance with applicable revenue procedures or publications (see § 601.601(d)(2)(ii)(*b*) of this chapter). Pursuant to these procedures, the consent of the Commissioner of Internal Revenue (or other authorized officer or employee of the Internal Revenue Service) to a magnetic medium must be obtained by submitting Form 4419 (Application for Filing Information Returns Magnetically/Electronically) prior to submitting a return described in this paragraph (b)(1) on the magnetic medium.

(2) If the use of Form W-2 (Wage and Tax Statement), Form 499R-2/W-2PR (Withholding Statement (Puerto Rico)), Form W-2VI (U.S. Virgin Islands Wage and Tax Statement), Form W-2GU (Guam Wage and Tax Statement), Form W-2AS (American Samoa Wage and Tax Statement), or other form treated as a form specified in this paragraph (b)(2) is required for the purpose of making an information return, the information required by the form must be submitted on magnetic media, except as otherwise provided in paragraph (c) of this section. Returns described in this paragraph (b)(2) must be made in accordance with applicable Social Security Administration procedures or publications (which may be obtained from the local office of the Social Security Administration).

(3) The Commissioner may prescribe by revenue procedure that additional forms are treated, for purposes of this section, as forms specified in paragraph (b)(1) or (b)(2) of this section.

(c) *Exceptions*—(1) *Low-volume filers/250-threshold*—(i) *In general.* No person is required to file information returns on magnetic media unless the person is required to file 250 or more returns during the calendar year. Persons filing fewer than 250 returns during the calendar year may make the returns on the prescribed paper form, or, alternatively, such persons may make returns on magnetic media in accordance with paragraph (b) of this section.

(ii) *Machine-readable forms.* Returns made on a paper form under this paragraph (c)(1) shall be machine-readable if applicable revenue procedures provide for a machine-readable paper form.

(iii) *No aggregation.* Each type of information return described in paragraphs (b)(1) and (2) of this section is considered a separate return for purposes of this paragraph (c)(1). Therefore, the 250-threshold applies separately to each type of form required to be filed.

(iv) *Examples.* The provisions of paragraph (c)(1)(iii) of this section are illustrated by the following examples:

*Example 1.* For the calendar year ending December 31, 1998, Company X is required to file 200 returns on Form 1099–INT and 350 returns on Form 1099–MISC. Company X is not required to file Forms 1099–INT on magnetic media but is required to file Forms 1099–MISC on magnetic media.

*Example 2.* During the calendar year ending December 31, 1998, Company Y has 275 employees in Puerto Rico and 50 employees in American Samoa. Company Y is required to file Forms 499R–2/W-2PR on magnetic media but is not required to file Forms W-2AS on magnetic media.

*Example 3.* For the calendar year ending December 31, 1998, Company Z files 300 original returns on Form 1099–DIV and later files 70 corrected returns on Form 1099–DIV. Company Z is required to file the original returns on magnetic media. However, Company Z is not required to file the corrected returns on magnetic media because the corrected returns fall under the 250-threshold. See § 301.6721–1(a)(2)(ii).

(2) *Waiver.* (i) The Commissioner may waive the requirements of this section if hardship is shown in a request for waiver filed in accordance with this paragraph (c)(2)(i). The principal factor in determining hardship will be the amount, if any, by which the cost of filing the information returns in accordance with this section exceeds the cost of filing the returns on other media. Notwithstanding the foregoing, if an employer is required to make a final return on Form 941, or a variation thereof, and expedited filing of Forms W-2, Forms 499R–2/W-2PR, Forms W-2VI, Forms W-2GU, or Form W-2AS is required, the unavailability of the specifications for magnetic media filing will be treated as creating a hardship (see § 31.6071(a)–1(a)(3)(ii) of this chapter). A request for waiver must be made in accordance with applicable revenue procedures or publications (see § 601.601(d)(2)(ii)(*b*) of this chapter). Pursuant to these procedures, a request for waiver should be filed at least 45 days before the due date of the information return in order for the Service to have adequate time to respond to the request for waiver. The waiver will specify the type of information return and the period to which it applies and will be subject to such terms and conditions regarding the method of reporting as may be prescribed by the Commissioner.

(ii) The Commissioner may prescribe rules that supplement the provisions of paragraph (c)(2)(i) of this section.

(d) *Paper form returns.* Returns submitted on paper forms (whether or not machine-readable) permitted under paragraph (c) of this section shall be in accordance with applicable Internal Revenue Service or Social Security Administration procedures.

(e) *Applicability of current procedures.* Until procedures are prescribed which further implement the mandatory filing on magnetic media provided by this section, a return to which this section applies shall be made in the manner and shall be subject to the requirements and conditions (including the requirement of applying for consent to the magnetic medium) prescribed in the regulations, revenue procedures and Social Security Administration publications relating to the filing of such return on magnetic media.

(f) *Failure to file.* If a person fails to file an information return on magnetic media when required to do so by this section, the person is deemed to have failed to file the return. In addition, if a person making returns on a paper form under paragraph (c) of this section fails to file a return on machine-readable paper form when required to do so by this section, the person is deemed to have failed to file the return. See sections 6652, 6693, and 6721 for penalties for failure to file certain returns. See also section 6724 and the regulations under section 6721 for the specific rules and limitations regarding the penalty imposed under section 6721 for failure to file on magnetic media.

(g) *Effective dates.* (1) Except as otherwise provided in paragraph (g)(2) or (3) of this section, this section applies to returns required to be filed after December 31, 1986.

(2) Paragraphs (a)(1), (b)(1), (b)(2), (c)(1)(i), (c)(1)(iii), (c)(1)(iv), (c)(2), (d), (e), and (f) of this section are effective for information returns required to be filed after December 31, 1996. For information returns required to be filed after December 31, 1989, and before January 1, 1997, see section 6011(e).

(3) This section applies to returns on Forms 1098-E, ''Student Loan Interest Statement,'' and 1098–T, ''Tuition Statement,'' filed after December 31, 2003.

[T.D. 8081, 51 FR 10348, Mar. 25, 1986, as amended by T.D. 8097, 51 FR 30352, Aug. 26, 1986; T.D. 8140, 52 FR 19137, May 21, 1987; T.D. 8636, 60 FR 66142, Dec. 21, 1995; T.D. 8772, 63 FR 35519, June 30, 1998; T.D. 8992, 67 FR 20907, Apr. 29, 2002; T.D. 9029, 67 FR 77687, Dec. 19, 2002]

### § 301.6011–3 Required use of magnetic media for partnership returns.

(a) *Partnership returns required on magnetic media.* If a partnership with more than 100 partners is required to

file a partnership return pursuant to § 1.6031(a)–1 of this chapter, the information required by the applicable forms and schedules must be filed on magnetic media, except as otherwise provided in paragraph (b) of this section. Returns filed on magnetic media must be made in accordance with applicable revenue procedures or publications. In prescribing revenue procedures or publications, the Commissioner may determine that partnerships will be required to use any one form of magnetic media filing. For example, the Commissioner may determine that partnerships with more than 100 partners must file their partnership returns electronically. In filing its return, a partnership must register to participate in the magnetic media filing program in the manner prescribed by the Internal Revenue Service in applicable revenue procedures or publications.

(b) *Waiver*. The Commissioner may waive the requirements of this section if hardship is shown in a request for waiver filed in accordance with this paragraph (b). A determination of hardship will be based upon all of the facts and circumstances. One factor in determining hardship will be the reasonableness of the incremental cost to the partnership of complying with the magnetic media filing requirements. Other factors, such as equipment breakdowns or destruction of magnetic media filing equipment, also may be considered. A request for waiver must be made in accordance with applicable revenue procedures or publications. The waiver will specify the type of partnership return and the period to which it applies. The waiver will also be subject to such terms and conditions regarding the method of filing as may be prescribed by the Commissioner.

(c) *Failure to file*. If a partnership fails to file a partnership return on magnetic media in the manner required and when required to do so by this section, the partnership will be deemed to have failed to file the return in the manner prescribed for purposes of the information return penalty under section 6721. See § 301.6724–1(c)(3) for rules regarding the waiver of penalties for undue economic hardship relating to filing returns on magnetic media.

(d) *Meaning of terms*. The following definitions apply for purposes of this section:

(1) *Magnetic media*. The term *magnetic media* means any magnetic media permitted under applicable regulations, revenue procedures, or publications. These generally include magnetic tape, tape cartridge, and diskette, as well as other media (such as electronic filing) specifically permitted under the applicable regulations, procedures, or publications.

(2) *Partnership*. The term *partnership* means a partnership as defined in § 1.761–1(a) of this chapter.

(3) *Partner*. The term *partner* means a member of a partnership as defined in section 7701(a)(2).

(4) *Partnership return*. The term *partnership return* means a form in Series 1065 (including Form 1065, U.S. Partnership Return of Income, and Form 1065–B, U.S. Return of Income for Electing Large Partnerships), along with the corresponding Schedules K–1 and all other related forms and schedules that are required to be attached to the Series 1065 form.

(5) *Partnerships with more than 100 partners*. A partnership has more than 100 partners if, over the course of the partnership's taxable year, the partnership had more than 100 partners, regardless of whether a partner was a partner for the entire year or whether the partnership had over 100 partners on any particular day in the year. For purposes of this paragraph (d)(5), however, only those persons having a direct interest in the partnership must be considered partners for purposes of determining the number of partners during the partnership's taxable year.

(e) *Examples*. The following examples illustrate the provisions of paragraph (d)(5) of this section. In the examples, the partnerships utilize the calendar year, and the taxable year in question is 2000:

*Example 1*. Partnership P had five general partners and 90 limited partners on January 1, 2000. On March 15, 2000, 10 more limited partners acquired an interest in P. On September 29, 2000, the 10 newest partners sold their individual partnership interests to C, a corporation which was one of the original 90 limited partners. On December 31, 2000, P had

the same five general partners and 90 limited partners it had on January 1, 2000. P had a total of 105 partners over the course of partnership taxable year 2000. Therefore, P must file its 2000 partnership return on magnetic media.

*Example 2.* Partnership Q is a general partnership that had 95 partners on January 1, 2000. On March 15, 2000, 10 partners sold their individual partnership interests to corporation D, which was not previously a partner in Q. On September 29, 2000, corporation D sold one-half of its partnership interest in equal shares to five individuals, who were not previously partners in Q. On December 31, 2000, Q had a total of 91 partners, and on no date in the year did Q have more than 100 partners. Over the course of the year, however, Q had 101 partners. Therefore, Q must file its 2000 partnership return on magnetic media.

*Example 3.* Partnership G is a general partnership with 100 partners on January 1, 2000. There are no new partners added to G in 2000. One of G's partners, A, is a partnership with 53 partners. A is one partner, regardless of the number of partners A has. Therefore, G has 100 partners and is not required to file its 2000 partnership return on magnetic media.

(f) *Effective date.* In general, this section applies to partnership returns for taxable years ending on or after December 31, 2000. However, electing large partnerships under section 775 and partnerships using foreign addresses on their Series 1065 forms are not required to file using magnetic media for taxable years ending before January 1, 2001.

[T.D. 8843, 64 FR 61503, Nov. 12, 1999]

### § 301.6011–5T Required use of magnetic media for corporate income tax returns (temporary).

(a) *Corporate income tax returns required on magnetic media*—(1) A corporation required to file a corporate income tax return on Form 1120, ''U.S. Corporation Income Tax Return,'' under paragraphs (a), (b) and (d) through (j) of § 1.6012–2, and paragraph (c) of § 1.6012–2T of this chapter must file its corporate income tax return on magnetic media if the corporation is required by the Internal Revenue Code or regulations to file at least 250 returns during the calendar year ending with or within its taxable year, was required to file a corporate income tax return on Form 1120 under paragraphs (a), (b) and (d) through (j) of § 1.6012–2, and paragraph (c) of § 1.6012–2T of this chapter for the preceding taxable year, and has been in existence for at least one year prior to the due date (excluding extensions) of its corporate income tax return. Returns filed on magnetic media must be made in accordance with applicable revenue procedures, publications, forms, or instructions. In prescribing revenue procedures, publications, forms, or instructions, the Commissioner may direct the type of magnetic media filing. (*See* § 601.601(d)(2) of this chapter).

(2) All members of a controlled group of corporations must file their corporate income tax returns on magnetic media if the aggregate number of returns required to be filed by the controlled group of corporations is at least 250.

(b) *Waiver.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. A request for waiver must be made in accordance with applicable revenue procedures or publications. The waiver also will be subject to the terms and conditions regarding the method of filing as may be prescribed by the Commissioner.

(c) *Failure to file.* If a corporation fails to file a corporate income tax return on magnetic media when required to do so by this section, the corporation is deemed to have failed to file the return. (*See* section 6651 for the addition to tax for failure to file a return). In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns on magnetic media) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media.* The term *magnetic media* means any magnetic media permitted under applicable regulations, revenue procedures, or publications. These generally include magnetic tape, tape cartridge, and diskette, as well as other media, such as electronic filing, specifically permitted under the applicable regulations, procedures, publications, forms, or instructions. (*See* § 601.601(d)(2) of this chapter).

(2) *Corporation*. The term *corporation* means a corporation as defined in section 7701(a)(3).

(3) *Controlled group of corporations*. The term *controlled group of corporations* means a group of corporations as defined in section 1563(a).

(4) *Corporate income tax return*. The term *corporate income tax return* means a Form 1120, ''U.S. Corporation Income Tax Return,'' along with all other related forms and schedules that are required to be attached to the Form 1120.

(5) *Determination of 250 returns*. For purposes of this section, a corporation or controlled group of corporations is required to file at least 250 returns if, during the calendar year ending with or within the taxable year of the corporation or the controlled group, the corporation or the controlled group is required to file at least 250 returns of any type, including information returns. If the corporation is a member of a controlled group, the determination of the number of returns includes all returns required to be filed by all members of the controlled group during that calendar year.

(e) *Example*. The following example illustrates the provisions of paragraph (d)(5) of this section:

*Example*. The taxable year of Corporation X, a fiscal year taxpayer with assets in excess of $10 million, ends on September 30. During the calendar year ending December 31, 2007, X was required to file one Form 1120, ''U.S. Corporation Income Tax Return,'' 100 Forms W-2, ''Wage and Tax Statement,'' 146 Forms 1099-DIV, ''Dividends and Distributions,'' one Form 940, ''Employer's Annual Federal Unemployment (FUTA) Tax Return,'' and four Forms 941, ''Employer's Quarterly Federal Tax Return.'' Because X is required to file 252 returns during the calendar year that ended within its taxable year ending September 30, 2008, X is required to file its Form 1120 electronically for its taxable year ending September 30, 2008.

(f) *Effective dates*. This section applies to corporate income tax returns for corporations that report total assets at the end of the corporation's taxable year that equal or exceed $50 million on Schedule L of their Form 1120, for taxable years ending on or after December 31, 2005. This section applies to corporate income tax returns for corporations that report total assets at the end of the corporation's taxable year that equal or exceed $10 million on Schedule L of their Form 1120, for taxable years ending on or after December 31, 2006.

[T.D. 9175, 70 FR 2014, Jan. 12, 2005, as amended by T.D. 9264, 71 FR 30608, May 30, 2006]

*Income Tax Returns*

### § 301.6012–1 Persons required to make returns of income.

For provisions with respect to persons required to make returns of income, see §§ 1.6012–1 to 1.6012–4, inclusive, of this chapter (Income Tax Regulations).

### § 301.6013–1 Joint returns of income tax by husband and wife.

For provisions with respect to joint returns of income tax by husband and wife, see §§ 1.6013–1 to 1.6013–7, inclusive, of this chapter (Income Tax Regulations).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980]

### § 301.6014–1 Income tax return—tax not computed by taxpayer.

For provisions relating to the election not to show on an income tax return the amount of tax due in connection therewith, see §§ 1.6014–1 and 1.6014–2 of this chapter (Income Tax Regulations).

[T.D. 7102, 36 FR 5498, Mar. 24, 1971]

### § 301.6015–1 Declaration of estimated income tax by individuals.

For provisions relating to requirements of declarations of estimated income tax by individuals, see §§ 1.6015 (a)–1 through 1.6015 (j)–1 of this chapter (Income Tax Regulations).

[T.D. 7427, 41 FR 34033, Aug. 12, 1976]

### § 301.6016–1 Declarations of estimated income tax by corporations.

For provisions concerning the requirement of declarations of estimated income tax by corporations, see §§ 1.6016–1 to 1.6016–4, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6017–1 Self-employment tax returns.**

For provisions relating to the requirement of self-employment tax returns, see § 1.6017–1 of this chapter (Income Tax Regulations).

*Estate and Gift Tax Returns*

**§ 301.6018–1 Estate tax returns.**

For provisions relating to requirement of estate tax returns, see §§ 20.6018–1 to 20.6018–4, inclusive, of this chapter (Estate Tax Regulations).

**§ 301.6019–1 Gift tax returns.**

For provisions relating to requirement of gift tax returns, see §§ 25.6019–1 to 25.6019–4, inclusive, of this chapter (Gift Tax Regulations).

*Miscellaneous Provisions*

**§ 301.6020–1T Returns prepared or executed by the Commissioner or other internal revenue officers (temporary).**

(a) *Preparation of returns*—(1) *In general.* If any person required by the Code or by the regulations prescribed thereunder to make a return fails to make such return, it may be prepared by the Commissioner or other authorized internal revenue officer or employee provided such person consents to disclose all information necessary for the preparation of such return. The return upon being signed by the person required to make it shall be received by the Commissioner as the return of such person.

(2) *Responsibility of person for whom return is prepared.* A person for whom a return is prepared in accordance with paragraph (a)(1) of this section shall for all legal purposes remain responsible for the correctness of the return to the same extent as if the return had been prepared by him.

(b) *Execution of returns*—(1) *In general.* If any person required by the Code or by the regulations prescribed thereunder to make a return (other than a declaration of estimated tax required under section 6654 or 6655) fails to make such return at the time prescribed therefor, or makes, willfully or otherwise, a false, fraudulent or frivolous return, the Commissioner or other authorized internal revenue officer or employee shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. The Commissioner or other authorized internal revenue officer or employee may make the return by gathering information and making computations through electronic, automated or other means to make a determination of the taxpayer's tax liability.

(2) *Form of the return.* A document (or set of documents) signed by the Commissioner or other authorized internal revenue officer or employee shall be a return for a person described in paragraph (b)(1) of this section if the document (or set of documents) identifies the taxpayer by name and taxpayer identification number, contains sufficient information from which to compute the taxpayer's tax liability, and the document (or set of documents) purports to be a return. A Form 13496, ''IRC Section 6020(b) Certification,'' or any other form that an authorized internal revenue officer or employee signs and uses to identify a set of documents containing the information set forth above as a section 6020(b) return, and the documents identified, constitute a return under section 6020(b). A return may be signed by the name or title of an internal revenue officer or employee being handwritten, stamped, typed, printed or otherwise mechanically affixed to the return, so long as that name or title was placed on the document to signify that the internal revenue officer or employee adopted the document as a return for the taxpayer. The document and signature may be in written or electronic form.

(3) *Status of returns.* Any return made in accordance with paragraph (b)(1) of this section and signed by the Commissioner or other authorized internal revenue officer or employee shall be prima facie good and sufficient for all legal purposes. Furthermore, the return shall be treated as the return filed by the taxpayer for purposes of determining the amount of the addition to tax under section 6651(a)(2) and (3).

(4) *Deficiency procedures.* For deficiency procedures in the case of income, estate, and gift taxes, see sections 6211 to 6216, inclusive, and §§ 301.6211–1 to 301.6215–1, inclusive.

(5) *Employment status procedures.* For pre-assessment procedures in employment taxes cases involving worker classification, see section 7436 (proceedings for determination of employment status).

(6) *Examples.* The application of this paragraph (b) is illustrated by the following examples:

*Example 1.* Individual A, a calendar-year taxpayer, fails to file his 2003 return. Employee X, a Service employee, opens an examination related to A's 2003 taxable year. At the end of the examination, X completes a Form 13496 and attaches to it the documents listed on the form. Those documents explain examination changes and provide sufficient information to compute A's tax liability. The Form 13496 provides that the Service employee identified on the Form certifies that the attached pages constitute a return under section 6020(b). When X signs the certification package, the package constitutes a return under paragraph (b) of this section because the package identifies A by name, contains A's taxpayer identifying number (TIN), has sufficient information to compute A's tax liability, and contains a statement stating that it constitutes a return under section 6020(b). In addition, the Service shall determine the amount of the additions to tax under section 6651(a)(2) by treating the section 6020(b) return as the return filed by the taxpayer. Likewise, the Service shall determine the amount of any addition to tax under section 6651(a)(3), which arises only after notice and demand for payment, by treating the section 6020(b) return as the return filed by the taxpayer.

*Example 2.* Same facts as in *Example 1*, except that, after performing the examination, X does not compile any examination documents together as a related set of documents. X also does not sign and complete the Form 13496 nor associate the forms explaining examination changes with any other document. Because X did not sign any document stating that it constitutes a return under section 6020(b) and the documents otherwise do not purport to be a section 6020(b) return, the documents do not constitute a return under section 6020(b). Therefore, the Service cannot determine the section 6651(a)(2) addition to tax against nonfiler A for A's 2003 taxable year on the basis of those documents.

*Example 3.* Individual C, a calendar-year taxpayer, fails to file his 2003 return. The Service determines through its automated internal matching programs that C received reportable income and failed to file a return. The Service, again through its automated systems, generates a Letter 2566, ''30 Day Proposed Assessment (SFR–01) 910 SC/CG.'' This letter contains C's name, TIN, and has sufficient information to compute C's tax liability. Contemporaneous with the creation of the Letter 2566, the Service, through its automated system, electronically creates and stores a certification stating that the electronic data contained as part of C's account constitutes a valid return under section 6020(b) as of that date. Further, the electronic data includes the signature of the Service employee authorized to sign the section 6020(b) return upon its creation. Although the signature is stored electronically, it can appear as a printed name when the Service requests a paper copy of the certification. The electronically created information, signature, and certification is a return under section 6020(b). The Service will treat that return as the return filed by the taxpayer in determining the amount of the section 6651(a)(2) addition to tax with respect to C's 2003 taxable year. Likewise, the Service shall determine the amount of any addition to tax under section 6651(a)(3), which arises only after notice and demand for payment, by treating the section 6020(b) return as the return filed by the taxpayer.

*Example 4.* Corporation M, a quarterly taxpayer, fails to file a Form 941, ''Employer's Quarterly Federal Tax Return,'' for the second quarter of 2004. Q, a Service employee authorized to sign returns under section 6020(b), prepares a Form 941 by hand, stating Corporation M's name, address, and TIN. Q completes the Form 941 by entering line item amounts, including the tax due, and then signs the document. The Form 941 that Q prepared and signed constitutes a section 6020(b) return because the Form 941 purports to be a return under section 6020(b), the form contains M's name and TIN, and it includes sufficient information to compute M's tax liability for the second quarter of 2004.

(c) *Cross references*—(1) For provisions that a return executed by the Commissioner or other authorized internal revenue officer or employee will not start the running of the period of limitations on assessment and collection, see section 6501(b)(3) and § 301.6501(b)–1(e).

(2) For determining the period of limitations on collection after assessment of a liability on a return executed by the Commissioner or other authorized internal revenue officer or employee, see section 6502 and § 301.6502–1.

(3) For additions to the tax and additional amounts for failure to file returns, see sections 6651 and § 301.6651–1, and section 6652 and § 301.6652–1, respectively.

(4) For additions to the tax for failure to pay tax, see section 6651 and § 301.6651–1.

(5) For criminal penalties for willful failure to make returns, see sections 7201, 7202, and 7203.

(6) For criminal penalties for willfully making false or fraudulent returns, see sections 7206 and 7207.

(7) For civil penalties for filing frivolous income tax returns, see section 6702.

(8) For authority to examine books and witnesses, see section 7602 and § 301.7602–1.

(d) *Effective date.* This section applies to returns prepared under section 6020 after July 18, 2005. The applicability of this section expires on July 16, 2008.

[T.D. 9215, 70 FR 41144, July 18, 2005]

### § 301.6021–1 Listing by district directors of taxable objects owned by nonresidents of internal revenue districts.

Whenever there are in any internal revenue district any articles subject to tax, which are not owned or possessed by or under the care or control of any person within such district, and of which no list has been transmitted to the district director, as required by law or by regulations prescribed pursuant to law, the district director, or other authorized internal revenue officer or employee, shall enter the premises where such articles are situated, shall make such inspection of the articles as may be necessary, and shall make lists of the same according to the forms prescribed. Such lists, being subscribed by the district director or other authorized internal revenue officer or employee, shall be sufficient lists of such articles for all purposes.

INFORMATION RETURNS

*Information Concerning Persons Subject to Special Provisions*

### § 301.6031(a)–1 Return of partnership income.

For provisions relating to the requirement of returns of partnership income, see § 1.6031(a)–1 of this chapter.

[T.D. 8841, 64 FR 61502, Nov. 12, 1999]

### § 301.6032–1 Returns of banks with respect to common trust funds.

For provisions relating to requirement of returns of banks with respect to common trust funds, see § 1.6032–1 of this chapter (Income Tax Regulations).

### § 301.6033–1 Returns by exempt organizations.

For provisions relating to the requirement of returns by exempt organizations, see § 1.6033–1 of this chapter (Income Tax Regulations).

### § 301.6033–4T Required use of magnetic media for returns by organizations required to file returns under section 6033 (temporary).

(a) *Returns by organizations required to file returns under section 6033 on magnetic media.* An organization required to file a return under section 6033 on Form 990, ''Return of Organization Exempt from Income Tax,'' or Form 990–PF, ''Return of Private Foundation or Section 4947(a)(1) Trust Treated as a Private Foundation,'' must file its Form 990 or 990–PF on magnetic media if the organization is required by the Internal Revenue Code or regulations to file at least 250 returns during the calendar year ending with or within its taxable year, was required to file its Form 990 or Form 990–PF under section 6033 for the preceding taxable year, and has been in existence for at least one calendar year prior to the due date (excluding extensions) of its Form 990 or Form 990–PF. Returns filed on magnetic media must be made in accordance with applicable revenue procedures, publications, forms, or instructions. In prescribing revenue procedures, publications, forms, or instructions, the Commissioner may direct the type of magnetic media filing. (*See* § 601.601(d)(2) of this chapter).

(b) *Waiver.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. A request for waiver must be made in accordance with applicable revenue procedures or publications. The waiver also will be subject to the terms and conditions regarding the method of filing as may be prescribed by the Commissioner.

(c) *Failure to file.* If an organization required to file a return under section 6033 fails to file an information return on magnetic media when required to do so by this section, the organization is

deemed to have failed to file the return. (*See* section 6652 for the addition to tax for failure to file a return.) In determining whether there is reasonable cause for failure to file the return, § 301.6652–2(f) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns on magnetic media) will apply.

(d) *Meaning of terms*. The following definitions apply for purposes of this section:

(1) *Magnetic media*. The term magnetic media means any magnetic media permitted under applicable regulations, revenue procedures, or publications. These generally include magnetic tape, tape cartridge, and diskette, as well as other media, such as electronic filing, specifically permitted under the applicable regulations, procedures, publications, forms or instructions. (*See* § 601.601(d)(2) of this chapter).

(2) *Return required under section 6033*. The term *return required under section 6033* means a Form 990, ''Return of Organization Exempt from Income Tax,'' and Form 990–PF, ''Return of Private Foundation or Section 4947(a)(1) Trust Treated as a Private Foundation,'' along with all other related forms and schedules that are required to be attached to the Form 990 or Form 990–PF.

(3) *Determination of 250 returns*. For purposes of this section, an organization is required to file at least 250 returns if, during the calendar year ending with or within the taxable year of the organization, the organization is required to file at least 250 returns of any type, including information returns.

(e) *Example*. The following example illustrates the provisions of paragraph (d)(3) of this section. In the example, the organization is a calendar year taxpayer:

*Example*. In 2006, Organization T, with total assets in excess of $10 million, is required to file one Form 990, ''Return of Organization Exempt from Income Tax,'' 200 Forms W-2, ''Wage and Tax Statement,'' and 60 Forms 1099–MISC, ''Miscellaneous Income.'' Because T is required to file 261 returns during the calendar year, T must file its 2006 Form 990 electronically.

(f) *Effective dates*. This section applies to any organization required to file Form 990 for a taxable year ending on or after December 31, 2005, that has total assets as of the end of the taxable year of $100 million or more. This section applies to any organization required to file Form 990 for a taxable year ending on or after December 31, 2006 that has total assets as of the end of the taxable year of $10 million or more. This section applies to any organization required to file Form 990–PF for taxable years ending on or after December 31, 2006.

[T.D. 9175, 70 FR 2015, Jan. 12, 2005]

### § 301.6034–1 Returns by trusts described in section 4947(a)(2) or claiming charitable or other deductions under section 642(c).

For provisions relating to the requirement of returns by trusts described in section 4947(a)(2) or claiming charitable or other deductions under section 642(c), see § 1.6034–1 of this chapter (Income Tax Regulations).

[T.D. 8026, 50 FR 20757, May 20, 1985]

### § 301.6035–1 Returns of officers, directors, and shareholders of foreign personal holding companies.

For provisions relating to the requirement of returns by officers, directors, and shareholders of foreign personal holding companies, see §§ 1.6035–1 to 1.6035–3, inclusive, of this chapter (Income Tax Regulations).

### § 301.6036–1 Notice required of executor or of receiver or other like fiduciary.

(a) *Receivers and other like fiduciaries*—(1) *Exemption for bankruptcy proceedings*. (i) A bankruptcy trustee, debtor in possession or other like fiduciary in a bankruptcy proceeding is not required by this section to give notice of appointment, qualification or authorization to act to the Secretary or his delegate. (However, see the notice requirements under the Bankruptcy Rules.)

(ii) Paragraph (a)(1)(i) of this section is effective for appointments, qualifications and authorizations to act made

on or after January 29, 1988. For appointments, qualifications and authorizations to act made before the foregoing date, 26 CFR 301.6036–1 (a)(1) and (4)(i) (revised as of April 1, 1986) apply.

(2) *Proceedings other than bankruptcy.* A receiver in a receivership proceeding or a similar fiduciary in any proceeding (including a fiduciary in aid of foreclosure), designated by order of any court of the United States or of any State or Territory or of the District of Columbia as in control of all or substantially all the assets of a debtor or other party to such proceeding shall, on, or within 10 days of, the date of his appointment or authorization to act, give notice thereof in writing to the district director for the internal revenue district in which the debtor, or such other party, is or was required to make returns. Moreover, any fiduciary in aid of foreclosure not appointed by order of any such court, if he takes possession of all or substantially all the assets of the debtor, shall, on, or within 10 days of, the date of his taking possession, give notice thereof in writing to such district director.

(3) *Assignment for benefit of creditors.* An assignee for the benefit of a creditor or creditors shall, on, or within 10 days of, the date of an assignment, give notice thereof in writing to the district director for the internal revenue district in which the debtor is or was required to make returns. For purposes of this subparagraph, an assignee for the benefit of creditors shall be any person who, by authority of law, by the order of any court, by oral or written agreement, or in any other manner acquires control or possession of or title to all or substantially all the assets of a debtor, and who under such acquisition is authorized to use, reassign, sell, or in any manner dispose of such assets so that the proceeds from the use, sale, or other disposition may be paid to or may inure directly or indirectly to the benefit of a creditor or creditors of such debtor.

(4) *Contents of notice*—(i) *Proceedings other than bankruptcy.* The written notice required under paragraph (a)(2) of this section shall contain:

(*a*) The name and address of the person making such notice and the date of his appointment or of his taking possession of the assets of the debtor or other person whose assets are controlled,

(*b*) The name, address, and, for notices filed after December 21, 1972, the taxpayer identification number of the debtor or other person whose assets are controlled.

(*c*) In the case of a court proceeding:

(*1*) The name and location of the court in which the proceedings are pending,

(*2*) The date on which such proceedings were instituted,

(*3*) The number under which such proceedings are docketed, and

(*4*) When possible, the date, time, and place of any hearing, meeting of creditors, or other scheduled action with respect to such proceedings.

(ii) *Assignment for benefit of creditors.* The written notice required under subparagraph (3) of this paragraph shall contain:

(*a*) The name and address of, and the date the asset or assets were assigned to, the assignee,

(*b*) The name, address, and, for notice filed after December 21, 1972, the taxpayer identification number of the debtor whose assets were assigned.

(*c*) A brief description of the assets assigned,

(*d*) An explanation of the action expected to be taken with respect to such assets, and

(*e*) When possible, the date, time, and place of any hearing, meeting of creditors, sale, or other scheduled action with respect to such assets.

(iii) The notice required by this section shall be sent to the attention of the Chief, Special Procedures Staff, of the district office to which it is required to be sent.

(b) *Executors, administrators, and persons in possession of property of decedent.* For provisions relating to the requirement of filing, by an executor, administrator, or person in possession of property of a decedent, of a preliminary notice in the case of the estate of a decedent dying before January 1, 1971, see § 20.6036–1 of this chapter (Estate Tax Regulations).

(c) *Notice of fiduciary relationship.* When a notice is required under § 301.6903–1 of a person acting in a fiduciary capacity and is also required of

such person under this section, notice given in accordance with the provisions of this section shall be considered as complying with both sections.

(d) *Suspension of period on assessment.* For suspension of the running of the period of limitations on the making of assessments from the date a proceeding is instituted to a date 30 days after receipt of notice from a fiduciary in any proceeding under the Bankruptcy Act or from a receiver in any other court proceeding, see section 6872 and § 301.6872–1.

(e) *Applicability.* Except as provided in paragraph (a)(1)(ii) of this section, the provisions of this section shall apply to those persons referred to in this section whose appointments, authorizations, or assignments occur on or after the date of publication of these regulations in the FEDERAL REGISTER as a Treasury decision.

(f) *Cross references.* (1) For criminal penalty for willful failure to supply information, see section 7203.

(2) For criminal penalties for willfully making false or fraudulent statements, see sections 7206 and 7207.

(3) For time for performance of acts where the last day falls on a Saturday, Sunday, or legal holiday, see section 7503 and § 301.7503–1.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7218, 37 FR 24748, Nov. 21, 1972; T.D. 7238, 37 FR 28738, Dec. 29, 1972; T.D. 8172, 53 FR 2600, Jan. 29, 1988]

### § 301.6037–1 Return of electing small business corporation.

For provisions relating to requirement of return of electing small business corporation, see § 1.6037–1 of this chapter (Income Tax Regulations).

### § 301.6037–2T Required use of magnetic media for returns of electing small business corporation (temporary).

(a) *Returns of electing small business corporation required on magnetic media*—An electing small business corporation required to file an electing small business return on Form 1120S, ''U.S. Income Tax Return for an S Corporation,'' under § 1.6037–1 of this chapter must file its Form 1120S on magnetic media if the small business corporation is required by the Internal Revenue Code and regulations to file at least 250 returns during the calendar year ending with or within its taxable year, was required to file its Form 1120S under § 6037–1 of this chapter for the preceding taxable year, and has been in existence for at least one calendar year prior to the due date (excluding extensions) of its Form 1120S. Returns filed on magnetic media must be made in accordance with applicable revenue procedures, publications, forms, or instructions. In prescribing revenue procedures, publications, forms, or instructions, the Commissioner may direct the type of magnetic media filing. (*See* § 601.601(d)(2) of this chapter).

(b) *Waiver.* The Commissioner may grant waivers of the requirements of this section in cases of undue hardship. A request for waiver must be made in accordance with applicable revenue procedures or publications. The waiver also will be subject to the terms and conditions regarding the method of filing as may be prescribed by the Commissioner.

(c) *Failure to file.* If an electing small business corporation fails to file a return on magnetic media when required to do so by this section, the corporation is deemed to have failed to file the return. (See section 6651 for the addition to tax for failure to file a return.) In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns on magnetic media) will apply.

(d) *Meaning of terms.* The following definitions apply for purposes of this section:

(1) *Magnetic media.* The term *magnetic media* means any magnetic media permitted under applicable regulations, revenue procedures, or publications. These generally include magnetic tape, tape cartridge, and diskette, as well as other media, such as electronic filing, specifically permitted under the applicable regulations, procedures, publications, forms, or instructions. (*See* § 601.601(d)(2) of this chapter).

(2) *Corporation.* The term *corporation* means a corporation as defined in section 7701(a)(3).

(3) *Electing small business corporation return*. The term *electing small business corporation return* means a Form 1120S, ''U.S. Income Tax Return for an S Corporation,'' along with all other related forms and schedules that are required to be attached to the Form 1120S.

(4) *Electing small business corporation*. The term *electing small business corporation* means an S corporation as defined in section 1361(a)(1).

(5) *Determination of 250 returns*. For purposes of this section, a corporation is required to file at least 250 returns if, during the calendar year ending with or within the taxable year of the corporation, the corporation is required to file at least 250 returns of any type, including information returns.

(e) *Example*. The following example illustrates the provisions of paragraph (d)(5) of this section. In the example, the corporation is a calendar year taxpayer:

*Example*. In 2007, Corporation S, an electing small business corporation with assets in excess of $10 million, is required to file one Form 1120S, ''U.S. Corporation Income Tax Return,'' 100 Forms W-2, ''Wage and Tax Statement,'' 146 Forms 1099–DIV, ''Dividends and Distributions,'' one Form 940, ''Employer's Annual Federal Unemployment (FUTA) Tax Return,'' four Forms 941, ''Employer's Quarterly Federal Tax Return.'' Because S is required to file 252 returns during the calendar year, S is required to file its 2007 Form 1120S electronically.

(f) *Effective dates*. This section applies to returns of electing small business corporations that report total assets at the end of the corporation's taxable year that equal or exceed $50 million on Schedule L of Form 1120S for taxable years ending on or after December 31, 2005. This section applies to returns of electing small business corporations that report total assets at the end of the corporation's taxable year that equal or exceed $10 million on Schedule L of Form 1120S for taxable years ending on or after December 31, 2006.

[T.D. 9175, 70 FR 2016, Jan. 12, 2005]

### § 301.6038–1 Information returns required of U.S. persons with respect to certain foreign corporations.

For provisions relating to information returns required of U.S. persons with respect to certain foreign corporations, see §§ 1.6038–1 and 1.6038–2 of this chapter (Income Tax Regulations).

### § 301.6039–1 Information returns and statements required in connection with certain options.

For provisions relating to information returns and statements required in connection with certain options, see §§ 1.6039–1 and 1.6039–2 of this chapter (Income Tax Regulations).

[T.D. 7275, 38 FR 11346, May 7, 1973]

*Information Concerning Transactions With Other Persons*

### § 301.6041–1 Returns of information regarding certain payments.

For provisions relating to the requirement of returns of information regarding certain payments, see §§ 1.6041–1 to 1.6041–6, inclusive, of this chapter (Income Tax Regulations).

### § 301.6042–1 Returns of information regarding payments of dividends and corporate earnings and profits.

For provisions relating to the requirement of returns of information regarding payments of dividends and corporate earnings and profits, see §§ 1.6042–1 to 1.6042–4, inclusive, of this chapter (Income Tax Regulations).

### § 301.6043–1 Returns regarding liquidation, dissolution, termination, or contraction.

For provisions relating to the requirement of returns of information regarding liquidations, dissolutions, terminations, or contracts, see §§ 1.6043–1, 1.6043–2, and 1.6043–3 of this chapter (Income Tax Regulations).

[T.D. 7563, 43 FR 40222, Sept. 11, 1978]

### § 301.6044–1 Returns of information regarding payments of patronage dividends.

For provisions relating to the requirement of returns of information regarding payments of patronage dividends, see §§ 1.6044–1 to 1.6044–5, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6046–1 Returns as to organization or reorganization of foreign corporations and as to acquisitions of their stock.**

For provisions relating to requirement of returns as to organization or reorganization of foreign corporations and as to acquisitions of their stock, see §§ 1.6046–1 to 1.6046–3, inclusive, of this chapter. (Income Tax Regulations.)

**§ 301.6047–1 Information relating to certain trusts and annuity and bond purchase plans.**

For provisions relating to the requirement of returns of information regarding certain trusts and annuity and bond purchase plans, see § 1.6047–1 of this chapter (Income Tax Regulations).

**§ 301.6048–1 Returns as to creation of or transfers to certain foreign trusts.**

For provisions relating to the requirement of returns as to creation of or transfers to certain foreign trusts, see § 16.3–1 of this chapter (Temporary Regulations under the Revenue Act of 1962).

**§ 301.6049–1 Returns regarding payments of interest.**

For provisions relating to the requirement of returns regarding payments of interest, see §§ 1.6049–1 to 1.6049–3, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6050A-1 Information returns regarding services performed by certain crewmen on fishing boats.**

For provisions relating to the requirement of returns of information regarding services performed by certain crewmen on fishing boats, see § 1.6050A-1 of this chapter (Income Tax Regulations) and § 301.6652–1 of this chapter (Regulations on Procedure and Administration).

[T.D. 7716, 45 FR 57124, Aug. 27, 1980]

**§ 301.6050M–1 Information returns relating to persons receiving contracts from certain Federal executive agencies.**

For provisions relating to the requirements of returns of information relating to persons receiving contracts from certain Federal executive agencies, see § 1.6050M–1 of this chapter (Income Tax Regulations).

[T.D. 8275, 54 FR 50372, Dec. 6, 1989]

*Information Regarding Wages Paid Employees*

**§ 301.6051–1 Receipts for employees.**

For provisions relating to statements for employees regarding remuneration paid during calendar year, see § 31.6051–1 of this chapter (Employment Tax Regulations).

**§ 301.6052–1 Information returns and statements regarding payment of wages in the form of group-term life insurance.**

For provisions relating to information returns and statements required in connection with the payment of wages in the form of group-term life insurance, see §§ 1.6052–1 and 1.6052–2 of this chapter (income tax regulations).

[T.D. 7275, 38 FR 11346, May 7, 1973]

**§ 301.6057–1 Employee retirement benefit plans; identification of participant with deferred vested retirement benefit.**

(a) *Annual registration statement*—(1) *In general.* Under section 6057(a), the plan administrator (within the meaning of section 414(g)) of an employee retirement benefit plan must file with the Internal Revenue Service information relating to each plan participant who separates from service covered by the plan and is entitled to a deferred vested retirement benefit under the plan, but is not paid this retirement benefit. Plans subject to this filing requirement are described in subparagraph (3) of this paragraph. Subparagraph (4) describes how the information is to be filed with the Internal Revenue Service. In the case of a plan to which only one employer contributes, the time for filing the information with respect to each separated participant is described in subparagraph (5). In the case of a plan to which more than one employer contributes the time for filing the information with respect to a participant is described in paragraph (b)(2) of this section. Paragraph (b) of this section also provides other rules

applicable only to plans to which more than one employer contributes.

(2) *Deferred vested retirement benefit.* For purposes of this section, a plan participant's deferred retirement benefit is considered a vested benefit if it is vested under the terms of the plan at the close of the plan year described in paragraph (a)(5) or (b)(4) of this section (whichever is applicable) for which information relating to any deferred vested retirement benefit of the participant must be filed. A participant's deferred retirement benefit need not be a nonforfeitable benefit within the meaning of section 411(a) for the filing requirements described in this section to apply. Accordingly, information relating to a participant's deferred vested retirement benefit must be filed as required by this section notwithstanding that the benefit is subject to forfeiture by reason of an event or condition occurring subsequent to the close of the plan year described in paragraph (a)(5) or (b)(4) of this section (whichever is applicable) for which information relating to any deferred vested retirement benefit of the participant must be filed.

(3) *Plans subject to filing requirement.* The term ''employee retirement benefit plan'' means a plan to which the vesting standards of section 203 of part 2 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 854) apply for any day in the plan year. (For purposes of this section, ''plan year'' means the plan year as determined for purposes of the annual return required by section 6058(a)). Accordingly, a plan need not be a qualified plan within the meaning of section 401(a) to be subject to these filing requirements. A plan to which more than one employer contributes must file the report of deferred vested retirement benefits described in this section, but see paragraph (b) of this section for special rules applicable to such a plan. The filing requirements described in this section and § 301.6057–2 (relating to notification of change in plan status) do not apply to a governmental or church plan described in section 414 (d) or (e).

(4) *Filing requirements.* Information relating to the deferred vested retirement benefit of a plan participant must be filed on schedule SSA as an attachment to the Annual Return/Report of Employee Benefit Plan (form 5500 series). Schedule SSA shall be filed on behalf of an employee retirement benefit plan for each plan year for which information relating to the deferred vested retirement benefit of a plan participant is filed under paragraph (a)(5) or (b)(2) of this section. There shall be filed on schedule SSA the name and social security number of the participant, a description of the nature, form, and amount of the deferred vested retirement benefit to which the participant is entitled, and such other information as is required by section 6057(a) or schedule SSA and the accompanying instructions. The form of the benefit reported on schedule SSA shall be the normal form of benefit under the plan, or, if the plan administrator (within the meaning of section 414(g)) considers it more appropriate, any other form of benefit.

(5) *Time for reporting deferred vested retirement benefit*—(i) *In general.* In the case of a plan to which only one employer contributes, information relating to the deferred vested retirement benefit of a plan participant must be filed no later than on the schedule SSA filed for the plan year following the plan year within which the participant separates from service covered by the plan. Information relating to a separated participant may, at the option of the plan administrator, be reported earlier (that is, on the schedule SSA filed for the plan year in which the participant separates from service covered by the plan). For purposes of this paragraph a participant is not considered to separate from service covered by the plan solely because the participant incurs a break in service under the plan. In addition, for purposes of this paragraph, in the case of a plan which uses the elapsed time method described in Department of Labor regulations for crediting service for benefit accrual purposes, a participant is considered to separate from service covered by the plan on the date the participant severs from service covered by the plan.

(ii) *Exception.* Notwithstanding subdivision (i), no information relating to the deferred vested retirement benefit of a separated participant is required

to be filed on schedule SSA if, before the date such schedule SSA is required to be filed (including any extension of time for filing granted pursuant to section 6081), the participant (A) is paid some or all of the deferred vested retirement benefit under the plan, (B) returns to service covered by the plan, or (C) forfeits all of the deferred vested retirement benefit under the plan.

(b) *Plans to which more than one employer contributes*—(1) *Application*. Section 6057 and this section apply to a plan to which more than one employer contributes with the modifications set forth in this paragraph. For purposes of section 6057 and this section, whether or not more than one employer contributes to a plan shall be determined by the number of employers who are required to contribute to the plan. Thus, for example, this paragraph applies to plans maintained by more than one employer which are collectively bargained as described in section 413(a), multiple-employer plans described in section 413(c) and the regulations thereunder, multiemployer plans described in section 414(f), and plans adopted by more than one employer of certain controlled and common control groups described in section 414 (b) and (c).

(2) *Time for reporting deferred vested retirement benefit*—(i) *In general*. In the case of a plan to which more than one employer contributes, information relating to the deferred vested retirement benefit of a plan participant must be filed no later than on the schedule SSA filed for the plan year within which the participant completes the second of two consecutive one-year breaks in service (as defined in the plan for vesting percentage purposes) in service computation periods (as defined in the plan for vesting percentage purposes) which begin after December 31, 1974. At the option of the plan administrator, information relating to a participant's deferred vested retirement benefit may be filed earlier (that is, on the schedule SSA filed for the plan year in which the participant incurs the first one-year break in service or, in the case of a separated participant, on the schedule SSA filed for the plan year in which the participant separates from service).

(ii) *Special rules*—For purposes of this subparagraph (1)—

(A) For the definition of the term ''1-year break in service'' in the case of a plan which uses the elapsed time method described in Department of Labor Regulations for crediting service for vesting percentage purposes, see § 1.411(a)–6(c)(2).

(B) In the case of a plan which does not define the term ''1-year break in service'' for vesting percentage purposes, a plan participant shall be deemed to incur a 1-year break in service under the plan in any plan year within which the participant does not complete more than 500 hours of service covered by the plan.

(iii) *Transitional rule*. Notwithstanding subdivision (i), if the second consecutive 1-year break in service described in subdivision (i) is incurred in a plan year beginning before January 1, 1978, information relating to the participant's deferred vested retirement benefit is not required to be filed earlier than on the schedule SSA filed for the first plan year beginning after December 31, 1977.

(iv) *Exception*. Notwithstanding subdivision (i) or (iii) of this subparagraph, no information relating to a participant's deferred vested retirement benefit is required to be filed on schedule SSA if, before the date such schedule SSA is required to be filed (including any extension of time for filing granted pursuant to section 6081), the participant (A) is paid some or all of the deferred vested retirement benefit under the plan, (B) accrues additional retirement benefits under the plan, or (C) forfeits all of the deferred vested retirement benefit under the plan.

(3) *Information relating to deferred vested retirement benefit*—(i) *Incomplete records*. Section 6057(a) and paragraph (a)(4) of this section require the filing on schedule SSA of a description of the deferred vested retirement benefit to which the participant is entitled. If the plan administrator of a plan to which more than one employer contributes maintains records of a participant's service covered by the plan which are incomplete as of the close of the plan year with respect to which the plan administrator files information relating to the participant on schedule SSA, the

plan administrator may elect to file the information required by schedule SSA based only upon these incomplete records. The plan administrator is not required, for purposes of completing schedule SSA, to compile from sources other than such records a complete record of a participant's years of service covered by the plan. Similarly, if retirement benefits under the plan are determined by taking into account a participant's service with an employer which is not service covered by the plan, but the plan administrator maintains records only with respect to periods of service covered by the plan, the plan administrator may complete schedule SSA taking into account only the participant's period of service covered by the plan.

(ii) *Inability to determine correct amount of participant's deferred vested retirement benefit.* If the amount of a participant's deferred vested retirement benefit which is filed on schedule SSA is computed on the basis of plan records maintained by the plan administrator which—

(A) Are incomplete with respect to the participant's service covered by the plan (as described in subdivision (i)), or

(B) Fail to account for the participant's service not covered by the plan which is relevant to a determination of the participant's deferred vested retirement benefit under the plan (as described in subdivision (i)),

then the plan administrator must indicate on schedule SSA that the amount of the deferred vested retirement benefit shown therein may be other than that to which the participant is actually entitled because the amount is based upon incomplete records.

(iii) *Inability to determine whether participant vested in deferred retirement benefit.* Where, as described in subdivision (i), information to be reported on schedule SSA is to be based upon records which are incomplete with respect to a participant's service covered by the plan or which fail to take into account relevant service not covered by the plan, the plan administrator may be unable to determine whether or not the participant is vested in any deferred retirement benefit. If, in view of information provided either by the incomplete records or the plan participant, there is a significant likelihood that the plan participant is vested in a deferred retirement benefit under the plan, information relating to the participant must be filed on schedule SSA with the notation that the participant may be entitled to a deferred vested retirement benefit under the plan, but information relating to the amount of the benefit may be omitted. This subdivision (iii) does not apply in a case in which it can be determined from plan records maintained by the plan administrator that the participant is vested in a deferred retirement benefit. Subdivision (ii), however, may apply in such a case.

(c) *Voluntary filing*—(1) *In general.* The plan administrator of an employee retirement benefit plan described in paragraph (a)(3) of this section, or any other employee retirement benefit plan (including a governmental or church plan), may at its option, file on schedule SSA information relating to the deferred vested retirement benefit of any plan participant who separates at any time from service covered by the plan, including plan participants who separate from service in plan years beginning before 1976.

(2) *Deleting previously filed information.* If, after information relating to the deferred vested retirement benefit of a plan participant is filed on schedule SSA, the plan participant—

(i) Is paid some or all of the deferred vested retirement benefit under the plan, or

(ii) Forfeits all of the deferred vested retirement benefit under the plan, the plan administrator may, at its option, file on schedule SSA (or such other form as may be provided for this purpose) the name and social security number of the participant with the notation that information previously filed relating to the participant's deferred vested retirement benefit should be deleted.

(d) *Filing incident to cessation of payment of benefits*—(1) *In general.* As described in this section, no information relating to the deferred vested retirement benefit of a plan participant is required to be filed on schedule SSA if before the date such schedule SSA is required to be filed, some of the deferred vested retirement benefit is paid

to the participant, and information relating to a participant's deferred vested retirement benefit which was previously filed on schedule SSA may be deleted if the participant is paid some of the deferred vested retirement benefit. If payment of the deferred vested retirement benefit ceases before all of the benefit to which the participant is entitled is paid to the participant, information relating to the deferred vested retirement benefit to which the participant remains entitled shall be filed on the schedule SSA filed for the plan year following the last plan year within which a portion of the benefit is paid to the participant.

(2) *Exception*. Notwithstanding subparagraph (1) of this paragraph, no information relating to the deferred vested retirement benefit to which the participant remains entitled is required to be filed on schedule SSA if, before the date such schedule SSA is required to be filed (including any extension of time for filing granted pursuant to section 6081), the participant (i) returns to service covered by the plan, (ii) accrues additional retirement benefits under the plan, or (iii) forfeits the benefit under the plan.

(e) *Individual statement to participant*. The plan administrator of an employee retirement benefit plan defined in paragraph (a)(3) of this section must provide each participant with respect to whom information is required to be filed on schedule SSA a statement describing the deferred vested retirement benefit to which the participant is entitled. The description provided the participant must include the information filed with respect to the participant on schedule SSA. The statement is to be delivered to the participant or forwarded to the participant's last known address no later than the date on which any schedule SSA reporting information with respect to the participant is required to be filed (including any extension of time for filing granted pursuant to section 6081).

(f) *Penalties*. For amounts imposed in the case of failure to file the report of deferred vested retirement benefits required by section 6057(a) and paragraph (a) or (b) of this section, see section 6652(e)(1). For the penalty relating to a failure to provide the participant the individual statement of deferred vested retirement benefit required by section 6057(e) and paragraph (e) of this section, see section 6690.

(g) *Effective dates*—(1) *Plans to which only one employer contributes*. In the case of a plan to which only one employer contributes, this section is effective for plan years beginning after December 31, 1975, and with respect to a participant who separates from service covered by the plan in plan years beginning after that date.

(2) *Plans to which more than one employer contributes*. In the case of a plan to which more than one employer contributes, this section is effective for plan years beginning after December 31, 1977, and with respect to a participant who completes two consecutive 1-year breaks in service under the plan in service computation periods beginning after December 31, 1974.

[T.D. 7561, 43 FR 38004, Aug. 25, 1978]

### § 301.6057–2 Employee retirement benefit plans; notification of change in plan status.

(a) *Change in plan status*. The plan administrator (within the meaning of section 414(g)) of an employee retirement benefit plan defined in § 301.6057–1(a)(3) (including a plan to which more than one employer contributes, as described in § 301.6057–1(b)(1)) must notify the Internal Revenue Service of the following changes in plan status—

(1) A change in the name of the plan.

(2) A change in the name or address of the plan administrator,

(3) The termination of the plan, or

(4) The merger or consolidation of the plan with another plan or the division of the plan into two or more plans.

(b) *Notification*. A notification of a change in status described in paragraph (a) of this section, must be filed on the Annual Return/Report of Employee Benefit Plan (form 5500 series) for the plan year in which the change in status occurred. The notification must be filed at the time and place and in the manner prescribed in the form and any accompanying instructions.

(c) *Penalty*. For amounts imposed in the case of failure to file a notification of a change in plan status required by section 6057(b) and this section, see section 6652(e)(2).

(d) *Effective date*. This section is effective for changes in plan status occurring within plan years beginning after December 31, 1975.

[T.D. 7561, 43 FR 38006, Aug. 25, 1978]

**§ 301.6058–1 Information required in connection with certain plans of deferred compensation.**

(a) *Reporting of information*—(1) *Annual return*. For each funded plan of deferred compensation an annual return must be filed with the Internal Revenue Service. The annual return of the plan is the appropriate Annual Return/Report of Employee Benefit Plan (Form 5500 series) as determined under these forms. The annual period for the annual return of the plan shall be either the plan year or the taxable year of the employer maintaining the plan as determined under these forms. These forms are hereinafter referred to as the ''forms prescribed by section 6058(a).''

(2) *Plans subject to requirements*. For purposes of this section, the term ''funded plan of deferred compensation'' means each pension, annuity, stock bonus, profit-sharing, or other funded plan of deferred compensation described in part 1 of subchapter D of chapter 1. Accordingly, the term includes qualified plans under sections 401(a), 403(a), and 405(a); individual retirement accounts and annuities described in sections 408(a) and 408(b); and custodial accounts under section 403(b)(7). The term also includes: funded plans of deferred compensation which are not qualified plans; funded governmental plans and church plans, whether or not qualified (See sections 414(d) and 414(e)); and plans maintained outside the United States primarily for nonresident aliens (as described in subsection (b)(4) of section 4 of subtitle A of title I of the Employee Retirement Income Security Act of 1974; (88 Stat. 840)). The term does not include annuity contracts described in section 403(b)(1) or individual retirement accounts (an individual participant or surviving beneficiary in such account must file under paragraph (d)(2) of this section) and bonds described in sections 408(c) and 409.

(3) *Required information*. The information required to be furnished on the forms prescribed by section 6058(a) shall include such information concerning the qualification of the plan, the financial condition of the trust, fund, or custodial or fiduciary account which is a part of the plan, and the operation of the plan as shall be required by the forms, applicable accompanying schedules and related instructions applicable to the annual period.

(4) *Time of filing*. The forms prescribed by section 6058(a) shall be filed in the manner and at the time as required by the forms and related instructions applicable to the annual period.

(b) *Who must file*—(1) *In general*. The annual return required to be filed under section 6058(a) and paragraph (a) of this section for the annual period shall be filed by either the employer maintaining the plan or the plan administrator (as defined in section 414(g)) of the plan for that annual period. Whether the employer or plan administrator files shall be determined under the forms prescribed by section 6058(a) and related instructions applicable to the annual period. Nothing in these forms shall preclude an employer from filing the return on behalf of the plan administrator, or the plan administrator from filing on behalf of the employer.

(2) *Definition of employer*. For purposes of subparagraph (1) of this paragraph, the term ''employer'' includes a sole proprietor and a partnership.

(c) *Other rules applicable to annual returns*—(1) *Extensions of time for filing*. For rules relating to the extension of time for filing, see section 6081 and the regulations thereunder and the instructions on the forms prescribed by section 6058(a).

(2) *Amended filing*. Any form prescribed by this section may be filed as an amendment to a form previously filed under this section with respect to the same annual period pursuant to the instructions for such forms.

(3) *Additional information*. In addition to the information otherwise required to be furnished by this section, the district director may require any further information that is considered necessary to determine allowable deductions under section 404, qualification under section 401, or the financial condition and operation of the plan.

(4) *Records*. Records substantiating all data and information required by this section to be filed must be kept at all times available for inspection by internal revenue officers at the principal office or place of business of the employer or plan administrator.

(5) *Relief from filing*. Notwithstanding paragraph (a) of this section, the Commissioner may, in his discretion, relieve an employer, or plan administrator, from reporting information on the forms prescribed by section 6058(a). This discretion includes the ability to relieve an employer, or plan administrator, from filing the applicable form.

(d) *Special rules for individual retirement arrangements*—(1) *Application*. This paragraph, in lieu of paragraph (a) of this section, applies to an individual retirement account described in section 408(a) and an individual retirement annuity described in section 408(b), including such accounts and annuities for which a deduction is allowable under section 220 (spousal individual retirement arrangements).

(2) *General rule*. For each taxable year beginning after December 31, 1974, every individual who during such taxable year—

(i) Establishes or maintains an individual retirement account described in section 408(a) (including an individual who is a participant in an individual retirement account described in section 408(c)).

(ii) Purchases or maintains an individual retirement annuity described in section 408(b), or

(iii) Is a surviving beneficiary with respect to an account or annuity referred to in this subparagraph which is in existence during such taxable year, shall file Form 5329 (or any other form designated by the Commissioner for this purpose), as an attachment to or part of the Form 1040 filed by such individual for such taxable year, setting forth in full the information required by that form and the accompanying instructions.

(3) *Special information returns*. If an individual described in subparagraph (2) of this paragraph is not required to file a Form 1040 for such taxable year, such individual shall file a Form 5329 (or any other designated form) with the Internal Revenue Service by the 15th day of the 4th month following the close of such individual's taxable year setting forth in full the information required by that form and the accompanying instructions.

(4) *Relief from filing*. The Commissioner may, in his discretion, relieve an individual from filing the form prescribed by this paragraph.

(5) *Retirement bonds*. An individual who purchases, holds, or maintains a retirement bond described in section 409 may be required to file a return under other provisions of the Code.

(e) *Actuarial statement in case of mergers, etc*. For requirements with respect to the filing of actuarial statements in the case of a merger, consolidation, or transfer of assets or liabilities, see section 6058(b) and section 414(l) and the regulations thereunder.

(f) *Effective dates*—(1) *Section 6058 (a) requirements*. The rules with respect to annual returns required under section 6058(a) (the rules in this section, other than paragraph (e) thereof) are effective for plan years beginning after September 2, 1974.

(2) *Section 6058(b) requirements*. The requirements of section 6058(b) relating to mergers, etc., and paragraph (e) of this section are effective on September 2, 1974, with respect to events described in section 6058(b) occurring on or after such date.

[T.D. 7551, 43 FR 29292, July 7, 1978]

### § 301.6059–1 Periodic report of actuary.

(a) *In general*. The actuarial report described in this section must be filed on behalf on a defined benefit plan to which the minimum funding standards of section 412 apply. The actuarial report must be filed by the plan administrator (within the meaning of section 414(g)) on Schedule B as an attachment to the annual Return/Report of Employee Benefit Plan (Form 5500 series). The instructions accompanying the Form 5500 series prescribe the place and date for filing Schedule B.

(b) *Plan years for which report required*. In the case of a plan in existence on January 1, 1974, Schedule B must be filed for the first plan year beginning after December 31, 1975, for which the minimum funding standards apply to the plan, and for each plan

year thereafter for which the Schedule must be filed under the instructions accompanying the Schedule and the Form 5500 series. In the case of a plan not in existence on January 1, 1974, Schedule B must be filed for the first plan year beginning after September 2, 1974, for which the minimum funding standards apply to the plan, and for each plan year thereafter for which the Schedule must be filed under the instructions accompanying the Schedule and the Form 5500 series. For rules relating to when a plan is considered to be in existence, see §1.410(a)–2(c). For purposes of this section, ''plan year'' means the plan year as determined for purposes of the minimum funding standards.

(c) *Contents of report*. The actuarial report of a plan filed on Schedule B must contain—

(1) The date of the actuarial valuation applicable to the plan year for which the report is filed (see section 412(c)(9) for rules relating to the frequency with which an actuarial valuation of the plan is required to be made),

(2) A description of the funding method and actuarial assumptions used to determine costs under the plan,

(3) A certification of the contribution necessary to reduce the accumulated funding deficiency (as defined in section 412(a)) to zero,

(4) A statement by the enrolled actuary signing the report that to the best of the actuary's knowledge the report is complete and accurate,

(5) A statement by the enrolled actuary signing the report that in the actuary's opinion the actuarial assumptions used are in the aggregate (i) reasonably related to the experience of the plan and to reasonable expectations, and (ii) represent the actuary's best estimate of anticipated experience under the plan,

(6) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan, and

(7) Such other information as may be required by Schedule B or the instructions accompanying the Schedule and the Form 5500 series.

(d) *Certification by enrolled actuary*. The actuarial report filed on Schedule B must be signed by an enrolled actuary (within the meaning of section 7701(a)(35)) or there may be attached to the report a statement signed by the actuary that contains the statements described in paragraph (c) (4) and (5) of this section.

An actuarial report filed for a plan year ending after January 25, 1982, does not satisfy the requirements of this section if the actuary seeks to materially qualify such statements. For this purpose, the following are not considered to materially qualify a statement required by paragraph (c) (4) or (5) of this section:

(1) A statement that the report is based in part on information provided to the actuary by another person, that such information would customarily not be verified by the actuary, and that the actuary has no reason to doubt the substantial accuracy of the information (taking into account the facts and circumstances that are known or reasonably should be known to the actuary, including the contents of any other actuarial report prepared by the actuary for the plan),

(2) A statement that the report is based in part on information provided by another person, that the actuary believes such information is or may be inaccurate or incomplete, but that the inaccuracies or omissions are not material, the inaccuracies or omissions are not so numerous or flagrant as to suggest that there may be material inaccuracies, and that therefore the actuarial report is substantially accurate and complete and fairly discloses the actuarial position of the plan,

(3) A statement that the report reflects the requirement of a regulation or ruling, and that any statement regarding the actuarial position of the plan is made only in light of such requirement,

(4) A statement that the report reflects an interpretation of a statute, regulation or ruling, that the actuary has no reason to doubt the validity of that interpretation, and that any statement regarding the actuarial position of the plan is made only in light of such interpretation,

(5) A statement that in the opinion of the actuary the report fully reflects

the requirements of an applicable statute, but does not conform to the requirements of a regulation or ruling promulgated under the statute that the actuary believes is contrary to the statute, or

(6) A statement furnished to comply with the requirements of paragraph (c)(6) of this section.

A statement otherwise described in a subparagraph of this paragraph (d) shall not be considered to satisfy the requirements of such subparagraph unless the statement identifies, with particularity, that matter to which the statement relates and the facts and circumstances surrounding the statement. In addition, a statement otherwise described in subparagraph (5) of this paragraph (d) shall not be considered to satisfy the requirements of that subparagraph unless the statement indicates whether an accumulated funding deficiency or a contribution that is not wholly deductible may result if the actuary's belief is determined to be incorrect.

(e) *Relief from filing*. Notwithstanding paragraph (a) of this section, the Commissioner may, in the Commissioner's discretion, relieve a plan administrator from filing Schedule B or from reporting information required by Schedule B or paragraph (c) of this section.

(f) *Penalty*. For the penalty imposed in the case of a failure to file the actuarial report required by this section, see section 6692 and § 301.6692–1.

(Secs. 6059 and 7805 of the Internal Revenue Code of 1954 (88 Stat. 947, 68A Stat. 917; 26 U.S.C. 6059, 7805))

[T.D. 7798, 46 FR 57483, Nov. 24, 1981; 46 FR 60435, Dec. 10, 1981]

SIGNING AND VERIFYING OF RETURNS AND OTHER DOCUMENTS

### § 301.6061–1 Signing of returns and other documents.

(a) *In general*. For provisions concerning the signing of returns and other documents, see the regulations relating to the particular tax.

(b) *Method of signing*. The Secretary may prescribe in forms, instructions, or other appropriate guidance the method of signing any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations.

(c) *Effective dates*. The rule in paragraph (a) is effective December 12, 1996. The rule in paragraph (b) is effective on July 21, 1995.

[T.D. 8689, 61 FR 65320, Dec. 12, 1996]

### § 301.6062–1 Signing of corporation returns.

For provisions relating to the signing of corporation income tax returns, see § 1.6062–1 of this chapter (Income Tax Regulations).

### § 301.6063–1 Signing of partnership returns.

For provisions relating to the signing of returns of partnership income, see § 1.6063–1 of this chapter (Income Tax Regulations).

### § 301.6064–1 Signature presumed authentic.

An individual's name signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

### § 301.6065–1 Verification of returns.

For provisions concerning the verification of returns and other documents, see the regulations relating to the particular tax.

TIME FOR FILING RETURNS AND OTHER DOCUMENTS

### § 301.6071–1 Time for filing returns and other documents.

For provisions concerning the time for filing returns and other documents, see the regulations relating to the particular tax.

### § 301.6072–1 Time for filing income tax returns.

For provisions relating to time for filing income tax returns, see §§ 1.6072–1 to 1.6072–4, inclusive, of this chapter (Income Tax Regulations).

### § 301.6073–1 Time for filing declarations of estimated income tax by individuals.

For provisions relating to time for filing declarations of estimated income

tax by individuals, see §§ 1.6073–1 to 1.6073–4, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6074–1 Time for filing declarations of estimated income tax by corporations.**

For provisions relating to time for filing declarations of estimated income tax by corporations, see §§ 1.6074–1 to 1.6074–3, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6075–1 Time for filing estate and gift tax returns.**

For provisions relating to time for filing estate tax returns and gift tax returns, see § 20.6075–1 of this chapter (Estate Tax Regulations) and § 25.6075–1 of this chapter (Gift Tax Regulations), respectively.

EXTENSION OF TIME FOR FILING RETURNS

**§ 301.6081–1 Extension of time for filing returns.**

For provisions concerning extensions of time for filing returns or other documents, see the regulations relating to the particular tax.

**§ 301.6081–2T Automatic extension of time for filing an information return with respect to certain foreign trusts (temporary).**

(a) *In general.* A trust required to file a return on Form 3520–A, ''Annual Information Return of Foreign Trust with a U.S. Owner,'' will be allowed an automatic 6-month extension of time to file the return after the date prescribed for filing the return if the trust files an application under this section in accordance with paragraph (b) of this section.

(b) *Requirements.* To satisfy this paragraph (b), a trust must—

(1) Submit a complete application on Form 7004, ''Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns,'' or in any other manner prescribed by the Commissioner; and

(2) File the application on or before the date prescribed for filing the return with the Internal Revenue Service office designated in the application's instructions.

(c) *Termination of automatic extension.* The Commissioner may terminate an automatic extension at any time by mailing to the trust a notice of termination at least 10 days prior to the termination date designated in such notice. The Commissioner must mail the notice of termination to the address shown on the Form 7004 or to the trust's last known address. For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

(d) *Penalties.* See section 6677 for failure to file information returns with respect to certain foreign trusts.

(e) *Effective dates.* This section is applicable for applications for an automatic extension of time to file an information return with respect to certain foreign trusts listed in paragraph (a) of this section filed after December 31, 2005. The applicability of this section expires on November 4, 2008.

[T.D. 9229, 70 FR 67363, Nov. 7, 2005]

PLACE FOR FILING RETURNS OR OTHER DOCUMENTS

**§ 301.6091–1 Place for filing returns and other documents.**

(a) *General rule.* For provisions concerning the place for filing returns, including hand-carried returns, see the regulations relating to the particular tax. Except as provided in paragraph (b) of this section, for provisions concerning the place for filing documents other than returns, see the regulations relating to the particular tax.

(b) *Exception for hand-carried documents other than returns.* Notwithstanding any other provisions of this chapter—

(1) *Persons other than corporations.* If a document, other than a return, of a person (other than a corporation) is hand carried, and if the document is otherwise required to be filed with a service center, such document may be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves the legal residence or principal place of business of such person, or, in the case of an estate, the local Internal Revenue Service office serving the domicile of the decedent at the time of his death. A

document may also be filed by hand carrying such document to the appropriate service center, or, in the case of a document required to be filed with an office of the Alcohol and Tobacco Tax and Trade Bureau, by hand carrying as specified in regulations of the Alcohol and Tobacco Tax and Trade Bureau, see, 27 CFR chapter I, subchapter F.

(2) *Corporations.* If a document, other than a return, of a corporation is hand carried, and if the document is otherwise required to be filed with a service center, such document may be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves the principal place of business or principal office or agency of the corporation. A document may also be filed by hand carrying such document to the appropriate service center, or, in the case of a document required to be filed with an office of the Alcohol and Tobacco Tax and Trade Bureau, by hand carrying as specified in regulations of the Alcohol and Tobacco Tax and Trade Bureau, see, 27 CFR chapter I, subchapter F.

(c) *Definition of hand carried.* For purposes of this section and section 6091(b)(4) and the regulations issued thereunder, a return or document will be considered to be hand carried if it is brought to the any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office by the person required to file the return or other document, or by his agent. Examples of persons who will be considered to be agents, for purposes of the preceding sentence, are: Members of the taxpayer's family, an employee of the taxpayer, the taxpayer's attorney, accountant, or tax advisor, and messengers employed by the taxpayer. A return or document will not be considered to be hand carried if it is sent to the Internal Revenue Service through the U.S. Mail.

[T.D. 6950, 33 FR 5359, Apr. 4, 1968, as amended by T.D. 7008, 34 FR 3673, Mar. 1, 1969; T.D. 7012, 34 FR 7697, May 15, 1969; T.D. 7188, 37 FR 12794, June 29, 1972; T.D. 7238, 37 FR 28739, Dec. 29, 1972; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976; T.D. 7495, 42 FR 33727, July 1, 1977; T.D. 9156, 69 FR 55747, Sept. 16, 2004]

**§ 301.6096–1 Designation by individuals for taxable years beginning after December 31, 1972.**

(a) *In general.* Every individual (other than a nonresident alien) whose income tax liability, as defined in paragraph (b) of this section, is one dollar or more may, at his option, designate that one dollar shall be paid over to the Presidential Election Campaign Fund, in accordance with the provisions of section 9006. In the case of a joint return of a husband and wife, each spouse may designate that one dollar be paid to the fund as provided in this paragraph only if the joint income tax liability of the husband and wife is two dollars or more.

(b) *Income tax liability.* For purposes of paragraph (a) of this section, the income tax liability of an individual for any taxable year is the amount of the tax imposed by chapter 1 on such individual for the taxable year (as shown on his or her return) reduced by the sum of the credits (as shown on his or her return) allowable under sections 33, 37, 38, 40, 41, 42, 44, and 44A.

(c) *Manner and time of designation.* (1) A designation under paragraph (a) of this section may be made with respect to any taxable year at the time of the filing of the return of the tax imposed by chapter 1 for such taxable year, and shall be made either on the first page of the return or on the page bearing the taxpayer's signature, in accordance with the instructions applicable thereto.

(2) With respect to any taxable year beginning after December 31, 1972 for which no designation was made under paragraph (c)(1) of this section, a designation may be made on the form furnished by the Internal Revenue Service for such purpose, filed within 20 and one half months after the due date for the original return for such taxable year. In the case of a joint return where neither spouse made a designation or where only one spouse made a designation, a designation may be made, as provided in this subparagraph, by the spouse or spouses who had not previously made a designation.

(3) A designation once made, whether by an original return or otherwise, may not be revoked.

(d) *Effective date.* This section shall apply to taxable years beginning after December 31, 1972.

[T.D. 7304, 39 FR 4476, Feb. 4, 1974, as amended by T.D. 7643, 44 FR 50338, Aug. 28, 1979]

### § 301.6096–2 Designation by individuals for taxable years ending on or after December 31, 1972 and beginning before January 1, 1973.

(a) *In general.* (1) For taxable years ending on or after December 31, 1972 and beginning before January 1, 1973, every individual (other than a non-resident alien) whose income tax liability, as defined in paragraph (b) of this section, is one dollar or more, may, at his option, designate that one dollar shall be paid over to the Presidential Election Campaign Fund, referred to in § 301.6096–1 (a). Where in accordance with prior law, such a designation was made for the account of any candidate of any specified political party, or for a general account for all candidates for election to the offices of President and Vice President of the United States, such a designation shall be treated solely as a designation to such fund.

(2) In the case of a joint return of a husband and wife, each spouse may designate that one dollar be paid to the fund as provided in paragraph (a)(1) of this section only if the joint income tax liability of the husband and wife is two dollars or more.

(b) *Income tax liability.* For purposes of paragraph (a) of this section, the income tax liability of an individual for any taxable year is the amount of the tax imposed by chapter 1 on such individual for such taxable year (as shown on his return), reduced by the sum of the credits (as shown on his return).

(c) *Manner and time of designation.* (1) A designation under paragraph (a) of this section may be made with respect to any such taxable year at the time of the filing of the return of the tax imposed by chapter 1 for such taxable year. If such designation is made at the time of filing the original return for such year, it shall be made by the individual on the form furnished by the Internal Revenue Service for such purpose in accordance with the instructions applicable thereto.

(2) With respect to any taxable year ending on or after December 31, 1972 and beginning before January 1, 1973, for which no designation was made under paragraph (c)(1) of this section, a designation may be made on the form furnished by the Internal Revenue Service for such purpose, filed within 20 and one half months after the due date for the original return for such taxable year. In the case of a joint return where neither spouse made a designation or where only one spouse made a designation, a designation may be made, as provided in this subparagraph, by the spouse or spouses who had not previously made a designation.

(3) A designation once made, whether by an original return or otherwise, may not be revoked.

[T.D. 7304, 39 FR 4476, Feb. 4, 1974]

MISCELLANEOUS PROVISIONS

### § 301.6101–1 Period covered by returns or other documents.

For provisions concerning the period covered by returns or other documents, see the regulations relating to the particular tax.

### § 301.6102–1 Computations on returns or other documents.

(a) *Amounts shown on forms.* To the extent permitted by any internal revenue form or instructions prescribed for use with respect to any internal revenue return, declaration, statement, other document, or supporting schedules, any amount required to be reported on such form shall be entered at the nearest whole dollar amount. The extent to which, and the conditions under which, such whole dollar amounts shall be entered on any form will be set forth in the instructions issued with respect to such form. For the purpose of the computation to the nearest dollar, a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case the amount (determined without regard to the fractional part of a dollar) shall be increased by $1. The following illustrates the application of this paragraph:

| Exact amount | To be reported as— |
|---|---|
| $18.49 | $18 |
| $18.50 | 19 |

| Exact amount | To be reported as— |
|---|---|
| $18.51 | 19 |

(b) *Election not to use whole dollar amounts*—(1) *Method of election*. Where any internal revenue form, or the instructions issued with respect to such form, provide that whole dollar amounts shall be reported, any person making a return, declaration, statement, or other document on such form may elect not to use whole dollar amounts by reporting thereon all amounts in full, including cents.

(2) *Time of election*. The election not to use whole dollar amounts must be made at the time of filing the return, declaration, statement, or other document. Such election may not be revoked after the time prescribed for filing such return, declaration, statement, or other document, including extensions of time granted for such filing. Such election may be made on any return, declaration, statement, or other document which is filed after the time prescribed for filing (including extensions of time), and such an election is irrevocable.

(3) *Effect of election*. The taxpayer's election shall be binding only on the return, declaration, statement, or other document filed for a taxable year or period, and a new election may be made on the return, declaration, statement, or other document filed for a subsequent taxable year or period. An election by either a husband or a wife not to report whole dollar amounts on a separate income tax return shall be binding on any subsequent joint return filed under the provisions of section 6013(b).

(4) *Fractional part of a cent*. For treatment of the fractional part of a cent in the payment of taxes, see section 6313 and § 301.6313–1.

(c) *Inapplicability to computation of amount*. The provisions of paragraph (a) of this section apply only to amounts required to be reported on a return, declaration, statement, or other document. They do not apply to items which must be taken into account in making the computations necessary to determine such amounts. For example, each item of receipt must be taken into account at its exact amount, including cents, in computing the amount of total receipts required to be reported on an income tax return or supporting schedule. It is the amount of total receipts, so computed, which is to be reported at the nearest whole dollar on the return or supporting schedule.

(d) *Effect on accounting method*. Section 6102 and this section have no effect on any authorized accounting method.

**§ 301.6103(a)–1 Disclosures after December 31, 1976, by officers and employees of Federal agencies of returns and return information (including taxpayer return information) disclosed to such officers and employees by the Internal Revenue Service before January 1, 1977, for a purpose not involving tax administration.**

(a) *General rule*. Except as provided by paragraph (b) of this section, a return or return information (including taxpayer return information), as defined in section 6103(b) (1), (2), and (3) of the Internal Revenue Code, disclosed by the Internal Revenue Service before January 1, 1977, to an officer or employee of a Federal agency (as defined in section 6103(b)(9)) for a purpose not involving tax administration (as defined in section 6103(b)(4)) pursuant to the authority of section 6103 (or any order of the President under section 6103 or rules and regulations thereunder prescribed by the Secretary or his delegate and approved by the President) before amendment of such section by section 1202 of the Tax Reform Act of 1976 (Pub. L. 94–455, 90 Stat. 1667) may be disclosed by, or on behalf of, such officer, employee, or agency after December 31, 1976, for any purpose authorized by such section (or such order or rules and regulations) before such amendment.

(b) *Exception*. Notwithstanding the provisions of paragraph (a) of this section, a return or return information (including taxpayer return information) disclosed before January 1, 1977, by the Service to an officer or employee of a Federal agency for a purpose unrelated to tax administration as described in paragraph (a) may, after December 31, 1976, be disclosed by, or on behalf of, such agency, officer, or

employee in an administrative or judicial proceeding only if such proceeding is one described in section 6103(i)(4) of the Code and if the requirements of section 6103(i)(4) have first been met.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65566, Oct. 3, 1980]

**§ 301.6103(a)–2 Disclosures after December 31, 1976, by attorneys of the Department of Justice and officers and employees of the Office of the Chief Counsel for the Internal Revenue Service of returns and return information (including taxpayer return information) disclosed to such attorneys, officers, and employees by the Service before January 1, 1977, for a purpose involving tax administration.**

(a) *General rule.* Except as provided by paragraph (b) of this section and subject to the requirements of this paragraph, a return or return information (including taxpayer return information), as defined in section 6103(b)(1), (2), and (3), of the Internal Revenue Code disclosed by the Internal Revenue Service before January 1, 1977, to an attorney of the Department of Justice (including a United States attorney) or to an officer or employee of the Office of the Chief Counsel for the Service for a purpose involving tax administration (as defined in section 6103(b)(4)) pursuant to the authority of section 6103 (or any order of the President under section 6103 or rules and regulations thereunder prescribed by the Secretary or his delegate and approved by the President) before amendment of such section by section 1202 of the Tax Reform Act of 1976 (Pub. L. 94–455, 90 Stat. 1667) may be disclosed by, or on behalf of, such attorney, officer, or employee after December 31, 1976, for any purpose authorized by such section (or such order or rules and regulations) before such amendment.

(b) *Exception.* Notwithstanding the provisions of paragraph (a) of this section, a return or return information (including taxpayer return information) disclosed before January 1, 1977, by the Service to an attorney of the Department of Justice or to an officer or employee of the Office of the Chief Counsel for the Service for a purpose related to tax administration as described in paragraph (a) may, after December 31, 1976, be disclosed by, or on behalf of, such attorney, officer, or employee in an administrative or judicial proceeding only if such proceeding is one described in section 6103(h)(4) of the Code and if the requirements of section 6103 (h)(4) have first been met.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65567, Oct. 3, 1980]

**§ 301.6103(c)–1 Disclosure of returns and return information to designee of taxpayer.**

(a) *Overview.* Subject to such requirements and conditions as the Secretary may prescribe by regulation, section 6103(c) of the Internal Revenue Code authorizes the Internal Revenue Service to disclose a taxpayer's return or return information to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with the taxpayer's request to such other person for information or assistance. This regulation contains the requirements that must be met before, and the conditions under which, the Internal Revenue Service may make such disclosures. Paragraph (b) of this section provides the requirements that are generally applicable to designate a third party to receive the taxpayer's returns and return information. Paragraph (c) of this section provides requirements under which the Internal Revenue Service may disclose information in connection with a taxpayer's written or nonwritten request for a third party to provide information or assistance with regard to a tax matter, for example, a Congressional inquiry. Paragraph (d) of this section provides the parameters for disclosure consents connected with electronic return filing programs and combined Federal-State filing. Finally, paragraph (e) of this section provides definitions and general rules related to requests for or consents to disclosure.

(b) *Disclosure of returns and return information to person or persons designated in a written request or consent*—(1) *General requirements.* Pursuant to section

6103(c) of the Internal Revenue Code, the Internal Revenue Service (or an agent or contractor of the Internal Revenue Service) may disclose a taxpayer's return or return information (in written or nonwritten form) to such person or persons as the taxpayer may designate in a request for or consent to such disclosure. A request for or consent to disclosure under this paragraph (b) must be in the form of a separate written document pertaining solely to the authorized disclosure. (For the meaning of separate written document, see paragraph (e)(1) of this section.) The separate written document must be signed (see paragraph (e)(2) of this section) and dated by the taxpayer who filed the return or to whom the return information relates. At the time it is signed and dated by the taxpayer, the written document must also indicate—

(i) The taxpayer's taxpayer identity information described in section 6103(b)(6);

(ii) The identity of the person or persons to whom the disclosure is to be made;

(iii) The type of return (or specified portion of the return) or return information (and the particular data) that is to be disclosed; and

(iv) The taxable year or years covered by the return or return information.

(2) *Requirement that request or consent be received within sixty days of when signed and dated.* The disclosure of a return or return information authorized by a written request for or written consent to the disclosure shall not be made unless the request or consent is received by the Internal Revenue Service (or an agent or contractor of the Internal Revenue Service) within 60 days following the date upon which the request or consent was signed and dated by the taxpayer.

(c) *Disclosure of returns and return information to designee of taxpayer to comply with a taxpayer's request for information or assistance.* If a taxpayer makes a written or nonwritten request, directly to another person or to the Internal Revenue Service, that such other person (for example, a member of Congress, friend, or relative of the taxpayer) provide information or assistance relating to the taxpayer's return or to a transaction or other contact between the taxpayer and the Internal Revenue Service, the Internal Revenue Service (or an agent or contractor of the Internal Revenue Service or a Federal government agency performing a Federal tax administration function) may disclose returns or return information (in written or nonwritten form) to such other person under the circumstances set forth in paragraphs (c)(1) through (3) of this section.

(1) *Written request for information or assistance.* (i) The taxpayer's request for information or assistance may be in the form of a letter or other written document, which must be signed (*see* paragraph (e)(2) of this section) and dated by the taxpayer. The taxpayer must also indicate in the written request—

(A) The taxpayer's taxpayer identity information described in section 6103(b)(6);

(B) The identity of the person or persons to whom disclosure is to be made; and

(C) Sufficient facts underlying the request for information or assistance to enable the Internal Revenue Service to determine the nature and extent of the information or assistance requested and the returns or return information to be disclosed in order to comply with the taxpayer's request.

(ii) A person who receives a copy of a taxpayer's written request for information or assistance but who is not the addressee of the request, such as a member of Congress who is provided with a courtesy copy of a taxpayer's letter to another member of Congress or to the Internal Revenue Service, cannot receive returns or return information under paragraph (c)(1) of this section.

(2) *Nonwritten request or consent.* (i) A request for information or assistance may also be nonwritten. Disclosure of returns and return information to a designee pursuant to a taxpayer's nonwritten request will be made only after the Internal Revenue Service has—

(A) Obtained from the taxpayer sufficient facts underlying the request for information or assistance to enable the Internal Revenue Service to determine

the nature and extent of the information or assistance requested and the return or return information to be disclosed in order to comply with the taxpayer's request;

(B) Confirmed the identity of the taxpayer and the designee; and

(C) Confirmed the date, the nature, and the extent of the information or assistance requested.

(ii) Examples of disclosures pursuant to nonwritten requests for information or assistance under this paragraph (c)(2) include, but are not limited to, disclosures to a friend, relative, or other person whom the taxpayer brings to an interview or meeting with Internal Revenue Service officials, and disclosures to a person whom the taxpayer wishes to involve in a telephone conversation with Internal Revenue Service officials.

(iii) As long as the requirements of this paragraph (c)(2) are met, the taxpayer does not need to be present, either in person or as part of a telephone conversation, for disclosures of returns and return information to be made to the other person.

(3) *Rules applicable to written and nonwritten requests for information or assistance.* A return or return information will be disclosed to the taxpayer's designee as provided by this paragraph only to the extent considered necessary by the Internal Revenue Service to comply with the taxpayer's request or consent. Such disclosures shall not be made unless the request or consent is received by the Internal Revenue Service, its agent or contractor, or a Federal government agency performing a Federal tax administration function in connection with a request for advice or assistance relating to such function. This paragraph (c) does not apply to disclosures to a taxpayer's representative in connection with practice before the Internal Revenue Service (as defined in Treasury Department Circular No. 230, 31 CFR part 10). For disclosures in these cases, see section 6103(e)(6) and §§ 601.501 through 601.508 of this chapter.

(d) *Acknowledgments of electronically filed returns and other documents; combined filing programs with State tax agencies.* The requirements of paragraphs (b) and (c) of this section do not apply to this paragraph (d).

(1) *Acknowledgment of, and notices regarding, electronically filed returns and other documents.* When a taxpayer files returns or other documents or information with the Internal Revenue Service electronically, the taxpayer may consent to the disclosure of return information to the transmitter or other third party, such as the taxpayer's financial institution, necessary to acknowledge that the electronic transmission was received and either accepted or rejected by the Internal Revenue Service, the reason for any rejection, and such other information as the Internal Revenue Service determines is necessary to the operation of the electronic filing program. The consent must inform the taxpayer of the return information that will be transmitted and to whom disclosure will be made.

(2) *Combined return filing programs with State tax agencies.* (i) A taxpayer's participation in a combined return filing program between the Internal Revenue Service and a State agency, body, or commission (State agency) described in section 6103(d)(1) constitutes a consent to the disclosure by the Internal Revenue Service, to the State agency, of taxpayer identity information, signature, and items of common data contained on the return. For purposes of this paragraph, common data means information reflected on the Federal return required by State law to be attached to or included on the State return. Instructions accompanying the forms or published procedures involved in such program must indicate that by participating in the program, the taxpayer is consenting to the Internal Revenue Service's disclosure to the State agency of the taxpayer identity information, signature, and items of common data, and that such information will be treated by the State agency as if it had been directly filed with the State agency. Such instructions or procedures must also describe any verification that takes place before the taxpayer identity information, signature and common data is transmitted by the Internal Revenue Service to the State agency.

(ii) No disclosures may be made under this paragraph (d)(2) unless there

are provisions of State law protecting the confidentiality of such items of common data.

(e) *Definitions and rules applicable to this section*—(1) *Separate written document.* (i) For the purposes of paragraph (b) of this section, *separate written document* means—

(A) Text appearing on one or more sheets of 8½ -inch by 11-inch or larger paper, each of which pertains solely to the authorized disclosure, so long as such sheet or sheets, taken together, contain all the elements described in paragraph (b)(1) of this section;

(B) Text appearing on one or more computer screens, each of which pertains solely to the authorized disclosure, so long as such screen or, taken together, such screens—

(*1*) Contain all the elements described in paragraph (b)(1) of this section,

(*2*) Can be signed (see paragraph (e)(2) of this section) and dated by the taxpayer, and

(*3*) Can be reproduced, if necessary; or

(C) A consent on the record in an administrative or judicial proceeding, or a transcript of such proceeding recording such consent, containing the information required under paragraph (b)(1) of this section.

(ii) A provision included in a taxpayer's application for a loan or other benefit authorizing the grantor of the loan or other benefit to obtain any financial information, including returns or return information, from any source as the grantor may request for purposes of verifying information supplied on the application, does not meet the requirements of paragraph (b)(1) of this section because the provision is not a separate written document relating solely to the disclosure of returns and return information. In addition, the provision does not contain the other information specified in paragraph (b)(1) of this section.

(2) *Method of signing.* A request for or consent to disclosure may be signed by any method of signing the Secretary has prescribed pursuant to § 301.6061–1(b) in forms, instructions, or other appropriate guidance.

(3) *Permissible designees and public forums.* Permissible designees under this section include individuals; trusts; estates; corporations; partnerships; Federal, State, local and foreign government agencies or subunits of such agencies; or the general public. When disclosures are to be made in a public forum, such as in a courtroom or congressional hearing, the request for or consent to disclosure must describe the circumstances surrounding the public disclosure, *e.g.*, congressional hearing, judicial proceeding, media, and the date or dates of the disclosure. When a designee is an individual, this section does not authorize disclosures to other individuals associated with such individual, such as employees of such individual or members of such individual's staff.

(4) *Authority to execute a request for or consent to disclosure.* Any person who may obtain returns under section 6103(e)(1) through (5), except section 6103(e)(1)(D)(iii), may execute a request for or consent to disclose a return or return information to third parties. For taxpayers that are legal entities, such as corporations and municipal bond issuers, any officer of the entity with authority under applicable State law to legally bind the entity may execute a request for or consent to disclosure. A person described in section 6103(e)(6) (a taxpayer's representative or individual holding a power of attorney) may not execute a request for or consent to disclosure unless the designation of representation or power of attorney specifically delegates such authority. A designee pursuant to this section does not have authority to execute a request for or consent to disclosure permitting the Internal Revenue Service to disclose returns or return information to another person.

(5) *No disclosure of return information if impairment.* A disclosure of return information shall not be made under this section if the Internal Revenue Service determines that the disclosure would seriously impair Federal tax administration (as defined in section 6103(b)(4) of the Internal Revenue Code).

(f) *Effective date.* This section is applicable on April 29, 2003.

[68 FR 22598, Apr. 29, 2003]

**§ 301.6103(h)(2)–1 Disclosure of returns and return information (including taxpayer return information) to and by officers and employees of the Department of Justice for use in Federal grand jury proceeding, or in preparation for proceeding or investigation, involving tax administration.**

(a) *Disclosure of returns and return information (including taxpayer return information) to and by officers and employees of the Department of Justice.* (1) Returns and return information (including taxpayer return information), as defined in section 6103(b) (1), (2), and (3) of the Internal Revenue Code, shall, to the extent provided by section 6103(h)(2) (A), (B), and (C) and subject to the requirements of section 6103(h)(3), be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and for their necessary use in, any Federal grand jury proceeding, or preparation for any proceeding (or for their necessary use in an investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, in a matter involving tax administration (as defined in section 6103(b)(4)), including any such proceeding (or any such investigation) also involving the enforcement of a related Federal criminal statute which has been referred by the Secretary to the Department of Justice.

(2) Returns and return information (including taxpayer return information) inspected by or disclosed to officers and employees of the Department of Justice as provided in paragraph (a)(1) of this section may also be used by such officers and employees or disclosed by them to other officers and employees (including United States attorneys and supervisory personnel, such as Section Chiefs, Deputy Assistant Attorneys General, Assistant Attorneys General, the Deputy Attorney General, and the Attorney General), of the Department of Justice where necessary—

(i) In connection with any Federal grand jury proceeding, or preparation for any proceeding (or with an investigation which may result in such a proceeding), described in paragraph (a)(1), or

(ii) In connection with any Federal grand jury proceeding, or preparation for any proceeding (or with an investigation which may result in such a proceeding), described in paragraph (a)(1) which also involves enforcement of a specific Federal criminal statute other than one described in paragraph (a)(1) to which the United States is or may be a party, provided such matter involves or arises out of the particular facts and circumstances giving rise to the proceeding (or investigation) described in paragraph (a)(1) and further provided the tax portion of such proceeding (or investigation) has been duly authorized by or on behalf of the Assistant Attorney General for the Tax Division of the Department of Justice, pursuant to the request of the Secretary, as a proceeding (or investigation) described in paragraph (a)(1). If, in the course of a Federal grand jury proceeding, or preparation for a proceeding (or the conduct of an investigation which may result in such a proceeding), described in subdivision (ii) of this subparagraph, the tax administration portion thereof is terminated for any reason, any further use or disclosure of such returns or taxpayer return information in such Federal grand jury proceeding, or preparation or investigation, with respect to the remaining portion may be made only pursuant to, and upon the grant of, a court order as provided by section 6103(i)(1)(A), provided, however, that the returns and taxpayer return information may in any event be used for purposes of obtaining the necessary court order.

(b) *Disclosure of returns and return information (including taxpayer return information) by officers and employees of the Department of Justice.* (1) Returns and return information (including taxpayer return information), as defined in section 6103(b) (1), (2), and (3) of the Code, inspected by or disclosed to officers and employees of the Department of Justice as provided by paragraph (a) of this section may be disclosed by such officers and employees to other persons, including, but not limited to, persons described in paragraph (b)(2), but only to the extent necessary in connection with a Federal grand jury

proceeding, or the proper preparation for a proceeding (or in connection with an investigation which may result in such a proceeding), described in paragraph (a). Such disclosures may include, but are not limited to, disclosures—

(i) To properly accomplish any purpose or activity of the nature described in section 6103(k)(6) and the regulations thereunder which is essential to such Federal grand jury proceeding, or to such proper preparation (or to such investigation);

(ii) To properly interview, consult, depose, or interrogate or otherwise obtain relevant information from, the taxpayer to whom such return or return information relates (or such taxpayer's legal representative) or from any witness who may be called to give evidence in the proceeding; or

(iii) To properly conduct negotiations concerning, or obtain authorization for, settlement or disposition of the proceeding, in whole or in part, or stipulations of fact in connection with the proceeding.

Disclosure of a return or return information to a person other than the taxpayer to whom such return or return information relates or such taxpayer's legal representative to properly accomplish any purpose or activity described in this paragraph should be made, however, only if such purpose or activity cannot otherwise properly be accomplished without making such disclosure.

(2) Among those persons to whom returns and return information may be disclosed by officers and employees of the Department of Justice as provided by paragraph (a)(1) of this section are—

(i) Other officers and employees of the Department of Justice, such as personnel of an office, board, division, or bureau of such department (for example, the Federal Bureau of Investigation or the Drug Enforcement Administration), clerical personnel (for example, secretaries, stenographers, docket and file room clerks, and mail room employees) and supervisory personnel (such as supervisory personnel of the Federal Bureau of Investigation or the Drug Enforcement Administration);

(ii) Officers and employees of another Federal agency (as defined in section 6103(b)(9)) working under the direction and control of any such officers and employees of the Department of Justice; and

(iii) Court reporters.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65567, Oct. 3, 1980]

### § 301.6103(i)–1 Disclosure of returns and return information (including taxpayer return information) to and by officers and employees of the Department of Justice or another Federal agency for use in Federal grand jury proceeding, or preparation for proceeding or investigation, involving enforcement of Federal criminal statute not involving tax administration.

(a) *Disclosure of returns and return information (including taxpayer return information) to officers and employees of the Department of Justice or another Federal agency*. Returns and return information (including taxpayer return information), as defined in section 6103(b)(1), (2), and (3) of the Internal Revenue Code, shall, to the extent provided by section 6103(i) (1), (2), and (3) and subject to the requirements of section 6103(i) (1) and (2), be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) or of another Federal agency (as defined in section 6103(b)(9)) personally and directly engaged in, and for their necessary use in, any Federal grand jury proceeding, or preparation for any administration or judicial proceeding (or their necessary use in an investigation which may result in such a proceeding), pertaining to enforcement of a specifically designated Federal criminal statute not involving or related to tax administration to which the United States or such agency is or may be a party.

(b) *Disclosure of returns and return information (including taxpayer return information) by officers and employees of the Department of Justice or another Federal agency*. (1) Returns and return information (including taxpayer return information), as defined in section 6103(b) (1), (2), and (3) of the Code, disclosed to officers and employees of the Department of Justice or other Federal

agency (as defined in section 6103(b)(9)) as provided by paragraph (a) of this section may be disclosed by such officers and employees to other persons, including, but not limited to, persons described in subparagraph (2) of this paragraph, but only to the extent necessary in connection with a Federal grand jury proceeding, or the proper preparation for a proceeding (or in connection with an investigation which may result in such a proceeding), described in paragraph (a). Such disclosures may include, but are not limited to, disclosures where necessary—

(i) To properly obtain the services of persons having special knowledge or technical skills (such as, but not limited to, handwriting analysis, photographic development, sound recording enhancement, or voice identification);

(ii) To properly interview, consult, depose, or interrogate or otherwise obtain relevant information from, the taxpayer to whom such return or return information relates (or such taxpayer's legal representative) or any witness who may be called to give evidence in the proceeding; or

(iii) To properly conduct negotiations concerning, or obtain authorization for, disposition of the proceeding, in whole or in part, or stipulations of fact in connection with the proceeding.

Disclosure of a return or return information to a person other than the taxpayer to whom such return or return information relates or such taxpayer's legal representative to properly accomplish any purpose or activity described in this subparagraph should be made, however, only if such purpose or activity cannot otherwise properly be accomplished without making such disclosures.

(2) Among those persons to whom returns and return information may be disclosed by officers and employees of the Department of Justice or other Federal agency as provided by subparagraph (1) of this paragraph are—

(i) Other officers and employees of the Department of Justice (including an office, board, division, or bureau of such department, such as the Federal Bureau of Investigation or the Drug Enforcement Administration) or other Federal agency described in subparagraph (1), such as clerical personnel (for example, secretaries, stenographers, docket and file room clerks, and mail room employees) and supervisory personnel (for example, in the case of the Department of Justice, Section Chiefs, Deputy Assistant Attorneys General, Assistant Attorneys General, the Deputy Attorney General, the Attorney General, and supervisory personnel of the Federal Bureau of Investigation or the Drug Enforcement Administration);

(ii) Officers and employees of another Federal agency (as defined in section 6103(b)(9)) working under the direction and control of such officers and employees of the Department of Justice or other Federal agency described in subparagraph (1); and

(iii) Court reporters.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65568, Oct. 3, 1980]

### § 301.6103(j)(1)–1 Disclosures of return information reflected on returns to officers and employees of the Department of Commerce for certain statistical purposes and related activities.

(a) *General rule.* Pursuant to the provisions of section 6103(j)(1) of the Internal Revenue Code and subject to the requirements of paragraph (d) of this section, officers or employees of the Internal Revenue Service will disclose return information (as defined by section 6103(b)(2) but not including return information described in section 6103(o)(2)) reflected on returns to officers and employees of the Department of Commerce to the extent, and for such purposes as may be, provided by paragraphs (b) and (c) of this section. Further, in the case of any disclosure of return information reflected on returns so provided by paragraphs (b) and (c) of this section, the tax period or accounting period to which such information relates will also be disclosed. ''Return information reflected on returns'' includes, but is not limited to, information on returns, information derived from processing such returns, and information derived from the Social Security Administration and other sources for the purposes of establishing

and maintaining taxpayer information relating to returns.

(b) *Disclosure of return information reflected on returns to officers and employees of the Bureau of the Census.*

(1) [Reserved] For further guidance, see § 301.6103(j)(1)–1T(b)(1).

(i) Taxpayer identity information (as defined in section 6103(b)(6) of the Internal Revenue Code), validity code with respect to the taxpayer identifying number (as described in section 6109), and taxpayer identity information of spouse and dependents, if reported.

(ii) Location codes (including area/district office and campus/service center codes).

(iii) Marital status.

(iv) Number and classification of reported exemptions.

(v) Wage and salary income.

(vi) Dividend income.

(vii) Interest income.

(viii) Gross rent and royalty income.

(ix) Total of—

(A) Wages, salaries, tips, etc.;

(B) Interest income;

(C) Dividend income;

(D) Alimony received;

(E) Business income;

(F) Pensions and annuities;

(G) Income from rents, royalties, partnerships, estates, trusts, etc.;

(H) Farm income;

(I) Unemployment compensation; and

(J) Total Social Security benefits.

(x) Adjusted gross income.

(xi) Type of tax return filed.

(xii) Entity code.

(xiii) Code indicators for Form 1040, Form 1040 (Schedules A, C, D, E, F, and SE), and Form 8814.

(xiv) Posting cycle date relative to filing.

(xv) Social Security benefits.

(2) Officers or employees of the Internal Revenue Service will disclose to officers and employees of the Bureau of the Census for purposes of, but only to the extent necessary in, conducting, as authorized by chapter 5 of title 13, United States Code, demographic, economic, and agricultural statistics programs and censuses and related program evaluation—

(i) From the business master files of the Internal Revenue Service—the taxpayer name directory and entity records consisting of taxpayer identity information (as defined in section 6103(b)(6)) with respect to taxpayers engaged in a trade or business, the principal industrial activity code, the filing requirement code, the employment code, the physical location, the location codes (including area/district office and campus/service center codes), and monthly corrections of, and additions to, such entity records;

(ii) From Form SS–4—all information reflected on such form;

(iii) From an employment tax return—

(A) Taxpayer identifying number (as described in section 6109) of the employer;

(B) Total compensation reported;

(C) Master file tax account code (MFT);

(D) Taxable period covered by such return;

(E) Employer code;

(F) Document locator number;

(G) Record code;

(H) Total number of individuals employed in the taxable period covered by the return;

(I) Total taxable wages paid for purposes of chapter 21; and

(J) Total taxable tip income reported for purposes of chapter 21;

(iv) From Form 1040 (Schedule SE)—

(A) Taxpayer identifying number of self-employed individual;

(B) Business activities subject to the tax imposed by chapter 21;

(C) Net earnings from farming;

(D) Net earnings from nonfarming activities;

(E) Total net earnings from self-employment; and

(F) Taxable self-employment income for purposes of chapter 2;

(v) Total Social Security taxable earnings; and

(vi) Quarters of Social Security coverage.

(3) [Reserved] For further guidance, see § 301.6103(j)(1)–1T(b)(3).

(i) Taxpayer identity information (as defined in section 6103(b)(6)) including parent corporation, shareholder, partner, and employer identity information.

(ii) Gross income, profits, or receipts.

(iii) Returns and allowances.

(iv) Cost of labor, salaries, and wages.

(v) Total expenses or deductions.

(vi) Total assets.

(vii) Beginning- and end-of-year inventory.

(viii) Royalty income.

(ix) Interest income, including portfolio interest.

(x) Rental income, including gross rents.

(xi) Tax-exempt interest income.

(xii) Net gain from sales of business property.

(xiii) Other income.

(xiv) Total income.

(xv) Percentage of stock owned by each shareholder.

(xvi) Percentage of capital ownership of each partner.

(xvii) End-of-year code.

(xviii) Months actively operated.

(xix) Principal industrial activity code, including the business description.

(xx) Total number of documents and the total amount reported on the Form 1096 transmitting Forms 1099–MISC.

(xxi) Form 941 indicator and business address on Form 1040 (Schedule C).

(xxii) Consolidated return indicator.

(xxiii) Wages, tips, and other compensation.

(xxiv) Social Security wages.

(xxv) Deferred wages.

(xxvi) Social Security tip income.

(xxvii) Total Social Security taxable earnings.

(xxviii) Gross distributions from employer-sponsored and individual retirement plans from Form 1099–R.

(4) Officers or employees of the Internal Revenue Service will disclose return information reflected on returns of taxpayers contained in the exempt organization master files of the Internal Revenue Service to officers and employees of the Bureau of the Census for purposes of, but only to the extent necessary in, conducting and preparing, as authorized by chapter 5 of title 13, United States Code, economic censuses. This return information reflected on returns of taxpayers consists of taxpayer identity information (as defined in section 6103(b)(6)), activity codes, and filing requirement code, and monthly corrections of, and additions to, such information.

(5) Subject to the requirements of paragraph (d) of this section and § 301.6103(p)(2)(B)–1, officers or employees of the Social Security Administration to whom the following return information reflected on returns has been disclosed as provided by section 6103(l)(1)(A) or (l)(5) may disclose such information to officers and employees of the Bureau of the Census for necessary purposes described in paragraph (b)(2) or (3) of this section:

(i) From Form SS–4—all information reflected on such form.

(ii) From Form 1040 (Schedule SE)—

(A) Taxpayer identifying number of self-employed individual;

(B) Business activities subject to the tax imposed by chapter 21;

(C) Net earnings from farming;

(D) Net earnings from nonfarming activities;

(E) Total net earnings from self-employment; and

(F) Taxable self-employment income for purposes of chapter 2.

(iii) From Form W-2, and related forms and schedules—

(A) Social Security number;

(B) Employer identification number;

(C) Wages, tips, and other compensation;

(D) Social Security wages; and

(E) Deferred wages.

(iv) Total Social Security taxable earnings.

(v) Quarters of Social Security coverage.

(6)(i) Officers or employees of the Internal Revenue Service will disclose the following return information (but not including return information described in section 6103(o)(2)) reflected on returns of corporations with respect to the tax imposed by chapter 1 to officers and employees of the Bureau of the Census for purposes of, but only to the extent necessary in, developing and preparing, as authorized by law, the Quarterly Financial Report:

(A) From the business master files of the Internal Revenue Service—

(*1*) Taxpayer identity information (as defined in section 6103(b)(6)), including parent corporation identity information;

(*2*) Document code;

(*3*) Location codes (including area/district office and campus/service center codes);

(*4*) Consolidated return and final return indicators;

(*5*) Principal industrial activity code;

(*6*) Partial year indicator;

(*7*) Annual accounting period;

(*8*) Gross receipts less returns and allowances; and

(*9*) Total assets.

(B) From Form SS–4—

(*1*) Month and year in which such form was executed;

(*2*) Taxpayer identity information; and

(*3*) Principal industrial activity, geographic, firm size, and reason for application codes.

(ii) Subject to the requirements of paragraph (d) of this section and § 301.6103(p)(2)(B)–1, officers or employees of the Social Security Administration to whom return information reflected on returns of corporations described in paragraph (b)(6)(i)(B) of this section has been disclosed as provided by section 6103(l)(1)(A) or (l)(5) may disclose such information to officers and employees of the Bureau of the Census for a purpose described in this paragraph (b)(6).

(iii) Return information reflected on employment tax returns disclosed pursuant to paragraphs (b)(2)(iii) (A), (B), (D), (I) and (J) of this section may be used by officers and employees of the Bureau of the Census for the purpose described in and subject to the limitations of this paragraph (b)(6).

(c) *Disclosure of return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis.*

(1) [Reserved] For further guidance, see § 301.6103(j)(1)–1T(c).

(2) Subject to the requirements of paragraph (d) of this section and § 301.6103(p)(2)(B)–1, officers and employees of the Social Security Administration to whom the following return information reflected on returns of designated classes or categories of corporations has been disclosed as provided by section 6103(l)(1)(A) or (l)(5) may disclose such information to officers and employees of the Bureau of Economic Analysis for necessary purposes described in paragraph (c)(1) of this section:

(i) From Form SS–4—Principal industrial activity and geographic codes.

(ii) From an employment tax return—

(A) Total compensation reported; and

(B) Taxable wages paid for purposes of chapter 21 to each employee.

(d) *Procedures and restrictions.* Disclosure of return information reflected on returns by officers or employees of the Internal Revenue Service or the Social Security Administration as provided by paragraphs (b) and (c) of this section will be made only upon written request to the Commissioner of Internal Revenue by the Secretary of Commerce describing—

(1) The particular return information reflected on returns to be disclosed;

(2) The taxable period or date to which such return information reflected on returns relates; and

(3)(i) The particular purpose for which the return information reflected on returns is to be used, and designating by name and title the officers and employees of the Bureau of the Census or the Bureau of Economic Analysis to whom such disclosure is authorized.

(ii) No such officer or employee to whom return information reflected on returns is disclosed pursuant to the provisions of paragraph (b) or (c) of this section shall disclose such information to any person, other than the taxpayer to whom such return information reflected on returns relates or other officers or employees of such bureau whose duties or responsibilities require such disclosure for a purpose described in paragraph (b) or (c) of this section, except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. If the Internal Revenue Service determines that the Bureau of the Census or the Bureau of Economic Analysis, or any officer or employee thereof, has failed to, or does not, satisfy the requirements of section 6103(p)(4) of the Internal Revenue Code or regulations or published procedures thereunder (see § 601.601(d)(2) of this chapter), the Internal Revenue Service may take such actions as are deemed necessary to ensure that such requirements are or will be satisfied, including suspension of disclosures of return information reflected on returns otherwise authorized by section 6103 (j)(1)

and paragraph (b) or (c) of this section, until the Internal Revenue Service determines that such requirements have been or will be satisfied.

(e) *Effective date.* This section is applicable to the Bureau of the Census on January 21, 2003.

[T.D. 9037, 68 FR 2693, Jan. 21, 2003, as amended by T.D. 9188, 70 FR 12141, Mar. 11, 2005; T.D. 9267, 71 FR 38263, July 6, 2006]

**§ 301.6103(j)(1)–1T Disclosures of return information reflected on returns to officers and employees of the Department of Commerce for certain statistical purposes and related activities (temporary).**

(a) and (b) [Reserved] For further guidance, see § 301.6103(j)(1)–1(a) and (b).

(c) *Disclosure of return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis.*

(1) The Internal Revenue Service will disclose to officers and employees of the Bureau of Economic Analysis for purposes of, but only to the extent necessary in, conducting and preparing statistical analyses, as authorized by law, all return information from the Statistics of Income sample, including edited information and regardless of format or medium, of designated classes or categories of corporations with respect to the tax imposed by chapter 1 of the Internal Revenue Code.

(2) [Removed and Reserved]

(3) The Internal Revenue Service will disclose the following return information reflected on returns filed by corporations to officers and employees of the Bureau of Economic Analysis:

(i) From the business master files of the Internal Revenue Service—

(A) Taxpayer identity information (as defined in section 6103(b)(6) of the Internal Revenue Code) with respect to corporate taxpayers;

(B) Business or industry activity codes;

(C) Filing requirement code; and

(D) Physical location.

(ii) From Form SS–4 filed by an entity identifying itself on the form as a corporation or a private services corporation—

(A) Taxpayer identity information (as defined in section 6103(b)(6), including legal, trade, and business name);

(B) Physical location;

(C) State or Country of incorporation;

(D) Entity Type (Corporate only);

(E) Estimated highest number of employees expected in the next 12 months;

(F) Principal activity of the business;

(G) Principal line of merchandise;

(H) Posting cycle date relative to filing; and

(I) Document code.

(iii) From an employment tax return filed by a corporation—

(A) Taxpayer identity information (as defined in section 6103(b)(6));

(B) Total compensation reported;

(C) Taxable wages paid for purposes of Chapter 21 to each employee;

(D) Master file tax account code (MFT);

(E) Total number of individuals employed in the taxable period covered by the return;

(F) Posting cycle date relative to filing;

(G) Accounting period covered; and

(H) Document code.

(iv) From returns of corporate taxpayer, including Forms 1120, 851, and other business returns, schedules and forms that the Internal Revenue Service may issue—

(A) Taxpayer identity information (as defined in section 6103(b)(6)), including that of parent corporation, affiliate or subsidiary, and shareholder;

(B) Gross sales and receipts;

(C) Returns and allowances;

(D) Cost of labor, salaries, and wages;

(E) Total assets;

(F) Posting cycle date relative to filing;

(G) Accounting period covered;

(H) Master file tax account code (MFT);

(I) Document code; and

(J) Principal industrial activity code.

(d) [Reserved] For further guidance, see § 301.6103(j)(1)–1(d).

(e) [Reserved] For further guidance, see § 301.6103(j)(1)–1(e).

(f) Effective date. This section is applicable to disclosures to the Bureau of Economic Analysis on or after July 6, 2006.

[T.D. 9267, 71 FR 38263, July 6, 2006]

**§ 301.6103(j)(5)–1 Disclosures of return information reflected on returns to officers and employees of the Department of Agriculture for conducting the census of agriculture.**

(a) *General rule.* Pursuant to the provisions of section 6103(j)(5) of the Internal Revenue Code and subject to the requirements of paragraph (c) of this section, officers or employees of the Internal Revenue Service will disclose return information reflected on returns to officers and employees of the Department of Agriculture to the extent, and for such purposes, as may be provided by paragraph (b) of this section. ''Return information reflected on returns'' includes, but is not limited to, information on returns, information derived from processing such returns, and information derived from other sources for the purposes of establishing and maintaining taxpayer information relating to returns.

(b) *Disclosure of return information reflected on returns to officers and employees of the Department of Agriculture.* (1) Officers or employees of the Internal Revenue Service will disclose the following return information reflected on returns described in this paragraph (b) for individuals, partnerships and corporations with agricultural activity, as determined generally by industry code classification or the filing of returns for such activity, to officers and employees of the Department of Agriculture for purposes of, but only to the extent necessary in, structuring, preparing, and conducting, as authorized by chapter 55 of title 7, United States Code, the census of agriculture.

(2) From Form 1040 ''U.S. Individual Income Tax Return'', Form 1041 ''U.S. Income Tax Return for Estates and Trusts'', Form 1065 ''U.S. Return of Partnership Income'' and Form 1065–B ''U.S. Return of Income for Electing Large Partnerships'' (Schedule F)—

(i) Taxpayer identity information (as defined in section 6103(b)(6) of the Internal Revenue Code);

(ii) Spouse's Social Security Number;

(iii) Annual accounting period;

(iv) Principal Business Activity (PBA) code;

(v) Taxable cooperative distributions;

(vi) Income from custom hire and machine work;

(vii) Gross income;

(viii) Master File Tax (MFT) code;

(ix) Document Locator Number (DLN);

(x) Cycle posted;

(xi) Final return indicator;

(xii) Part year return indicator; and

(xiii) Taxpayer telephone number.

(3) From Form 943, ''Employer's Annual Tax Return for Agricultural Employees''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) Total wages subject to Medicare taxes;

(iv) MFT code;

(v) DLN;

(vi) Cycle posted;

(vii) Final return indicator; and

(viii) Part year return indicator.

(4) From Form 1120 series, ''U.S. Corporation Income Tax Return''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) Gross receipts less returns and allowances;

(iv) PBA code;

(v) MFT Code;

(vi) DLN;

(vii) Cycle posted;

(viii) Final return indicator;

(ix) Part year return indicator; and

(x) Consolidated return indicator.

(5) From Form 1065 series, ''U.S. Return of Partnership Income''—

(i) Taxpayer identity information;

(ii) Annual accounting period;

(iii) PBA code;

(iv) Gross receipts less returns and allowances;

(v) Net farm profit (loss);

(vi) MFT code;

(vii) DLN;

(viii) Cycle posted;

(ix) Final return indicator; and

(x) Part year return indicator.

(c) *Procedures and Restrictions.* (1) Disclosure of return information reflected on returns by officers or employees of the Internal Revenue Service as provided by paragraph (b) of this section will be made only upon written request designating, by name and title, the officers and employees of the Department of Agriculture to whom such disclosure is authorized, to the Commissioner of Internal Revenue by the Secretary of Agriculture and describing—

(i) The particular return information reflected on returns for disclosure;

(ii) The taxable period or date to which such return information reflected on returns relates; and

(iii) The particular purpose for the requested return information reflected on returns.

(2)(i) No such officer or employee to whom the Internal Revenue Service discloses return information reflected on returns pursuant to the provisions of paragraph (b) of this section shall disclose such information to any person, other than the taxpayer to whom such return information reflected on returns relates or other officers or employees of the Department of Agriculture whose duties or responsibilities require such disclosure for a purpose described in paragraph (b)(1) of this section, except in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(ii) If the Internal Revenue Service determines that the Department of Agriculture, or any officer or employee thereof, has failed to, or does not, satisfy the requirements of section 6103(p)(4) of the Internal Revenue Code or regulations or published procedures, the Internal Revenue Service may take such actions as are deemed necessary to ensure that such requirements are or will be satisfied, including suspension of disclosures of return information reflected on returns otherwise authorized by section 6103(j)(5) and paragraph (b) of this section, until the Internal Revenue Service determines that such requirements have been or will be satisfied.

(d) *Effective date.* This section is applicable on February 22, 2006.

[T.D. 9245, 71 FR 8945, Feb. 22, 2006]

### § 301.6103(k)(6)–1 Disclosure of return information by certain officers and employees for investigative purposes.

(a) *General rule.* (1) Pursuant to the provisions of section 6103(k)(6) and subject to the conditions of this section, an internal revenue employee or an Office of Treasury Inspector General for Tax Administration (TIGTA) employee, in connection with official duties relating to any examination, administrative appeal, collection activity, administrative, civil or criminal investigation, enforcement activity, ruling, negotiated agreement, prefiling activity, or other proceeding or offense under the internal revenue laws or related statutes, or in preparation for any proceeding described in section 6103(h)(2) (or investigation which may result in such a proceeding), may disclose return information, of any taxpayer, to the extent necessary to obtain information relating to such official duties or to accomplish properly any activity connected with such official duties, including, but not limited to—

(i) Establishing or verifying the correctness or completeness of any return or return information;

(ii) Determining the responsibility for filing a return, for making a return if none has been made, or for performing such acts as may be required by law concerning such matters;

(iii) Establishing or verifying the liability (or possible liability) of any person, or the liability (or possible liability) at law or in equity of any transferee or fiduciary of any person, for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes or the amount thereof for collection;

(iv) Establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes;

(v) Obtaining the services of persons having special knowledge or technical skills (such as, but not limited to, knowledge of particular facts and circumstances relevant to a correct determination of a liability described in paragraph (a)(1)(iii) of this section or skills relating to handwriting analysis, photographic development, sound recording enhancement, or voice identification) or having recognized expertise in matters involving the valuation of property if relevant to proper performance of official duties described in this paragraph;

(vi) Establishing or verifying the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in

paragraph (a)(1)(iii) of this section for collection, or otherwise to apply the provisions of the Internal Revenue Code relating to establishment of liens against such assets, or levy, seizure, or sale on or of the assets to satisfy any such liability;

(vii) Preparing for any proceeding described in section 6103(h)(2) or conducting an investigation which may result in such a proceeding; or

(viii) Obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer's liability under the Internal Revenue Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or prefiling process.

(2) Disclosure of return information for the purpose of obtaining information to carry out properly the official duties described by this paragraph, or any activity connected with the official duties, is authorized only if the internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, the information is not otherwise reasonably available, or if the activity connected with the official duties cannot occur properly without the disclosure.

(3) Internal revenue and TIGTA employees may identify themselves, their organizational affiliation (e.g., Internal Revenue Service (IRS), Criminal Investigation (CI) or TIGTA, Office of Investigations (OI)), and the nature of their investigation, when making an oral, written, or electronic contact with a third party witness. Permitted disclosures include, but are not limited to, the use and presentation of any identification media (such as a Federal agency badge, credential, or business card) or the use of an information document request, summons, or correspondence on Federal agency letterhead or which bears a return address or signature block that reveals affiliation with the Federal agency.

(4) This section does not address or affect the requirements under section 7602(c) (relating to contact of third parties).

(b) *Disclosure of return information in connection with certain personnel or claimant representative matters.* In connection with official duties relating to any investigation concerned with enforcement of any provision of the Internal Revenue Code, including enforcement of any rule or directive prescribed by the Secretary or the Commissioner of Internal Revenue under any provision of the Internal Revenue Code, or the enforcement of any provision related to tax administration, that affects or may affect the personnel or employment rights or status, or civil or criminal liability, of any former, current, or prospective employee of the Treasury Department, Bureau of Alcohol, Tobacco, Firearms, and Explosives, United States Customs Service, United States Secret Service, or any successor agency, or the rights of any person who is, or may be, a party to an administrative action or proceeding pursuant to 31 U.S.C. 330 (relating to practice before the Treasury Department), an internal revenue, TIGTA, or other Federal officer or employee who is responsible for investigating such employees and persons and is properly in possession of relevant return information is authorized to disclose such return information to the extent necessary for the purpose of obtaining, verifying, or establishing other information which is or may be relevant and material to the investigation.

(c) *Definitions.* The following definitions apply to this section—

(1) *Disclosure of return information to the extent necessary* means a disclosure of return information which an internal revenue or TIGTA employee, based on the facts and circumstances, at the time of the disclosure, reasonably believes is necessary to obtain information to perform properly the official duties described by this section, or to accomplish properly the activities connected with carrying out those official duties. The term *necessary* in this context does not mean essential or indispensable, but rather appropriate and helpful in obtaining the information sought. Nor does *necessary* in this context refer to the necessity of conducting an investigation or the appropriateness of the means or methods chosen to conduct the investigation.

Section 6103(k)(6) does not limit or restrict internal revenue or TIGTA employees with respect to the decision to initiate or the conduct of an investigation. Disclosures under this paragraph (c)(1), however, may not be made indiscriminately or solely for the benefit of the recipient or as part of a negotiated quid pro quo arrangement. This paragraph (c)(1) is illustrated by the following examples:

*Example 1.* A revenue agent contacts a taxpayer's customer regarding the customer's purchases made from the taxpayer during the year under investigation. The revenue agent is able to obtain the purchase information only by disclosing the taxpayer's identity and the fact of the investigation. Depending on the facts and circumstances known to the revenue agent at the time of the disclosure, such as the way the customer maintains his records, it also may be necessary for the revenue agent to inform the customer of the date of the purchases and the types of merchandise involved for the customer to find the purchase information.

*Example 2.* A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness provides copies of the sales invoices in question and then asks the revenue agent for the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be only for the benefit of the third party witness and not necessary to obtain information for the examination.

*Example 3.* A revenue agent contacts a third party witness to obtain copies of invoices of sales made to a taxpayer under examination. The third party witness agrees to provide copies of the sales invoices in question only if the revenue agent provides him with the current address of the taxpayer because the taxpayer still owes money to the third party witness. The revenue agent may not disclose that current address because this disclosure would be a negotiated quid pro quo arrangement.

(2) *Disclosure of return information to accomplish properly an activity connected with official duties* means a disclosure of return information to carry out a function associated with official duties generally consistent with established practices and procedures. This paragraph (c)(2) is illustrated by the following example:

*Example.* A taxpayer failed to file an income tax return and pay the taxes owed. After the taxes were assessed and the taxpayer was notified of the balance due, a revenue officer filed a notice of federal tax lien and then served a notice of levy on the taxpayer's bank. The notices of lien and levy contained the taxpayer's name, social security number, amount of outstanding liability, and the tax period and type of tax involved. The taxpayer's assets were levied to satisfy the tax debt, but it was determined that, prior to the levy, the revenue officer failed to issue the taxpayer a notice of intent to levy, as required by section 6331, and a notice of right to hearing before the levy, as required by section 6330. The disclosure of the taxpayer's return information in the notice of levy is authorized by section 6103(k)(6) despite the revenue officer's failure to issue the notice of intent to levy or the notice of right to hearing. The ultimate validity of the underlying levy is irrelevant to the issue of whether the disclosure was authorized by section 6103(k)(6).

(3) *Information not otherwise reasonably available* means information that an internal revenue or TIGTA employee reasonably believes, under the facts and circumstances, at the time of a disclosure, cannot be obtained in a sufficiently accurate or probative form, or in a timely manner, and without impairing the proper performance of the official duties described by this section, without making the disclosure. This definition does not require or create the presumption or expectation that an internal revenue or TIGTA employee must seek information from a taxpayer or authorized representative prior to contacting a third party witness in an investigation. Neither the Internal Revenue Code, IRS procedures, nor these regulations require repeated contacting of an uncooperative taxpayer. Moreover, an internal revenue or TIGTA employee may make a disclosure to a third party witness to corroborate information provided by a taxpayer. This paragraph (c)(3) is illustrated by the following examples:

*Example 1.* A revenue agent is conducting an examination of a taxpayer. The taxpayer refuses to cooperate or provide any information to the revenue agent. Information relating to the taxpayer's examination would be information not otherwise reasonably available because of the taxpayer's refusal to cooperate and supply any information to the revenue agent. The revenue agent may seek information from a third party witness.

*Example 2.* A special agent is conducting a criminal investigation of a taxpayer. The

special agent has acquired certain information from the taxpayer. Although the special agent has no specific reason to disbelieve the taxpayer's information, the special agent contacts several third party witnesses to confirm the information. The special agent may contact third party witnesses to verify the correctness of the information provided by the taxpayer because the IRS is not required to rely solely on information provided by a taxpayer, and a special agent may take appropriate steps, including disclosures to third party witnesses under section 6103(k)(6), to verify independently or corroborate information obtained from a taxpayer.

(4) *Internal revenue employee* means, for purposes of this section, an officer or employee of the IRS or Office of Chief Counsel for the IRS, or an officer or employee of a Federal agency responsible for administering and enforcing taxes under Chapters 32 (Part III of Subchapter D), 51, 52, or 53 of the Internal Revenue Code, or investigating tax refund check fraud under 18 U.S.C. 510.

(5) *TIGTA employee* means an officer or employee of the Office of Treasury Inspector General for Tax Administration.

(d) *Examples*. The following examples illustrate the application of this section:

*Example 1*. A revenue agent is conducting an examination of a taxpayer. The taxpayer has been very cooperative and has supplied copies of invoices as requested. Some of the taxpayer's invoices show purchases that seem excessive in comparison to the size of the taxpayer's business. The revenue agent contacts the taxpayer's suppliers for the purpose of corroborating the invoices the taxpayer provided. In contacting the suppliers, the revenue agent discloses the taxpayer's name, the dates of purchase, and the type of merchandise at issue. These disclosures are permissible under section 6103(k)(6) because, under the facts and circumstances known to the revenue agent at the time of the disclosures, the disclosures were necessary to obtain information (corroboration of invoices) not otherwise reasonably available because suppliers would be the only source available for corroboration of this information.

*Example 2*. A revenue agent is conducting an examination of a taxpayer. The revenue agent asks the taxpayer for business records to document the deduction of the cost of goods sold shown on Schedule C of the taxpayer's return. The taxpayer will not provide the business records to the revenue agent, who contacts a third party witness for verification of the amount on the Schedule C. In the course of the contact, the revenue agent shows the Schedule C to the third party witness. This disclosure is not authorized under section 6103(k)(6). Section 6103(k)(6) permits disclosure only of return information, not the return (including schedules and attachments) itself. If necessary, a revenue agent may disclose return information extracted from a return when questioning a third party witness. Thus, the revenue agent could have extracted the amount of cost of goods sold from the Schedule C and disclosed that amount to the third party witness.

*Example 3*. A special agent is conducting a criminal investigation of a taxpayer, a doctor, for tax evasion. Notwithstanding the records provided by the taxpayer and the taxpayer's bank, the special agent decided to obtain information from the taxpayer's patients to verify amounts paid to the taxpayer for his services. Accordingly, the special agent sent letters to the taxpayer's patients to verify these amounts. In the letters, the agent disclosed that he was a special agent with IRS–CI and that he was conducting a criminal investigation of the taxpayer. Section 6103(k)(6) permits these disclosures (including the special agent disclosing his affiliation with CI and the nature of the investigation) to confirm the taxpayer's income. The decision whether to verify information already obtained is a matter of investigative judgment and is not limited by section 6103(k)(6).

*Example 4*. Corporation A requests a private letter ruling (PLR) as to the tax consequences of a planned transaction. Corporation A has represented that it is in compliance with laws administered by Agency B that may relate to the tax consequences of the proposed transaction. Further information is needed from Agency B relating to possible tax consequences. Under section 6103(k)(6), the IRS may disclose Corporation A's return information to Agency B to the extent necessary to obtain information from Agency B for the purpose of properly considering the tax consequences of the proposed transaction that is the subject of the PLR.

(e) *Effective date*. This section is applicable on July 16, 2006.

[T.D. 9274, 71 FR 38986, July 11, 2006; 71 FR 60827, Oct. 17, 2006; 71 FR 61833, Oct. 19, 2006]

### § 301.6103(k)(9)–1 Disclosure of returns and return information relating to payment of tax by credit card and debit card.

Officers and employees of the Internal Revenue Service may disclose to card issuers, financial institutions, or other persons such return information as the Commissioner deems necessary in connection with processing credit

card and debit card transactions to effectuate payment of tax as authorized by § 301.6311–2. Officers and employees of the Internal Revenue Service may disclose such return information to such persons as the Commissioner deems necessary in connection with billing or collection of the amounts charged or debited, including resolution of errors relating to the credit card or debit card account as described in § 301.6311–2(d).

[T.D. 8969, 66 FR 64742, Dec. 14, 2001]

### § 301.6103(l)–1 Disclosure of returns and return information for purposes other than tax administration.

(a) *Definition.* For purposes of applying the provisions of section 6103(l) of the Internal Revenue Code, the term *agent* includes a contractor.

(b) *Effective date.* This section is applicable January 6, 2004.

[T.D. 9111, 69 FR 507, Jan. 6, 2004]

### § 301.6103(l)(2)–1 Disclosure of returns and return information to Pension Benefit Guaranty Corporation for purposes of research and studies.

(a) *General rule.* Pursuant to the provisions of section 6103(l)(2) of the Internal Revenue Code and subject to the requirements of paragraph (b) of this section, officers and employees of the Internal Revenue Service may disclose returns and return information (as defined by section 6103(b)) to officers and employees of the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, conducting research and studies authorized by title IV of the Employee Retirement Income Security Act of 1974.

(b) *Procedures and restrictions.* Disclosure of returns or return information by officers or employees of the Service as provided by paragraph (a) of this section will be made only upon written request to the Commissioner of Internal Revenue by the Executive Director of the Pension Benefit Guaranty Corporation describing the returns or return information to be disclosed, the taxable period or date to which such returns or return information relates, and the purpose for which the returns or return information is needed in the administration of title IV of the Employee Retirement Income Security Act of 1974, and designating by title the officers and employees of such corporation to whom such disclosure is authorized. No such officer or employee to whom returns or return information is disclosed pursuant to the provisions of paragraph (a) shall disclose such returns or return information to any person, other than the taxpayer by whom the return was made or to whom the return information relates or other officers or employees of such corporation whose duties or responsibilities require such disclosure for a purpose described in paragraph (a), except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65570, Oct. 3, 1980]

### § 301.6103(l)(2)–2 Disclosure of returns and return information to Department of Labor for purposes of research and studies.

(a) *General rule.* Pursuant to the provisions of section 6103(l)(2) of the Internal Revenue Code and subject to the requirements of paragraph (b) of this section, officers or employees of the Internal Revenue Service may disclose returns and return information (as defined by section 6103(b)) to officers and employees of the Department of Labor for purposes of, but only to the extent necessary in, conducting research and studies authorized by section 513 of the Employee Retirement Income Security Act of 1974.

(b) *Procedures and restrictions.* Disclosure of returns or return information by officers or employees of the Service as provided by paragraph (a) of this section will be made only upon written request to the Commissioner of Internal Revenue by the Administrator of the Pension and Welfare Benefit Programs of the Department of Labor describing the returns or return information to be disclosed, the taxable period or date to which such returns or return information relates, and the purpose for which the returns or return information is needed in the administration of title I of the Employee Retirement

Income Security Act of 1974, and designating by title the officers and employees of such department to whom such disclosure is authorized. No such officer or employee to whom returns or return information is disclosed pursuant to the provisions of paragraph (a) shall disclose such returns or return information to any person, other than the taxpayer by whom the return was made or to whom the return information relates or other officers or employees of such department whose duties or responsibilities require such disclosure for a purpose described in paragraph (a), except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65571, Oct. 3, 1980]

### § 301.6103(l)(2)–3 Disclosure to Department of Labor and Pension Benefit Guaranty Corporation of certain returns and return information.

(a) *Disclosures following general requests.* Pursuant to the provisions of section 6103(l)(2) of the Internal Revenue Code and subject to the requirements of this paragraph, officers or employees of the Internal Revenue Service may disclose the following returns and return information (as defined by section 6103(b)) to officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of title I or IV of the Employee Retirement Income Security Act of 1974 (hereinafter referred to in this section as the Act)—

(1) Notification of receipt by the Service of an application by a particular taxpayer for a determination of whether a pension, profit-sharing, or stock bonus plan, a trust which is a part of such a plan, or an annuity or bond purchase plan meets the applicable requirements of part I of subchapter D of chapter 1 of the Code;

(2) Notification that a particular application described in subparagraph (1) of this paragraph alleges that certain employees may be excluded from participation by reason of section 410(b)(2)(A) and (B) for the purpose of obtaining the finding necessary for the application of such section;

(3) An application by a particular taxpayer for a determination of whether a pension, profit-sharing, or stock bonus plan, or an annuity or bond purchase plan, meets the applicable requirements of part I of subchapter D of chapter 1 of the Code with respect to a termination or proposed termination of the plan or to a partial termination or proposed partial termination of the plan, and any statement filed as provided by section 6058(b);

(4) Notification that the Service has determined that a plan or trust described in subparagraph (1) or (3) of this paragraph meets or does not meet the applicable requirements of part I of subchapter D of chapter 1 of the Code and has issued a determination letter to such effect to a particular taxpayer or that an application for such a determination has been withdrawn by the taxpayer;

(5) If the Department of Labor or the Pension Benefit Guaranty Corporation has commented on an application upon which a determination letter described in subparagraph (4) of this paragraph has been issued, a copy of the letter or document issued to the applicant;

(6) Notification to a particular taxpayer that the Service intends to disqualify a pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or bond purchase plan because such plan or trust does not meet the requirements of section 410(a) or 411 as of the date that such notification is issued;

(7) Notification required by section 3002(a) of the Act of the commencement of any proceeding to determine whether a particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or bond purchase plan meets the requirements of section 410(a) or 411;

(8) Prior to issuance of a notice of deficiency to a particular taxpayer under section 6212, notification that the Service has determined that a deficiency exists under section 6211 with respect to the tax imposed by section 4971 (a) or (b) on such taxpayer, except that if the Service determines that the collection of such tax is in jeopardy within

the meaning of section 6861(a), such notification may be disclosed after issuance of the notice of deficiency or jeopardy assessment;

(9) Notification of receipt by the Service of, and action taken with respect to, an application by or on behalf of a particular taxpayer for a waiver of the tax imposed by section 4971 (b);

(10) Prior to issuance of a notice of deficiency to a particular taxpayer under section 6212, notification that a deficiency exists under section 6211 with respect to the tax imposed by section 4975 (a) or (b) on such taxpayer, except that if the Service determines that the collection of such tax is in jeopardy within the meaning of section 6861(a), such notification may be disclosed after issuance of the notice of deficiency or jeopardy assessment;

(11) Notification that the Service has waived the tax imposed by section 4975(b) on a particular taxpayer;

(12) Notification of applicability of section 4975 to a particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or stock purchase plan engaged in prohibited transactions within the meaning of section 4975(c);

(13) Notification to a plan administrator that the Service has determined that a pension, profit-sharing, stock bonus, annuity, or stock purchase plan no longer meets the requirements of section 401(a) or 404(a)(2);

(14) Notification that the Service has determined that there has been a termination or partial termination of a particular pension, profit-sharing, stock bonus, annuity, or stock purchase plan within the meaning of section 411(d)(3);

(15) Notification of the occurrence of an event (other than an event described in subparagraph (13), (14), or (18) of this paragraph) which the Service has determined to indicate that a particular pension, profit-sharing, stock bonus, annuity, or stock purchase plan may not be sound under section 4043(c)(2) of the Act;

(16) Notification that the Service has received and responded to a request on behalf of a particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or stock purchase plan for an extension of time for filing an annual return by such plan or trust;

(17) Notification that the Service has received and responded to a request on behalf of a particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or stock purchase plan to change the annual accounting period of such plan or trust;

(18) Notification that the Service has determined that a particular plan does not meet the requirements of section 412 without regard to whether such plan is one described in section 4021(a)(2) of the Act;

(19) Notification of the results of an investigation by the Service requested by the Department of Labor or the Pension Benefit Guaranty Corporation, or both, with respect to whether the tax described in section 4971 should be imposed on any employer named in such request or whether the tax imposed by section 4975 should be paid by any person named in the request;

(20) Notification of receipt by the Service of an application by a particular taxpayer for exemption under section 4975(c)(2) or of initiation by the Service of an administrative proceeding for such exemption;

(21) Notification of receipt by the Service of, and action taken with respect to, an application by or on behalf of a particular taxpayer for a waiver or variance of the minimum funding standard under section 303 of the Act or section 412(d);

(22) Notification that the Service intends to undertake, is undertaking, or has completed, an examination to determine whether—

(i) A particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or stock purchase plan meets the applicable requirements of part I of subchapter D of chapter 1 of the Code,

(ii) Any particular person is, or may be, liable for any tax imposed by section 4971 or 4975, or

(iii) A particular employee welfare benefit plan, as defined in section 3(1) of the Act, meets the applicable requirements of section 501(c) or 120, together with any completed Department of Labor or Pension Benefit Guaranty Corporation form (and supplemental

schedules) relating to such examination;

(23) Copies of initial pleadings indicating that the Service intends to intervene in a civil action under section 502(h) of the Act;

(24) Notification of receipt by the Service of a request for technical advice as to whether a particular pension, profit-sharing, or stock bonus plan, a trust which is a part of such plan, or an annuity or bond purchase plan should be disqualified because of fiduciary actions subject to part 4 of subtitle B of title I of the Act which may violate the exclusive benefit rule of section 401(a);

(25) Notification of receipt by the National Office of the Service of a request by or on behalf of a particular taxpayer for a ruling, opinion, variance, or waiver under any provision of title I of the Act and a copy of any such ruling, opinion, variance or waiver;

(26) Notification that the Service proposes to take substantive action which would significantly impact on or substantially affect collectively bargained plans and a description of such proposed substantive action; and

(27) Notification of receipt by the Service of, and action taken with respect to, a request by a particular taxpayer for a ruling under section 412(c)(8), 412(e), or 412(f).

Return information disclosed under this paragraph includes the taxpayer identity information (as defined in section 6103(b)(6)) of the plan or trust, the name and address of the sponsor and administrator of the plan or trustee of the trust, and the name and address of the person authorized to represent the plan or trust before the Service. Disclosure of returns or return information as provided by this paragraph will be made only following receipt by the Commissioner of Internal Revenue or his delegate of an annual written request for such disclosure by the Secretary of Labor or his delegate or the Executive Director of the Pension Benefit Guaranty Corporation or his delegate describing the categories of returns or return information to be disclosed by the Service and the particular purpose for which the returns or return information is needed in the administration of title I or IV of the Act, and designating by title the officers and employees of the Department of Labor or such corporation to whom such disclosure is authorized.

(b) *Additional returns and return information subject to disclosure*—(1) *Returns and return information relating to automatic notification.* (i) Subject to the requirements of subparagraph (3)(i) of this paragraph, officers or employees of the Service may disclose to officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of title I or IV of the Act additional return and return information relating to any item described in paragraph (a) of this section.

(ii) Subject to the requirements of subparagraph (3)(ii) of this paragraph, in connection with the disclosure of any item as provided by paragraph (a) of this section, officers and employees of the Service may disclose to officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation such additional returns and return information relating to such item as the Service determines are or may be necessary in the administration of title I or IV of the Act.

(2) *Other returns and return information.* Subject to the requirements of subparagraph (3)(i) of this paragraph, officers or employees of the Service may disclose to officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation returns and return information (other than returns and return information disclosed as provided by paragraph (a) of this section or § 301.6103(l)(2)–1 or § 301.6103(l)(2)–2 for purposes of, but only to the extent necessary in, administration of title I or IV of the Act.

(3) *Procedures.* (i) Disclosure of returns or return information by officers or employees of the Service as provided by subparagraph (1)(i) or (2) of this paragraph will be made only following receipt by the Commissioner of Internal Revenue or his delegate of a written request for such disclosure by the Secretary of Labor or his delegate or the Executive Director of the Pension Benefit Guaranty Corporation or his delegate identifying the particular taxpayer by whom such return was made

or to whom such return information relates, describing the particular returns or return information to be disclosed, stating the purpose for which the returns or return information is needed in the administration of title I or IV of the Act, and designating by title the officers and employees of such department or corporation to whom such disclosure is authorized.

(ii) Disclosure of returns or return information by officers or employees of the Service as provided by subparagraph (1)(ii) of this paragraph will be made only following receipt by the Commissioner of Internal Revenue or his delegate of an annual written request for such disclosure by the Secretary of Labor or his delegate or the Executive Director of the Pension Benefit Guaranty Corporation or his delegate stating the purpose for which the returns or return information is needed in the administration of title I or IV of the Act, and designating by title the officers and employees of such department or corporation to whom such disclosure is authorized.

(c) *Disclosure and use of returns and return information by officers and employees of Department of Labor, Pension Benefit Guaranty Corporation, and Department of Justice*—(1) *Use by officers and employees of Department of Labor and Pension Benefit Guaranty Corporation.* Returns and return information disclosed to officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation as provided by this section may be used by such officers and employees for purposes of, but only to the extent necessary in, administration of any provision of title I or IV of the Act, including any preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) authorized by, or described in, title I or IV of the Act.

(2) *Disclosure by officers and employees of Department of Labor and Pension Benefit Guaranty Corporation to, and use by, other persons, including officers and employees of the Department of Justice.* (i) Returns and return information disclosed to officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation as provided by this section may be disclosed by such officers and employees to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and for their necessary use in, any Federal grand jury proceeding, or preparation for any civil or criminal judicial proceeding (or for their necessary use in an investigation which may result in such a proceeding), authorized by, or described in, title I or IV of the Act.

(ii) Returns and return information disclosed to officers and employees of the Department of Labor, the Pension Benefit Guaranty Corporation, and the Department of Justice as provided by this section may be disclosed by such officers and employees to other persons, including, but not limited to, persons described in subparagraph (2)(iii) of this paragraph, but only to the extent necessary in connection with administration of the provisions of title I or IV of the Act, including a Federal grand jury proceeding, and proper preparation for a proceeding (or investigation), described in subparagraph (1) or (2)(i). Such disclosures may include, but are not limited to, disclosures where necessary—

(A) To properly obtain the services of persons having special knowledge or technical skills;

(B) To properly interview, consult, depose, or interrogate or otherwise obtain relevant information from the taxpayer to whom such return or return information relates (or the legal representative of such taxpayer) or any witness who may be called to give evidence in the proceeding; or

(C) To properly conduct negotiations concerning, or obtain authorization for, settlement or disposition of the proceeding, in whole or in part, or stipulations of fact in connection with the proceeding.

Disclosure of a return or return information to a person other than the taxpayer to whom such return or return information relates (or the legal representative of such taxpayer) to properly accomplish any purpose or activity described in this subparagraph should be made, however, only if such purpose or activity cannot otherwise properly be accomplished without making such disclosure.

(iii) Among those persons to whom returns and return information may be disclosed by officers and employees of the Department of Labor, the Pension Benefit Guaranty Corporation, and the Department of Justice as provided by subparagraph (2)(ii) of this paragraph are:

(A) Other officers and employees of the Department of Labor, the Pension Benefit Guaranty Corporation, and the Department of Justice;

(B) Officers and employees of another Federal agency (as defined in section 6103(b)(9)) working under the direction and control of such officers and employees of the Department of Labor, the Pension Benefit Guaranty Corporation, or the Department of Justice; and

(C) Court reporters.

Disclosure of returns or return information to other persons by officers and employees of the Department of Labor or the Pension Benefit Guaranty Corporation as provided by subparagraph (2)(ii) of this paragraph for purposes of conducting research, surveys, studies, and publications referred to in section 513(a), or authorized by title IV, of the Act shall be restricted, however, to disclosure to other officers and employees of such department or corporation to whom such disclosure is necessary in connection with such conduct or to the taxpayer by whom such return was made or to whom such return information relates if the return or return information can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(3) *Disclosure in judicial proceedings.* A return or return information disclosed to officers and employees of the Department of Labor, the Pension Benefit Guaranty Corporation, or the Department of Justice as provided by this section may be entered into evidence by such officers or employees in a civil or criminal judicial proceeding authorized by, or described in, title I or IV of the Act, provided that, in the case of a judicial proceeding described in section 6103(i)(4), the requirements of section 6103(i)(4) have first been met.

(d) *Disclosure of returns and return information in connection with certain consultations between Departments of the Treasury and Labor.* Upon general written request to the Commissioner of Internal Revenue by the Secretary of Labor, officers and employees of the Service may disclose to officers and employees of the Department of Labor such returns and return information as may be necessary to properly carry out any consultation required by section 3002, 3003, or 3004 of the Act.

(e) *Return information open to public inspection under section 6104.* Nothing in these regulations shall be construed to deny officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation the right to inspect return information available to the public under section 6104 of the Code.

(Secs. 6103 and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1667, 1685, 68A Stat. 917; 26 U.S.C. 6103 and 7805))

[T.D. 7723, 45 FR 65571, Oct. 3, 1980, as amended by T.D. 7757, 46 FR 6930, Jan. 22, 1981; T.D. 7911, 48 FR 40377, Sept. 7, 1983]

### § 301.6103(l)(14)–1 Disclosure of return information to United States Customs Service.

(a) *General rule.* Pursuant to the provisions of section 6103(l)(14) of the Internal Revenue Code, officers and employees of the Internal Revenue Service may disclose to officers and employees of the United States Customs Service return information (as defined by section 6103(b)) with respect to taxes imposed by chapters 1 and 6 of the Internal Revenue Code solely for purposes of, and only to the extent necessary in—

(1) Ascertaining the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 or;

(2) Other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits.

(b) *Procedures.* Disclosure of return information by officers or employees of the Internal Revenue Service as provided by paragraph (a) of this section will be made only following receipt by the Internal Revenue Service of a written request for the disclosure by the Commissioner of the U.S. Customs Service identifying—

(1) The particular items of return information to be disclosed;

(2) The particular taxpayer to whom the return information relates;

(3) The taxable period or date to which the return information relates;

(4) The particular purpose for which each item of return information is needed, including an explanation as to how the requested information is necessary to accomplish that purpose. In addition, the request must designate by title the officers and employees of the Customs Service to whom the disclosure is authorized and certify that the Customs Service has initiated or intends to initiate, under section 509 of the Tariff Act of 1930, an audit of each taxpayer for whom return information is requested or that the taxpayer has a transactional or ownership relationship with the subject of such an audit.

(c) *Return information subject to disclosure.* Any return information requested must be necessary to a Customs determination of the correctness of any entry in audits conducted under section 509 of the Tariff Act of 1930. Taxpayers as to whom return information is requested must either be the subject of a Customs audit (or intended audit) or have a transactional or ownership relationship with the subject of a Customs audit. Requested information must relate to the declared value, classification or rate of duty applicable to entered merchandise. Requested information may also include any adjustment by the IRS to the items of return information described by this paragraph.

(d) *Return information not subject to disclosure.* The following return information may not be requested or disclosed pursuant to section 6103(l)(14) of the Internal Revenue Code: any Advance Pricing Agreement or information submitted to or generated by the IRS as part of the negotiation process for an Advance Pricing Agreement, or any information to the extent its disclosure would be inconsistent with a tax treaty or executive agreement with respect to which the United States is a party.

(e) *Impairment of tax administration.* Return information with respect to a taxpayer may not be disclosed pursuant to this section if the IRS determines that the disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation or proceeding.

(f) *Use by Customs Service.* Return information disclosed under this section may be used by the U.S. Customs Service to the extent necessary to ascertain or to document the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 and in any related administrative proceedings to recover any loss of revenue, or to collect duties, taxes or fees, determined to be due and owing pursuant to these audits. Uses may include, to the extent necessary, disclosure to the importer (or the legal representative of such importer) subject to the audit with respect to which the information was requested.

(g) *Disclosure to, and use by, the Department of Justice.* Return information disclosed to officers and employees of the U.S. Customs Service as provided by this section may be disclosed by these officers and employees to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their necessary use in, advocating or defending the correctness of Customs determinations with respect to any entry, in any civil judicial proceeding, or any preparations therefor (or for their necessary use in an investigation which may result in such a proceeding), to recover any loss of revenue, or to collect duties, taxes or fees, determined to be due and owing as a consequence of an audit provided for in section 509 of the Tariff Act of 1930.

(h) *Disclosure by officers and employees of the Department of Justice.* Return information disclosed to officers and employees of the Department of Justice (including United States Attorneys) as provided by this section may be disclosed by these officers and employees to other persons as is necessary to properly accomplish the purposes or activities described in paragraph (g). Disclosure of return information to a person, other than the importer (or the legal representative of the importer) subject to the audit with respect to which the information was originally requested, to properly accomplish any purpose or activity described in paragraph (g) may be made, however, only if the purpose or activity cannot otherwise properly be accomplished without

making the disclosure. Disclosures may include, but are not limited to, disclosures where necessary—

(1) To properly obtain the services of persons having special knowledge or technical skills;

(2) To properly interview, consult, depose, or interrogate or otherwise obtain relevant information from, the taxpayer (or the legal representative of the taxpayer) to whom the return information relates or any witness who may be called to give evidence in the proceeding; or

(3) To properly conduct negotiations concerning, or obtain authorization for, settlement or disposition of the proceeding, in whole or in part, or stipulations of fact in connection with the proceeding.

(i) *Use in criminal judicial proceedings.* Return information disclosed pursuant to this section may not be used in any criminal judicial proceeding, or any preparations therefor (or in a criminal investigation which may result in such a proceeding), involving the enforcement of a criminal statute, without compliance with the requirements of section 6103(i) (1) or (2) as appropriate. However, the return information may in any event be used for purposes of complying with the requirements of section 6103(i).

(j) *Restrictions.* Return information disclosed to officers and employees of the U.S. Customs Service or to the Department of Justice as provided by this section may not be used or disclosed for any purpose other than to ascertain, or advocate or defend the correctness of, Customs determinations with respect to, any entry in the audits for which the information was requested or in certain actions resulting from the audits as described above. Return information disclosed to officers and employees of the U.S. Customs Service or to the Department of Justice as provided by this section may not be disclosed to any person, including any contractor of the U.S. Customs Service, except as provided by this section, or as otherwise provided by section 6103 of the Internal Revenue Code.

[T.D. 8527, 59 FR 11548, Mar. 11, 1994. Redesignated by T.D. 8694, 61 FR 66220, Dec. 17, 1996]

### § 301.6103(m)–1 Disclosure of taxpayer identity information.

(a) *Definition.* For purposes of applying the provisions of section 6103(m) of the Internal Revenue Code, the term *agent* includes a contractor.

(b) *Effective date.* This section is applicable January 6, 2004.

[T.D. 9111, 69 FR 507, Jan. 6, 2004]

### § 301.6103(n)–1 Disclosure of returns and return information in connection with procurement of property and services for tax administration purposes.

(a) *General rule.* Pursuant to the provisions of section 6103(n) of the Internal Revenue Code and subject to the requirements of paragraphs (b), (c), and (d) of this section, officers or employees of the Treasury Department, a State tax agency, the Social Security Administration, or the Department of Justice, are authorized to disclose returns and return information (as defined in section 6103(b)) to any person (including, in the case of the Treasury Department, any person described in section 7513(a)), or to an officer or employee of such person, to the extent necessary in connection with contractual procurement of—

(1) Equipment or other property, or

(2) Services relating to the processing, storage, transmission, or reproduction of such returns or return information, the programming, maintenance, repair, or testing of equipment or other property, or the providing of other services, for purposes of tax administration (as defined in section 6103(b)(4)).

No person, or officer or employee of such person, to whom a return or return information is disclosed by an officer or employee of the Treasury Department, the State tax agency, the Social Security Administration, or the Department of Justice, under the authority of this paragraph shall in turn disclose such return or return information for any purpose other than as described in this paragraph, and no such further disclosure for any such described purpose shall be made by such person, officer, or employee to anyone, other than another officer or employee of such person whose duties or responsibilities require such disclosure for a

purpose described in this paragraph, without written approval by the Internal Revenue Service.

(b) *Limitations.* For purposes of paragraph (a) of this section, disclosure of returns or return information in connection with contractual procurement of property or services described in such paragraph will be treated as necessary only if such procurement or the performance of such services cannot otherwise be reasonably, properly, or economically carried out or performed without such disclosure. Thus, for example, disclosures of returns or return information to employees of a contractor for purposes of programming, maintaining, repairing, or testing computer equipment used by the Internal Revenue Service or a State tax agency should be made only if such services cannot be reasonably, properly, or economically performed by use of information or other data in a form which does not identify a particular taxpayer. If, however, disclosure of returns or return information is in fact necessary in order for such employees to reasonably, properly, or economically perform the computer related services, such disclosures should be restricted to returns or return information selected or appearing at random. Further, for purposes of paragraph (a), disclosure of returns or return information in connection with the contractual procurement of property or services described in such paragraph should be made only to the extent necessary to reasonably, properly, or economically conduct such procurement activity. Thus, for example, if an activity described in paragraph (a) can be reasonably, properly, and economically conducted by disclosure of only parts or portions of a return or if deletion of taxpayer identity information (as defined in section 6103(b)(6) of the Code) reflected on a return would not seriously impair the ability of the contractor or his officers or employees to conduct the activity, then only such parts or portions of the return, or only the return with taxpayer identity information deleted, should be disclosed.

(c) *Notification requirements.* Persons to whom returns or return information is or may be disclosed as authorized by paragraph (a) of this section shall provide written notice to their officers or employees—

(1) That returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized by paragraph (a) of this section;

(2) That further inspection of any returns or return information for a purpose or to an extent unauthorized by paragraph (a) of this section constitutes a misdemeanor, punishable upon conviction by a fine of as much as $1,000, or imprisonment for as long as 1 year, or both, together with costs of prosecution;

(3) That further disclosure of any returns or return information for a purpose or to an extent unauthorized by paragraph (a) of this section constitutes a felony, punishable upon conviction by a fine of as much as $5,000, or imprisonment for as long as 5 years, or both, together with the costs of prosecution;

(4) That any such unauthorized further inspection or disclosure of returns or return information may also result in an award of civil damages against any person who is not an officer or employee of the United States in an amount not less than $1,000 for each act of unauthorized inspection or disclosure or the sum of actual damages sustained by the plaintiff as a result of such unauthorized disclosure or inspection as well as an award of costs and reasonable attorneys fees; and

(5) If such person is an officer or employee of the United States, a conviction for an offense referenced in paragraph (c)(2) or (c)(3) of this section shall result in dismissal from office or discharge from employment.

(d) *Safeguards.* Any person to whom a return or return information is disclosed as authorized by paragraph (a) of this section shall comply with all applicable conditions and requirements which may be prescribed by the Internal Revenue Service for the purposes of protecting the confidentiality of returns and return information and preventing disclosures of returns or return information in a manner unauthorized by paragraph (a). The terms of any contract between the Treasury Department, a State tax agency, the Social

Security Administration, or the Department of Justice, and a person pursuant to which a return or return information is or may be disclosed for a purpose described in paragraph (a) shall provide, or shall be amended to provide, that such person, and officers and employees of the person, shall comply with all such applicable conditions and restrictions as may be prescribed by the Service by regulation, published rules or procedures, or written communication to such person. If the Service determines that any person, or an officer or employee of any such person, to whom returns or return information has been disclosed as provided in paragraph (a) has failed to, or does not, satisfy such prescribed conditions or requirements, the Service may take such actions as are deemed necessary to ensure that such conditions or requirements are or will be satisfied, including—

(1) Suspension or termination of any duty or obligation arising under a contract with the Treasury Department referred to in this paragraph or suspension of disclosures by the Treasury Department otherwise authorized by paragraph (a) of this section, or

(2) Suspension of further disclosures of returns or return information by the Service to the State tax agency, or to the Department of Justice, until the Service determines that such conditions and requirements have been or will be satisfied.

(e) *Definitions*. For purposes of this section—

(1) The term *Treasury Department* includes the Internal Revenue Service and the Office of the Chief Counsel for the Internal Revenue Service;

(2) The term *State tax agency* means an agency, body, or commission described in section 6103(d) of the Code; and

(3) The term *Department of Justice* includes offices of the United States Attorneys.

(f) *Effective date*. Section 301.6103(n)–1(c) is applicable on March 12, 2003.

[T.D. 7723, 45 FR 65573, Oct. 3, 1980, as amended by T.D. 8271, 54 FR 46383, Nov. 3, 1989; T.D. 8695, 61 FR 66218, Dec. 17, 1996; T.D. 9044, 68 FR 11741, Mar. 12, 2003]

**§ 301.6103(p)(2)(B)–1 Disclosure of returns and return information by other agencies.**

(a) *General rule*. Subject to the requirements of paragraphs (b), (c), and (d) of this section, returns or return information that have been obtained by a Federal, state or local agency, or its agents or contractors, in accordance with section 6103 (the first recipient) may be disclosed by the first recipient to another recipient authorized to receive such returns or return information under section 6103 (the second recipient).

(b) *Approval by Commissioner*. A disclosure described in paragraph (a) of this section may be made if the Commissioner of Internal Revenue (the Commissioner) determines, after receiving a written request under this section, that such returns or return information are more readily available from the first recipient than from the Internal Revenue Service (IRS). The disclosure authorization by the Commissioner shall be directed to the head of the first recipient and may contain such conditions or restrictions as the Commissioner may prescribe. The disclosure authorization may be revoked by the Commissioner at any time.

(c) *Requirements and restrictions*. The second recipient may receive only returns or return information as authorized by the provision of section 6103 applicable to such second recipient. Any returns or return information disclosed may be used by the second recipient only for a purpose authorized by and subject to any conditions imposed by section 6103 and the regulations thereunder, including, if applicable, safeguards imposed by section 6103(p)(4).

(d) *Records and reports of disclosure*. The first recipient shall maintain to the satisfaction of the IRS a permanent system of standardized records regarding such disclosure authorization described in paragraph (a) of this section and any disclosure of returns and return information made pursuant to such authorization, and shall provide such information as prescribed by the Commissioner in order to enable the IRS to comply with its obligations under section 6103(p)(3) to keep accountings for disclosures and to make annual reports of disclosures to the

Joint Committee on Taxation. The information required for reports to the Joint Committee on Taxation must be provided within 30 days after the close of each calendar year. The requirements of this paragraph do not apply to the disclosure of returns and return information as provided by paragraph (a) of this section which, had such disclosures been made directly by the IRS, would not have been subject to the recordkeeping requirements imposed by section 6103(p)(3)(A).

(e) *Effective date*. This section is applicable on January 21, 2003.

[T.D. 9036, 68 FR 2696, Jan. 21, 2003]

### § 301.6103(p)(4)–1T Procedures relating to safeguards for returns or return information (temporary).

For security guidelines and other safeguards for protecting returns and return information, see guidance published by the Internal Revenue Service. For procedures for administrative review of a determination that an authorized recipient has failed to safeguard returns or return information, see § 301.6103(p)(7)–1T.

[T.D. 9252, 71 FR 9451, Feb. 24, 2006]

### § 301.6103(p)(7)–1T Procedures for administrative review of a determination that an authorized recipient has failed to safeguard returns or return information (temporary).

(a) *In general*. Notwithstanding any section of the Internal Revenue Code, the Internal Revenue Service (IRS) may terminate or suspend disclosure of returns and return information to any authorized recipient specified in subsection (p)(4) of section 6103, if the IRS makes a determination that:

(1) The authorized recipient has allowed an unauthorized inspection or disclosure of returns or return information and that the authorized recipient has not taken adequate corrective action to prevent the recurrence of an unauthorized inspection or disclosure, or

(2) The authorized recipient does not satisfactorily maintain the safeguards prescribed by section 6103(p)(4), and has made no adequate plan to improve its system to maintain the safeguards satisfactorily.

(b) *Notice of IRS's intention to terminate or suspend disclosure*. Prior to terminating or suspending authorized disclosures, the IRS will notify the authorized recipient in writing of the IRS's preliminary determination and of the IRS's intention to discontinue disclosure of returns and return information to the authorized recipient. Upon so notifying the authorized recipient, the IRS, if it determines that tax administration otherwise would be seriously impaired, may suspend further disclosures of returns and return information to the authorized recipient pending a final determination by the Commissioner or a Deputy Commissioner described in paragraph (d)(2) of this section.

(c) *Authorized recipient's right to appeal*. An authorized recipient shall have 30 days from the date of receipt of a notice described in paragraph (b) of this section to appeal the preliminary determination described in paragraph (b) of this section. The appeal shall be made directly to the Commissioner.

(d) *Procedures for administrative review*. (1) To appeal a preliminary determination described in paragraph (b) of this section, the authorized recipient shall send a written request for a conference to: Commissioner of Internal Revenue (Attention: SE:S:CLD:GLD), 1111 Constitution Avenue, NW., Washington, DC 20224. The request must include a complete description of the authorized recipient's present system of safeguarding returns or return information, as well as a complete description of its practices with respect to the inspection, disclosure, and use of the returns or return information it (including any authorized contractors or agents) receives under the Internal Revenue Code. The request then must state the reason or reasons the authorized recipient believes that such system, or practice, including improvements, if any, to such system or practice expected to be made in the near future, is or will be adequate to safeguard returns or return information.

(2) Within 45 days of the receipt of the request made in accordance with the provisions of paragraph (d)(1) of this section, the Commissioner or Deputy Commissioner personally will hold a conference with representatives of

the authorized recipient, after which the Commissioner or Deputy Commissioner will make a final determination with respect to the appeal.

(e) *Effective date.* This section is applicable to all authorized recipients of returns and return information that are subject to the safeguard requirements set forth in section 6103(p)(4) on or after February 23, 2006.

[T.D. 9252, 71 FR 9451, Feb. 24, 2006]

### § 301.6104(a)–1 Public inspection of material relating to tax-exempt organizations.

(a) *Application for tax exemption and supporting documents.* If the Internal Revenue Service determines that an organization described in section 501 (c) or (d) is exempt from taxation for any taxable year, the application for tax exemption upon which the determination is based, together with any supporting documents, is open to public inspection. Some applications for tax exemption have been destroyed and therefore are not available for inspection. For purposes of determining the availability for public inspection, a claim for tax exemption filed to reestablish exempt status after denial thereof under the provisions of section 503 or 504 (as in effect on December 31, 1969), or under the corresponding provisions of any prior revenue law, is considered an application for tax exemption.

(b) *Letters or documents issued by the Internal Revenue Service with respect to an application for tax exemption.* If an application for tax exemption is filed with the Internal Revenue Service after October 31, 1976, and is open to public inspection under paragraph (a) of this section, then any letter or document issued to the applicant by the Internal Revenue Service which relates to the application is also open to public inspection. For rules relating to when a letter or document is issued, see § 301.6110–2(h). Letters or documents to which this paragraph applies include, but are not limited to—

(1) Favorable rulings and determination letters (see § 601.201(n)(1)) issued in response to applications for tax exemption,

(2) Technical advice memoranda (see § 601.201(n)(9)) issued with respect to an approved, or subsequently approved, application for tax exemption, and

(3) Letters issued in response to an application for tax exemption that propose a finding that the organization is not entitled to be exempt from tax, if the organization is subsequently determined, on the basis of the application, to be exempt from tax.

(c) *Requirement of exempt status.* An application for tax exemption, supporting documents, and letters or documents issued by the Internal Revenue Service that relate to the application will not be open to public inspection before the organization filing the application is determined, on the basis of the application, to be exempt from taxation for any taxable year. On the other hand, if the organization is determined to be exempt for any taxable year, the material will not be withheld from public inspection on the ground that the organization is determined not to be exempt for any other taxable year.

(d) *Documents included in the term ''application for tax exemption''.* For purposes of this section—

(1) *Prescribed application form.* If a form is prescribed for an organization's application for tax exemption, the application for tax exemption includes the form and all documents and statements the Internal Revenue Service requires to be filed with the form.

(2) *No prescribed application form.* If no form is prescribed for an organization's application for tax exemption, the application for tax exemption includes:

(i) The application letter and a copy of the articles of incorporation, declaration of trust, or other instrument of similar import that sets forth the permitted powers or activities of the organization,

(ii) The bylaws or other code of regulations,

(iii) The latest financial statement showing assets, liabilities, receipts and disbursements,

(iv) Statements showing the character of the organization, the purpose for which it was organized, and its actual activities,

(v) Statements showing sources of income and receipts and the disposition thereof, and whether or not any income or receipts is credited to surplus or

may inure to the benefit of any private shareholder or individual, and

(vi) Any other statements or documents the Internal Revenue Service requires to be filed with the application lettter.

(3) *Prohibited transactions.* An application for tax exemption does not include a request for a ruling as to whether a proposed transaction is a prohibited transaction under section 503.

(e) *Supporting documents defined.* For purposes of this section, ''supporting documents'', as used with respect to an application for tax exemption, means any statement or document not described in paragraph (d) of this section that is submitted by an organization in support of its application. For example, a legal brief submitted in support of an application for tax exemption is a supporting document.

(f) *Statement of exempt status.* In addition to having the opportunity to inspect material relating to tax exempt organizations, a person may request a statement setting forth the following information:

(1) The subsection and paragraph of section 501 (or the corresponding provision of any prior revenue law) under which an organization has been determined, on the basis of an application open to public inspection, to qualify for exemption from taxation, and

(2) Whether the organization is currently held to be exempt.

The request for the statement must be made in the same manner as a request for inspection (see § 301.6104(a)–6).

(g) *Withholding of certain information from public inspection.* For rules relating to certain information contained in an application for tax exemption and related material which will be withheld from public inspection, see § 301.6104(a)–5(a).

(h) *Procedures for inspection.* For rules relating to procedures for public inspection of applications for tax exemption and related material, see § 301.6104(a)–6.

(i) *Material not open to public inspection under section 6104 or 6110.* Under section 6110 certain written determinations issued by the Internal Revenue Service are made available for public inspection. Section 6110 does not apply, however, to matters on which the determination of availability for public inspection is made under section 6104. Accordingly, § 301.6110–1(a) describes matters which, for purposes of section 6110, are considered within the ambit of section 6104. Some determination letters and other documents relating to tax exempt organizations that are not open to public inspection under section 6104(a)(1)(A) and this section are nevertheless within the ambit of section 6104 for purposes of section 6110. These determination letters and other documents are therefore not available for public inspection under either section 6104 or section 6110. They include but are not limited to—

(1) Unfavorable rulings or determination letters (see § 601.201(n)) issued in response to applications for tax exemption,

(2) Rulings or determination letters revoking or modifying a favorable determination letter (see § 601.201(n)(6)),

(3) Technical advice memoranda (see § 601.201(n)(9)) relating to a disapproved application for tax exemption or the revocation or modification of a favorable determination letter,

(4) Any letter or document filed with or issued by the Internal Revenue Service relating to whether a proposed or accomplished transaction is a prohibited transaction under section 503,

(5) Any letter or document filed with or issued by the Internal Revenue Service relating to an organization's status as an organization described in section 509 (a) or 4942(j)(3), unless the letter or document relates to the organization's application for tax exemption, and

(6) Any other letter or document filed with or issued by the Internal Revenue Service which, although it relates to an organization's tax exempt status as an organization described in section 501 (c) or (d), does not relate to that organization's application for tax exemption, within the meaning of paragraph (d).

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50486, Nov. 8, 1982]

**§ 301.6104(a)–2 Public inspection of material relating to pension and other plans.**

(a) *Material open to inspection.* Except as provided in § 301.6104(a)–4 with respect to plans having fewer than 26 participants, an application for a determination letter which is filed with the Internal Revenue Service after September 2, 1974, together with supporting documents filed by the applicant in support of the application, will be open to public inspection under section 6104(a)(1)(B) (i) and (ii). An application for a determination letter and supporting documents will be open to public inspection whether or not the application is withdrawn by the applicant, and whether or not the Internal Revenue Service determines that the plan, account, or annuity to which the application relates is qualified or that any related trust or custodial account is exempt from tax.

(b) *Documents included in the term ''application for a determination letter''*—(1) *Employees' plans and individual retirement plans.* For purposes of this section, the term ''application for a determination letter'' includes the documents that an applicant files with respect to a request that the Internal Revenue Service determine the qualification of—

(i) A pension, profit-sharing, or stock bonus plan under section 401(a),

(ii) An annuity plan under section 403(a),

(iii) A bond purchase plan under section 405(a), or

(iv) An individual retirement account or annuity described in section 408 (a), (b) or (c).

(2) *Tax exempt trusts or custodial accounts.* The term ''application for a determination letter'' also includes the documents an applicant files with respect to a request that the Internal Revenue Service determine the exemption from tax under section 501(a) of an organization forming part of a plan or account described in subparagraph (1) of this paragraph, or a custodial account described in section 401(f).

(3) *Master, prototype and pattern plans.* The term ''application for a determination letter'' also includes documents which an applicant files with respect to a request for approval of a master, prototype, pattern or other such plan or account.

(4) *Prescribed forms and application letters.* With respect to an application for a determination letter described in this paragraph (b) for which an application form is prescribed, the application for a determination letter includes the form and all documents and statements required to be filed in connection with the form. With respect to an application for a determination letter for which no application form is prescribed, the application for a determination letter includes the application letter and all documents and statements the Internal Revenue Service requires to be submitted with the application letter.

(c) *Documents not constituting an ''application for a determination letter''.* The following are not applications for a determination letter for purposes of this section:

(1) An incomplete application that is returned without action for proper completion,

(2) An application that is returned without action to the applicant for failure to notify all interested parties in accordance with the regulations under section 7476 (relating to declaratory judgments), and

(3) A request for a ruling as to whether a proposed transaction is a prohibited transaction under section 4975.

(d) *Supporting documents.* ''Supporting documents'', as used with respect to an application for a determination letter which is open to public inspection under this section, means any statement or document submitted in support of the application which is not specifically required by the application form or the Internal Revenue Service. For example, a legal brief submitted in support of an application for a determination letter is a supporting document.

(e) *Applicant.* For purposes of this section, § 301.6104(a)–3 (relating to Internal Revenue Service letters and documents open to public inspection) and § 301.6104(a)–5 (relating to the withholding of certain information from public inspection), an ''applicant'' includes, but is not limited to, an employer, plan administrator (as defined in section 414(g)), labor union, bank, or

insurance company that files an application for a determination letter.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50487, Nov. 8, 1982]

### § 301.6104(a)–3 Public inspection of Internal Revenue Service letters and documents relating to pension and other plans.

(a) *In general.* Except as provided in § 301.6104(a)–4 with respect to plans having fewer than 26 participants, a letter or other document issued by the Internal Revenue Service after September 2, 1974, is open to public inspection under section 6104(a)(1)(B)(iv) and this section, if it is issued with respect to—

(1) The qualification of a pension, profit-sharing or stock bonus plan under section 401(a), an annuity plan under section 403(a), a bond purchase plan under section 405(a), or an individual retirement account or annuity described in section 408 (a), (b) or (c),

(2) The exemption from tax under section 501(a) of an organization forming part of such a plan or account, or a custodial account described in section 401(f), or

(3) The approval of a master, prototype, pattern or other such plan or account.

(b) *Scope.* Internal Revenue Service letters and documents open to public inspection under section 6104(a)(1)(B)(iv) and this section are not limited to those issued in response to an application for a determination letter described in § 301.6104(a)–2. They are, however, limited to those issued by the Internal Revenue Service to the person or organization which either did or could file an application for a determination letter for the plan, account or annuity to which the letter or document relates. If such a person or organization designates a representative having a power of attorney, however, then the letter or document will be open to inspection if issued to the representative. For rules relating to when a letter or document is issued, see § 301.6110–2(h). Internal Revenue Service letters and documents are open to public inspection under section 6104(a)(1)(B)(iv) and this section whether or not the Internal Revenue Service determines that the plan, account or annuity to which the letter or document relates is qualified or that any related trust or custodial account is exempt from tax.

(c) *Letters and documents open to public inspection.* Internal Revenue Service letters and documents open to public inspection under section 6104(a)(1)(B)(iv) and this section include, but are not limited to:

(1) Determination letters relating to the qualification of a plan, account or annuity described in paragraph (a)(1) of this section (see § 601.201 (o)),

(2) Technical advice memoranda (see § 601.201(n)(9)) relating to the issuance of such determination letters,

(3) Technical advice memoranda relating to the continuing qualification of a plan, account or annuity previously determined to be qualified, or to the qualification of a plan, account or annuity for which no determination letter has been issued,

(4) Letters or documents revoking or modifying any prior favorable determination letter or denying the qualification of a plan, account or annuity for which no determination letter has been issued,

(5) Determination letters relating to the exemption from tax of a trust or custodial account described in paragraph (a)(2) of this section (see § 601.201 (o)(2)(i)(*b*)), or

(6) Opinion letters relating to the acceptability of the form of any master, prototype or other such plan or account (see § 601.201 (p) and (q)) or notification letters issued with respect to pattern plans.

(d) *Extent letter or document open to public inspection.* A letter or document issued by the Internal Revenue Service is open to public inspection under section 6104(a)(1)(B)(iv) and this section only to the extent it relates directly to the qualification of a plan, account or annuity, the exemption from tax of a related organization or custodial account, or the approval of a master, prototype, pattern or other such plan. Any part of the letter or document which does not directly relate to such a qualification, exemption or approval is not open to public inspection. For example,

a letter to an employer which concludes that an employee's plan is not qualified and the related trust is not tax exempt will be open to public inspection. However, that same letter may also assert an income tax deficiency because employer contributions to the trust are, therefore, not deductible. In such a case, that part of the letter relating to the tax deficiency will be deleted before the letter is opened to public inspection.

(e) *Letters or documents issued with respect to tax return examination.* In the case of an examination of a taxpayer's return or consideration of a taxpayer's claim for credit or refund, no letter or document issued to the taxpayer before the preliminary or ''30-day'' letter described in § 601.105(d)(1) is issued to the taxpayer will be open to public inspection under section 6104(a)(1)(B)(iv) and this section. The ''30-day'' letter and any statutory notice of deficiency subsequently issued to the taxpayer under section 6212 will be open to public inspection to the extent provided in paragraph (d) of this section. If any letter or document other than a statutory notice of deficiency is issued to the taxpayer after the ''30-day'' letter is issued, such letter or document will be open to inspection to the extent provided in paragraph (d) of this section only if it finally resolves or otherwise disposes of a plan qualification or tax exemption issue raised in the ''30-day'' letter.

(f) *Letters or documents issued after September 2, 1974.* Section 6104(a)(1)(B)(iv) and this section apply to letters or documents issued by the Internal Revenue Service after September 2, 1974, even though the relevant application for a determination letter or other initiating correspondence from the applicant was filed with the Internal Revenue Service before September 2, 1974.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[47 FR 7845, 47 FR 50487, Nov. 8, 1982]

### § 301.6104(a)–4 Requirement for 26 or more plan participants.

(a) *Inspection by plan participants.* In the case of a plan, annuity or account described in § 301.6104(a)–2(b) and § 301.6104(a)–3(a) that has fewer than 26 participants, material described in §§ 301.6104(a)–2 and 301.6104(a)–3 as open to public inspection is only open to inspection by a plan participant or the participant's authorized representative. This limitation does not apply, however, with respect to documents which an applicant files with respect to a request for approval of a master, prototype, pattern or other such plan (see § 301.6104 (a)–2 (b)(3)) or to opinion, notification or other such letters issued by the Internal Revenue Service with respect to such plans (see § 301.6104 (a)–3 (a)(3)).

(b) *Determining number of plan participants*—(1) *In general.* For purposes of determining whether a plan has fewer than 26 participants, the number of plan participants will be the number indicated on the most recent annual return filed for the plan under section 6058. Where an annual return indicates the number of participants both at the beginning and end of the plan year, the number indicated on the return means the number at the end of the plan year. If no annual return has been filed for the plan, then the number of plan participants will be the number indicated on the most recent application for a determination letter filed for the plan. If, however, the number of plan participants is increased prior to final Internal Revenue Service action on the application, the number of plan participants will be that increased number.

(2) *Decreasing number of plan participants.* If a plan having 26 or more participants, as indicated on an annual return or application for a determination letter, subsequently files an annual return indicating fewer than 26 plan participants, then material relating to the plan which is issued or received by the Internal Revenue Service after the date the annual return is filed will be open to inspection only by plan participants or their authorized representatives. Similarly, if a plan having 26 or more participants as indicated on an annual return or an application for a determination letter, subsequently files an application for a determination letter which indicates fewer than 26 plan participants, then that application and related material, as well as any other

material relating to the plan which is received or issued by the Internal Revenue Service after the date of receipt of that application, will be open to inspection only by plan participants or their authorized representatives. In either case, material open to public inspection pursuant to the number of plan participants indicated on previous annual returns or applications for a determination letter will remain open to public inspection.

(3) *Increasing number of plan participants.* If a plan having fewer than 26 plan participants, as indicated on an annual return or application for a determination letter, files a subsequent return or application indicating 26 or more plan participants, all the plan's prior applications and other material received or issued by the Internal Revenue Service after September 2, 1974, will be open to public inspection regardless of the number of plan participants indicated on any prior return or application.

(c) *Plan participant.* Solely for purposes of determining who is a plan participant permitted to inspect material relating to a plan having fewer than 26 participants, the term ''plan participant'' includes, but is not limited to, former employees (such as certain retired and terminated employees) who have a nonforfeitable right to benefits under the plan. An individual who is merely a beneficiary of an employee or former employee is not a plan participant, unless the individual is a beneficiary of a deceased former employee and is receiving benefits or entitled to receive future benefits under the plan. The term ''plan participant'' also includes the administrator, executor, or trustee of the estate of a deceased plan participant if such administrator, executor, or trustee is receiving benefits or entitled to receive future benefits under the plan in his or her official capacity. That material may be available for inspection to an individual under this paragraph does not constitute a determination by the Internal Revenue Service that the individual is a plan participant for any purpose other than inspection under section 6104(a)(1)(B).

(d) *Authorized representative.* ''Authorized representative'' means the representative of a plan participant designated by the participant in writing to inspect material described in §§ 301.6104(a)–2 and 301.6104(a)–3. The document designating the authorized representative must be signed by the plan participant and must specify that the representative is authorized to inspect the material. The document, or a copy, must be filed with the office of the Internal Revenue Service in which the authorized representative is to inspect the material. A copy which is reproduced by a photographic process need not be certified as a true and correct copy of the original.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50488, Nov. 8, 1982]

### § 301.6104(a)–5 Withholding of certain information from public inspection.

(a) *Tax exempt organizations*—(1) *Trade secrets, patents, processes, styles of work, or apparatus.* An organization whose application for tax exemption is open to public inspection under section 6104(a)(1)(A) and § 301.6104(a)–1 may in writing request the withholding of information contained in the application or supporting documents which relates to any trade secret, patent, process, style of work, or apparatus of the organization. The information will be withheld from public inspection if the Commissioner determines that the disclosure of such information would adversely affect the organization. Requests for withholding information from public inspection should be filed with the office with which the organization files the documents containing the information. The request must clearly identify the material desired to be withheld (the document, page, paragraph, and line) and must state why the information should not be open to public inspection. The organization will be notified of the Commissioner's determination as to whether the information will be withheld from public inspection. If the Commissioner determines that the information will be disclosed, the organization will be given 15 days after notification of the Commissioner's decision to contest that decision before the document is disclosed.

(2) *National defense material.* The Internal Revenue Service will withhold from public inspection any information which is submitted by an organization whose application for tax exemption is open to inspection under section 6104(a)(1)(A) and § 301.6104(a)–1, if the Commissioner determines that public disclosure would adversely affect the national defense.

(b) *Pension and other plans*—(1) *Applicant's exclusion of certain information.* Except as provided in subparagraph (2) of this paragraph, information that, in the opinion of the applicant, is of the type described in section 6104(a)(1) (C) or (D) should not be included in an application for a determination letter, supporting documents, or any other document open to inspection under section 6104(a)(1)(B). Accordingly, an applicant should not include in an application for a determination letter or supporting documents confidential compensation information as described in subparagraph (4) of this paragraph. Neither should an applicant include information relating to any trade secret, patent, process, style of work or apparatus, the disclosure of which would be adverse to the applicant.

(2) *Exception for separate document.* The rule that an applicant should exclude from an application for a determination letter or other documents information of the type in section 6104(a)(1) (C) or (D) does not apply—

(i) In the case of the separate schedule to certain applications for a determination letter which is provided for the purpose of setting forth confidential compensation information (as described in subparagraph (4) of this paragraph) which must be submitted by the applicant.

(ii) If the applicant determines that it is impossible to provide the Internal Revenue Service with sufficient information to support an application for a determination letter without submitting what is believed to be information of the type described in section 6104(a)(1) (C) or (D), or

(iii) If the Internal Revenue Service requests that the applicant submit information of the type described in section 6104(a)(1) (C) and (D).

In a case described in subdivision (ii) or (iii) of this subparagraph, the applicant is to set forth the information in a document separate from the remainder of the application for a determination letter or other documents. The separate document is to state why the information is to be witheld from public inspection under section 6104(a)(1) (C) or (D). If the Internal Revenue Service has not requested the information, the separate document is to also state why it is impossible to provide the Internal Revenue Service sufficient information to support the application for a determination letter without including information which is to be withheld. The separate document should clearly identify the relevant portion of the application for a determination letter or other document (the document, page, paragraph, and line) to which the information set forth in the separate document relates. The Internal Revenue Service will withhold from public inspection (including inspection by a plan participant or authorized representative) information contained in the separate document if the Commissioner determines that the information is in fact information of the type described in section 6104(a)(1) (C) or (D), and, in the case of information relating to any trade secret, patent, process, style of work or apparatus, the Commissioner further determines that disclosure would be adverse to the applicant. If the Commissioner determines that the information will be disclosed, the organization will be given 15 days after notification of the Commissioner's decision to contest the decision before the document is disclosed.

(3) *National defense material.* The Internal Revenue Service will withhold from public inspection (including inspection by a plan participant or authorized representative) any information which is included in an application for a determination letter or supporting documents if the Commissioner determines that public disclosure would adversely affect the national defense. The information will be withheld whether or not submitted on a separate document pursuant to subparagraph (2) of this paragraph.

(4) *Confidential compensation information.* If an application for a determination letter, supporting document, or related letter or document referred to in

section 6104(a)(1)(B) and §§ 301.6104(a)–2 and 301.6104(a)–3 contains information (including aggregate figures) from which an individual's compensation (including deferred compensation) may be ascertained, that information is not open to public inspection (including inspection by a plan participant or authorized representative). Confidential compensation information includes the amount of benefit a specific plan participant may expect to receive at normal or early retirement age and the amount of the employer's contributions under the plan that may be allocated to a specific plan participant. However, so long as a plan has more than one participant, the amount of benefit provided under the plan to plan participants, in general, at normal or early retirement age, or the amount of the employer's contributions under the plan that are allocable to plan participants, in general, does not constitute confidential compensation information. Further, a description of the numbers of individuals covered and not covered by a plan, listed by compensation range, does not constitute confidential compensation information.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50489, Nov. 8, 1982]

### § 301.6104(a)–6 Procedural rules for inspection.

(a) *Place of inspection; tax exempt organizations and pension and other plans.* Material relating either to tax exempt organizations or to pension and other plans that is open to public inspection under section 6104(a)(1) and § 301.6104(a)–1 through § 301.6104(a)–3 will be made available for inspection at the Freedom of Information Reading Room, National Office, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224, and in the office of any district director of internal revenue.

(b) *Request for inspection*—(1) *Tax exempt organizations and pension and other plans; public inspection.* Material relating to either tax exempt organizations or pension and other plans that is open to public inspection under section 6104(a)(1) and §§ 301.6104(a)–1 through § 301.6104(a)–3 will be available for inspection only upon request. If inspection at the National Office is desired, a request should be made in writing to the Commissioner of Internal Revenue, Attention: Freedom of Information Reading Room, 1111 Constitution Avenue, NW., Washington, D.C. 20224. Requests for inspection in the office of a district director should be made in writing to the district director's office. The request must describe the material to be inspected in reasonably sufficient detail so that Internal Revenue Service personnel can locate the material. If a tax-exempt organization has more than one application for tax exemption open to public inspection, or if a pension or other plan has more than one application for a determination letter open to public inspection, only the most recent application and related material will be made available for inspection unless the request states otherwise. Further, in the case of a pension or other plan, only Internal Revenue Service documents issued or delivered after the date of the filing of the most recent application for a determination letter will be made available for inspection, unless the request states otherwise.

(2) *Pension and other plans; inspection by plan participant or authorized representative.* As described in § 301.6104(a)–4, material relating to plans having fewer than 26 participants is only open to inspection by a plan participant or authorized representative. In the case of such a plan, the rules described in subparagraph (1) of this paragraph apply. The request for inspection must include satisfactory evidence that the person requesting inspection is a plan participant (see § 301.6104(a)–4(c)) or an authorized representative of such a plan participant within the meaning of § 301.6104(a)–4(d).

(c) *Time and extent of inspection.* A person requesting inspection will be notified when the material will be made available for inspection. The material will be made available for inspection at times that will not interfere with its use by the Internal Revenue Service or exclude other persons from inspecting it. In addition, the Commissioner or district director may limit

the number of applications for tax exemption, applications for a determination letter, supporting documents, or letters and documents issued by the Internal Revenue Service that will be made available to any person for inspection on a given date. Inspection will be allowed only in the presence of an Internal Revenue Service employee and only during regular business hours.

(d) *Copies*. Notes may be taken of the material open for inspection. Copies may be made manually or, if a person provides the equipment, photographically at the place of inspection. Photographic copying is subject to reasonable supervision with regard to the facilities and equipment used. Any fees the Internal Revenue Service may charge for furnishing copies under this section shall be no more than under the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. 552, by the Commissioner from time to time. Copies will be certified upon request.

(Secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7845, 47 FR 50490, Nov. 8, 1982, as amended by T.D. 9070, 68 FR 40769, July 9, 2003]

### § 301.6104(b)–1 Publicity of information on certain information returns.

(a) *In general*. The following information, together with the name and address of the organization or trust furnishing such information, shall be a matter of public record:

(1) Except as otherwise provided in section 6104 and the regulations thereunder, the information required by section 6033.

(2) The information furnished pursuant to section 6034 (relating to returns by certain trusts) on Form 1041–A.

(3) The information required to be furnished by section 6058.

(b) *Nondisclosure of certain information*—(1) *Names and addresses of contributors*. The names and addresses of contributors to an organization other than a private foundation shall not be made available for public inspection under section 6104(b).

(2) *Amounts of contributions*. The amounts of contributions and bequests to an organization shall be available for public inspection unless the disclosure of such information can reasonably be expected to identify any contributor. Notwithstanding the preceding sentence, the amounts of contributions and bequests to a private foundation shall be available for public inspection.

(3) *Foreign organizations*. The names, addresses, and amounts of contributions or bequests of persons who are not citizens of the United States to a foreign organization described in section 4948(b) shall not be made available for public inspection under section 6104(b).

(4) *Confidential business information*. Confidential business information of contributors to any trust described in section 501(c)(21) (black lung trusts) shall not be available for public inspection under section 6104(b) provided:

(i) A request if filed with the office with which the trustee filed the documents in which the information to be withheld is contained.

(ii) Such request clearly specifies the information to be withheld and the reasons supporting the request for withholding, and

(iii) The Commissioner determines that such information is confidential business information.

Information such as the contributor's estimated total liability for black lung benefits, the contributor's coal pricing policies, or any background information necessary to establish estimated total liability or coal pricing policies are examples of confidential business information that shall not be disclosed to the public under this subparagraph.

(c) *Place of inspection*. Information furnished on the public portion of returns (as described in paragraph (a) of this section) shall be made available for public inspection at the Freedom of Information Reading Room. Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, and at the office of any district director.

(d) *Procedure for public inspection*—(1) *Requests for inspection*. Information furnished on the public portion of returns (as described in paragraph (a) of this section) shall be available for public inspection only upon request. Requests

for public inspection must be in writing to or at any of the offices mentioned in paragraph (c) of this section. Persons submitting requests for inspection must provide the name and address of the organization that filed the return, the type of return, and the year for which the organization filed.

(2) *Time and extent of inspection.* A person requesting public inspection in the manner specified in subparagraph (1) of this paragraph shall be notified by the Internal Revenue Service when the material he desires to inspect will be made available for his inspection. Information on returns required by sections 6033, 6034, and 6058 will be made available for public inspection at such reasonable and proper times, and under such conditions, that will not interfere with their use by the Internal Revenue Service and will not exclude other persons from inspecting them. In addition the Commissioner, Director of the Service Center, or district director may limit the number of returns to be made available to any person for inspection on a given date. Inspection will be allowed only in the presence of an internal revenue officer or employee and only during the regular hours of business of the Internal Revenue Service office.

(3) *Returns available.* Returns filed before January 1, 1970, shall be available for public inspection only pursuant to the provisions of section 6104 in effect for such years. The information furnished on all returns filed after December 31, 1969, purusant to the requirements of section 6033, 6034, or 6058, shall be available for public inspection in accordance with the provisions of section 6104.

(4) *Copies.* Notes may be taken of the material opened for inspection under this section. Copies may be made manually or, if a person provides the equipment, photographically at the place of inspection, subject to reasonable supervision with regard to the facilities and equipment to be employed. Copies of the material opened for inspection will be furnished by the Internal Revenue Service to any person making request therefor. Requests for such copies shall be made in the same manner as requests for inspection (see subparagraph (1) of this paragraph) to the office of the Internal Revenue Service in which such material is available for inspection as provided in paragraph (c) of this section. Copies may also be obtained by written request to the director of any service center. If made at the time of inspection, the request for copies need not be in writing. Any copies furnished will be certified upon request. Any fees the Internal Revenue Service may charge for furnishing copies under this section shall be no more than under the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. 552, by the Commissioner from time to time.

[T.D. 8026, 50 FR 20757, May 20, 1985, as amended by T.D. 9070, 68 FR 40769, July 9, 2003]

### § 301.6104(c)–1 Disclosure of certain information to State officers.

(a) *Notification of determinations*—(1) *Automatic notification.* Upon making a determination described in paragraph (c) of this section, the Internal Revenue Service will notify the Attorney General and the principal tax officer of each of the following States of such determination without application or request by such State officer—

(i) In the case of any organization described in section 501(c)(3), the State in which the principal office of the organization is located (as shown on the last-filed return required by section 6033, or on the application for exemption if no return has been filed), and the State in which the organization was incorporated, or if a trust, in which it was created, and

(ii) In the case of a private foundation, each State which the organization was required to list as an attachment to its last-filed return pursuant to § 1.6033–2(a)(2)(iv).

(2) *Applications for notification by other State officers.* Other officers of States described in subparagraph (1) of this paragraph, and officers of States not described in such subparagraph, may request that they be notified (either generally or with respect to a particular organization or type of organization) of determinations described in paragraph (c) of this section. In such cases, these State officers must show that they are appropriate State officers

within the meaning of section 6104(c)(2). The required showing may be made by presenting a letter from the Attorney General of the State setting forth (i) the functions and authority of the State officer under State law, and (ii) sufficient facts for the Internal Revenue Service to determine that such officer is an appropriate State officer within the meaning of section 6104(c)(2).

(3) *Manner of notification*. A State officer who is entitled to be notified of a determination under this paragraph will be notified by sending him a copy of the communication from the Internal Revenue Service to the organization which informs such organization of the determination.

(b) *Inspection by State officers*—(1) *In general*. After a determination described in paragraph (c) of this section has been made, appropriate State officers within the meaning of section 6104(c)(2) may inspect the material described in subparagraph (3) of this paragraph. Such material may be inspected at an office of the Internal Revenue Service which will be designated upon receipt of a request for inspection; the location of such office will be determined with due consideration of the needs of the Internal Revenue Service and the needs of the State officer entitled to inspect.

(2) *State officers who may inspect material*. Any State officer entitled to be notified of a determination without application (under paragraph (a)(1) of this section) may inspect the material described in subparagraph (3) of this paragraph upon demonstrating that he is so entitled. Any State officer who has in fact been notified by the Internal Revenue Service of a determination may inspect such material without further demonstration, unless it shall be determined by the Internal Revenue Service that such officer was not entitled to be so notified. Other State officers must demonstrate to the satisfaction of the Internal Revenue Service that they are entitled to be notified under paragraph (a)(2) of this section before they may inspect such material.

(3) *Material which may be inspected*. (i) Except as provided in subdivision (ii) of this subparagraph, a State officer who is so entitled under subparagraphs (1) and (2) of this paragraph will be permitted to inspect and copy all returns, filed statements, records, reports, and other information relating to a determination described in paragraph (c) of this section which is relevant to a determination under State law, and which is in the hands of the Internal Revenue Service.

(ii) The following material will not be made available for inspection by State officers under section 6104(c) and this section—

(*a*) Interpretations by the Internal Revenue Service or other federal agency of federal laws (including the Internal Revenue Code of 1954 and its predecessors) which would not otherwise be made available to State officers under section 6103(d),

(*b*) Reports of informers, or any other material which would disclose the identity, or threaten the safety or anonymity, of an informer,

(*c*) Returns of persons (other than those exempt from taxation) which would not be available under section 6103(d) to the State officer requesting inspection, or

(*d*) Other material the disclosure of which the Commissioner has determined would prejudice the proper administration of the internal revenue laws.

(4) *Statement by State officer*. Before any State officer will be permitted to inspect material described in this paragraph, he must submit a statement to the Internal Revenue Service that he intends to use such material solely in fulfilling his functions under State law relating to organizations of the type described in section 501(c)(3); material is made available to State officers under this section in reliance on such statements. For provisions relating to penalties for misuse of information which is made available under section 6104(c) and this section, see 18 U.S.C. 1001.

(c) *Determinations defined*. For purposes of this section, a determination means a final determination by the Internal Revenue Service that—

(1) An organization is refused recognition as an organization described in section 501(c)(3), or has been operated in such a manner that it will not, or will no longer, be recognized as

meeting the requirements for exemption under that section, or

(2) A deficiency of tax exists under section 507 or chapter 41 or 42.

For purposes of this paragraph, a determination by the Internal Revenue Service is not final until all administrative review with respect to such determination has been completed. For purposes of this section, a waiver of restrictions on assessment and collection of deficiency in tax is treated as a final determination that a deficiency of tax exists when such waiver has been finally accepted by the Internal Revenue Service. For example, a final determination that a deficiency of tax exists under section 507 or chapter 41 or 42 is made when the organization is sent a notice of deficiency with respect to such tax.

(d) *Effective date*. The provisions of this section apply with respect to all determinations made after December 31, 1969.

(Secs. 6033(a)(1), 6104(b), and 7805 of the Internal Revenue Code of 1954 (83 Stat. 519, 68A Stat. 755 as amended by 83 Stat. 530, and 68A Stat. 917; 26 U.S.C. 6033(a)(1), 6104(b), and 7805); secs. 6104(a)(1)(A), 6104(a)(1)(B), and 7805 of the Internal Revenue Code of 1954 (72 Stat. 1660, 88 Stat. 940, 68A Stat. 917; 26 U.S.C. 6104(a)(1)(A), 6104(a)(1)(B), 7805))

[T.D. 7122, 36 FR 11031, June 8, 1971, as amended by T.D. 7290, 38 FR 31835, Nov. 19, 1973; T.D. 7785, 46 FR 38508, July 28, 1981. Redesignated by T.D. 7845, 47 FR 50490, Nov. 8, 1982]

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[T.D. 8861, 65 FR 2033, Jan. 13, 2000]

### § 301.6104(d)–1 Public inspection and distribution of applications for tax exemption and annual information returns of tax-exempt organizations.

(a) *In general.* Except as otherwise provided in this section, if a tax-exempt organization (as defined in paragraph (b)(1) of this section) filed an application for recognition of exemption under section 501, it shall make its application for tax exemption (as defined in paragraph (b)(3) of this section) available for public inspection without charge at its principal, regional and district offices during regular business hours. Except as otherwise provided in this section, a tax-exempt organization shall make its annual information returns (as defined in paragraph (b)(4) of this section) available for public inspection without charge in the same offices during regular business hours. Each annual information return shall be made available for a period of three years beginning on the date the return is required to be filed (determined with regard to any extension of time for filing) or is actually filed, whichever is later. In addition, except as provided in §§ 301.6104(d)–2 and 301.6104(d)–3, an organization shall provide a copy without charge, other than a reasonable fee for reproduction and actual postage costs, of all or any part of any application or return required to be made available for public inspection under this paragraph to any individual who makes a request for such copy in person or in writing. See paragraph (d)(3) of this section for rules relating to fees for copies.

(b) *Definitions.* For purposes of applying the provisions of section 6104(d), this section and §§ 301.6104(d)–2 and 301.6104(d)–3, the following definitions apply:

(1) *Tax-exempt organization.* The term *tax-exempt organization* means any organization that is described in section 501(c) or section 501(d) and is exempt from taxation under section 501(a). The term *tax-exempt organization* also includes any nonexempt charitable trust described in section 4947(a)(1) or nonexempt private foundation that is subject to the reporting requirements of section 6033 pursuant to section 6033(d).

(2) *Private foundation.* The term *private foundation* means a private foundation as defined in section 509(a) or a nonexempt charitable trust described in section 4947(a)(1) or a nonexempt private foundation subject to the information reporting requirements of section 6033 pursuant to section 6033(d).

(3) *Application for tax exemption*—(i) *In general.* Except as described in paragraph (b)(3)(iii) of this section, the term *application for tax exemption* includes any prescribed application form (such as Form 1023 or Form 1024), all documents and statements the Internal Revenue Service requires an applicant to file with the form, any statement or other supporting document submitted by an organization in support of its application, and any letter or other document issued by the Internal Revenue Service concerning the application (such as a favorable determination letter or a list of questions from the Internal Revenue Service about the application). For example, a legal brief submitted in support of an application, or a response to questions from the Internal Revenue Service during the application process, is part of an application for tax exemption.

(ii) *No prescribed application form.* If no form is prescribed for an organization's application for tax exemption, the application for tax exemption includes—

(A) The application letter and copy of the articles of incorporation, declaration of trust, or other similar instrument that sets forth the permitted powers or activities of the organization;

(B) The organization's bylaws or other code of regulations;

(C) The organization's latest financial statements showing assets, liabilities, receipts and disbursements;

(D) Statements describing the character of the organization, the purpose for which it was organized, and its actual activities;

(E) Statements showing the sources of the organization's income and receipts and their disposition; and

(F) Any other statements or documents the Internal Revenue Service required the organization to file with, or that the organization submitted in support of, the application letter.

(iii) *Exceptions*. The term *application for tax exemption* does not include—

(A) Any application for tax exemption filed by an organization that the Internal Revenue Service has not yet recognized, on the basis of the application, as exempt from taxation under section 501 for any taxable year;

(B) Any application for tax exemption filed before July 15, 1987, unless the organization filing the application had a copy of the application on July 15, 1987;

(C) In the case of a tax-exempt organization other than a private foundation, the name and address of any contributor to the organization; or

(D) Any material, including the material listed in § 301.6104(a)–1(i) and information that the Secretary would be required to withhold from public inspection, that is not available for public inspection under section 6104.

(iv) *Local or subordinate organizations*. For rules relating to applications for tax exemption of local or subordinate organizations, see paragraph (f)(1) of this section.

(4) *Annual information return*—(i) *In general*. Except as described in paragraph (b)(4)(ii) of this section, the term *annual information return* includes an exact copy of any return filed by a tax-exempt organization pursuant to section 6033. It also includes any amended return the organization files with the Internal Revenue Service after the date the original return is filed. Returns filed pursuant to section 6033 include Form 990, Return of Organization Exempt From Income Tax, Form 990–PF, Return of Private Foundation, or any other version of Form 990 (such as Forms 990–EZ or 990–BL, except Form 990–T) and Form 1065. Each copy of a return must include all information furnished to the Internal Revenue Service on the return, as well as all schedules, attachments and supporting documents. For example, in the case of a Form 990, the copy must include Schedule A of Form 990 (containing supplementary information on section 501(c)(3) organizations), and those parts of the return that show compensation paid to specific persons (currently, Part V of Form 990 and Parts I and II of Schedule A of Form 990).

(ii) *Exceptions*. The term *annual information return* does not include Schedule A of Form 990–BL, Form 990–T, Exempt Organization Business Income Tax Return, Schedule K–1 of Form 1065 or Form 1120–POL, U.S. Income Tax Return For Certain Political Organizations. In the case of a tax-exempt organization other than a private foundation, the term *annual information return* does not include the name and address of any contributor to the organization.

(iii) *Returns more than 3 years old*. The term *annual information return* does not include any return after the expiration of 3 years from the date the return is required to be filed (including any extension of time that has been granted for filing such return) or is actually filed, whichever is later. If an organization files an amended return, however, the amended return must be made available for a period of 3 years beginning on the date it is filed with the Internal Revenue Service.

(iv) *Local or subordinate organizations*. For rules relating to annual information returns of local or subordinate organizations, see paragraph (f)(2) of this section.

(5) *Regional or district offices*—(i) *In general*. A regional or district office is any office of a tax-exempt organization, other than its principal office, that has paid employees, whether part-time or full-time, whose aggregate number of paid hours a week are normally at least 120.

(ii) *Site not considered a regional or district office*. A site is not considered a regional or district office, however, if—

(A) The only services provided at the site further exempt purposes (such as day care, health care or scientific or medical research); and

(B) The site does not serve as an office for management staff, other than managers who are involved solely in managing the exempt function activities at the site.

(c) *Special rules relating to public inspection*—(1) *Permissible conditions on public inspection*. A tax-exempt organization may have an employee present in the room during an inspection. The

organization, however, must allow the individual conducting the inspection to take notes freely during the inspection. If the individual provides photocopying equipment at the place of inspection, the organization must allow the individual to photocopy the document at no charge.

(2) *Organizations that do not maintain permanent offices.* If a tax-exempt organization does not maintain a permanent office, the organization shall comply with the public inspection requirements of paragraph (a) of this section by making its application for tax exemption and its annual information returns, as applicable, available for inspection at a reasonable location of its choice. Such an organization shall permit public inspection within a reasonable amount of time after receiving a request for inspection (normally not more than 2 weeks) and at a reasonable time of day. At the organization's option, it may mail, within 2 weeks of receiving the request, a copy of its application for tax exemption and annual information returns to the requester in lieu of allowing an inspection. The organization may charge the requester for copying and actual postage costs only if the requester consents to the charge. An organization that has a permanent office, but has no office hours or very limited hours during certain times of the year, shall make its documents available during those periods when office hours are limited or not available as though it were an organization without a permanent office.

(d) *Special rules relating to copies*—(1) *Time and place for providing copies in response to requests made in-person*—(i) *In general.* Except as provided in paragraph (d)(1)(iii) of this section, a tax-exempt organization shall provide copies of the documents it is required to provide under section 6104(d) in response to a request made in person at its principal, regional and district offices during regular business hours. Except as provided in paragraph (d)(1)(ii) of this section, an organization shall provide such copies to a requester on the day the request is made.

(ii) *Unusual circumstances.* In the case of an in-person request, where unusual circumstances exist such that fulfilling the request on the same business day places an unreasonable burden on the tax-exempt organization, the organization must provide the copies no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request, whichever occurs first. Unusual circumstances include, but are not limited to, receipt of a volume of requests that exceeds the organization's daily capacity to make copies; requests received shortly before the end of regular business hours that require an extensive amount of copying; or requests received on a day when the organization's managerial staff capable of fulfilling the request is conducting special duties, such as student registration or attending an off-site meeting or convention, rather than its regular administrative duties.

(iii) *Agents for providing copies.* A principal, regional or district office of a tax-exempt organization subject to the requirements of this section may retain a local agent to process requests made in person for copies of its documents. A local agent must be located within reasonable proximity of the applicable office. A local agent that receives a request made in person for copies must provide the copies within the time limits and under the conditions that apply to the organization itself. For example, a local agent generally must provide a copy to a requester on the day the agent receives the request. When a principal, regional or district office of a tax-exempt organization using a local agent receives a request made in person for a copy, it must immediately provide the name, address and telephone number of the local agent to the requester. An organization that provides this information is not required to respond further to the requester. However, the penalty provisions of sections 6652(c)(1)(C), 6652(c)(1)(D), and 6685 continue to apply to the tax-exempt organization if the organization's local agent fails to provide the documents as required under section 6104(d).

(2) *Request for copies in writing*—(i) *In general.* A tax-exempt organization must honor a written request for a copy of documents (or the requested part) that the organization is required

to provide under section 6104(d) if the request—

(A) Is addressed to, and delivered by mail, electronic mail, facsimile, or a private delivery service as defined in section 7502(f) to a principal, regional or district office of the organization; and

(B) Sets forth the address to which the copy of the documents should be sent.

(ii) *Time and manner of fulfilling written requests*—(A) *In general.* A tax-exempt organization receiving a written request for a copy shall mail the copy of the requested documents (or the requested parts of documents) within 30 days from the date it receives the request. However, if a tax-exempt organization requires payment in advance, it is only required to provide the copies within 30 days from the date it receives payment. For rules relating to payment, see paragraph (d)(3) of this section. In the absence of evidence to the contrary, a request or payment that is mailed shall be deemed to be received by an organization 7 days after the date of the postmark. A request that is transmitted to the organization by electronic mail or facsimile shall be deemed received the day the request is transmitted successfully. If an organization requiring payment in advance receives a written request without payment or with an insufficient payment, the organization must, within 7 days from the date it receives the request, notify the requester of its prepayment policy and the amount due. A copy is deemed provided on the date of the postmark or private delivery mark (or if sent by certified or registered mail, the date of registration or the date of the postmark on the sender's receipt). If an individual making a request consents, a tax-exempt organization may provide a copy of the requested document exclusively by electronic mail. In such case, the material is provided on the date the organization successfully transmits the electronic mail.

(B) *Request for a copy of parts of document.* A tax-exempt organization must fulfill a request for a copy of the organization's entire application for tax exemption or annual information return or any specific part or schedule of its application or return. A request for a copy of less than the entire application or less than the entire return must specifically identify the requested part or schedule.

(C) *Agents for providing copies.* A tax-exempt organization subject to the requirements of this section may retain an agent to process written requests for copies of its documents. The agent shall provide the copies within the time limits and under the conditions that apply to the organization itself. For example, if the organization received the request first (*e.g.*, before the agent), the deadline for providing a copy in response to a request shall be determined by reference to when the organization received the request, not when the agent received the request. An organization that transfers a request for a copy to such an agent is not required to respond further to the request. If the organization's agent fails to provide the documents as required under section 6104(d), however, the penalty provisions of sections 6652(c)(1)(C), 6652(c)(1)(D), and 6685 continue to apply to the tax-exempt organization.

(3) *Fees for copies*—(i) *In general.* A tax-exempt organization may charge a reasonable fee for providing copies. A fee is reasonable only if it is no more than the total of the applicable per-page copying charge prescribed by the fee schedule promulgated pursuant to section (a)(4)(A)(i) of the Freedom of Information Act, 5 U.S.C. 552, by the Commissioner from time to time, and the actual postage costs incurred by the organization to send the copies. The applicable per-page copying charge shall be determined without regard to any applicable fee exclusion provided in the fee schedule for an initial or *de minimis* number of pages (*e.g.* the first 100 pages). Before the organization provides the documents, it may require that the individual requesting copies of the documents pay the fee. If the organization has provided an individual making a request with notice of the fee, and the individual does not pay the fee within 30 days, or if the individual pays the fee by check and the check does not clear upon deposit, the organization may disregard the request.

(ii) *Form of payment*—(A) *Request made in person*. If a tax-exempt organization charges a fee for copying (as permitted under paragraph (d)(3)(i) of this section), it shall accept payment by cash and money order for requests made in person. The organization may accept other forms of payment, such as credit cards and personal checks.

(B) *Request made in writing*. If a tax-exempt organization charges a fee for copying and postage (as permitted under paragraph (d)(3)(i) of this section), it shall accept payment by certified check, money order, and either personal check or credit card for requests made in writing. The organization may accept other forms of payment.

(iii) *Avoidance of unexpected fees*. Where a tax-exempt organization does not require prepayment and a requester does not enclose payment with a request, an organization must receive consent from a requester before providing copies for which the fee charged for copying and postage exceeds $20.

(iv) *Responding to inquiries of fees charged*. In order to facilitate a requester's ability to receive copies promptly, a tax-exempt organization shall respond to any questions from potential requesters concerning its fees for copying and postage. For example, the organization shall inform the requester of its charge for copying and mailing its application for exemption and each annual information return, with and without attachments, so that a requester may include payment with the request for copies.

(e) *Documents to be provided by regional and district offices*. Except as otherwise provided, a regional or district office of a tax-exempt organization must satisfy the same rules as the principal office with respect to allowing public inspection and providing copies of its application for tax exemption and annual information returns. A regional or district office is not required, however, to make its annual information return available for inspection or to provide copies until 30 days after the date the return is required to be filed (including any extension of time that is granted for filing such return) or is actually filed, whichever is later.

(f) *Documents to be provided by local and subordinate organizations*—(1) *Applications for tax exemption*. Except as otherwise provided, a tax-exempt organization that did not file its own application for tax exemption (because it is a local or subordinate organization covered by a group exemption letter referred to in §1.508–1 of this chapter) must, upon request, make available for public inspection, or provide copies of, the application submitted to the Internal Revenue Service by the central or parent organization to obtain the group exemption letter and those documents which were submitted by the central or parent organization to include the local or subordinate organization in the group exemption letter. However, if the central or parent organization submits to the Internal Revenue Service a list or directory of local or subordinate organizations covered by the group exemption letter, the local or subordinate organization is required to provide only the application for the group exemption ruling and the pages of the list or directory that specifically refer to it. The local or subordinate organization shall permit public inspection, or comply with a request for copies made in person, within a reasonable amount of time (normally not more than 2 weeks) after receiving a request made in person for public inspection or copies and at a reasonable time of day. In a case where the requester seeks inspection, the local or subordinate organization may mail a copy of the applicable documents to the requester within the same time period in lieu of allowing an inspection. In such a case, the organization may charge the requester for copying and actual postage costs only if the requester consents to the charge. If the local or subordinate organization receives a written request for a copy of its application for tax exemption, it must fulfill the request in the time and manner specified in paragraph (d)(2) of this section. The requester has the option of requesting from the central or parent organization, at its principal office, inspection or copies of the application for group exemption and the material submitted by the central or parent organization to include a local or subordinate organization in the

group ruling. If the central or parent organization submits to the Internal Revenue Service a list or directory of local or subordinate organizations covered by the group exemption letter, it must make such list or directory available for public inspection, but it is required to provide copies only of those pages of the list or directory that refer to particular local or subordinate organizations specified by the requester. The central or parent organization must fulfill such requests in the time and manner specified in paragraphs (c) and (d) of this section.

(2) *Annual information returns.* A local or subordinate organization that does not file its own annual information return (because it is affiliated with a central or parent organization that files a group return pursuant to § 1.6033–2(d) of this chapter) must, upon request, make available for public inspection, or provide copies of, the group returns filed by the central or parent organization. However, if the group return includes separate schedules with respect to each local or subordinate organization included in the group return, the local or subordinate organization receiving the request may omit any schedules relating only to other organizations included in the group return. The local or subordinate organization shall permit public inspection, or comply with a request for copies made in person, within a reasonable amount of time (normally not more than 2 weeks) after receiving a request made in person for public inspection or copies and at a reasonable time of day. In a case where the requester seeks inspection, the local or subordinate organization may mail a copy of the applicable documents to the requester within the same time period in lieu of allowing an inspection. In such a case, the organization may charge the requester for copying and actual postage costs only if the requester consents to the charge. If the local or subordinate organization receives a written request for a copy of its annual information return, it must fulfill the request by providing a copy of the group return in the time and manner specified in paragraph (d)(2) of this section. The requester has the option of requesting from the central or parent organization, at its principal office, inspection or copies of group returns filed by the central or parent organization. The central or parent organization must fulfill such requests in the time and manner specified in paragraphs (c) and (d) of this section.

(3) *Failure to comply.* If an organization fails to comply with the requirements specified in this paragraph, the penalty provisions of sections 6652(c)(1)(C), 6652(c)(1)(D), and 6685 apply.

(g) *Failure to comply with public inspection or copying requirements.* If a tax-exempt organization denies an individual's request for inspection or a copy of an application for tax exemption or an annual information return as required under this section, and the individual wants to alert the Internal Revenue Service to the possible need for enforcement action, the individual may provide a statement to the district director for the key district in which the applicable tax-exempt organization's principal office is located (or such other person as the Commissioner may designate) that describes the reason why the individual believes the denial was in violation of the requirements of section 6104(d).

(h) *Effective date*—(1) *In general.* For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation, this section is applicable (except as provided in paragraph (h)(2) of this section) beginning March 13, 2000.

(2) *Private foundation annual information returns.* This section does not apply to any private foundation return the due date for which (determined with regard to any extension of time for filing) is before the applicable date for private foundations specified in paragraph (h)(1) of this section.

[T.D. 8818, 64 FR 17285, Apr. 9, 1999. Redesignated and amended by T.D. 8861, 65 FR 2033, 2034, Jan. 13, 2000, as amended by T.D. 9070, 68 FR 40769, July 9, 2003]

### § 301.6104(d)–2 Making applications and returns widely available.

(a) *In general.* A tax-exempt organization is not required to comply with a request for a copy of its application for tax exemption or an annual information return pursuant to § 301.6104(d)–1(a)

if the organization has made the requested document widely available in accordance with paragraph (b) of this section. An organization that makes its application for tax exemption and/or annual information return widely available must nevertheless make the document available for public inspection as required under § 301.6104(d)–1(a), as applicable.

(b) *Widely available*—(1) *In general.* A tax-exempt organization makes its application for tax exemption and/or an annual information return widely available if the organization complies with the requirements specified in paragraph (b)(2) of this section, and if the organization satisfies the requirements of paragraph (d) of this section.

(2) *Internet posting*—(i) *In general.* A tax-exempt organization can make its application for tax exemption and/or an annual information return widely available by posting the document on a World Wide Web page that the tax-exempt organization establishes and maintains or by having the document posted, as part of a database of similar documents of other tax-exempt organizations, on a World Wide Web page established and maintained by another entity. The document will be considered widely available only if—

(A) the World Wide Web page through which it is available clearly informs readers that the document is available and provides instructions for downloading it;

(B) the document is posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the application for tax exemption or annual information return as it was originally filed with the Internal Revenue Service, except for any information permitted by statute to be withheld from public disclosure. (See section 6104(d)(3) and § 301.6104(d)–3(b)(3) and (4)); and

(C) any individual with access to the Internet can access, download, view and print the document without special computer hardware or software required for that format (other than software that is readily available to members of the public without payment of any fee) and without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page.

(ii) *Transition rule.* A tax-exempt organization that posted its application for tax exemption or its annual information returns on a World Wide Web page on or before April 9, 1999 in a manner consistent with regulation project REG–246250–96 (1997 C.B. 627) (See § 601.601(d)(2) of this chapter.) will be treated as satisfying the requirements of paragraphs (b)(2)(i)(B) & (C) of this section until June 8, 2000 provided that an individual can access, download, view and print the document without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page.

(iii) *Reliability and accuracy.* In order for the document to be widely available through an Internet posting, the entity maintaining the World Wide Web page must have procedures for ensuring the reliability and accuracy of the document that it posts on the page and must take reasonable precautions to prevent alteration, destruction or accidental loss of the document when posted on its page. In the event that a posted document is altered, destroyed or lost, the entity must correct or replace the document.

(c) *Discretion to prescribe other methods for making documents widely available.* The Commissioner, from time to time, may prescribe additional methods, other than an Internet posting meeting the requirements of paragraph (b)(2) of this section, that a tax-exempt organization may use to make its documents widely available.

(d) *Notice requirement.* If a tax-exempt organization has made its application for tax exemption and/or an annual information return widely available it must notify any individual requesting a copy where the documents are available (including the address on the World Wide Web, if applicable). If the request is made in person, the organization shall provide such notice to the individual immediately. If the request is made in writing, the notice shall be provided within 7 days of receiving the request.

(e) *Effective date.* For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation,

this section is applicable beginning March 13, 2000.

[T.D. 8818, 64 FR 17285, Apr. 9, 1999. Redesignated and amended by T.D. 8861, 65 FR 2034, Jan. 13, 2000]

### § 301.6104(d)–3 Tax-exempt organization subject to harassment campaign.

(a) *In general.* If the district director for the key district in which the organization's principal office is located (or such other person as the Commissioner may designate) determines that the organization is the subject of a harassment campaign and compliance with the requests that are part of the harassment campaign would not be in the public interest, a tax-exempt organization is not required to fulfill a request for a copy (as otherwise required by § 301.6104(d)–1(a)) that it reasonably believes is part of the campaign.

(b) *Harassment.* A group of requests for an organization's application for tax exemption or annual information returns is indicative of a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of a tax-exempt organization, rather than to collect information about the organization. Whether a group of requests constitutes such a harassment campaign depends on the relevant facts and circumstances. Facts and circumstances that indicate the organization is the subject of a harassment campaign include: a sudden increase in the number of requests; an extraordinary number of requests made through form letters or similarly worded correspondence; evidence of a purpose to deter significantly the organization's employees or volunteers from pursuing the organization's exempt purpose; requests that contain language hostile to the organization; direct evidence of bad faith by organizers of the purported harassment campaign; evidence that the organization has already provided the requested documents to a member of the purported harassing group; and a demonstration by the tax-exempt organization that it routinely provides copies of its documents upon request.

(c) *Special rule for multiple requests from a single individual or address.* A tax-exempt organization may disregard any request for copies of all or part of any document beyond the first two received within any 30-day period or the first four received within any one-year period from the same individual or the same address, regardless of whether the district director for the applicable key district (or such other person as the Commissioner may designate) has determined that the organization is subject to a harassment campaign.

(d) *Harassment determination procedure.* A tax-exempt organization may apply for a determination that it is the subject of a harassment campaign and that compliance with requests that are part of the campaign would not be in the public interest by submitting a signed application to the district director for the key district where the organization's principal office is located (or such other person as the Commissioner may designate). The application shall consist of a written statement giving the organization's name, address, employer identification number, and the name, address and telephone number of the person to contact regarding the application. The application must describe in detail the facts and circumstances that the organization believes support a determination that the organization is subject to a harassment campaign. The organization may suspend compliance with respect to any request for a copy of its documents based on its reasonable belief that such request is part of a harassment campaign, provided that the organization files an application for a determination within 10 business days from the day the organization first suspends compliance with respect to a request that is part of the alleged campaign. In addition, the organization may suspend compliance with any request it reasonably believes to be part of the harassment campaign until it receives a response to its application for a harassment campaign determination.

(e) *Effect of a harassment determination.* If the appropriate district director (or such other person as the Commissioner may designate) determines that a tax-exempt organization is the subject of a harassment campaign and it is not in the public interest to comply

with requests that are part of the campaign, such organization is not required to comply with any request for copies that it reasonably believes is part of the campaign. This determination may be subject to other terms and conditions set forth by the district director (or such other person as the Commissioner may designate). A person (as defined in section 6652(c)(4)(C)) shall not be liable for any penalty under sections 6652(c)(1)(C), 6652(c)(1)(D) or 6685 for failing to timely provide a copy of documents in response to a request covered in a request for a harassment determination if the organization fulfills the request within 30 days of receiving a determination from the district director (or such other person as the Commissioner may designate) that the organization is not subject to a harassment campaign. Notwithstanding the preceding sentence, if the district director (or such other person as the Commissioner may designate) further determines that the organization did not have a reasonable basis for requesting a determination that it was subject to a harassment campaign or reasonable belief that a request was part of the campaign, the person (as defined in section 6652(c)(4)(C)) remains liable for any penalties that result from not providing the copies in a timely fashion.

(f) *Examples*. The provisions of this section are illustrated by the following examples:

*Example 1*. V, a tax-exempt organization, receives an average of 25 requests per month for copies of its three most recent information returns. In the last week of May, V is mentioned in a national news magazine story that discusses information contained in V's 1996 information return. From June 1 through June 30, 1997 V receives 200 requests for a copy of its documents. Other than the sudden increase in the number of requests for copies, there is no other evidence to suggest that the requests are part of an organized campaign to disrupt V's operations. Although fulfilling the requests will place a burden on V, the facts and circumstances do not show that V is subject to a harassment campaign. Therefore, V must respond timely to each of the 200 requests it receives in June.

*Example 2*. Y is a tax-exempt organization that receives an average of 10 requests a month for copies of its annual information returns. From March 1, 1997 to March 31, 1997, Y receives 25 requests for copies of its documents. Fifteen of the requests come from individuals Y knows to be active members of the board of organization X. In the past X has opposed most of the positions and policies that Y advocates. None of the requesters have asked for copies of documents from Y during the past year. Y has no other information about the requesters. Although the facts and circumstances show that some of the individuals making requests are hostile to Y, they do not show that the individuals have organized a campaign that will place enough of a burden on Y to disrupt its activities. Therefore, Y must respond to each of the 25 requests it receives in March.

*Example 3*. The facts are the same as in *Example 2*, except that during March 1997, Y receives 100 requests. In addition to the fifteen requests from members of organization X's board, 75 of the requests are similarly worded form letters. Y discovers that several individuals associated with X have urged the X's members and supporters, via the Internet, to submit as many requests for a copy of Y's annual information returns as they can. The message circulated on the Internet provides a form letter that can be used to make the request. Both the appeal via the Internet and the requests for copies received by Y contain hostile language. During the same year but before the 100 requests were received, Y provided copies of its annual information returns to the headquarters of X. The facts and circumstances show that the 75 form letter requests are coordinated for the purpose of disrupting Y's operations, and not to collect information that has already been provided to an association representing the requesters' interests. Thus, the fact and circumstances show that Y is the subject of an organized harassment campaign. To confirm that it may disregard the 90 requests that constitute the harassment campaign, Y must apply to the applicable district director (or such other person as the Commissioner may designate) for a determination. Y may disregard the 90 requests while the application is pending and after the determination is received. However, it must respond within the applicable time limits to the 10 requests it received in March that were not part of the harassment campaign.

*Example 4*. The facts are the same as in *Example 3*, except that Y receives 5 additional requests from 5 different representatives of the news media who in the past have published articles about Y. Some of these articles were hostile to Y. Normally, the Internal Revenue Service will not consider a tax-exempt organization to have a reasonable belief that a request from a member of the news media is part of a harassment campaign absent additional facts that demonstrate that the organization could reasonably believe the particular requests from the

news media to be part of a harassment campaign. Thus, absent such additional facts, Y must respond within the applicable time limits to the 5 requests that it received from representatives of the news media.

(g) *Effective date*. For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation, this section is applicable beginning March 13, 2000.

[T.D. 8818, 64 FR 17289, Apr. 9, 1999. Redesignated and amended by T.D. 8861, 65 FR 2034, Jan. 13, 2000]

### § 301.6105–1 Compilation of relief from excess profits tax cases.

Pursuant to and in accordance with the provisions of section 6105, the Commissioner shall make and publish in the FEDERAL REGISTER a compilation, for each fiscal year beginning after June 30, 1941, of all cases in which relief under the provisions of section 722 of the Internal Revenue Code of 1939, as amended, has been allowed during such fiscal year by the Commissioner and by the Tax Court of the United States.

### § 301.6106–1 Publicity of unemployment tax returns.

For provisions relating to publicity of returns made in respect of unemployment tax imposed by chapter 23 of the Code, see §§ 301.6103(a)–1, 301.6103 (b)–1, 301.6103(c)–1, 301.6103 (d)–1, and 301.6103(f)–1.

### § 301.6108–1 Publication of statistics of income.

Pursuant to and in accordance with the provisions of section 6108, statistics reasonably available with respect to the operation of the income tax laws shall be prepared and published annually by the Commissioner.

### § 301.6109–1 Identifying numbers.

(a) *In general*—(1) *Taxpayer identifying numbers*—(i) *Principal types*. There are several types of taxpayer identifying numbers that include the following: social security numbers, Internal Revenue Service (IRS) individual taxpayer identification numbers, IRS adoption taxpayer identification numbers, and employer identification numbers. Social security numbers take the form 000–00–0000. IRS individual taxpayer identification numbers and IRS adoption taxpayer identification numbers also take the form 000–00–0000 but include a specific number or numbers designated by the IRS. Employer identification numbers take the form 00–0000000.

(ii) *Uses*. Social security numbers, IRS individual taxpayer identification numbers, and IRS adoption taxpayer identification numbers are used to identify individual persons. Employer identification numbers are used to identify employers. For the definition of social security number and employer identification number, see §§ 301.7701–11 and 301.7701–12, respectively. For the definition of IRS individual taxpayer identification number, see paragraph (d)(3) of this section. For the definition of IRS adoption taxpayer identification number, see § 301.6109–3(a). Except as otherwise provided in applicable regulations under this chapter or on a return, statement, or other document, and related instructions, taxpayer identifying numbers must be used as follows:

(A) Except as otherwise provided in paragraph (a)(1)(ii)(B) and (D) of this section, and § 301.6109–3, an individual required to furnish a taxpayer identifying number must use a social security number.

(B) Except as otherwise provided in paragraph (a)(1)(ii)(D) of this section and § 301.6109–3, an individual required to furnish a taxpayer identifying number but who is not eligible to obtain a social security number must use an IRS individual taxpayer identification number.

(C) Any person other than an individual (such as corporations, partnerships, nonprofit associations, trusts, estates, and similar nonindividual persons) that is required to furnish a taxpayer identifying number must use an employer identification number.

(D) An individual, whether U.S. or foreign, who is an employer or who is engaged in a trade or business as a sole proprietor should use an employer identification number as required by returns, statements, or other documents and their related instructions.

(2) *A trust that is treated as owned by one or more persons pursuant to sections 671 through 678*—(i) *Obtaining a taxpayer*

*identification number*—(A) *General rule.* Unless the exception in paragraph (a)(2)(i)(B) of this section applies, a trust that is treated as owned by one or more persons under sections 671 through 678 must obtain a taxpayer identification number as provided in paragraph (d)(2) of this section.

(B) *Exception for a trust all of which is treated as owned by one grantor or one other person and that reports under § 1.671–4(b)(2)(i)(A) of this chapter.* A trust that is treated as owned by one grantor or one other person under sections 671 through 678 need not obtain a taxpayer identification number, provided the trust reports pursuant to § 1.671–4(b)(2)(i)(A) of this chapter. The trustee must obtain a taxpayer identification number as provided in paragraph (d)(2) of this section for the first taxable year that the trust is no longer owned by one grantor or one other person or for the first taxable year that the trust does not report pursuant to § 1.671–4(b)(2)(i)(A) of this chapter.

(ii) *Obligations of persons who make payments to certain trusts.* Any payor that is required to file an information return with respect to payments of income or proceeds to a trust must show the name and taxpayer identification number that the trustee has furnished to the payor on the return. Regardless of whether the trustee furnishes to the payor the name and taxpayer identification number of the grantor or other person treated as an owner of the trust, or the name and taxpayer identification number of the trust, the payor must furnish a statement to recipients to the trustee of the trust, rather than to the grantor or other person treated as the owner of the trust. Under these circumstances, the payor satisfies the obligation to show the name and taxpayer identification number of the payee on the information return and to furnish a statement to recipients to the person whose taxpayer identification number is required to be shown on the form.

(3) *Obtaining a taxpayer identification number for a trust, or portion of a trust, following the death of the individual treated as the owner*—(i) *In general*—(A) *A trust all of which was treated as owned by a decedent.* In general, a trust all of which is treated as owned by a decedent under subpart E (section 671 and following), part I, subchapter J, chapter 1 of the Internal Revenue Code as of the date of the decedent's death must obtain a new taxpayer identification number following the death of the decedent if the trust will continue after the death of the decedent.

(B) *Taxpayer identification number of trust with multiple owners.* With respect to a portion of a trust treated as owned under subpart E (section 671 and following), part I, subchapter J, chapter 1 (subpart E) of the Internal Revenue Code by a decedent as of the date of the decedent's death, if, following the death of the decedent, the portion treated as owned by the decedent remains part of the original trust and the other portion (or portions) of the trust continues to be treated as owned under subpart E by a grantor(s) or other person(s), the trust reports under the taxpayer identification number assigned to the trust prior to the decedent's death and the portion of the trust treated as owned by the decedent prior to the decedent's death (assuming the decedent's portion of the trust is not treated as terminating upon the decedent's death) continues to report under the taxpayer identification number used for reporting by the other portion (or portions) of the trust. For example, if a trust, reporting under § 1.671–4(a) of this chapter, is treated as owned by three persons and one of them dies, the trust, including the portion of the trust no longer treated as owned by a grantor or other person, continues to report under the tax identification number assigned to the trust prior to the death of that person. See § 1.671–4(a) of this chapter regarding rules for filing the Form 1041, ''U.S. Income Tax Return for Estates and Trusts,'' where only a portion of the trust is treated as owned by one or more persons under subpart E.

(ii) *Furnishing correct taxpayer identification number to payors following the death of the decedent.* If the trust continues after the death of the decedent and is required to obtain a new taxpayer identification number under paragraph (a)(3)(i)(A) of this section, the trustee must furnish payors with a new Form W–9, ''Request for Taxpayer

Identification Number and Certification,'' or an acceptable substitute Form W–9, containing the new taxpayer identification number required under paragraph (a)(3)(i)(A) of this section, the name of the trust, and the address of the trustee.

(4) *Taxpayer identification number to be used by a trust upon termination of a section 645 election*—(i) *If there is an executor*. Upon the termination of the section 645 election period, if there is an executor, the trustee of the former electing trust may need to obtain a taxpayer identification number. If § 1.645–1(g) of this chapter regarding the appointment of an executor after a section 645 election is made applies to the electing trust, the electing trust must obtain a new TIN upon termination of the election period. See the instructions to the Form 1041 for whether a new taxpayer identification number is required for other former electing trusts.

(ii) *If there is no executor*. Upon termination of the section 645 election period, if there is no executor, the trustee of the former electing trust must obtain a new taxpayer identification number.

(iii) *Requirement to provide taxpayer identification number to payors*. If the trustee is required to obtain a new taxpayer identification number for a former electing trust pursuant to this paragraph (a)(4), or pursuant to the instructions to the Form 1041, the trustee must furnish all payors of the trust with a completed Form W–9 or acceptable substitute Form W–9 signed under penalties of perjury by the trustee providing each payor with the name of the trust, the new taxpayer identification number, and the address of the trustee.

(5) *Persons treated as payors*. For purposes of paragraphs (a)(2), (3), and (4) of this section, a *payor* is a person described in §§ 1.671–4(b)(4) of this chapter.

(6) *Effective date*. Paragraphs (a)(3), (4), and (5) of this section apply to trusts of decedents dying on or after December 24, 2002.

(b) *Requirement to furnish one's own number*—(1) *U.S. persons*. Every U.S. person who makes under this title a return, statement, or other document must furnish its own taxpayer identifying number as required by the forms and the accompanying instructions. A U.S. person whose number must be included on a document filed by another person must give the taxpayer identifying number so required to the other person on request. For penalties for failure to supply taxpayer identifying numbers, see sections 6721 through 6724. For provisions dealing specifically with the duty of employees with respect to their social security numbers, see § 31.6011(b)-2 (a) and (b) of this chapter (Employment Tax Regulations). For provisions dealing specifically with the duty of employers with respect to employer identification numbers, see § 31.6011(b)-1 of this chapter (Employment Tax Regulations).

(2) *Foreign persons*. The provisions of paragraph (b)(1) of this section regarding the furnishing of one's own number shall apply to the following foreign persons—

(i) A foreign person that has income effectively connected with the conduct of a U.S. trade or business at any time during the taxable year;

(ii) A foreign person that has a U.S. office or place of business or a U.S. fiscal or paying agent at any time during the taxable year;

(iii) A nonresident alien treated as a resident under section 6013(g) or (h);

(iv) A foreign person that makes a return of tax (including income, estate, and gift tax returns), an amended return, or a refund claim under this title but excluding information returns, statements, or documents;

(v) A foreign person that makes an election under § 301.7701–3(c);

(vi) A foreign person that furnishes a withholding certificate described in § 1.1441–1(e)(2) or (3) of this chapter or § 1.1441–5(c)(2)(iv) or (3)(iii) of this chapter to the extent required under § 1.1441–1(e)(4)(vii) of this chapter;

(vii) A foreign person whose taxpayer identifying number is required to be furnished on any return, statement, or other document as required by the income tax regulations under section 897 or 1445. This paragraph (b)(2)(vii) applies as of November 3, 2003; and

(viii) A foreign person that furnishes a withholding certificate described in § 1.1446–1(c)(2) or (3) of this chapter or whose taxpayer identification number

is required to be furnished on any return, statement, or other document as required by the income tax regulations under section 1446. This paragraph (b)(2)(viii) shall apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 of this chapter apply by reason of an election under § 1.1446–7 of this chapter.

(c) *Requirement to furnish another's number*. Every person required under this title to make a return, statement, or other document must furnish such taxpayer identifying numbers of other U.S. persons and foreign persons that are described in paragraph (b)(2)(i), (ii), (iii), (vi), (vii), or (viii) of this section as required by the forms and the accompanying instructions. The taxpayer identifying number of any person furnishing a withholding certificate referred to in paragraph (b)(2)(vi) or (viii) of this section shall also be furnished if it is actually known to the person making a return, statement, or other document described in this paragraph (c). If the person making the return, statement, or other document does not know the taxpayer identifying number of the other person, and such other person is one that is described in paragraph (b)(2)(i), (ii), (iii), (vi), (vii), or (viii) of this section, such person must request the other person's number. The request should state that the identifying number is required to be furnished under authority of law. When the person making the return, statement, or other document does not know the number of the other person, and has complied with the request provision of this paragraph (c), such person must sign an affidavit on the transmittal document forwarding such returns, statements, or other documents to the Internal Revenue Service, so stating. A person required to file a taxpayer identifying number shall correct any errors in such filing when such person's attention has been drawn to them. References in this paragraph (c) to paragraph (b)(2)(viii) of this section shall apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 of this chapter apply by reason of an election under § 1.1446–7 of this chapter.

(d) *Obtaining a taxpayer identifying number*—(1) *Social security number*. Any individual required to furnish a social security number pursuant to paragraph (b) of this section shall apply for one, if he has not done so previously, on Form SS–5, which may be obtained from any Social Security Administration or Internal Revenue Service office. He shall make such application far enough in advance of the first required use of such number to permit issuance of the number in time for compliance with such requirement. The form, together with any supplementary statement, shall be prepared and filed in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. Individuals who are ineligible for or do not wish to participate in the benefits of the social security program shall nevertheless obtain a social security number if they are required to furnish such a number pursuant to paragraph (b) of this section.

(2) *Employer identification number*—(i) *In general*. Any person required to furnish an employer identification number must apply for one, if not done so previously, on Form SS–4. A Form SS–4 may be obtained from any office of the Internal Revenue Service, U.S. consular office abroad, or from an acceptance agent described in paragraph (d)(3)(iv) of this section. The person must make such application far enough in advance of the first required use of the employer identification number to permit issuance of the number in time for compliance with such requirement. The form, together with any supplementary statement, must be prepared and filed in accordance with the form, accompanying instructions, and relevant regulations, and must set forth fully and clearly the requested data.

(ii) [Reserved]

(iii) *Special rule for Section 708(b)(1)(B) terminations*. A new partnership that is formed as a result of the termination of a partnership under section 708(b)(1)(B) will retain the employer identification number of the terminated partnership. This paragraph (d)(2)(iii) applies to terminations of partnerships under section 708(b)(1)(B)

occurring on or after May 9, 1997; however, this paragraph (d)(2)(iii) may be applied to terminations occurring on or after May 9, 1996, provided that the partnership and its partners apply this paragraph (d)(2)(iii) to the termination in a consistent manner.

(3) *IRS individual taxpayer identification number*—(i) *Definition.* The term *IRS individual taxpayer identification number* means a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title. The term *IRS individual taxpayer identification number* does not refer to a social security number or an account number for use in employment for wages. For purposes of this section, the term *alien individual* means an individual who is not a citizen or national of the United States.

(ii) *General rule for obtaining number.* Any individual who is not eligible to obtain a social security number and is required to furnish a taxpayer identifying number must apply for an IRS individual taxpayer identification number on Form W–7, Application for IRS Individual Taxpayer Identification Number, or such other form as may be prescribed by the Internal Revenue Service. Form W–7 may be obtained from any office of the Internal Revenue Service, U.S. consular office abroad, or any acceptance agent described in paragraph (d)(3)(iv) of this section. The individual shall furnish the information required by the form and accompanying instructions, including the individual's name, address, foreign tax identification number (if any), and specific reason for obtaining an IRS individual taxpayer identification number. The individual must make such application far enough in advance of the first required use of the IRS individual taxpayer identification number to permit issuance of the number in time for compliance with such requirement. The application form, together with any supplementary statement and documentation, must be prepared and filed in accordance with the form, accompanying instructions, and relevant regulations, and must set forth fully and clearly the requested data.

(iii) *General rule for assigning number.* Under procedures issued by the Internal Revenue Service, an IRS individual taxpayer identification number will be assigned to an individual upon the basis of information reported on Form W–7 (or such other form as may be prescribed by the Internal Revenue Service) and any such accompanying documentation that may be required by the Internal Revenue Service. An applicant for an IRS individual taxpayer identification number must submit such documentary evidence as the Internal Revenue Service may prescribe in order to establish alien status and identity. Examples of acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver's license, birth certificate, identity card, or immigration documentation.

(iv) *Acceptance agents*—(A) *Agreements with acceptance agents.* A person described in paragraph (d)(3)(iv)(B) of this section will be accepted by the Internal Revenue Service to act as an acceptance agent for purposes of the regulations under this section upon entering into an agreement with the Internal Revenue Service, under which the acceptance agent will be authorized to act on behalf of taxpayers seeking to obtain a taxpayer identifying number from the Internal Revenue Service. The agreement must contain such terms and conditions as are necessary to insure proper administration of the process by which the Internal Revenue Service issues taxpayer identifying numbers to foreign persons, including proof of their identity and foreign status. In particular, the agreement may contain—

(*1*) Procedures for providing Form SS–4 and Form W–7, or such other necessary form to applicants for obtaining a taxpayer identifying number;

(*2*) Procedures for providing assistance to applicants in completing the application form or completing it for them;

(*3*) Procedures for collecting, reviewing, and maintaining, in the normal course of business, a record of the required documentation for assignment of a taxpayer identifying number;

(*4*) Procedures for submitting the application form and required documentation to the Internal Revenue Service, or if permitted under the agreement, submitting the application form together with a certification that the acceptance agent has reviewed the required documentation and that it has no actual knowledge or reason to know that the documentation is not complete or accurate;

(*5*) Procedures for assisting taxpayers with notification procedures described in paragraph (g)(2) of this section in the event of change of foreign status;

(*6*) Procedures for making all documentation or other records furnished by persons applying for a taxpayer identifying number promptly available for review by the Internal Revenue Service, upon request; and

(*7*) Provisions that the agreement may be terminated in the event of a material failure to comply with the agreement, including failure to exercise due diligence under the agreement.

(B) *Persons who may be acceptance agents.* An acceptance agent may include any financial institution as defined in section 265(b)(5) or §1.165–12(c)(1)(v) of this chapter, any college or university that is an educational organization as defined in §1.501(c)(3)–1(d)(3)(i) of this chapter, any federal agency as defined in section 6402(f) or any other person or categories of persons that may be authorized by regulations or Internal Revenue Service procedures. A person described in this paragraph (d)(3)(iv)(B) that seeks to qualify as an acceptance agent must have an employer identification number for use in any communication with the Internal Revenue Service. In addition, it must establish to the satisfaction of the Internal Revenue Service that it has adequate resources and procedures in place to comply with the terms of the agreement described in paragraph (d)(3)(iv)(A) of this section.

(4) *Coordination of taxpayer identifying numbers*—(i) *Social security number.* Any individual who is duly assigned a social security number or who is entitled to a social security number will not be issued an IRS individual taxpayer identification number. The individual can use the social security number for all tax purposes under this title, even though the individual is, or later becomes, a nonresident alien individual. Further, any individual who has an application pending with the Social Security Administration will be issued an IRS individual taxpayer identification number only after the Social Security Administration has notified the individual that a social security number cannot be issued. Any alien individual duly issued an IRS individual taxpayer identification number who later becomes a U.S. citizen, or an alien lawfully permitted to enter the United States either for permanent residence or under authority of law permitting U.S. employment, will be required to obtain a social security number. Any individual who has an IRS individual taxpayer identification number and a social security number, due to the circumstances described in the preceding sentence, must notify the Internal Revenue Service of the acquisition of the social security number and must use the newly-issued social security number as the taxpayer identifying number on all future returns, statements, or other documents filed under this title.

(ii) *Employer identification number.* Any individual with both a social security number (or an IRS individual taxpayer identification number) and an employer identification number may use the social security number (or the IRS individual taxpayer identification number) for individual taxes, and the employer identification number for business taxes as required by returns, statements, and other documents and their related instructions. Any alien individual duly assigned an IRS individual taxpayer identification number who also is required to obtain an employer identification number must furnish the previously-assigned IRS individual taxpayer identification number to the Internal Revenue Service on Form SS–4 at the time of application for the employer identification number. Similarly, where an alien individual has an employer identification number and is required to obtain an IRS individual taxpayer identification number, the individual must furnish the previously-assigned employer identification number to the Internal Revenue Service on Form W–7, or such other form as may be prescribed by the

Internal Revenue Service, at the time of application for the IRS individual taxpayer identification number.

(e) *Banks, and brokers and dealers in securities.* For additional requirements relating to deposits, share accounts, and brokerage accounts, see 31 CFR 103.34 and 103.35.

(f) *Penalty.* For penalties for failure to supply taxpayer identifying numbers, see sections 6721 through 6724.

(g) *Special rules for taxpayer identifying numbers issued to foreign persons*—(1) *General rule*—(i) *Social security number.* A social security number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. citizen or resident alien individual. A person may establish a different status for the number by providing proof of foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. Upon accepting an individual as a nonresident alien individual, the Internal Revenue Service will assign this status to the individual's social security number.

(ii) *Employer identification number.* An employer identification number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. person. However, the Internal Revenue Service may establish a separate class of employer identification numbers solely dedicated to foreign persons which will be identified as such in the records and database of the Internal Revenue Service. A person may establish a different status for the number either at the time of application or subsequently by providing proof of U.S. or foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. The Internal Revenue Service may require a person to apply for the type of employer identification number that reflects the status of that person as a U.S. or foreign person.

(iii) *IRS individual taxpayer identification number.* An IRS individual taxpayer identification number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a nonresident alien individual. If the Internal Revenue Service determines at the time of application or subsequently, that an individual is not a nonresident alien individual, the Internal Revenue Service may require that the individual apply for a social security number. If a social security number is not available, the Internal Revenue Service may accept that the individual use an IRS individual taxpayer identification number, which the Internal Revenue Service will identify as a number belonging to a U.S. resident alien.

(2) *Change of foreign status.* Once a taxpayer identifying number is identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. or foreign person, the status of the number is permanent until the circumstances of the taxpayer change. A taxpayer whose status changes (for example, a nonresident alien individual with a social security number becomes a U.S. resident alien) must notify the Internal Revenue Service of the change of status under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify.

(3) *Waiver of prohibition to disclose taxpayer information when acceptance agent acts.* As part of its request for an IRS individual taxpayer identification number or submission of proof of foreign status with respect to any taxpayer identifying number, where the foreign person acts through an acceptance agent, the foreign person will agree to waive the limitations in section 6103 regarding the disclosure of certain taxpayer information. However, the waiver will apply only for purposes of permitting the Internal Revenue Service and the acceptance agent to communicate with each other regarding matters related to the assignment of a taxpayer identifying number, including disclosure of any taxpayer identifying number previously issued to the foreign person, and change of foreign status. This paragraph (g)(3) applies to payments made after December 31, 2001.

(h) *Special rules for certain entities under § 301.7701–3*—(1) *General rule*. Any entity that has an employer identification number (EIN) will retain that EIN if its federal tax classification changes under § 301.7701–3.

(2) *Special rules for entities that are disregarded as entities separate from their owners*—(i) *When an entity becomes disregarded as an entity separate from its owner*. Except as otherwise provided in regulations or other guidance, a single owner entity that is disregarded as an entity separate from its owner under § 301.7701–3, must use its owner's taxpayer identifying number (TIN) for federal tax purposes.

(ii) *When an entity that was disregarded as an entity separate from its owner becomes recognized as a separate entity*. If a single owner entity's classification changes so that it is recognized as a separate entity for federal tax purposes, and that entity had an EIN, then the entity must use that EIN and not the TIN of the single owner. If the entity did not already have its own EIN, then the entity must acquire an EIN and not use the TIN of the single owner.

(3) *Effective date*. The rules of this paragraph (h) are applicable as of January 1, 1997.

(i) *Special rule for qualified subchapter S subsidiaries (QSubs)*—(1) *General rule*. Any entity that has an employer identification number (EIN) will retain that EIN if a QSub election is made for the entity under § 1.1361–3 or if a QSub election that was in effect for the entity terminates under § 1.1361–5.

(2) *EIN while QSub election in effect*. Except as otherwise provided in regulations or other published guidance, a QSub must use the parent S corporation's EIN for Federal tax purposes.

(3) *EIN when QSub election terminates*. If an entity's QSub election terminates, it may not use the EIN of the parent S corporation after the termination. If the entity had an EIN prior to becoming a QSub or obtained an EIN while it was a QSub in accordance with regulations or other published guidance, the entity must use that EIN. If the entity had no EIN, it must obtain an EIN upon termination of the QSub election.

(4) *Effective date*. The rules of this paragraph (i) apply on January 20, 2000.

(j) *Effective date*—(1) *General rule*. Except as otherwise provided in this paragraph (j), the provisions of this section are generally effective for information that must be furnished after April 15, 1974. However, the provisions relating to IRS individual taxpayer identification numbers apply on and after May 29, 1996. An application for an IRS individual taxpayer identification number (Form W–7) may be filed at any time on or after July 1, 1996.

(2) *Special rules*—(i) *Employer identification number of an estate*. The requirement under paragraph (a)(1)(ii)(C) of this section that an estate obtain an employer identification number applies on and after January 1, 1984.

(ii) *Taxpayer identifying numbers of certain foreign persons*. The requirement under paragraph (b)(2)(iv) of this section that certain foreign persons furnish a TIN on a return of tax is effective for tax returns filed after December 31, 1996.

(iii) Paragraphs (a)(1)(i), (a)(1)(ii) introductory text, (a)(1)(ii)(A), and (a)(1)(ii)(B) of this section apply to income tax returns due (without regard to extensions) on or after April 15, 1998.

[T.D. 7306, 39 FR 9946, Mar. 15, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 301.6109–1, see the List of CFR Sections Affected which appears in the Findings Aids section of the printed volume and on GPO Access.

### § 301.6109–2 Authority of the Secretary of Agriculture to collect employer identification numbers for purposes of the Food Stamp Act of 1977.

(a) *In general*. The Secretary of Agriculture may require each applicant retail food store or wholesale food concern to furnish its employer identification number in connection with the administration of section 9 of the Food Stamp Act of 1977 (7 U.S.C. 2018) (relating to the determination of the qualifications of applicants under the Food Stamp Act).

(b) *Limited purpose*. The Secretary of Agriculture may have access to the employer identification numbers obtained pursuant to paragraph (a) of this section, but only for the purpose of establishing and maintaining a list of

the names and employer identification numbers of the stores and concerns for use in determining those applicants who have been previously sanctioned or convicted under section 12 or 15 of the Food Stamp Act of 1977 (7 U.S.C. 2021 or 2024). The Secretary of Agriculture may use this determination of sanctions and convictions in administering section 9 of the Food Stamp Act of 1977.

(c) *Sharing of information*—(1) *Sharing permitted with certain United States agencies and instrumentalities.* The Secretary of Agriculture may share the information contained in the list described in paragraph (b) of this section with any other agency or instrumentality of the United States that otherwise has access to employer identification numbers, but only to the extent the Secretary of Agriculture determines sharing such information will assist in verifying and matching that information against information maintained by the other agency or instrumentality.

(2) *Restrictions on the use of shared information.* The information shared by the Secretary of Agriculture pursuant to this section may be used by any other agency or instrumentality of the United States only for the purpose of effective administration and enforcement of the Food Stamp Act of 1977 or for the purpose of investigation of violations of other Federal laws or enforcement of those laws.

(d) *Safeguards*—(1) *Restrictions on access to employer identification numbers by individuals*—(i) *Numbers maintained by the Secretary of Agriculture.* The individuals who are permitted access to employer identification numbers obtained pursuant to paragraph (a) of this section and maintained by the Secretary of Agriculture are officers and employees of the United States whose duties or responsibilities require access to such employer identification numbers for the purpose of effective administration or enforcement of the Food Stamp Act of 1977 or for the purpose of sharing the information in accordance with paragraph (c) of this section.

(ii) *Numbers maintained by any other agency or instrumentality.* The individuals who are permitted access to employer identification numbers obtained pursuant to paragraph (c) of this section and maintained by any agency or instrumentality of the United States other than the Department of Agriculture are officers and employees of the United States whose duties or responsibilities require access to such employer identification numbers for the purpose of effective administration and enforcement of the Food Stamp Act of 1977 or for the purpose of investigation of violations of other Federal laws or enforcement of those laws.

(2) *Other safeguards.* The Secretary of Agriculture, and the head of any other agency or instrumentality referred to in paragraph (c) of this section, must provide for any additional safeguards that the Secretary of the Treasury determines to be necessary or appropriate to protect the confidentiality of the employer identification numbers. The Secretary of Agriculture, and the head of any other agency or instrumentality referred to in paragraph (c) of this section, may also provide for any additional safeguards to protect the confidentiality of employer identification numbers, provided these safeguards are consistent with safeguards determined by the Secretary of the Treasury to be necessary or appropriate.

(e) *Confidentiality and disclosure of employer identification numbers.* Employer identification numbers obtained pursuant to paragraph (a) or (c) of this section are confidential. No officer or employee of the United States who has or had access to any such employer identification number may disclose that number in any manner to an individual not described in paragraph (d) of this section. For purposes of this paragraph (e), *officer or employee* includes a former officer or employee.

(f) *Sanctions*—(1) *Unauthorized, willful disclosure of employer identification numbers.* Sections 7213(a) (1), (2), and (3) apply with respect to the unauthorized, willful disclosure to any person of employer identification numbers that are maintained pursuant to this section by the Secretary of Agriculture, or any other agency or instrumentality with which information is shared pursuant to paragraph (c) of this section, in the same manner and to the same extent as sections 7213(a) (1), (2), and (3) apply

with respect to unauthorized disclosures of returns and return information described in those sections.

(2) *Willful solicitation of employer identification numbers.* Section 7213(a)(4) applies with respect to the willful offer of any item of material value in exchange for any employer identification number maintained pursuant to this section by the Secretary of Agriculture, or any other agency or instrumentality with which information is shared pursuant to paragraph (c) of this section, in the same manner and to the same extent as section 7213(a)(4) applies with respect to offers (in exchange for any return or return information) described in that section.

(g) *Delegation.* All references in this section to the Secretary of Agriculture are references to the Secretary of Agriculture or his or her delegate.

(h) *Effective date.* Except as provided in the following sentence, this section is effective on February 1, 1992. Any provisions relating to the sharing of information by the Secretary of Agriculture with any other agency or instrumentality of the United States are effective on August 15, 1994.

[T.D. 8369, 56 FR 49685, Oct. 1, 1991, as amended by T.D. 8621, 60 FR 51725, Oct. 3, 1995; 61 FR 1035, Jan. 11, 1996]

### § 301.6109–3 IRS adoption taxpayer identification numbers.

(a) *In general*—(1) *Definition.* An *IRS adoption taxpayer identification number* (ATIN) is a temporary taxpayer identifying number assigned by the Internal Revenue Service (IRS) to a child (other than an alien individual as defined in § 301.6109–1(d)(3)(i)) who has been placed, by an authorized placement agency, in the household of a prospective adoptive parent for legal adoption. An ATIN is assigned to the child upon application for use in connection with filing requirements under the Internal Revenue Code and the regulations thereunder. When an adoption becomes final, the adoptive parent must apply for a social security number for the child. After the social security number is assigned, that number, rather than the ATIN, must be used as the child's taxpayer identification number on all returns, statements, or other documents required under the Internal Revenue Code and the regulations thereunder.

(2) *Expiration and extension.* An ATIN automatically expires two years after the number is assigned. However, upon request, the IRS may grant an extension if the IRS determines the extension is warranted.

(b) *Definitions.* For purposes of this section—

(1) *Authorized placement agency* has the same meaning as in § 1.152–2(c) of this chapter;

(2) *Prospective adoptive child* or *child* means a child who has not been adopted, but who has been placed in the household of a prospective adoptive parent for legal adoption by an authorized placement agency; and

(3) *Prospective adoptive parent* or *parent* means an individual in whose household a prospective adoptive child is placed by an authorized placement agency for legal adoption.

(c) *General rule for obtaining a number*—(1) *Who may apply.* A prospective adoptive parent may apply for an ATIN for a child if—

(i) The prospective adoptive parent is eligible to claim a personal exemption under section 151 with respect to the child;

(ii) An authorized placement agency places the child with the prospective adoptive parent for legal adoption;

(iii) The Social Security Administration will not process an application for an SSN by the prospective adoptive parent on behalf of the child (for example, because the adoption is not final); and

(iv) The prospective adoptive parent has used all reasonable means to obtain the child's assigned social security number, if any, but has been unsuccessful in obtaining this number (for example, because the biological parent who obtained the number is not legally required to disclose the number to the prospective adoptive parent).

(2) *Procedure for obtaining an ATIN.* If the requirements of paragraph (c)(1) of this section are satisfied, the prospective adoptive parent may apply for an ATIN for a child on Form W–7A, *Application for Taxpayer Identification Number for Pending Adoptions* (or such other form as may be prescribed by the IRS). An application for an ATIN should be

made far enough in advance of the first intended use of the ATIN to permit issuance of the ATIN in time for such use. An application for an ATIN must include the information required by the form and accompanying instructions, including the name and address of each prospective adoptive parent and the child's name and date of birth. In addition, the application must include such documentary evidence as the IRS may prescribe to establish that a child was placed in the prospective adoptive parent's household by an authorized placement agency for legal adoption. Examples of acceptable documentary evidence establishing placement for legal adoption by an authorized placement agency may include—

(i) A copy of a placement agreement entered into between the prospective adoptive parent and an authorized placement agency;

(ii) An affidavit or letter signed by the adoption attorney or government official who placed the child for legal adoption pursuant to state law;

(iii) A document authorizing the release of a newborn child from a hospital to a prospective adoptive parent for adoption; and

(iv) A court document ordering or approving the placement of a child for adoption.

(d) *Effective date.* The provisions of this section apply to income tax returns due (without regard to extension) on or after April 15, 1998.

[T.D. 8839, 64 FR 51242, Sept. 22, 1999]

### § 301.6110–1 Public inspection of written determinations and background file documents.

(a) *General rule.* Except as provided in § 301.6110–3, relating to deletion of certain information, § 301.6110–5(b), relating to actions to restrain disclosure, paragraph (b)(2) of this section, relating to technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, and paragraph (b)(3) of this section, relating to general written determinations relating to accounting or funding periods and methods, the text of any written determination (as defined in § 301.6110–2(a)) issued pursuant to a request postmarked or hand delivered after October 31, 1976, shall be open to public inspection in the places provided in paragraph (c)(1) of this section. The text of any written determination issued pursuant to a request postmarked or hand delivered before November 1, 1976, shall be open to public inspection pursuant to section 6110(h) and § 301.6110–6, when funds are appropriated by Congress for such purpose. The procedures and rules set forth in §§ 301.6110–1 through 301.6110–5 and 301.6110–7 do not apply to written determinations issued pursuant to requests postmarked or hand delivered before November 1, 1976, unless § 301.6110–6 states otherwise. There shall also be open to public inspection in each place of public inspection an index to the written determinations open or subject to inspection at such place. Each such index shall be arranged by section of the Internal Revenue Code, related statute, or tax treaty and by subject matter description with such section in such manner as the Commissioner may from time to time provide. The Commissioner shall not be required to make any written determination or background file document open to public inspection pursuant to section 6110 or refrain from disclosure of any such documents or any information therein, except as provided by section 6110 or with respect to a discovery order made in connection with a judicial proceeding. The provisions of section 6110 shall not apply to matters for which the determination of whether public inspection should occur is made pursuant to section 6104. Matters within the ambit of section 6104 include: Any application filed with the Internal Revenue Service with respect to the qualification or exempt status of an organization, plan, or account described in section 6104(a)(1), whether the plan or account has more than 25 or less than 26 participants; any document issued by the Internal Revenue Service in which the qualification or exempt status of an organization, plan, or account described in section 6104 (a)(1) is granted, denied or revoked or the portion of any document in which technical advice with respect thereto is given to a district director; any application filed, and any document issued by the Internal Revenue Service, with respect to the qualification or status of

master, prototype, and pattern employee plans; the portion of any document issued by the Internal Revenue Service in which is discussed the effect on the qualification or exempt status of an organization, plan, or account described in section 6104(a)(1) of proposed transactions by such organization, plan, or account; and any document issued by the Internal Revenue Service in which is discussed the qualification or status of an organization described in section 509(a) or 4942(j)(3), but not including any document issued to nonexempt charitable trusts described in section 4947(a)(1).

(b) *Items that may be inspected only under certain circumstances*—(1) *Background file documents.* A background file document (as such term is defined in § 301.6110–2(g)) relating to a particular written determination issued pursuant to a request postmarked or hand delivered after October 31, 1976, shall not be subject to inspection until such written determination is open to public inspection or available for inspection pursuant to paragraph (b) (2) or (3) of this section, and then only if a written request pursuant to paragraph (c)(4) of this section is made for inspection of such background file document. Background file documents relating to written determinations issued pursuant to requests postmarked or hand delivered before November 1, 1976, shall be subject to inspection pursuant to section 6110 (h) and § 301.6110–6, when funds are appropriated by Congress for such purpose. The version of the background file document which is available for inspection shall be the version originally made available for inspection, as modified by any additional disclosure pursuant to section 6110(d)(3) and (f)(4).

(2) *Technical advice memoranda involving civil fraud and criminal investigations, jeopardy and termination assessments.* Any technical advice memorandum (as such term is defined in § 301.6110–2(f) involving any matter that is the subject of a civil fraud or criminal investigation, a jeopardy assessment (as such term is defined in section 6861), or a termination assessment (as such term is defined in section 6851) shall not be subject to inspection until all actions relating to such investigation or assessment are completed and then only if a written request pursuant to paragraph (c)(4) of this section is made for inspection of such technical advice memorandum. A ''civil fraud investigation'' is any administrative step or judicial proceeding in which an issue for determination is whether the Commissioner should impose additional tax pursuant to section 6653(b). A ''criminal investigation'' is any administrative step or judicial proceeding in which an issue for determination is whether a taxpayer should be charged with or is guility of criminal conduct. An action relating to a civil fraud or criminal investigation includes any such administrative step or judicial proceeding, the review of subsequent related activities and related returns of the taxpayer or related taxpayers, and any other administrative step or judicial procedure or proceeding or appellate process that is initiated as a consequence of the facts and circumstances disclosed by such investigation. An action relating to a jeopardy or termination assessment includes any administrative step or judicial proceeding that is initiated to determine whether to make such assessment, that is brought pursuant to section 7429 to determine the appropriateness or reasonableness of such assessment, or that is brought to resolve the legal consequences of the tax status or liability issue underlying the making of such assessment. Any action relating to a civil fraud or criminal investigation, a jeopardy assessment, or a termination assessment is not completed until all available administrative steps and judicial proceedings and remedies, including appeals, have been completed.

(3) *Written determinations with respect to adoption of or change in certain accounting or funding periods and methods.* Any general written determination (as defined in § 301.6110–2(c) that relates solely to approval of any adoption of or change in—

(i) The funding method or plan year of a plan under section 412.

(ii) A taxpayer's annual accounting period under section 442.

(iii) A taxpayer's method of accounting under section 446(e), or

(iv) A partnership's or partner's taxable year under section 706

shall not be subject to inspection until such written determination would, but for this paragraph (b)(3), be open to public inspection pursuant to § 301.6110–5(c) and then only if a written request pursuant to paragraph (c)(4) of this section is made for inspection of such written determination.

(c) *Procecure for public inspection*—(1) *Place of public inspection*. The text of any ruling (as such term is defined in § 301.6110–2(d) or technical advice memorandum that is open to public inspection pursuant to section 6110 shall be located in the National Office Reading Room. The text of any determination letter (as such term is defined in § 301.6110–2(e)) that is open to public inspection pursuant to section 6110 shall be located in the Reading Room of the Regional Office in which is located the district office that issued such determination letter. Inspection of any written determination subject to inspection only upon written request shall be requested from the National Office Reading Room. Inspection of any background file document shall be requested only from the reading room in which the related written determination is either open to public inspection or subject to inspection upon written request. The locations and mailing addresses of the reading rooms are set forth in § 601.702(b)(3)(ii) of this chapter.

(2) *Time and manner of public inspection*. The inspection authorized by section 6110 will be allowed only in the place provided for such inspection in the presence of an Internal Revenue officer or employee and only during the regular hours of business of the Internal Revenue Service office in which the reading room is located. The public will not be allowed to remove any record from a reading room. A person who wishes to inspect reading room material without visiting a reading room may submit a written request pursuant to paragraph (c)(4) of this section for copies of any such material to the Internal Revenue Service reading room in which is located such material.

(3) *Copies*. Notes may be taken of any material open to public inspection under section 6110, and copies may be made manually. Copies of any material open to public inspection or subject to inspection upon written request will be furnished by the Internal Revenue Service to any person making requests therefor pursuant to paragraph (c)(4) of this section. If made at the time of inspection the request for copies need not be in writing, unless the material is not immediately available for copying. The Commissioner may prescribe fees pursuant to section 6110(j) for furnishing copies of material open or subject to inspection.

(4) *Requests*. Any request for copies of written determinations, for inspection of general written determinations relating to accounting or funding periods and methods or technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, for inspection or copies of background file documents, and for copies of the index shall be submitted to the reading room in which is located the requested material. If made in person, the request may be submitted to the internal revenue employee supervising the reading room. The request shall contain:

(i) Authorization for the Internal Revenue Service to charge the person making such request for making copies, searching for material, and making deletions therefrom;

(ii) The maximum amount of charges which the Internal Revenue Service may incur without further authorization from the person making such request;

(iii) With respect to requests for inspection and copies of background file documents, the file number of the written determination to which such background file document relates and a specific identification of the nature or type of the background file document requested;

(iv) With respect to requests for inspections of general written determinations relating to accounting or funding periods and methods, the day, week, or month of issuance of such written determination, and the applicable category as selected from a special summary listing of categories prepared by the Internal Revenue Service;

(v) With respect to requests for copies of written determinations, the file

number of the written determination to be copied, which can be ascertained in the reading room or from the index;

(vi) With respect to requests for copies of portions of the index, the section of the Internal Revenue Code, related statute or tax treaty in which the person making such request is interested;

(vii) With respect to material which is to be mailed, the name, address, and telephone number of the person making such request and the address to which copies of the requested material should be sent; and

(viii) Such other information as the Internal Revenue Service may from time to time require in its operation of reading rooms.

[T.D. 7524, 42 FR 63412, Dec. 16, 1977]

**§ 301.6110–2 Meaning of terms.**

(a) *Written determination.* A ''written determination'' is a ruling, a determination letter, or a technical advice memorandum, as such terms are defined in paragraphs (d), (e), and (f) of this section, respectively. Notwithstanding paragraphs (d) through (f) of this section, a written determination does not include for example, opinion letters (as defined in § 601.201(a)(4) of this chapter), information letters (as defined in § 601.201(a)(5) of this chapter), technical information responses, technical assistance memoranda, notices of deficiency, reports on claims for refund, Internal Revenue Service decisions to accept taxpayers' offers in compromise, earnings and profits determinations, or documents issued by the Internal Revenue Service in the course of tax administration that are not disclosed to the persons to whose tax returns or tax liability the documents relate.

(b) *Reference written determination.* A ''reference written determination'' is any written determination that the Commissioner determines to have significant reference value. Any written determination that the Commissioner determines to be the basis for a published revenue ruling is a reference written determination until such revenue ruling is obsoleted, revoked, superseded or otherwise held to have no effect.

(c) *General written determination.* A ''general written determination'' is any written determination that is not a reference written determination.

(d) *Ruling.* A ''ruling'' is a written statement issued by the National Office to a taxpayer or to the taxpayer's authorized representative (as such term is defined in § 601.201(e)(7) of this chapter) on behalf of the taxpayer, that interprets and applies tax laws to a specific set of facts. A ruling generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts.

(e) *Determination letter.* A ''determination letter'' is a written statement issued by a district director in response to a written inquiry by an individual or an organization that applies principles and precedents previously announced by the National Office to the particular facts involved.

(f) *Technical advice memorandum.* A ''technical advice memorandum'' is a written statement issued by the National Office to, and adopted by, a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. A technical advice memorandum generally recites the relevant facts, sets forth the applicable law, and states a legal conclusion.

(g) *Background file document*—(1) *General rule.* A ''background file document'' is—(i) The request for a written determination.

(ii) Any written material submitted in support of such request by the person by whom or on whose behalf the request for a written determination is made,

(iii) Any written communication, or memorandum of a meeting, telephone communication, or other contact, between employees of the Internal Revenue Service or Office of its Chief Counsel and persons outside the Internal Revenue Service in connection with such request or written determination which is received prior to the issuance (as such term is defined in paragraph (h) of this section) of the written determination, but not including communications described in paragraph (g)(2) of this section, and

(iv) Any subsequent communication between the National Office and a district director concerning the factual

circumstances underlying the request for a technical advice memorandum, or concerning a request by the district director for reconsideration by the National Office of a proposed technical advice memorandum.

(2) *Limitations.* Notwithstanding paragraph (g)(1) of this section, a ''background file document'' shall not include any—

(i) Communication between the Department of Justice and the Internal Revenue Service or the Office of its Chief Counsel relating to any pending civil or criminal case or investigation,

(ii) Communication between Internal Revenue Service employees and employees of the Office of its Chief Counsel,

(iii) Internal memorandum or attorney work product prepared by the Internal Revenue Service or Office of its Chief Counsel which relates to the development of the conclusion of the Internal Revenue Service in a written determination, including, with respect to a technical advice memorandum, the Transmittal Memorandum, as defined in § 601.105(b)(5)(vi)(c) of this chapter,

(iv) Correspondence or any portion of correspondence between the Internal Revenue Service and any person relating solely to the making of or extent of deletions pursuant to section 6110(c), or a request pursuant to section 6110(g) (3) and (4) for postponement of the time at which a written determination is made open or subject to inspection,

(v) Material relating to (A) a request for a ruling or determination letter that is withdrawn prior to issuance thereof or that the Internal Revenue Service declines to answer, (B) a request for technical advice that the National Office declines to answer, or (C) the appeal of a taxpayer from the decision of a district director not to seek technical advice, or

(vi) Response to a request for technical advice which the district director declines to adopt, and the district director's request for reconsideration thereof.

(h) *Issuance.* ''Issuance'' of a written determination occurs, with respect to rulings and determination letters, upon the mailing of the ruling or determination letter to the person to whom it pertains. Issuance of a technical advice memorandum occurs upon the adoption of the technical advice memorandum by the district director.

(i) *Person to whom written determination pertains.* A ''person to whom a written determination pertains'' is the person by whom a ruling or determination letter is requested, but if requested by an authorized representative, the person on whose behalf the request is made. With respect to a technical advice memorandum, a ''person to whom a written determination pertains'' is the taxpayer whose return is being examined or whose claim for refund or credit is being considered.

(j) *Person to whom a background file document relates.* A ''person to whom a background file document relates'' is the person to whom the related written determination pertains, as such term is defined in paragraph (i) of this section.

(k) *Person who has a direct interest in maintaining confidentiality.* A ''person who has a direct interest in maintaining the confidentiality of a written determination'' is any person whose name and address is listed in the request for such written determination, as required by § 601.201(e)(2) of this chapter. A ''person who has a direct interest in maintaining the confidentiality of a background file document'' is any person whose name and address is in such background file document, or who has a direct interest in maintaining the confidentiality of the written determination to which such background file document relates.

(l) *Successor in interest.* A ''successor in interest'' to any person to whom a written determination pertains or background file document relates is any person who acquires the rights and assumes the liabilities of such person with respect to the transaction which was the subject matter of the written determination, provided that the successor in interest notifies the Commissioner with respect to the succession in interest.

[T.D. 7524, 42 FR 63413, Dec. 16, 1977]

### § 301.6110–3 Deletion of certain information in written determinations open to public inspection.

(a) *Information subject to deletion.* There shall be deleted from the text of any written determination open to

public inspection or subject to inspection upon written request and background file document subject to inspection upon written request pursuant to section 6110 the following types of information:

(1) *Identifying details.* (i) The names, addresses, and identifying numbers (including telephone, license, social security, employer identification, credit card, and selective service numbers) of any person, other than the identifying details of a person who makes a third-party communication described in § 301.6110–4(a), and

(ii) Any other information that would permit a person generally knowledgeable with respect to the appropriate community to identify any person. The determination of whether information would permit identification of a particular person will be made in view of information available to the public at the time the written determination or background file document is made open or subject to inspection and in view of information that will subsequently become available, provided the Internal Revenue Service is made aware of such information and the potential that such information may identify any person. The ''appropriate community'' is that group of persons who would be able to associate a particular person with a category of transactions one of which is described in the written determination or background file document. The appropriate community may vary according to the nature of the transaction which is the subject of the written determination. For example, if a steel company proposes to enter a transaction involving the purchase and installation of blast furnaces, the ''appropriate community'' may include all steel producers and blast furnace manufacturers, but if the installation process is a unique process of which everyone in national industry is aware, the ''appropriate community'' might also include the national industrial community. On the other hand, if the steel company proposes to enter a transaction involving the purchase of land on which to construct a building to house the blast furnaces, the ''appropriate community'' may also include those residing or doing business within the geographical locale of the land to be purchased.

(2) *Information concerning national defense and foreign policy.* Information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which is in fact properly classified pursuant to such order.

(3) *Information exempted by other statutes and agency rules.* Information specifically exempted from disclosure by any statute other than the Internal Revenue Code of 1954 and 5 U.S.C. 552 which is applicable to the Internal Revenue Service, and any information obtained by the Internal Revenue Service solely and directly from another Federal agency subject to a nondisclosure rule of such agency. Deletion of information shall not be made solely because the same information was submitted to another Federal agency subject to a nondisclosure rule applicable only to such agency.

(4) *Trade secrets and privileged or confidential commercial or financial information*—(i) *Deletions to be made.* Any—

(A) Trade secrets, and

(B) Commercial or financial information obtained from any person which, despite the fact that identifying details are deleted pursuant to paragraph (a)(1) of this section, nonetheless remains privileged or confidential.

(ii) *Trade secret.* For purposes of paragraph (a)(4)(i)(A) of this section, a trade secret may consist of any formula, pattern, device or compilation of information that is used in one's business, and that gives one an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. The subject of a trade secret must be secret, that is, it must not be of public knowledge or of a general knowledge in the trade or business. Novelty, in the patent law sense, is not required for a trade secret.

(iii) *Privileged or confidential.* For purposes of paragraph (a)(4)(i)(B) of this section, information is privileged or confidential if from examination of the

request and supporting documents relating to a written determination, and in consideration of the fact that identifying details are deleted pursuant to paragraph (a)(1) of this section, it is determined that disclosure of such information would cause substantial harm to the competitive position of any person. For example, while determining whether disclosure of certain information would cause substantial harm to X's competitive position, the Internal Revenue Service becomes aware that his information has previously been disclosed to the public. In this situation, the Internal Revenue Service will not agree with X's argument that disclosure of the information would cause substantial harm to X's competitive position. An example of information previously disclosed to the public is financial information contained in the published annual reports of widely held public corporations.

(5) *Information within the ambit of personal privacy.* Information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, despite the fact that identifying details are deleted pursuant to paragraph (a)(1) of this section. Personal privacy information encompasses embarrassing or sensitive information that a reasonable person would not reveal to the public under ordinary circumstances. Matters of personal privacy include, but are not limited to, details not yet public of a pending divorce, medical treatment for physical or mental disease or injury, adoption of a child, the amount of a gift, and political preferences. A clearly unwarranted invasion of personal privacy exists if from analysis of information submitted in support of the request for a written determination it is determined that the public interest purpose for requiring disclosure is outweighed by the potential harm attributable to such invasion of personal privacy.

(6) *Information concerning agency regulation of financial institutions.* Information contained in or related to reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions concerning examination, operation or condition of a financial institution, disclosure of which would damage the standing of such financial institution.

(7) *Information concerning wells.* Geological or geophysical information and data, including maps, concerning wells.

(b) *Manner of deletions.* Whenever information, which is not to be disclosed pursuant to section 6110(c), is deleted from the text of a written determination or background file document, substitutions therefore shall be made to the extent feasible if necessary for an understanding of the legal analysis developed in such written determination or to make the disclosed text of a background file document comprehensible. Wherever any material is deleted, an indication of such deletion, and of any substitution therefor, shall be made in such manner as the Commissioner deems appropriate.

(c) *Limitations on the making of deletions.* Any portion of a written determination or background file document that has been deleted will be restored to the text thereof—

(1) If pursuant to section 6110(d)(3) or (f)(4)(A) a court orders disclosure of such portion, or

(2) If pursuant, to § 301.6110–5(d)(1) an agreement is reached to disclose information.

[T.D. 7524, 42 FR 63414, Dec. 16, 1977]

### § 301.6110–4 Communications from third parties.

(a) *General rule.* Except as provided in paragraph (b) of this section a record will be made of any communication, whether written, by telephone, at a meeting, or otherwise, received by the Internal Revenue Service or Office of its Chief Counsel prior to the issuance of written determination from any person other than a person to whom the written determination pertains or the authorized representative of such person. This rule applies to any communication concerning such written determination, any communication concerning the request for such written determination, or any communication concerning other matters involving such written determination. A notation that such communication has been made shall be placed on such written determination when it is made open to public inspection or available for inspection upon written request pursuant

to § 301.6110–5. The notation to be placed on a written determination shall consist of the date on which the communication was received and the category of the person making such communication, for example, Congressional, Department of Commerce, Treasury, trade association, White House, educational institution. Any person may request the Internal Revenue Service to disclose the name of any person about whom a notation has been made pursuant to this paragraph.

(b) *Limitations*. The provisions of paragraph (a) of this section shall not apply to communications received by the Internal Revenue Service from employee of the Internal Revenue Service or Office of its Chief Counsel, from the Chief of Staff of the Joint Committee on Internal Revenue Taxation, from the Department of Justice with respect to any pending civil or criminal case or investigation, or from another government agency in response to a request made by the Internal Revenue Service to such agency for assistance involving the expertise of such agency.

(c) *Action to obtain disclosure of identity of person to whom written determination pertains*—(1) *Creation of remedy*. With respect to any written determination on which a notation has been placed pursuant to paragraph (a) of this section, any person may file a petition in the United States Tax Court or file a complaint in the United States District Court for the District of Columbia for an order requiring that the identity of any person to whom such written determination pertains be disclosed, but such petition or complaint must be filed within 36 months of the date such written determination is made open or subject to inspection.

(2) *Necessary disclosure*. Whenever an action is brought pursuant to section 6110(d)(3), the court may order that the identity of any person to whom the written determination pertains be disclosed. Such disclosure may be ordered if the court determines that there is evidence in the record from which it could reasonably be concluded that an impropriety occurred or undue influence was exercised with respect to such written determination by or on behalf of the person to whom the written determination pertains. The court may, pursuant to section 6110(d)(3), also order the disclosure of any material deleted pursuant to section 6110(c) if such disclosure is in the public interest. The written determination or background file document with respect to which the disclosure was sought shall be revised to disclose the information which the court orders to be disclosed.

(3) *Required notice*. If a proceeding is commenced pursuant to section 6110(d)(3) and paragraph (c)(1) of this section with respect to any written determination, the Secretary shall send notice of the commencement of such proceeding to any person whose identity is subject to being disclosed and to the person about whom a third-party communication notation has been made pursuant to section 6110(d)(1). Such notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (c)(3) within 15 days after notice of the petition or complaint filed pursuant to section 6110(d)(3) is served on the Secretary. For further guidance regarding the definition of last known address, see § 301.6212–2.

(4) *Intervention*. Any person who is entitled to receive notice pursuant to paragraph (c)(3) of this section shall have the right to intervene in any action brought pursuant to section 6110(d)(3). If appropriate such person shall be permitted to intervene anonymously.

[T.D. 7524, 42 FR 63415, Dec. 16, 1977, as amended by T.D. 8939, 66 FR 2819, Jan. 12, 2001]

### § 301.6110–5 Notice and time requirements; actions to restrain disclosure; actions to obtain additional disclosure.

(a) *Notice*—(1) *General rule*. Before a written determination is made open to public inspection or subject to inspection upon written request, or before a background file document is subject to inspection upon written request, the person to whom the written determination pertains or background file document relates shall be notified by the Commissioner of intention to disclose such written determination or background file document. The notice with respect to a written determination,

other than a written determination described in § 301.6110–1(b) (2) or (3) shall be mailed when such written determination is issued. The notice with respect to any written determination relating to accounting or funding periods and methods, any technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, and any background file document shall be mailed within a reasonable time after the receipt of the first written request for inspection thereof.

(2) *Contents of notice.* The notice required by paragraph (a)(1) of this section shall—

(i) Include a copy of the text of the written determination or background file document, which the Commissioner proposes to make open to public inspection or subject to inspection pursuant to a written request, on which is indicated (A) the material that the Commissioner proposes to delete pursuant to section 6110(c), (B) any substitutions proposed to be made therefor, and (C) any third-party communication notations required to be placed pursuant to § 301.6110–4(a) on the face of the written determination.

(ii) State that the written determination or background file document is to be open to public inspection or subject to inspection pursuant to a written request pursuant to section 6110.

(iii) State that the recipient of the notice has the right to seek administrative remedies pursuant to paragraph (b)(1) of this section and to commence judicial proceedings pursuant to section 6110(f)(3) within indicated time periods, and

(iv) Prominently indicate the date on which the notice is mailed.

(b) *Actions to restrain disclosure*—(1) *Administrative remedies.* Any person to whom a written determination pertains or background file document relates, and any successor in interest, executor or authorized representative of such person may pursue the administrative remedies described in § 601.105(b)(5)(iii)(*i*) and (vi)(*f*) and § 601.201(e) (11) and (16) of this chapter. Any person who has a direct interest in maintaining the confidentiality of any written determination or background file document or portion thereof may pursue the administrative remedies described in § 601.105(b)(5)(vi)(*f*) and § 601.201(e)(16) of this chapter. No person about whom a third-party communication notation has been made pursuant to § 301.6110–4(a) may pursue any administrative remedy for the purpose of restraining disclosure of the identity of such person where such identity appears with respect to the making of such third-party communication.

(2) *Judicial remedy.* Except as provided in paragraph (b)(3) of this section, any person permitted to resort to administrative remedies pursuant to paragraph (b)(1) of this section may, if such person proposes any deletion not made pursuant to § 301.6110–3 by the Commissioner, file a petition in the United States Tax Court pursuant to section 6110(f)(3) for a determination with respect to such proposed deletion. If appropriate, such petition may be filed anonymously. Any petition filed pursuant to section 6110(f)(3) must be filed within 60 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1).

(3) *Limitations on right to bring judicial actions.* No petition shall be filed pursuant to section 6110(f)(3) unless the administrative remedies provided by paragraph (b)(1) of this section have been exhausted. However, if the petitioner has responded within the prescribed time period to the notice pursuant to section 6110(f)(1) of intention to disclose, but has not received the final administrative conclusion of the Internal Revenue Service within 50 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1), the petitioner may file a petition pursuant to section 6110(f)(3). No judicial action with respect to any written determination or background file document shall be commenced pursuant to section 6110(f)(3) by any person who has received a notice with respect to such written determination or background file document pursuant to paragraph (b)(4) of this section.

(4) *Required notice.* If a proceeding is commenced pursuant to section 6110(f)(3) with respect to any written determination or background file document, the Secretary shall send notice

of the commencement of such proceeding to any person to whom such written determination pertains or to whom such background file document relates. No notice is required to be sent to persons who have filed the petition that commenced the proceeding pursuant to section 6110(f)(3) with respect to such written determination or background file document. The notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (b)(4) within 15 days after notice of the petition filed pursuant to section 6110(f)(3) is served on the Secretary. For further guidance regarding the definition of last known address, see § 301.6212–2.

(5) *Intervention*. Any person who is entitled to receive notice pursuant to paragraph (b)(4) of this section shall have the right to intervene in any action brought pursuant to this section. If appropriate, such person shall be permitted to intervene anonymously.

(c) *Time at which open to public inspection*—(1) *General rule*. Except as otherwise provided in paragraph (c)(2) of this section, the text of any written determination or background file document open to public inspection or available for inspection upon written request pursuant to section 6110 shall be made open to or available for inspection no earlier than 75 days and no later than 90 days after the date on which the Commissioner mails the notice required by paragraph (a)(1) of this section. However, if an action is brought pursuant to section 6110(f)(3) to restrain disclosure of any portion of such written determination or background file document the disputed portion of such written determination or background file document shall be made open to or available for inspection pursuant to paragraph (c)(2)(i) of this section.

(2) *Limitations*—(i) *Court order*. The portion of the text of any written determination or background file document that was subject to an action pursuant to section 6110(f)(3) to restrain disclosure in which the court determined that such disclosure should not be restrained shall be made open to or available for inspection within 30 days of the date that the court order becomes final. However, in no event shall such portion of the text of such written determination or background file document be made open to or available for inspection earlier than 75 days after the date on which the Commissioner mails the notice of intention to disclose required by section 6110(f)(1) and paragraph (a)(1) of this section. Such 30–day period may be extended for such time as the court finds necessary to allow the Commissioner to comply with its decision. Any portion of a written determination or background file document which a court orders open to public inspection or subject to inspection upon written request pursuant to section 6110(f)(4) or disclosed pursuant to section 6110(d)(3) shall be made open or subject to inspection or disclosed within such time as the court provides.

(ii) *Postponement based on incomplete status of underlying transaction*—(A) *Initial period not to exceed 90 days*. The time period set forth in paragraph (c)(1) of this section within which a written determination shall be made open to public inspection or available for inspection upon written request shall be extended, upon the written request of the person to whom such written determination pertains or the authorized representative of such person, until 15 days after the date on which the transaction set forth in the written determination is scheduled to be completed, but such day shall be no later than 180 days after the date on which the Commissioner mails the notice of intention to disclose.

(B) *Additional period*. The time period determined pursuant to paragraph (c)(2)(ii)(A) of this section shall be further extended upon an additional written request, if the Commissioner determines from the information contained in such request that good cause exists to warrant such extension. This further extension shall be until 15 days after the date on which the transaction set forth in the written determination is expected to be completed, but such day shall be no later than 360 days after the date on which the Commissioner mails the notice of intention to disclose. The good cause required by this paragraph (B) exists if the person requesting the delay in inspection demonstrates to the satisfaction of the Commissioner

that it is likely that the lack of such extension will cause interference with consummation of the pending transaction.

(C) *Written request for extension.* The written request for extension of the time when a written determination is to be made open to public inspection or available for inspection upon written request shall set forth the date on which it is expected that the underlying transaction will be completed, and, with respect to the additional extension described in paragraph (c)(2)(ii)(B) of this section, set forth the reason for requesting such extension. A request for extension of time may not be submitted until the notice of intention to disclose is mailed and must be received by the Internal Revenue Service office which issued such written determination no later than—

(*1*) In the case of the initial extension, 60 days after the date on which the Commissioner mails the notice of intention to disclose, or

(*2*) In the case of the additional extension, 15 days before the day on which, for purposes of paragraph (c)(2)(ii)(A) of this section, the transaction set forth in the written determination was expected to have been completed.

(D) *Notice and determination of actual completion.* If an extension of time for inspection has been granted, and the transaction is completed prior to the day on which it was expected to have been completed, the Internal Revenue Service office which issued such written determination shall be so notified by the person who requested such extension. In such event, the written determination shall be made open to public inspection or available for inspection upon written request on the earlier of (*1*) 30 days after the day on which the Commissioner is notified that the transaction is completed, or (*2*) the day on which the written determination was scheduled to be made open to public inspection or available for inspection upon written request pursuant to paragraph (c)(2)(ii) of this section. Similarly, if the Commissioner determines that the transaction was completed prior to the day on which it was expected to have been completed, even if the person requesting such extension has not so notified the Internal Revenue Service, the written determination shall be made open to public inspection or available for inspection upon written request on the earlier of (*1*) the day which is 30 days after the Commissioner ascertains that the transaction is completed sooner than has been expected, or (*2*) the day on which the written determination was scheduled to be made open to public inspection or available for inspection upon written request pursuant to paragraph (c)(2)(ii) of this section.

(d) *Actions to obtain additional disclosure*—(1) *Administrative remedies.* Under section 6110(f)(4) any person may seek to obtain additional disclosure of information contained in any written determination or background file document that has been made open or subject to inspection. A request for such additional disclosure shall be submitted to the Internal Revenue Service office which issued such written determination, or to which the request for inspection of such background file document has been submitted pursuant to § 301.6110–1(c)(4), and must contain the file number of the written determination or a description of the background file document (including the file number of the related written determination), the deleted information which in the opinion of such person should be open or subject to inspection, and the basis for such opinion. If the Internal Revenue Service determines that the request constitutes a request for disclosure of the name, address, or the identifying numbers described in § 301.6110–3(a)(1)(i) of any person, it shall within a reasonable time notify the person requesting such disclosure that disclosure will not be made. If the Internal Revenue Service determines that the request or any portion thereof constitutes a request for disclosure of information other than the name, address, or the identifying numbers described in § 301.6110–3(a)(1)(i) of any person, it shall send a notice that such additional disclosure has been requested to any person to whom the written determination pertains or background file document relates, and to all persons who are identified by name and address in the written determination or background file document. Notice

that such persons have been contacted shall be sent to the person requesting the additional disclosure. The notice that additional disclosure has been requested shall state that the Internal Revenue Service has determined that additional disclosure of information other than the name, address, or the identifying numbers described in § 301.6110–3(a)(1)(i) of any person has been requested, inform the recipient of the notice that the person seeking the additional disclosure has the right under section 6110(f)(4) to bring a judicial action to attempt to compel such disclosure, and request the recipient of the notice to reply within 20 days by submitting a statement of whether or not the recipient of the notice agrees to the requested disclosure or portion thereof. If all persons to whom a notice is sent pursuant to this paragraph (d)(1) of this section agree to disclose the requested information or any portion thereof, the person seeking such disclosure will be so informed; the written determination or background file document shall be accordingly revised to disclose the information with respect to which an agreement to disclose has been reached. If any of the persons to whom a notice is sent pursuant to this paragraph (d)(1) of this section do not agree to the additional disclosure or do not respond to such notice, the Internal Revenue Service shall within a reasonable time so notify the person requesting such disclosure, and deny the request for additional disclosure.

(2) *Judicial remedy*. Except as provided in paragraph (d)(3) of this section, any person who seeks to obtain additional disclosure of information contained in any written determination or background file document may file a petition pursuant to section 6110(f)(4) in the United States Tax Court or a complaint in the United States District Court for the District of Columbia for an order requiring that such information be made open or subject to inspection. Nothing in this paragraph shall prevent the Commissioner from disposing of written determinations and related background file documents pursuant to § 301.6110–7(a).

(3) *Limitations on right to bring judicial action*—(i) *Exhaustion of administrative remedies*. No petition or complaint shall be filed pursuant to section 6110(f)(4) unless the administrative remedies provided by paragraph (d)(1) of this section have been exhausted. However, if the Internal Revenue Service does not approve or deny the request for additional disclosure within 180 days after the request is submitted, the person making the request may file a petition pursuant to section 6110(f)(4).

(ii) *Actions to obtain identity*. No petition or complaint shall be filed pursuant to section 6110(f)(4) to obtain disclosure of the identity of any person to whom a written determination on which a third-party communication notation has been placed pursuant to § 301.6110–4(a) pertains. Such actions shall be brought pursuant to section 6110(d)(3).

(4) *Required notice*. If a proceeding is commenced pursuant to section 6110(f)(4) with respect to any written determination or background file document, the Secretary shall send notice of the commencement of such proceeding to any person to whom the written determination pertains or background file document relates, and to all persons who are identified by name and address in the written determination or background file document. The notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (d)(4) within 15 days after notice of the petition or complaint filed pursuant to section 6110(f)(4) is served on the Secretary.

(5) *Intervention*. Any person who is entitled to receive notice pursuant to paragraph (d)(4) of this section shall have the right to intervene in any action brought pursuant to this section. If appropriate, such person shall be permitted to intervene anonymously.

[T.D. 7524, 42 FR 63415, Dec. 16, 1977, as amended by T.D. 8939, 66 FR 2819, Jan. 12, 2001]

**§ 301.6110–6 Written determinations issued in response to requests submitted before November 1, 1976.**

(a) *Inspection of written determinations and background file documents*—(1) *General rule.* Except as provided in this section, the text of any written determination issued in response to a request postmarked or hand delivered before November 1, 1976 and any related background file document shall be open or subject to inspection in accordance with the rules in §§ 301.6110–1 through 301.6110–5 and 301.6110–7. However, the rules in § 301.6110–4 do not apply to inspection under this section. The rules in § 301.6110–5 (a), (b) and (c) also do not apply, except with respect to background file documents.

(2) *Exclusions.* The following written determinations are not open or subject to inspection under this section.

(i) Written determinations with respect to matters for which the determination of whether public inspection should occur is made under section 6104. Some of these matters are listed in § 301.6110–1(a).

(ii) Written determinations issued before September 2, 1974, dealing with the qualification of a plan described in section 6104(a)(1)(B)(i) or the exemption from tax under section 501(a) of an organization forming part of such a plan.

(iii) Written determination issued pursuant to requests submitted before November 1, 1976 with respect to the exempt staus under section 501(a) of organizations described in section 501 (c) or (d), the status of organizations as private foundations under section 509(a), or the status of organizations as operating foundations under section 4942(j)(3).

(iv) General written determinations that relate solely to accounting or funding periods and methods, as defined in § 301.6110–1(b)(3).

(v) Determination letters.

(3) *Items that may be inspected only under certain circumstances*—(i) *Background file documents.* A background file document relating to a particular written determination issued in response to a request submitted before November 1, 1976 shall not be subject to inspection until the related written determination is open to public inspection or available for inspection, and then only if a written request pursuant to § 301.6110–1(c)(4) is made for inspection of the background file document. However, the following background file documents are not open or subject to inspection:

(A) Background file documents relating to general written determinations issued before July 5, 1967.

(B) Background file documents relating to written determinations described in paragraph (a)(2) of this section.

(ii) *General written determinations issued before July 5, 1967.* General written determinations issued before July 5, 1967 shall not be subject to inspection until all other written determinations issued in response to requests postmarked or hand delivered before November 1, 1976 that are open to inspection under this section have been made open to public inspection, and then only if a written request pursuant to § 301.6110–1(c)(4) is made for inspection of the written determination. In this regard, the request for inspection must also contain the section of the Internal Revenue Code in which the requester is interested and the dates of issuance of the written determinations.

(b) *Notice and time requirements, and actions to restrain disclosure*—(1) *Notice*—(i) *General rule.* Before a written determination is made open to public inspection and before a particular written determination is subject to inspection in response to the first written request therefor, the Commissioner shall publish in the FEDERAL REGISTER a notice that the written determination is to be made open or subject to inspection. Notices with respect to written determinations, other than those described in paragraph (a)(3)(ii) of this section, shall be published at the earliest practicable time after this regulation is adopted as a Treasury decision. Notices with respect to written determinations subject to inspection upon written request shall be published within a reasonable time after the receipt of the first written request for inspection thereof, but no sooner than the day as of which all other written determinations open to public inspection under this section have been made open to public inspection. Notices with respect to background file documents

shall be sent in accordance with the rules in § 301.6110–5(a) and will be mailed by the Internal Revenue Service to the most recent addresses of the persons to whom the background file document relates that are in the written determination file.

(ii) *Sequence of notices.* Notices with respect to written determinations, other than general written determinations issued before July 5, 1967, shall be published in the following order. The first category is notices with respect to reference written determinations issued under the Internal Revenue Code of 1954. The second category is notices with respect to general written determinations issued after July 4, 1967. The third category is notices with respect to reference written determinations issued under the Internal Revenue Code of 1939 or corresponding provisions of prior law. Within a category, the Commissioner may publish notices individually or for groups of written determinations arranged according to the jurisdictions of the ruling branches in the Office of the Assistant Commissioner (Technical) and the Assistant Commissioner (Employee Plans and Exempt Organizations), as the Commissioner may find reasonable. To the extent practicable, notices published individually shall be published in the reverse order of the issuance of the written determinations for which they are published, starting with the most recent written determination issued. To the extent practicable, each group shall consist of consecutively issued written determinations. Notices for groups shall be published, to the extent practicable, in the reverse order of the time period of issuance of the written determinations in each group, starting with the most recent time period.

(iii) *Contents of notice.* The notice required by paragraph (b)(1)(i) of this section shall:

(A) Identify by subject matter description and dates of issuance the written determinations that the Commissioner proposes to make open or subject to inspection.

(B) State that the written determinations will be made open or subject to inspection pursuant to section 6110(h),

(C) State that the persons to whom the written determinations pertain have the right to seek administrative remedies under paragraph (b)(2)(ii) of this section and to commence judicial proceedings under section 6110(h)(4) within indicated time periods,

(D) State that there exist the possibilities that someone might request additional disclosure under section 6110(f)(4) and that someone might request inspection of a related background file document, and

(E) State that any notice that must be mailed by the Internal Revenue Service will be sent to the most recent address of the person to whom the notice must be sent that is in the relevent written determination file.

(2) *Actions to restrain disclosure*—(i) *Information on written determinations described by notice.* Any person may, within 15 days after the Commissioner publishes in the FEDERAL REGISTER a notice of intention to disclose a written determination under section 6110(h), request the Internal Revenue Service to provide certain information. This information includes whether any of the written determinations described by the notice is one that was issued to the person requesting this information. The Internal Revenue Service will also inform the person whether any of the written determinations described by the notice is one that was issued to a person with respect to whom the person requesting this information is a successor in interest executor or authorized representative. However, in order to do so, the Internal Revenue Service must be given the name and taxpayer identifying number of this other person and documentation of the relationship between that person and the person requesting the information. If the person requesting this information is a person to whom a written determination described by the notice pertains, or a successor in interest, executor, or authorized representative of that person, the Internal Revenue Service will also provide the person with a copy of the written determination on which is indicated the material that the Commissioner proposes to delete under section 6110(c) and any substitution proposed to be made therefor.

(ii) *Administrative remedies.* Any person to whom a written determination described by the notice in the FEDERAL

REGISTER pertains, and any successor in interest, executor or authorized representative of that person may pursue the administrative remedies described in this paragraph (b)(2)(ii). If after receiving the information described in paragraph (b)(2)(i) of this section, the person pursuing these administrative remedies desires to protest the disclosure of certain information in the written determination, that person must within 35 days after the notice is published submit a written statement identifying those deletions not made by the Internal Revenue Service which the person believes should have been made. The person pursuing these administrative remedies must also submit a copy of the version of the written determination proposed to be open or subject to inspection on which that person indicates, by the use of brackets, the deletions which the person believes should have been made. The Internal Revenue Service shall, within 20 days after receipt of the response by the person pursuing these administrative remedies, mail to that person its final administrative conclusion with respect to the deletions to be made.

(iii) *Judicial remedy*. Except as provided in paragraph (b)(2)(iv) of this section, any person permitted to resort to administrative remedies under paragraph (b)(2)(ii) of this section may, if that person proposed any deletion not made under section 6110(c) by the Commissioner, file a petition in the United States Tax Court under section 6110(h)(4) for a determination with respect to the proposed deletion. If appropriate, the petition may be filed anonymously. Any petition filed under section 6110(h)(4) must be filed within 75 days after the date on which the Commissioner publishes in the FEDERAL REGISTER the notice of intention to disclose required under section 6110(h)(4).

(iv) *Limitations on right to bring judicial actions*. No petition shall be filed under section 6110(h)(4) unless the administrative remedies provided by paragraph (b)(2)(ii) of this section have been exhausted. However, under two circumstances the petition may be filed even though the administrative remedies have not been exhausted. The first circumstance is if the petitioner requests the information described in paragraph (b)(2)(i) of this section within 15 days after the notice of intention to disclose is published in the FEDERAL REGISTER, but does not receive it within 30 days after the notice is published. The other circumstance is if the petitioner submits the statement of deletions within 35 days after the notice is published, but does not receive the final administrative conclusion of the Internal Revenue Service within 65 days after the notice is published. No judicial action with respect to any written determination shall be commenced under section 6110(h)(4) by any person who has received a notice with respect to the written determination under paragraph (b)(2)(v) of this section.

(v) *Required notice*. If a proceeding is commenced under section 6110(h)(4) with respect to any written determination, the Secretary shall send notice of the commencement of the proceeding to any person to whom the written determination pertains. No notice is required to be sent to persons who have filed the petition that commenced the proceeding under section 6110(h)(4) with respect to the written determination. The notice shall be sent, by registered or certified mail, to the last known address of the persons described in this paragraph (b)(2)(v) within 15 days after notice of the petition filed under section 6110(h)(4) is served on the Secretary. For further guidance regarding the definition of last known address, see § 301.6212–2.

(vi) *Intervention*. Any person who is entitled to receive notice under paragraph (b)(2)(v) of this section has the right to intervene in any action brought under this paragraph (b)(2). If appropriate, this person shall be permitted to intervene anonymously.

(vii) *Background file documents*. The following qualifications of the rules in § 301.6110–5(b) apply with respect to the restraint of disclosure of background file documents related to written determinations to which this section applies. First, the administrative remedies described in §§ 601.105 (b)(5)(iii)(*i*) and 601.201(e)(11) of this chapter do not apply. Second, the rule in §§ 601.105(b)(5)(vi)(*f*) and 601.201(e)(16) that the Internal Revenue Service will

not consider the deletion of material not proposed for deletion prior to the issuance of the written determination does not apply.

(3) *Time at which open to public inspection*—(i) *General rule*. Except as otherwise provided in paragraph (b)(3)(ii) of this section, the text of any written determination open to public inspection or available for inspection upon written request under section 6110(h) shall be made open to or available for inspection no earlier than 90 days and no later than 120 days after the date on which the Commissioner publishes in the FEDERAL REGISTER the notice of intention to disclose required under section 6110(h)(4). However, if an action is brought under section 6110(h)(4) to restrain disclosure of any portion of a written determination, the disputed portion of that written determination shall be made open to or available for inspection under paragraph (b)(3)(ii) of this section.

(ii) *Limitation on account of court order*. The portion of the text of any written determination that was subject to an action under section 6110(h)(4) to restrain disclosure in which the court determined that the disclosure should not be restrained shall be made open to or available for inspection within 30 days of the date that the court order becomes final. However, in no event shall that portion of the text of that written determination be made open to or available for inspection earlier than 90 days after the date on which the Commissioner publishes in the FEDERAL REGISTER the notice of intention to disclose required by section 6110(h)(4) and paragraph (b)(1) of this section. This 30-day period may be extended for such time as the court finds necessary to allow the Commissioner to comply with its decision. Any portion of a written determination which a court orders open to public inspection or subject to inspection upon written request under section 6110(f)(4) shall be open or subject to inspection within such time as the court provides.

(iii) *Background file documents*. The rules in § 301.6110–5(c)(2)(ii) do not apply with respect to the time at which background file documents related to written determinations to which this section applies are subject to inspection.

[T.D. 7548, 43 FR 20791, May 15, 1978, as amended by T.D. 8939, 66 FR 2819, Jan. 12, 2001]

### § 301.6110–7 Miscellaneous provisions.

(a) *Disposition of written determinations and background file documents*—(1) *Reference written determinations*. The Internal Revenue Service shall not dispose of any reference written determinations or related background file documents. The Commissioner may reclassify reference written determinations as general written determinations if the classification as reference was erroneous or if the Commissioner determines that such written determination no longer has any significant reference value. Notwithstanding the preceding sentence, the Commissioner shall not classify as a general written determination any written determination which is determined to be the basis for a published revenue ruling unless such revenue ruling is obsoleted, revoked, superseded or otherwise held to have no effect.

(2) *General written determinations*. The Internal Revenue Service may dispose of general written determinations and any background file document relating to such written determination pursuant to its established records disposition procedures. Disposition of a written determination shall not occur earlier than 3 years after the date on which such written determination is made open to public inspection or available for inspection upon written request. Disposition of a background file document shall not occur earlier than 3 years after the date on which the related written determination is made open to public inspection or available for inspection upon written request.

(b) *Precedential status of written determinations open to public inspection*. A written determination may not be used or cited as precedent, but the rule set forth in this paragraph shall not apply to change the precedential status, if any, of written determinations issued with respect to taxes imposed by subtitle D of the Internal Revenue Code of 1954.

(c) *Civil remedies*—(1) *Liability for failure to make deletions or to conform to time limitations*—(i) *Creation of remedy*. An exclusive remedy against the Commissioner shall exist in the Court of Claims for—

(A) The person to whom the written determination pertains whenever the Commissioner fails to act in accordance with the time requirements of section 6110(g), and

(B) The person to whom the written determination pertains and any person identified in such written determination whenever the Commissioner fails to make deletions required by section 6110(c) if as a consequence of such failure there is disclosed the identity of such person or other information with respect to such person that is required to be deleted pursuant to section 6110(c).

(ii) *Limitations*. The remedy provided in paragraph (c)(1)(i) of this section for failure to make deletions shall be available only if—

(A) The failure of the Commissioner to make the deletions required by section 6110(c) is intentional or willful,

(B) The Commissioner fails to make any deletion required by section 6110(c) which the Commissioner has agreed to make, or

(C) The Commissioner fails to make any deletion which a court has ordered to be made pursuant to section 6110(f)(3).

(iii) *Damages*. In any suit brought pursuant to paragraph (c)(1)(i) of this section in which the court determines that an employee of the Internal Revenue Service intentionally or willfully failed to make a deletion required by section 6110(c), or intentionally or willfully failed to act in accordance with the time requirements of section 6110(g), the United States shall be liable, to the person described in paragraph (c)(1)(i) of this section who brought the action, in an amount equal to the sum of—

(A) Actual damages sustained by such person but in no case shall such person be entitled to receive less than the sum of $1,000.

(B) The costs of the action, and

(C) Reasonable attorney's fees as determined by the court.

(2) *Liability for making additional disclosure of information*. The Commissioner shall not be liable for making any additional disclosure ordered pursuant to an action described in § 301.6110–5(d)(2) if the notice required by § 301.6110–5(d)(4) is sent.

(3) *Obligation to defend action for additional disclosure*. The Commissioner shall not be required to defend any action brought to obtain additional disclosure pursuant to section 6110(f)(4) if the notice required by § 301.6110–5(d)(4) is sent.

(4) *Obligation to make deletions*. The Commissioner shall be obligated to make only those deletions required by section 6110(c) which he has agreed to make, those which a court has ordered to be made pursuant to § 301.6110–5(b)(2) and those the omission of which would be intentional or willful.

(d) *Fees*—(1) *General rule*—(i) *Copies*. The Commissioner may prescribe fees pursuant to § 607.702(f)(4) of this chapter for the costs of furnishing copies of material open to public inspection or subject to inspection upon written request pursuant to section 6110.

(ii) *Preparation of information available upon request*. The Commissioner may prescribe fees pursuant to § 601.702(f) of this chapter for the costs of searching for and making deletions from any written determinations and background if documents that are subject to inspection only upon written request pursuant to § 301.6110–1(b).

(2) *Reduction or waiver of fees*—(i) *Public interest*. The Commissioner shall reduce or waive the fees described in paragraph (d)(1) of this section if the Commissioner determines that furnishing copies of, searching for, or making deletions from any written determination or background file document primarily benefits the general public, as described in § 601.702(f)(2)(ii)(B) of this chapter.

(ii) *Previous requests*. The Commissioner may waive the fees described in paragraph (d)(1) of this section for searching for any written determination or background file document if the search for such written determination or background file document was made pursuant to a previous request for inspection thereof. The Commissioner

shall waive the fees described in paragraph (d)(1) of this section for making deletions from any written determination or background file document if the making of such deletions from such written determination or background file document was made pursuant to a previous request for inspection thereof. Nothing in this (d)(2)(ii) shall prevent the Commissioner from prescribing fees for making additional deletions from such written determination or background file document pursuant to § 301.6110–5(b).

[T.D. 7524, 42 FR 63417, Dec. 16, 1977]

### § 301.6111–1T Questions and answers relating to tax shelter registration.

The following questions and answers relate to the tax shelter registration requirements of section 6111 of the Internal Revenue Code of 1954, as added by section 141(a) of the Tax Reform Act of 1984 (Pub. L. 98–369, 98 Stat. 678).

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## IN GENERAL

Q-1. What is tax shelter registration?

A-1. Tax shelter registration is a new provision of the Internal Revenue Code that affects organizers, sellers, investors, and certain other persons associated with investments that are considered tax shelters. The new provision imposes the following three requirements. First, a tax shelter must be registered by the tax shelter organizer. (See A-4 of this section for the definition of a tax shelter. See A-25 through A-39 of this section for rules relating to tax shelter organizers. See A-26 of this section for rules regarding when the seller of an interest in a tax shelter is treated as the tax shelter organizer.) Registration is accomplished by filing a properly completed Form 8264 with the Internal Revenue Service. The Internal Revenue Service will assign a registration number to each tax shelter that is registered. Second, any person who sells or otherwise transfers an interest in a tax shelter must furnish the registration number of the tax shelter to the purchaser or transferee of the interest. (See A-51 through A-54 of this section for the time and manner in which the number must be furnished.) Third, any person who claims a deduction, loss, credit, or other tax benefit or reports any income from the tax shelter must report the registration number of the tax shelter on any return on which the deduction, loss, credit, benefit, or income in included. (See A-55 through A-57 of this section for rules relating to the reporting of tax shelter registration numbers.)

Q-2. Are penalties provided for failure to comply with the requirements of tax shelter registration?

A-2. Yes. Separate penalties are provided for failure to satisfy any of the requirements set forth in A-1 of this section. See A-1 of § 301.6707–1T for the penalty for failure to register a tax shelter and A-8 of § 301.6707–1T for the penalty for filing false or incomplete information will respect to the registration of a tax shelter. See A-12 of § 301.6707–1T for the penalty for failure to furnish the tax shelter registration number to purchasers or transferees. See A-13 of 301.6707–1T for the penalty for failure to report the tax shelter registration number on a tax return on which a deduction, loss, credit, income, or other tax benefit is included. In addition, criminal penalties may be imposed for willful noncompliance with the requirements of tax shelter registration. See, for example, section 7203, relating to willful failure to supply information, and section 7206, relating to fraudulent and false statements.

Q-3. Does registration of a tax shelter with the Internal Revenue Service indicate that the Internal Revenue Service has reviewed, examined, or approved the tax shelter or the claimed tax benefits?

A-3. No. Moreover, any representation to prospective investors that states that a tax shelter is registered with the Internal Revenue Service (or that registration is being sought) must include a legend stating that registration does not indicate that the Internal Revenue Service has reviewed, examined or approved the tax shelter or any

of the claimed tax benefits. (See A-50 of this section for the form and content of the legend.)

TAX SHELTER DEFINED

Q-4. What investments are tax shelters that are required to be registered with the Internal Revenue Service?

A-4. A tax shelter is any investment that meets the following two requirements:

(I) The investment must be one with respect to which a person could reasonably infer, from the representations made or to be made in connection with any offer for sale of any interest in the investment, that the tax shelter ratio for any investor may be greater than 2 to 1 as of the close of any of the first 5 years ending after the date on which the investment is offered for sale.

(II) The investment must be (i) required to be registered under a federal or state law regulating securities, (ii) sold pursuant to an exemption from registration requiring the filing of a notice with a federal or state agency regulating the offering or sale of securities, or (iii) a substantial investment.

An investment that satisfies these two requirements is considered a tax shelter for registration purposes regardless of whether it is marketed or customarily designated as a tax shelter. See A-5 of this section for the definition of tax shelter ratio. See A-17 and A-18 of this section for the definition of an investment required to be registered under a federal or state law regulating securities. See A-19 and A-20 of this section for the definition of an investment sold pursuant to an exemption from registration requiring the filing of a notice. See A-21 of this section for the definition of a substantial investment.

TAX SHELTER RATIO

Q-5. What does the term ''tax shelter ratio'' mean?

A-5. The term ''tax shelter ratio'' means, with respect to any year, the ratio that the aggregate amount of deductions and 200 percent of the credits that are or will be represented as potentially allowable to an investor under subtitle A of the Internal Revenue Code for all periods up to (and including) the close of such year, bears to the investment base for such investor as of the close of such year.

DEDUCTIONS AND CREDITS REPRESENTED AS POTENTIALLY ALLOWABLE

Q-6. What do the terms ''amount of deductions'' and ''credits'' mean?

A-6. The term ''amount of deductions'' means the amount of gross deductions and other similar tax benefits potentially allowable with respect to the investment. The gross deductions are not to be offset by any gross income to be derived or potentially derived from the investment. Thus, the term ''amount of deductions'' is not equivalent to the net loss, if any, attributable to the investment. The term ''credits'' means the gross amount of credits potentially allowable with respect to the investment without regard to any possible tax liability resulting from the investment or any potential recapture of the credits.

Q-7. What does the term ''year'' mean for purposes of determining the tax shelter ratio?

A-7. The term ''year'' means the taxable year of a tax shelter, or if the tax shelter has no taxable year, the calendar year.

Q-8. Under what circumstances is a deduction or credit considered to be represented as being potentially allowable to an investor?

A-8. A deduction or credit is considered to be represented as being potentially allowable to an investor if any statement is made (or will be made) in connection with the offering for sale of an interest in an investment indicating that a tax deduction or credit is available or may be used to reduce federal income tax or federal taxable income. Representations of tax benefits may be oral or written and include those made at the time of the initial offering for sale of interests in the investment, such as advertisements, written offering materials, prospectuses, or tax opinions, and those that are expected to be made subsequent to the initial offering. Representations are not confined solely to statements regarding actual dollar amounts of tax benefits, but also include general representations that tax benefits are available with respect to an investment. Thus, for example, an advertisement stating

that ''purchase of restaurant includes trade fixtures (5-year write-off and investment tax credit)'' constitutes an explicit representation of tax benefits.

Q-9. If a deduction or credit is not explicitly represented as being potentially allowable to an investor may it be inferred as a represented tax benefit that is includible in the tax shelter ratio?

A-9. Yes. Although some explicit representation concerning tax benefits is necessary before an investment may be considered a tax shelter, once an explicit representation is made (or will be made) regarding any tax benefit, all deductions or credits typically associated with the investment will be inferred to have been represented as potentially allowable. Thus, the tax shelter ratio will be determined with reference to those tax benefits that are explicitly represented as being potentially allowable as well as all other tax benefits that are typically associated with the investment. The amount of each deduction or credit that is includible in the tax shelter ratio, if not specifically represented as to amount, should be reasonably estimated based on representations of economic value or economic projections, if any, or on any other information available to the tax shelter organizer. Reasonable estimates of deductions or credits may take into account past experience with similar investments. Reasonable estimates must assume use of the most accelerated allowable basis for cost recovery deductions.

As an example of the application of this A-9, assume that an advertisement explicitly states that a building is eligible for the investment tax credit for rehabilitation of a certified historic structure, but makes no mention of cost recovery deductions, amortization deductions for construction period interest and taxes, real estate taxes after construction, ongoing maintenance expenses, or other deductions or credits typically associated with a building. Reasonable estimates of all such deductions and credits must be included with the investment tax credit explicitly represented in determining the tax shelter ratio associated with any investor's acquisition of an interest in the building.

Q-10. Does the fact that representations are made (or to be made) indicating that a deduction may be offset by income from the investment or that a deduction or credit may be subject to recapture or may be disallowed on audit affect the computation of the tax shelter ratio?

A-10. No. Deductions and credits represented as being potentially allowable are taken into account in computing the tax shelter ratio regardless of whether any qualifying statements are made.

Q-11. Is interest to be paid by an investor with respect to a debt obligation incurred in connection with the acquisition of an interest in the tax shelter included in the aggregate amount of deductions?

A-11. If a deduction for such interest is explicitly represented (or will be represented) as being potentially allowable, the interest is includible in the aggregate amount of the deductions. In addition, any interest to be paid with respect to a debt obligation the proceeds of which reduce the investment base (see A-14 of this section), regardless of whether a deduction for such interest is explicitly represented as being allowable, will be considered a deduction typically associated with the investment (see A-9 of this section). Accordingly, such interest will be considered to be represented as being potentially allowable and must be taken into account in computing the tax shelter ratio. If interest to be paid with respect to a debt obligation the proceeds of which do not reduce the investment base (see A-14 of this section) is not explicitly represented as being potentially allowable, however, such interest will not be considered typically associated with the investment and will not be taken into account in computing the tax shelter ratio.

Q-12. If representations are made that part or all of an amount invested in a tax shelter will be deductible upon the occurrence of an unintended event, will the deduction be included in the aggregate amount of deductions?

A-12. No. Thus, for example, if representations are made that a person's investment in a tax shelter may give rise to a loss deduction if the investment becomes worthless, the amount

of the loss deduction will not be included in the aggregate amount of deductions and will not be taken into account in computing the tax shelter ratio. Similarly, if representations are made that the costs of acquiring oil and gas lease interests may be deductible if the lease is proved worthless by abandonment, the amount of any loss deduction will not be included in the aggregate amount of deductions.

INVESTMENT BASE

Q-13. What does the term ''investment base'' mean?

A-13. The term ''investment base'' means, with respect to any year (as defined in A-7 of this section), means the cumulative amount of money and the adjusted basis of other property (reduced by any liability to which such other property is subject) that is unconditionally required to be contributed or paid directly to the tax shelter on or before the close of such year by an investor.

Q-14. What amounts must be eliminated from the investment base?

A-14. The investment base must be reduced by the following amounts:

(1) Any amount borrowed by the investor, even if borrowed on a recourse basis, from any person who participated in the organization, sale, or management of the investment or who has an interest (other than an interest as a creditor) in the investment (''a participating person'') or from any person who is related (as defined in section 168 (e)(4)) to a participating person, unless the amount is unconditionally required to be repaid by the investor before the close of the year for which the determination is being made. An amount will be considered unconditionally required to be repaid by the investor only if any offering material in which the borrowed amount is described and any agreement to be entered into between a participating (or related) person and the investor provide that the amount must be repaid (without exception) by the end of the year for which the determination is being made. An amount that is to be repaid only from earnings of the investment is not an amount that is unconditionally required to be repaid and is thus excluded from the investment base. In addition, an amount is not unconditionally required to be repaid if the amount will be (or is expected to be) reloaned to the investor during the 5–year period ending after the date the investment is offered for sale.

(2) Any amount borrowed by the investor, even if borrowed on a recourse basis, from a person, if the loan is arranged by a participating (or related) person, unless the amount is unconditionally required to be repaid by the investor before the close of the year for which the determination is being made. Any borrowing that is represented (orally or in writing) as being available from a specific source will be treated as arranged by a participating (or related) person, if the participating (or related) person provides a list of investors, or information relating to the investment, to the lender or otherwise informs the lender about the investment. However, in the case of an amount borrowed on a recourse basis, the mere fact that a lender who is actively and regularly engaged in the business of lending money obtained information relating to the investment, from a participating (or related) person, solely in response to a lender's request made in connection with such borrowing or a prior loan to the investment, a participating (or related) person, or an investor, will not, by itself, result in a determination that the loans are arranged by a participating (or related) person. Financing may be treated as arranged by a participating (or related) person regardless of whether a commitment to provide the financing is made by the lender to the participating or related person.

For example, assume that a tax shelter organizer represents that the purchase of an interest in a tax shelter may be financed with the proceeds of a revolving loan, and the tax shelter organizer provides investors with the names of several banks or other lending institutions to which the tax shelter organizer has provided information about the investment. Assume further that the information was not provided in response to requests from such lending institutions made in connection with prior loans. The proceeds of the revolving loan will be excluded from the investment base because the loan is

not unconditionally required to be repaid and it is treated as having been arranged by the tax shelter organizer.

(3) Any amount borrowed, directly or indirectly, from a lender located outside the United States (''foreign-connected financing''), of which a participating (or related) person knows or has reason to know.

(4) Any amounts to be held for the benefit of investors in cash, cash equivalents, or marketable securities. An amount is to be held in cash equivalents if the amount is to be held in a checking account, savings account, mutual fund, certificate of deposit, book entry government obligation, or any other similar account or arrangement. Marketable securities are any securities that are part of an issue any portion of which is traded on an established securities market and any securities that are regularly quoted by brokers or dealers making a market.

(5) Any distributions (whether of cash or property) that will be made without regard to the income of the tax shelter, but only to the extent such distributions exceed the amount to be held as of the close of the year in cash, cash equivalents, or marketable securities.

TAX SHELTER RATIO—MISCELLANEOUS

Q-15. Does an investment satisfy the requirement in A-4 (I) of this section (''the tax shelter ratio requirement'') if it may be inferred from the representations made or to be made to investors that the tax shelter ratio for some, but not all, of the investors may be greater than 2 to 1 as of the close of any one of the first five years?

A-15. Yes. If the tax shelter ratio for any one investor may be greater that 2 to 1, the investment satisfies the tax shelter ratio requirement and is a tax shelter if it also meets the requirement in A-4(II) of this section. Moreover, an investment will satisfy the tax shelter ratio requirement even if the tax shelter ratio for a single investor exceeds 2 to 1 as of the close of only one of the first five years.

For purposes of computing the tax shelter ratio for a year, all persons with interests in the investment are considered investors, except that general partners in a limited partnership will not be treated as investors in the partnership if the general partners' aggregate interest in each item of partnership income, gain, loss, deduction, and credit for such year is not expected to exceed 2 percent. In determining the general partners' interest in such items, limited partnership interests owned by general partners shall not be taken into account. For purposes other than the computation of the tax shelter ratio, however, all general partners will be treated as investors. Thus, for example, a general partner with a 1 percent interest in a limited partnership will be treated as an investor for the purpose of determining whether the partnership is a substantial investment.

Q-16. If a person could reasonably infer from the representations made or to be made about an investment that the tax shelter ratio for the investment may be greater than 2 to 1 under one arrangement for financing the purchase of an interest by an investor, but would be 2 to 1 or less under an alternative financing arrangement, does the investment satisfy the tax shelter ratio requirement of A-4 (I) of this section.

A-16. Yes. An investment satisfies the tax shelter ratio requirement of A-4 (I) of this section if a person could reasonably infer from the representations made or to be made that the tax shelter ratio for any person may be greater than 2 to 1 as of the close of any one of the first five years. The tax shelter ratio requirement is met if the tax shelter ratio may exceed 2 to 1 under any type of financing arrangement that is or will be represented as being available to investors.

INVESTMENTS SUBJECT TO SECURITIES REGULATION

Q-17. What is an investment that is required to be registered under a federal law regulating securities?

A-17. An investment required to be registered under a federal law regulating securities is any public offering of an investment that is required to be registered under the Securities Act of 1933 (1933 Act), the Investment Company Act of 1940, or any other federal law regulating securities. An investment is required to be registered under the 1933 Act, the Investment Company

Act, or any other federal law regulating securities, if failure to register the investment would result in a violations of the applicable federal law, whether or not the investment has in fact been registered and, if proper notice has not been filed, whether or not the investment could have been sold pursuant to an exemption listed in A-19 of this section if such notice had been filed.

Q-18. What is an investment required to be registered under a state law regulating securities?

A-18. An investment required to be registered under a state law regulating securities is any investment required to be registered under a blue sky law or other similar state statute regulating securities. The term ''state'' includes the 50 states, the District of Columbia, and possessions of the United States.

Q-19. What is an investment sold pursuant to an exemption from registration requiring the filing of a notice with a federal agency regulating the offering or sale of securities?

A-19. An investment sold pursuant to an exemption from registration requiring the filing of a notice with such a federal agency is any investment that is sold pursuant to an exemption from registration requiring the filing or submission of a notice or other document with the Securities and Exchange Commission or any other federal agency regulating the offering or sale of securities, including the following exemptions (and applicable filing):

(1) Regulation A, as promulgated under section (3)(b) of the 1933 Act (Form 1(A)),

(2) Regulation B, as promulgated under section 3(b) of the 1933 Act (Schedules A through F),

(3) Regulation D, as promulgated under sections (3)(b) and 4(2) of the 1933 Act (Form D), and

(4) Any other statutory or regulatory exemption from registration requiring the filing or submission of a notice or other document.

Q-20. What is an investment sold pursuant to an exemption from registration requiring the filing of a notice with a state agency regulating the offering or sale of securities?

A-20. An investment sold pursuant to an exemption from registration requiring the filing of a notice with such a state agency is any investment sold pursuant to an exemption under a blue sky law or other similar state statutory or regulatory scheme that requires the filing or submission of a notice or other document with such a state agency. See A-18 of this section for the definition of state.

SUBSTANTIAL INVESTMENT

Q-21. What is a substantial investment?

A-21. An investment is a substantial investment if the aggregate amount that may be offered for sale to all investors exceeds $250,000 and 5 or more investors are expected. The aggregate amount offered for sale is the aggregate amount to be received from the sale of interests in the investment and includes all cash, the fair market value of all property contributed, and the principal amount of all indebtedness received in exchange for interests in the investment, regardless of whether the proceeds of the indebtedness are included in the investment base under A-14 of this section. For purposes of determining whether 5 or more investors are expected in an investment involving real property (and related personal property) that is used as a farm (as defined in section 2032A(e)(4)) for farming purposes (as defined in section 2032A(e)(5)), interests in the investment expected to be held by a husband and wife, their children and parents, and the spouses of their children (or any of them) will be treated as if the interests were to be held by one investor. Thus, for example, interests in a farm that are offered to two brothers and their wives would be treated as interests offered to one investor. Such an investment could be a substantial investment only if four or more persons who were not members of the family were expected to be investors in the farm.

Q-22. Will an investment be considered a substantial investment if the investment involves a number of parts each including fewer than 5 investors or an aggregate amount of $250,000 or less?

A-22. Yes, under the circumstances described in this A-22. For purposes of determining whether investments are

parts of a substantial investment, similar investments offered by the same person or related persons (as defined in section 168(e)(4)) are aggregated together. Investments are considered similar if they involve similar principal business assets and similar plans or arrangements. Investments that include no business assets will be considered similar if they involve similar plans or arrangements.

Similar investments are aggregated solely for the purpose of determining whether investments involving fewer than 5 investors or an aggregate amount of $250,000 or less are substantial investments. For this purpose, similar investments are aggregated even though some, but not all, of the investments are (i) required to be registered under a Federal or State law regulating securities or are sold pursuant to an exemption from securities registration requiring the filing of a notice with a Federal or State agency regulating the offering or sale of securities (*i.e.*, required to be registered as tax shelters whether or not a substantial investment) or (ii) substantial investments without regard to aggregation.

Assume, for example, that a person develops similar arrangements involving 8 different partnerships, each investing in a separate but similar asset (such as a separate master recording or separate piece of similar real estate), each with a different general partner and each with 3 different limited partners. Assume further that the arrangements of all the partnerships are similar. These partnerships involving similar arrangements and similar assets would be aggregated together. Thus, if each partner is expected to invest $11,000, there will be 32 investors (1 general partner plus 3 limited partners times 8 partnerships) and an aggregate investment of $352,000 (32 partners times $11,000). Accordingly, each partnership will constitute part of a substantial investment. If representations are made that $1,000 in tax credits and $3,000 in deductions are available to each limited partner in the first year and $10,000 of the cash invested was expected to be the proceeds of a loan arranged by the organizer, the tax shelter ratio as of the close of the first year (assuming there are no deductions or credits typically associated with such investment, as described in A-9 of this section) would be 5 to 1 ($5,000 in total tax benefits and $1,000 investment base). Accordingly, the organizer would be required to register the partnerships with the Internal Revenue Service.

Q-23. If an investment involving fewer than 5 investors or an aggregate amount of $250,000 or less is offered for sale and, at the time of the offering, it is not known (and there is no reason to know) that subsequent similar investments will be offered by the person who made the first offering (or a related person), will subsequent similar investments offered by that person (or a related person) be aggregated with the first investment for purposes of determining whether the investments constitute a substantial investment?

A-23. No. However, a tax shelter organizer will be presumed to have known of any similar investments (as defined in A-22 of this section) offered during the 12 months following the first offering of an investment.

### Exceptions From Tax Shelter Registration

Q-24. Are there any investments that will not be subject to tax shelter registration even if they satisfy the requirements of a tax shelter (as defined in A-4 of this section)?

A-24. Yes. The following investments are not subject to tax shelter registration:

(1) Sales of residences primarily to persons who are expected to use the residences as their principal place of residence,

(2) Sales or leases or tangible personal property (other than master sound recordings, motion picture or television films, videotapes, lithograph plates, or other property relating to a literary, musical, or artistic composition) by the manufacturer (or a member of an affiliated group, within the meaning of section 1502, including the manufacturer) of the property primarily to persons who are expected to use the property in their principal active trade or business (see, however, A-32 and A-46 of this section for the additional rules applicable to a purchaser of property described in this A-24 who

organizes an investment involving the property),

(3) Any other investment as specified by the Secretary in a rule-related notice published in the FEDERAL REGISTER.

Q-24A. Under what other circumstances are particular sales or leases of tangible personal property to certain persons or the performance of particular services for certain persons exempt from tax shelter registration?

A-24A. A person who, in the ordinary course of a trade or business, sells or leases tangible personal property (other than collectibles (as defined in section 408(m)(2)), master sound recordings, motion picture or television films, videotapes, lithograph plates, or other property that includes or relates to a literary, musical or artistic composition) to a purchaser or lessee who is reasonably expected to use the property either for a personal use or in the purchaser's or lessee's principal active trade or business is not required for any purpose to treat such a purchaser or lessee as an investor in a tax shelter. Property may be reasonably expected to be used by a purchaser or lessee for personal use only if sold or leased to the purchaser or lessee in a quantity that is customary for such use. Similarly, a person who performs services for another person in connection with the principal active trade or business of the recipient of the services or for the recipient's personal use is not required to treat the recipient as an investor in a tax shelter. Persons who are not reasonably expected to use property or services either in their principal active trade or business or for personal use must be treated as tax shelter investors in the event the sales, leases, or performance of services otherwise constitute a tax shelter.

Assume, for example, that an organizer forms Z corporation to feed cattle and to provide services in connection with the cattle feeding operations. Z will agree to serve customers with a minimum of 200 head of cattle. The fee for the services is $20 per head. Feed for cattle will cost $280 per head. Z represents that the service fee and the cost of the feed may be financed by $5,000 of cash and $55,000 of proceeds of a revolving recourse note that Z has arranged be available. Z provides its services to 100 customers. Ninety-five of the customers are persons whose principal active trade or business is reasonably expected to be farming (as defined in section 464(e)(1)). Five of the customers are not reasonably expected to engage in farming as their principal active trade or business. Although all the individual investments involve similar principal business assets and similar plans or arrangements, only the 5 customers who are not reasonably expected to be in the principal active trade or business of farming will be treated as investors in a tax shelter and aggregated to determine whether a substantial investment exists. Thus, there will be 5 investors and an aggregate investment of $300,000. If representations are made that the service fee and the cost of the feed are tax deductible, the tax shelter ratio (assuming there are no deductions or credits typically associated with such an investment, as described in A-9 of this section) would be 12 to 1 ($60,000 in total tax benefits and $5,000 investment base) and the organizer would be required to register the five aggregated feeding arrangements as a tax shelter. The registration number of the tax shelter must be provided to the five customers treated as investors in the tax shelter, but would not be required to be furnished to the customers whose principal active trade or business is reasonably expected to be farming.

PERSONS REQUIRED TO REGISTER A TAX SHELTER

Q-25. Who has the legal obligation to register a tax shelter?

A-25. A tax shelter organizer is obligated to register the tax shelter.

Q-26. What is the definition of tax shelter organizer?

A-26. Several categories of persons may be tax shelter organizers. In general, the term tax shelter organizer means a person principally responsible for organizing a tax shelter. If a person principally responsible for organizing a tax shelter has not registered the tax shelter by the day on which interests in the shelter are first offered for sale, any other person who participated in the organization of the tax shelter will be treated as a tax shelter organizer. If

neither a person principally responsible for organizing the tax shelter nor any other person who participated in the organization of a tax shelter has registered the tax shelter by the day on which interests in the tax shelter are first offered for sale, then any person who participates in the management of the tax shelter at a time when the tax shelter is not registered will be treated as a tax shelter organizer. Finally, if a person participates in the sale of a tax shelter at a time when the person knows or has reason to know that a tax shelter has not been registered, that person will be treated as a tax shelter organizer. See A-38 of this section for rules relating to the execution of an agreement among persons who may be treated as tax shelter organizers to designate one person to register a tax shelter.

Q-27. Who is a person principally responsible for organizing a tax shelter?

A-27. A person principally responsible for organizing a tax shelter (''principal organizer'') is any person who discovers, creates, investigates, or initiates the investment, devises the business or financial plans for the investment, or carries out those plans through negotiations or transactions with others.

Q-28. What constitutes participation in the organization of a tax shelter?

A-28. Participation in the organization of a tax shelter includes the performance of any act (directly or through an agent) related to the establishment of the tax shelter, including the following:

(1) Preparation of any document establishing the tax shelter (for example, articles of incorporation, a trust instrument, or a partnership agreement);

(2) Preparation of any document in connection with the registration (or exemption from registration) of the tax shelter with any federal, state, or local government body;

(3) Preparation of a prospectus, offering memorandum, financial statement, or other statement describing the tax shelter;

(4) Preparation of a tax or other legal opinion relating to the tax shelter;

(5) Preparation of an appraisal relating to the tax shelter;

(6) Negotiation or other participation on behalf of the tax shelter in the purchase of any property relating to the tax shelter.

Q-29. What constitutes participation in the management of a tax shelter?

A-29. Participation in the management of a tax shelter includes managing the assets of the tax shelter, directing the business activity of the tax shelter, or, depending on the form of the tax shelter, acting as a general partner who actively participates in the management of a partnership, a trustee of a trust, a director or an officer of a corporation (including a corporate general partner of a partnership), or performing activities similar to those performed by such a general partner, a trustee, a director, or an officer.

Q-30. Will the performance of any act described in A-27 through A-29 of this section constitute participation in the organization or management of a tax shelter if the person performing the act is unrelated to the tax shelter (or any principal organizer of the tax shelter) and does not participate in the entrepreneurial risks or benefits of the tax shelter?

A-30. No. The performance of an act described in A-27 through A-29 of this section will not constitute participation in the organization or management of a tax shelter unless the person performing the act is unrelated to the tax shelter (or any principal organizer of the tax shelter) or the person participates in the entrepreneurial risks or benefits of the tax shelter. A person will be considered related to a tax shelter if the person is related to the tax shelter or a principal organizer of the tax shelter within the meaning of section 168(e)(4) or is employed by the tax shelter or a principal organizer of the tax shelter or has an interest (other than an interest as a creditor) in the tax shelter. A person will be considered a participant in the entrepreneurial risks or benefits of a tax shelter if the person's compensation for performing an act described in A-27 through A-29 of this section is contingent on any matter relating to the tax shelter (*e.g.*, the compensation is based in whole or in part upon (i) whether interests in the tax shelter are actually sold or (ii) the

number or value of the units in the tax shelter that are sold), or if the person will receive an interest in the tax shelter as part or all of the person's compensation.

For example, assume that A forms Z partnership, a tax shelter for which registration is required. Z hires the X law firm, none of the partners of which is related to the tax shelter, to prepare the documents necessary to register the offering of Z securities with the Securities and Exchange Commission. X charges $100 an hour for its services in connection with the preparation of the necessary documents, and payment of the fee is not contingent. X will not be treated as a participant in the organization of the tax shelter. If, however, X were to charge a fee equal to 1 percent of the value of the units in the tax shelter that are sold, X would be considered a participant in the organization of the shelter.

As another example, assume that individual C is an attorney employed by W corporation, the corporate general partner and principal organizer of Z, and that C prepares the documents necessary to register the tax shelter with the Securities and Exchange Commission. C will be treated as having participated in the organization of the tax shelter regardless of the way in which C's compensation is structured, because C, as an employee, is related to the principal organizer of the tax shelter.

Q-31. What constitutes participation in the sale of a tax shelter?

A-31. Participation in the sale of a tax shelter includes any marketing activities (directly or through an agent) with respect to an investment, including the following:

(1) Direct contact with a prospective purchaser of an interest, or with a representative or agent of a prospective purchaser, but only if the contract relates to the possible purchase of an interest in the tax shelter;

(2) Solicitation of investors using the mail, telephone, or other means, or by placing an advertisement for the tax shelter in a newspaper, magazine, or other publication or medium;

(3) Instructing or advising salespersons regarding the tax shelter or sales presentations.

Q-32. May persons be treated as tax shelter organizers if such persons do not make any representations of tax benefits to investors?

A-32. Yes. If a person described in A-26 of this section knows or has reason to know that representations of tax benefits have been made, that person may be treated as a tax shelter organizer. For example, a participant in the sale of a tax shelter may know or have reason to know that representations of tax benefits have been made by the principal organizer or others who participate in the organization of the tax shelter. In addition, a person who acquires property from a manufacturer in a transaction exempt from tax shelter registration under A-24 of this section and who organizes an investment involving the property may know or have reason to know of any representation of tax benefits made by the manufacturer.

Q-33. If a person performs support services such as typing, photocopying, or printing for a tax shelter (or a tax shelter organizer) or performs other ministerial functions for the tax shelter (or a tax shelter organizer), may the person be considered to have participated in the organization, management, or sale of the tax shelter?

A-33. No. Merely performing support services or ministerial functions will not be considered participation in the organization, management, or sale of a tax shelter.

CIRCUMSTANCES UNDER WHICH TAX SHELTER ORGANIZERS ARE REQUIRED TO REGISTER A TAX SHELTER

Q-34. When is a principal organizer or a person who participates in the organization of a tax shelter required to register a tax shelter?

A-34. A principal organizer or a person who participates in the organization of a tax shelter (*i.e.*, a person who could be treated as a tax shelter organizer within the meaning of A-26 of this section) is required to register the tax shelter by the day on which the first offering for sale of interests in the tax shelter occurs, unless the person has signed a designation agreement pursuant to A-38 of this section. If a group of persons who could be treated as tax

shelter organizers has signed a designation agreement pursuant to A-38 of this section, the designated organizer is required to register the tax shelter by the day on which the first offering for sale of interests in the tax shelter occurs. See A-39 of this section for additional rules applicable to tax shelter organizers (other than a designated organizer) who have signed a designation agreement.

Q-35. When is a person who participates in the management of a tax shelter (''manager'') required to register a tax shelter?

A-35. A manager who has not signed a designation agreement pursuant to A-38 of this section must register the tax shelter if the manager participates in the management of the tax shelter on or after the first offering for sale of interests in the tax shelter at a time when the tax shelter has not been properly registered (*i.e.*, the manager is treated as a tax shelter organizer within the meaning of A-26 of this section). Such a manager must register the tax shelter by the day on which the first offering for sale of interests in the tax shelter occurs, or by the day on which the manager's participation in the management of the tax shelter commences, whichever is later. See A-39 of this section for rules applicable to a manager who has signed a designation agreement.

Q-36. When is a person who participates in the sale of a tax shelter (''seller'') required to register the tax shelter?

A-36. A seller who has not signed a designation agreement pursuant to A-38 of this section must register the tax shelter if the seller participates in the sale of the tax shelter at a time when the seller knows or has reason to know that the tax shelter has not been properly registered (*i.e.*, the seller is treated as a tax shelter organizer within the meaning of A-26 of this section). A seller who has not signed a designation agreement will be deemed to have reason to know that the tax shelter has not been properly registered if the seller does not receive a copy of the Internal Revenue Service tax shelter registration notice containing the registration number within the 30-day period after the seller first offers interests in the tax shelter for sale. A seller must register the tax shelter as soon as practicable after the seller first knows or has reason to know that the tax shelter has not been properly registered. See A-39 of this section for rules applicable to a seller who has signed a designation agreement.

Q-37. When is a person who acts in more than one capacity with respect to a tax shelter required to register the shelter?

A-37. A person who acts in more than one capacity with respect to a tax shelter (*i.e.*, as two or more of the following: principal organizer, participant in the organization, manager, or seller) must register the tax shelter by the earliest day on which a tax shelter organizer acting in any of the person's several capacities would be required to register the tax shelter.

Q-38. May a group of persons who could be treated as tax shelter organizers under A-26 of this section designate one person to register the tax shelter?

A-38. Yes. A group of persons who could be treated as tax shelter organizers under A-26 of this section may enter into a written agreement designating one person as the tax shelter organizer responsible for registering the tax shelter (''designated organizer''). The designated organizer should ordinarily be a person principally responsible for organizing the tax shelter, but may be any person who participates in the organization of the tax shelter. Although persons who participate only in the sale or management of a tax shelter may sign a designation agreement, they may not be the designated organizer. In addition, the designated organizer may not be a person who is a resident in a country other than the United States. Any person who signs a designation agreement, other than the designated organizer, will not be liable for failing to register the tax shelter and will not be subject to a penalty, even if the designated organizer fails to register the tax shelter, unless the person fails to register the tax shelter when such registration is required under A-39 of this section. See A-7 of § 301.6707–1T for additional rules relating to the reasonable cause exception

applicable to persons who sign a designation agreement.

Q-39. Is a tax shelter organizer who has signed a designation agreement and who is not the designated organizer required to register the tax shelter under any circumstances?

A-39. Yes. If a tax shelter organizer who has signed a designation agreement pursuant to A-38 of this section knows or has reason to know on or after the day on which the first offering for sale of interests in a tax shelter occurs that the designated organizer failed to register the tax shelter, such tax shelter organizer must register the tax shelter as soon as practicable after he first knows or has reason to know of the failure. A tax shelter organizer who has signed a designation agreement is deemed to have reason to know that the designated organizer has failed to register the tax shelter if the tax shelter organizer does not receive a copy of the Internal Revenue Service registration notice containing the registration number from the designated organizer within the 60-day period after the day on which the first offering for sale of interests in the tax shelter occurs (or the person signs the designation agreement, if later). See A-41 of this section for the requirement that the designated organizer provide a copy of the registration notice and number to persons who have signed the designation agreement.

REGISTRATION—GENERAL RULES

Q-40. By what date must a tax shelter be registered?

A-40. A tax shelter must be registered not later than the day on which the first offering for sale of an interest in the tax shelter occurs.

Q-41. Is a tax shelter organizer (including a designated organizer) who registers a tax shelter responsible for performing any act with respect to tax shelter registration other than registering the tax shelter?

A-41. Yes. A tax shelter organizer (including a designated organizer) who registers a tax shelter must provide a copy of the Internal Revenue Service registration notice containing the registration number within 7 days after the notice is received from the Internal Revenue Service to the principal organizer (if a different person) and to any persons who the tax shelter organizer knows or has reason to know are participating in the sale of interests in the tax shelter (if such persons begin to participate after the registration number is received, they must be provided the notice within 7 days after they commence their participation). In addition, a designated organizer must provide a copy of the notice within 7 days after it is received to all persons who have signed the designation agreement.

Q-42. What is the sale of an interest in a tax shelter?

A-42. The sale of an interest in a tax shelter includes the sale of property, or any interest in property, the entry into a leasing arrangement, a consulting, management or other agreement for the performance of services, or the sale or entry into any other plan, investment, or arrangement.

Q-43. What does the term ''offering for sale'' mean?

A-43. The term ''offering for sale'' means making any representation, whether oral or written, relating to participation in a tax shelter as an investor. The term includes any advertisement relating to the tax shelter and any mail, telephonic, or other contact with prospective investors. A representation relating to participation in a tax shelter will be considered an offering for sale of an interest in the tax shelter even though there is included in the representation an explicit statement that the representation does not constitute an offer to sell or a solicitation of an offer to buy an interest in the tax shelter. In determining whether an offering for sale of an interest has occurred, federal and state laws regulating securities are not controlling.

Q-44. After a tax shelter has been registered, must it be registered again each year that it continues to be offered for sale?

A-44. No. Registration is effective for the year in which first accomplished and all subsequent years.

Q-45. If the facts relating to a tax shelter change after the tax shelter has been registered, must the tax shelter be registered again or must an amended application for registration be filed by the tax shelter organizer?

A-45. No. The tax shelter organizer, however, is permitted to file an amended application if a material change in facts occurs after the initial registration. A material change in facts is—

(1) A change in the identifying information relating to the tax shelter or tax shelter organizer,

(2) The acquisition or construction of a principal asset not reported on the initial application for registration,

(3) A change in the method of financing a minimum investment unit, or

(4) A change in the principal business activity.

In addition, a change in any tax shelter ratio reported on the initial application for registration that increases or decreases the reciprocal of the tax shelter ratio (*i.e.*, the fraction in which the amount of the applicable investment base is the numerator and the amount of the applicable deductions and credits is the denominator) by 50 percent or more is a material change in facts. For example, if the tax shelter ratio increases from 2 to 1 to 4 to 1, the reciprocal of the tax shelter ratio decreases from ½ to ¼, a 50-percent decrease. Similarly, if the tax shelter ratio decreases from 6 to 1 to 4 to 1, the reciprocal of the tax shelter ratio increases from ⅙ to ¼, a 50-percent increase. In either case, there is a material change in facts and an amended application could be filed.

Q-45A. What information should be included on an amended application for registration?

A-45A. The tax shelter organizer must include the identifying information requested on Form 8264, Application for Registration of a Tax Shelter, and the tax shelter registration number that has been assigned to the tax shelter. In addition, the tax shelter organizer should include any other information requested on Form 8364(1) that has changed since the tax shelter was registered, or (2) that the tax shelter organizer did not know at the time the tax shelter was registered but has learned of since the registration.

For example, assume that A organizes partnership L, a blind pool that will invest in real estate. Before the real estate is identified or acquired, interests in L will be offered to the public in an offering that must be registered with the Securities and Exchange Commission. Although A does not know what real estate L will acquire and therefore is unable to calculate the tax shelter ratio with certainty, A concludes (based on representations made or to be made) that the tax shelter ratio will exceed 2 to 1 as to some of the investors. Accordingly, A registers L as a tax shelter. A attaches a statement to the application for registration, explaining that L is a blind pool organized to invest in real estate, but that L has not yet acquired any real estate. In addition, A attaches a statement explaining that although the tax shelter ratio is expected to exceed 2 to 1, A cannot compute the tax shelter ratio with certainty because L has not yet acquired any real estate. Several months after L is registered, L acquires a shopping center. A may file an amended application for registration. In addition to reporting the identifying information and the tax shelter registration number on the amended application, A should report the shopping center as the principal asset and the recomputed tax shelter ratio.

As another example, assume that C organizes a limited partnership that is a tax shelter. On the application for registration, C reports that the tax shelter ratio is 2.2 to 1. After the partnership has been registered, C finds that the partnership is unable to attract sufficient investors. To make investing in the partnership more attractive, C decides to offer financing for the purchase or interests in the partnership. As a result of the change in financing, the tax shelter ratio will be 5 to 1. Because there is a change in financing and a change in the tax shelter ratio that decreases the reciprocal of the tax shelter ratio by 50 percent or more, C may file an amended application for registration. In addition to reporting the identifying information and the tax shelter registration number on the amended application, C should report the recomputed tax shelter ratio and information relating to the change in financing.

Q-46. If assets constituting a tax shelter are sold (''original sale'') and, subsequently, either the assets or interests in the assets are offered for sale by

the purchaser (''resale''), must the purchaser file a new application for registration if the resale is an offering or sale of interests in a tax shelter?

A-46. If the resale constitutes a tax shelter, the purchaser must file a new application for registration, unless the tax shelter organizer with respect to the original sale is also the tax shelter organizer with respect to the resale and the facts pertaining to the resale were reflected in the application for registration filed with respect to the original sale. For example, assume that A intends to sell a building with an estimated fair market value of $2.5 million to a group of 5 investors (*i.e.*, a substantial investment, as defined in A-21 of this section). A also intends to make representations of tax benefits attributable to an investment in the building. Based on these representations and the investment base, the tax shelter ratio attributable to an investment in the building may be greater than 2 to 1. A therefore files an application for registration relating to the building with the Internal Revenue Service. The Internal Revenue Service issues a registration number for the investment, and A furnishes the registration number to each of the 5 investors in accordance with A-53 of this section. In an unrelated transaction, the 5 investors decide to syndicate the building and to offer interests in the syndicate to approximately 500 investors. In connection with this offer, the investors expect to make representations concerning tax benefits with respect to the syndication. If based on these representations and the investment base, the tax shelter ratio may be greater than 2 to 1 for an investor in the syndicate, the 5 investors must file an application for registration for the syndicate before interests in the syndicate may be offered for sale. The investors in the syndicate must be furnished with the new registration number and not the registration number issued with respect to A. On the other hand, if the original sale and the syndication were part of A's plan to sell interests in the building, A is a tax shelter organizer with respect to the syndication. If the facts pertaining to the syndication were reflected on A's application for registration with respect to the original sale, a second application for registration would not be required with respect to the syndication. However, the investors in the syndicate would have to be furnished with the tax shelter registration number issued to A.

Q-47. When is a tax shelter considered registered?

A-47. A tax shelter is considered registered when a properly completed Form 8264, Application for Registration of a Tax Shelter, is filed with the appropriate Internal Revenue Service Center. See A-7 of § 301.6111–2T for rules relating to the information required to be included on the form, and A-8 of § 301.6707–1T for rules relating to the penalty for filing incomplete information.

Q-48. Must a person registering a tax shelter that is a substantial investment only by reason of an aggregation of multiple investments under A-22 of this section complete a separate Form 8264 for each investment constituting part of the substantial investment?

A-48. A separate Form 8264 must be completed for each investment that differs from the other investments in a substantial investment with respect to any of the following:

(1) Principal asset,

(2) Accounting methods,

(3) Federal or state agencies with which the investment is registered or with which an exemption notice is filed,

(4) Methods of financing the purchase of an interest in the investment,

(5) Tax shelter ratio.

Such aggregated investments, however, are part of a single tax shelter.

Q-49. Do the rules of section 7502 of the Internal Revenue Code, regarding timely mailing, apply to the filing of registration forms?

A-49. Yes.

Q-50. After a tax shelter has been registered, may representations that the investment has been registered with the Internal Revenue Service be made to potential investors?

A-50. Investors may be informed that the investment has been registered with the Internal Revenue Service. Investors also must be informed, however, that registration does not imply that the Internal Revenue Service has reviewed, examined, or approved the

investment or the claimed tax benefits. The disclaimer must be substantially in the form provided below:

ISSUANCE OF A REGISTRATION NUMBER DOES NOT INDICATE THAT THIS INVESTMENT OR THE CLAIMED TAX BENEFITS HAVE BEEN REVIEWED, EXAMINED, OR APPROVED BY THE INTERNAL REVENUE SERVICE.

See A-53 of this section for rules relating to the legend that must be included on any statement on which the tax shelter registration number is furnished to investors.

FURNISHING TAX SHELTER REGISTRATION NUMBERS TO INVESTORS

Q-51. Who must furnish investors in a tax shelter with the registration number of the tax shelter?

A-51. Any person who sells (or otherwise transfers) an interest in a tax shelter is required to furnish the registration number assigned to that tax shelter to each person who purchases (or otherwise acquires) an interest in that tax shelter from the seller or transferor. For example, X, a tax shelter organizer, sells an interest in a tax shelter to A. One year later A sells A's interest in the shelter to B. X must furnish the tax shelter registration number to A, and A must furnish the number to B. If B sells or otherwise transfers the interest (by gift, for example), B must furnish the number to the purchaser or transferee of B's interest in the tax shelter.

Q-52. When must the registration number be furnished to purchasers of interests in the tax shelter?

A-52. The person who sells (or otherwise transfers) an interest in a tax shelter must furnish the registration number to the purchaser (or transferee) at the time of sale (or transfer) of the interest (or, if later, within 20 days after the seller or transferor receives the registration number). If the registration number is not furnished at the time of the sale (or other transfer), the seller (or transferor) must furnish the statement described in A-54 to the purchaser (or transferee) at the time of the sale (or other transfer). If interests in a tax shelter were sold before September 1, 1984, all investors who acquired their interests in the tax shelter before September 1, 1984, must be furnished with the registration number of the tax shelter by December 31, 1984. The registration number will be considered furnished to the investor if it is mailed to the investor at the last address of the investor known to the person required to furnish the number.

Q-53. How is a seller or transferor of an interest in a tax shelter required to furnish the registration number to investors?

A-53. The person who sells (or otherwise transfers) an interest in a tax shelter must furnish the registration number of the tax shelter to the tax shelter to the purchaser (or transferee) on a written statement. The written statement shall show the name, registration number, and taxpayer identification number of the tax shelter, and include a prominent legend in bold and conspicuous type stating that the registration number must be included on any return on which the investor claims any deduction, loss, credit, or other tax benefit, or reports any income, by reason of the tax shelter. The statment must also include a prominent legend in bold and conspicuous type stating that the issuance of the registration number does not indicate that the Internal Revenue Service has reviewed, examined, or approved the investment or the claimed tax benefits. The statement shall be substantially in the form provided below:

You have acquired an interest in [name and address of tax shelter] whose taxpayer identification number is [if any]. The Internal Revenue Service has issued [name of tax shelter] the following tax shelter registration number: [Number]

YOU MUST REPORT THIS REGISTRATION NUMBER TO THE INTERNAL REVENUE SERVICE, IF YOU CLAIM ANY DEDUCTION, LOSS, CREDIT, OR OTHER TAX BENEFIT OR REPORT ANY INCOME BY REASON OR YOUR INVESTMENT IN [NAME OF TAX SHELTER].

You must report the registration number (as well as the name, and taxpayer identification number of [name of tax shelter]) on Form 8271.

FORM 8271 MUST BE ATTACHED TO THE RETURN ON WHICH YOU CLAIM THE DEDUCTION, LOSS, CREDIT, OR

OTHER TAX BENEFIT OR REPORT ANY INCOME.

ISSUANCE OF A REGISTRATION NUMBER DOES NOT INDICATE THAT THIS INVESTMENT OR THE CLAIMED TAX BENEFITS HAVE BEEN REVIEWED, EXAMINED, OR APPROVED BY THE INTERNAL REVENUE SERVICE.

This statement may be modified as necessary if the tax shelter is not a separate entity (*e.g.*, certain Schedule F or Schedule C activities) or has no name or taxpayer identification number.

Q-54. If a registration number has not been received by a seller (or transferor) from the person who registered the tax shelter by the time interests in the tax shelter are sold (or otherwise transferred), must the seller (or transferor) of the interests furnish the purchaser (or transferee) with any information regarding the registration?

A-54. Yes. At the time of the sale (or other transfer) the seller (or other transferor) must furnish the purchaser (or transferee) with a written statement in substantially the form prescribed in A-53 of this section, except that the second sentence of the form prescribed in A-53 shall be replaced by a statement in the form provided below:

On behalf of [name of tax shelter], [name of tax shelter organizer who has applied for registration] has applied to the Internal Revenue Service for a tax shelter registration number. The number will be furnished to you when it is received.

INCLUDING THE REGISTRATION NUMBER ON TAX RETURNS

Q-55. Is an investor required to report the registration number of a tax shelter in which the investor has acquired an interest to the Internal Revenue Service?

A-55. Yes. Any person claiming any deduction, loss, credit, or other tax benefit by reason of a tax shelter must report the registration number of the tax shelter on Form 8271, Investor Reporting of Tax Shelter Registration Number, which must be attached to the return on which any deduction, loss credit, or other tax benefit attributable to the tax shelter is claimed. For purposes of determining whether the tax shelter registration number must be reported by an investor, income attributable to an investment, such as a partner's distributive share of income, constitutes a deduction or tax benefit that is claimed, because gross deductions and other tax benefits are included in the net income reported by the investor. Thus, the registration number also must be reported on any return on which an investor reports any income attributable to a tax shelter.

Q-56. What should the investor do if the investor has received a notice that a registration number for the tax shelter has been applied for, but the investor has not received the registration number by the time the investor files a return on which a deduction, loss credit, other tax benefit, or income attributable to the tax shelter is included?

A-56. The investor must attach to the return a Form 8271 with the words ''Applied For'' written in the space for the registration number and must include on the Form 8271 the name and taxpayer identification number (if any) of the tax shelter and the name of the person who has applied for registration of the tax shelter.

Q-57. Does the requirement to include the tax shelter registration number on a return apply to applications for tentative refund (Form 1045 and Form 1139) and amended returns (Form 1040X, Form 1120X)?

A-57. Yes. A completed Form 8271 must be attached to any such return on which any deduction, loss, credit, other tax benefit, or income relating to a tax shelter is included.

PROJECTED INCOME INVESTMENTS

Q-57A. Are the registration requirements suspended with respect to any tax shelters?

A-57A. Yes. If a tax shelter is a projected income investment, it is not required to be registered before the first offering for sale of an interest in the tax shelters occurs, but is subject only to the registration requirements set forth in A-57H through A-57J of this section. A tax shelter is a projected income investment if—

(a) The tax shelter is not expected to reduce the cumulative tax liability of

any investor for any year during the 5-year period described in A-4 (I) of this section; and

(b) The assets of the tax shelter do not include or relate to any property described in A-57E of this section.

Q-57B. Under what circumstances does a tax shelter satisfy the requirement of paragraph (a) of A-57A of this section?

A-57B. A tax shelter is not expected to reduce the cumulative tax liability of any investor for any year during the 5-year period described in A-4 (I) of this section only if—

(a) A written financial projection or other written representation that is provided to investors before the sale of interests in the investment states (or leads a reasonable investor to believe) that the investment will not reduce the cumulative tax liability of any investor with respect to any year (within the meaning of A-7 of this section) in such 5-year period; and

(b) No written or oral projections or representations, other than those related to circumstances that are highly unlikely to occur, state (or lead a reasonable investor to believe) that the investment may reduce the cumulative tax liability of any investor with respect to any such year.

Thus, a tax shelter for which there are multiple written or oral financial projections or other representations is not a projected income investment if any such projection or representation that relates to circumstances that are not highly unlikely to occur states (or leads a reasonable investor to believe) that the investment may reduce the cumulative tax liability of any investor. See A-57D and A-57F of this section for rules relating to financial projections or other representations that are not made in good faith, that are not based on reasonable economic and business assumptions, or that relate to circumstances that are highly unlikely.

Q-57C. When does an investment reduce the cumulative tax liability of an investor?

A-57C. (a) An investment reduces the cumulative tax liability of an investor with respect to a year during the 5-year period described in A-4 (I) of this section if, as of the close of such year, (i) cumulative projected deductions for the investor exceed cumulative projected income for the investor, or (ii) cumulative projected credits for the investor exceed cumulative projected tax liability (without regard to credits) for the investor.

(b) The cumulative projected deductions for an investor as of the close of a year are the gross deductions of the investor with respect to the investment, for all periods up to (and including) the end of such year, that are included in the financial projection or upon which the representation is based. The deductions with respect to an investment include all deductions explicitly represented as being allowable and all deductions typically associated (within the meaning of A-9 of this section) with the investment. Therefore, interest to be paid by the investor that is taken into account in determining the tax shelter ratio of the investment (see A-11 of this section) is treated as a deduction with respect to the investment.

(c) The cumulative projected income for an investor as of the close of a year is the gross income of the investor with respect to the investment, for all periods up to (and including) the end of such year, that is included in the financial projection or upon which the representation is based. For this purpose, income attributable to cash, cash equivalents, or marketable securities (within the meaning of A-14 (4) of this section) may not be treated as income from the investment.

(d) The cumulative projected credits for an investor as of the close of a year are the gross credits of the investor with respect to the investment, for all periods up to (and including) the close of such year, that are included in the financial projection or upon which the representation is based. The credits with respect to an investment include all credits explicitly represented as being allowable and all credits typically associated (within the meaning of A-9 of this section) with the investment.

(e) The cumulative projected tax liability (without regard to credits) for an investor as of the close of a year is 50 percent of the excess of cumulative projected income for the investor over cumulative projected deductions for

the investor with respect to the investment as of the close of such year.

(f) The following examples illustrate the application of the principles of this A-57C:

*Example 1.* The promotional material with respect to a tax shelter includes a written financial projection indicating that the expected income of the investment in each of its first 5 years is $800,000. In subsequent oral discussions, investors are advised that, in certain circumstances that are not highly unlikely, the income expected from the investment may be as little as $500,000 per year. The subsequent oral discussions are taken into account in determining whether any projections or representations state or lead a reasonable investor to believe that the investment may reduce the cumulative tax liability of any investor. Thus, if the written financial projections indicate that the gross deductions attributable to the investment in each of its first 5 years are expected to be $600,000 and the subsequent oral discussions do not indicate that the amount of those deductions will change under the circumstances in which the income expected may be as little as $500,000, the subsequent oral discussions taken together with the written financial projections state (or lead a reasonable investor to believe) that the cumulative tax liability of an investor may be reduced (*i.e.,* the subsequent oral discussions (taken together with the projections) state or lead a reasonable investor to believe that cumulative projected deductions may exceed cumulative projected income under circumstances that are not highly unlikely). Accordingly, under paragraph (b) of A-57B of this section, the tax shelter would not qualify as a projected income investment.

*Example 2.* The written promotional material with respect to a tax shelter states that certain deductions are allowable to an investor (without specifying their amount), but there is no written statement relating to the amount of income expected from the investment. Because there is no written financial projection or other written representation that states or leads a reasonable investor to believe that the investment will not reduce the investor's cumulative tax liability (*i.e.,* the cumulative projected deductions, although not specified in the projections, may exceed the cumulative projected income (0)), the requirement of paragraph (a) of A-57B of this section would not be satisifed. The result in this example would be the same if there were only oral representations that the income to be derived from the investment would exceed the deductions with respect to the investment, because there would be no written statement as required by paragraph (a) of A-57B of this section. The tax shelter in this case would qualify as a projected income investment, however, if the written promotional material contains good-faith representations based on reasonable economic and business assumptions that state or lead reasonable investors to believe that the cumulative projected income from the investment will exceed the cumulative projected deductions allowable with respect to the investment for each year in the 5-year period, even though the amounts of income and deductions are not specified.

*Example 3.* The written promotional material with respect to a tax shelter includes a good-faith financial projection for the first 5 years of the investment. Based on reasonable economic and business assumptions, the projection indicates that the expected net income of the investment in each of its first 4 years is $100,000 ($500,000 of gross income and $400,000 of gross deductions), but as a result of the anticipated acquisition of new business assets a loss of $20,000 is expected in the fifth year of the investment ($500,000 of gross income and $520,000 of gross deductions). The projection also indicates that a credit of $50,000 is expected in the fifth year of the investment. Such a written financial projection would be considered to state that the investment will not reduce the cumulative tax liability of any investor with respect to any year in the 5-year period described in A-4 (I) of this section. Although a loss and a credit are projected in the fifth year of the investment, as of the close of such year, cumulative projected income ($2,500,000) exceeds cumulative projected deductions ($2,120,000), and cumulative projected tax liability (without regard to credits) ($380,000 × 50 percent =$190,000) exceeds cumulative projected credits ($50,000). Assuming no contrary oral or written projections or representations are made, the tax shelter would thus be a projected income investment.

*Example 4.* The written promotional material with respect to a tax shelter states that an investor will be entitled to a ''1.5 to 1 write-off'' in the year of investment. This statement is a representation that the investment will reduce the cumulative tax liability of an investor with respect to the first year of the investment and, accordingly, the investment is not a projected income investment. The result in this example would be the same if any ''write-off'' were represented, even if the write-off were less than 1.5 to 1.

Q-57D. Are all financial projections and representations relating to the cumulative tax liability of an investor taken into account for purposes of A-57B of this section?

A-57D. (a) No. A financial projection or other representation relating to the cumulative tax liability of an investor is not taken into account for purposes

of A-57B of this section unless it is made in good faith and is based on reasonable economic and business assumptions. In addition, a financial projection or other representation is not taken into account if it relates to circumstances that are highly unlikely. Moreover, a general statement or disclaimer indicating that projected income is not guaranteed or otherwise assured, standing alone, is not a projection or representation for purposes of paragraph (b) of A-57B of this section.

(b) The following example illustrates the application of the principles of this A-57D:

*Example*. The written promotional material with respect to a tax shelter contains a representation stating that the investment is projected to produce net income for all investors in each of its first five years and there are no credits potentially allowable with respect to the investment. This statement is based on reasonable economic and business assumptions. Such a written representation, if made in good faith, would be considered under paragraph (a) of A-57B of this section to state that the investment will not reduce the cumulative tax liability of any investor with respect to any year in the 5-year period described in A-4(I) of this section. In addition, no oral or written statements or representations are communicated to investors that would indicate under paragraph (b) of A-57B of this section that the investment might reduce the cumulative tax liability of any investor with respect to any year in the 5-year period.

Assume the tax shelter organizer has knowledge of certain other facts that lead the tax shelter organizer to believe that it is more likely than not that the investment will produce a net loss in the first year. The representation projecting net income is thus contrary to the tax shelter organizer's belief that it is more likely than not that the investment will produce a net loss in the first year. Therefore, the representation is not made in good faith. Since representations not made in good faith are ignored under A-57D, the tax shelter would not be a projected income investment. If, on the other hand, the tax shelter organizer did not know of the other facts so that the tax shelter organizer did not believe that the investment would produce a net loss in the first year, the representation projecting income is made in good faith. In that case, the tax shelter would be a projected income investment.

Q-57E. What assets may not be held by a projected income investment?

A-57E. A tax shelter is not a projected income investment if more than an incidental amount of its assets include or relate to any interest in a collectible (as defined in section 408(m)(2)), a master sound recording, motion picture or television film, videotape, lithograph plate, copyright, or a literary, musical, or artistic composition.

Q-57F. What are the consequences if financial projections or other representations are not made in good faith or are not based on reasonable economic and business assumptions?

A-57F. If a tax shelter is not a projected income investment because the financial projections or other representations are not made in good faith or are not based on reasonable economic and business assumptions, it must be registered not later than the day on which the first offering for sale of an interest in the tax shelter occurs. If the tax shelter is not registered timely, the tax shelter organizer may be subject to a penalty. (See A-1 of § 301.6707–1T.)

Q-57G. When does a tax shelter cease to be a projected income investment?

A-57G. A tax shelter ceases to be a projected income investment on the last day of the first year (as defined in A-7 of this section) in the 5-year period described in A-4 (I) of this section for which, for any investor, (i) the gross deductions allocable to the investor for that year and prior years exceed the gross income allocable to the investor for such years, or (ii) the credit allocable to the investor for that year and prior years exceed 50 percent of the amount by which gross income allocable to the investor exceeds gross deductions allocable to the investor for such years. For purposes of determining when a tax shelter ceases to be a projected income investment, the tax shelter organizer is not required to take into account interest that may be incurred by an investor with respect to debt described in A-14 (2) or (3) of this section, but is required to take into account interest incurred by an investor with respect to debt described in A-14 (1) of this section. In addition, the tax shelter organizer may not take into account income attributable to cash, cash equivalents, or marketable securities (within the meaning of A-14 (4) of this section).

Q-57H. How does the requirement to register apply with respect to a tax shelter that is a projected income investment?

A-57H. In the case of a tax shelter that is a projected income investment, registration is not required unless the tax shelter ceases to be a projected income investment under A-57G of this section. If the tax shelter ceases to be a projected income investment, the tax shelter organizer must register the tax shelter in accordance with the rules set forth in A-1 through A-39 and A-41 through A-50 of this section. The tax shelter must be registered—

(a) Within 30 days after the date on which the tax shelter ceases to be a projected income investment, and

(b) Before the date on which the tax shelter or a tax shelter organizer sends the investor any schedule of profit or loss, or income, deduction, or credit that may be used in preparing the investor's income tax return for the taxable year that includes the date on which the tax shelter ceases to be a projected income investment. If a tax shelter organizer fails to register timely as required by this A-57H, the tax shelter organizer may be subject to a penalty. (See A-1 of § 301.6707–1T.) For example, assume that C is the principal organizer and general partner of a limited partnership. Interests in the partnership will be offered for sale in a public offering required to be registered with the Securities and Exchange Commission. C knows that the tax shelter ratio (as defined in A-5 of this section) for the limited partners will be 5 to 1. Although C knows the partnership is a tax shelter, C does not register the partnership by the day on which the first offering for sale of an interest occurs because C believes the partnership is a projected income investment. In the second year of the partnership, the gross deductions allocable to each of the limited partners for the first two years of the partnership exceed the gross income allocable to the limited partners in such years. Thus, the partnership ceases to be a projected income investment under A-57G of this section. Assuming further that C continues as the general partner and knowingly fails to register the partnership as a tax shelter within the time prescribed in this A-57H, C will be subject to a penalty of 1 percent of the aggregate amount invested in the partnership. Because there is an intentional disregard of the registration requirements, the $10,000 limitation will not apply.

Q-57I. How does the requirement to furnish registration numbers (A-51 through A-54 of this section) apply in the case of a tax shelter that is a projected income investment?

A-57I. In the case of a tax shelter that is a projected income investment, a person who sells or transfers an interest in the tax shelter is not required to furnish a registration number under A-51 of this section or a notice under A-54 of this section unless the tax shelter ceases to be a projected income investment. If the tax shelter ceases to be a projected income investment, the tax shelter organizer who registers the tax shelter is required to furnish the registration number to all persons who the tax shelter organizer knows or has reason to know are participating in the sale of interests in the tax shelter and to all persons who the tax shelter organizer knows or has reason to know have acquired interests in the tax shelter. A person who sold (or otherwise transferred) an interest in the tax shelter before the date on which the tax shelter ceased to be a projected income investment is required to furnish the registration number to the purchaser or transferee as provided in A-51 of this section only if the seller or transferor knows or has reason to know that the tax shelter has ceased to be a projected income investment and that the tax shelter organizer who registered the tax shelter has not provided a registration number to such purchaser or transferee. In the case of persons who acquired interests in the tax shelter before the date on which the tax shelter ceased to be a projected income investment, the registration number must be provided not later than the date described in paragraph (b) of A-57H of this section or, if the tax shelter does not provide any schedule described in paragraph (b) of A-57H of this section, within 60 days after the date on which the tax shelter ceases to be a projected income investment. Thus, for example,

if a tax shelter that ceases to be a projected income investment is a partnership, the tax shelter organizer would be required to provide the registration number to each partner not later than the date the Schedule K–1 for the year in which the tax shelter ceases to be a projected income investment is provided to each partner.

The registration number must be provided in accordance with A-51 and A-52 of this section and must be accompanied by a statement explaining that the tax shelter has ceases to be a projected income investment and instructing the recipient to furnish the registration number to any persons to whom the recipient has sold or otherwise transferred interests in the tax shelter. A tax shelter organizer who fails to provide the registration number as provided in this A-57I may be subject to penalties. (See A-12 of § 301.6707–1T.)

Q-57J. How does the requirement to include the registration number on tax returns (A-55 through A-57 of this section) apply in the case of a tax shelter that is a projected income investment?

A-57J. In the case of a tax shelter that is a projected income investment, an investor is not required to report a registration number on the investor's tax return unless the tax shelter ceases to be a projected income investment. If the tax shelter ceases to be a projected income investment, the requirements of A-55 through A-57 apply with respect to returns for taxable years ending on or after the date on which the tax shelter ceases to be a projected income investment.

EFFECTIVE DATES

Q-58. On what date does the requirement to register a tax shelter become effective?

A-58. In general, a tax shelter must be registered if any interest in the tax shelter (other than an interest previously sold to an investor) is sold on or after September 1, 1984 (whether or not interests in the tax shelter were sold or offered for sale before September 1, 1984). The tax shelter must be registered with the Internal Revenue Service not later than the first day after August 31, 1984 on which an interest in the tax shelter is offered for sale.

Q-59. By what date must the tax shelter registration number be furnished to investors who acquired interests before September 1, 1984 in a tax shelter that is required to be registered.

A-59. All investors who acquired their interests in a tax shelter before September 1, 1984 must be supplied with the tax shelter registration number by December 31, 1984. See A-52 of this section for the date by which registration numbers must be furnished to investors who acquire their interests on or after September 1, 1984.

Q-60. What interests will be taken into account in determining whether an investment in which interests were sold before September 1, 1984, is a substantial investment?

A-60. The determination of whether an investment is a substantial investment will be made by taking into account only the interests that are offered for sale on or after September 1, 1984. An investment will be considered a substantial investment if there are expected to be 5 or more investors on or after September 1, 1984, and the aggregate amount offered for sale on or after September 1, 1984 is expected to exceed $250,000. Amounts received from the sale of interests before September 1, 1984, however, are taken into account in computing the amount of the penalty for failure to register.

(Secs. 6111 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 26 U.S.C. 6111; 68A Stat. 917, 26 U.S.C. 7805); secs. 6111, 6112 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 98 Stat. 681, 68A Stat. 917; 26 U.S.C. 6111, 6112 and 7805))

[T.D. 7964, 49 FR 32713, Aug. 15, 1984, as amended by T.D. 7990, 49 FR 43641, Oct. 31, 1984; T.D. 7964, 49 FR 44461, Nov. 7, 1984; T.D. 8078, 51 FR 7440, Mar. 25, 1986]

### § 301.6111–2 Confidential corporate tax shelters.

(a) *In general.*—(1) Under section 6111(d) and this section, a confidential corporate tax shelter is treated as a tax shelter subject to the requirements of sections 6111 (a) and (b).

(2) A confidential corporate tax shelter is any transaction—

(i) A significant purpose of the structure of which is the avoidance or evasion of Federal income tax, as described in paragraph (b) of this section,

for a direct or indirect corporate participant;

(ii) That is offered to any potential participant under conditions of confidentiality, as described in paragraph (c) of this section; and

(iii) For which the tax shelter promoters may receive fees in excess of $100,000 in the aggregate, as described in paragraph (d) of this section.

(3) For purposes of this section, references to the term *transaction* include all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and include any series of steps carried out as part of a plan. For purposes of this section, the term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term *substantially similar* must be broadly construed in favor of registration. For examples, see § 1.6011–4(c)(4) of this chapter.

(4) A transaction described in paragraph (b) of this section is for a direct or an indirect corporate participant if it is expected to provide Federal income tax benefits to any corporation (U.S. or foreign) whether or not that corporation participates directly in the transaction.

(b) *Transactions structured for avoidance or evasion of Federal income tax*—(1) *In general.* The avoidance or evasion of Federal income tax will be considered a significant purpose of the structure of a transaction if the transaction is described in paragraph (b)(2) or (3) of this section. However, a transaction described in paragraph (b)(3) of this section need not be registered if the transaction is described in paragraph (b)(4) of this section. For purposes of this section, Federal income tax benefits include deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from Federal income taxation, and any other tax consequences that may reduce a taxpayer's Federal income tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

(2) *Listed transactions.* A transaction is described in this paragraph (b)(2) if the transaction is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction. If a transaction becomes a listed transaction after the date on which registration would otherwise be required under this section, and if the transaction otherwise satisfies the confidentiality and fee requirements of paragraphs (a)(2)(ii) and (iii) of this section, registration shall in all events be required with respect to any interests in the transaction that are offered for sale after the transaction becomes a listed transaction. However, because a transaction identified as a listed transaction is generally considered to have been structured for a significant tax avoidance purpose, such a transaction ordinarily will have been subject to registration under this section before becoming a listed transaction if the transaction previously satisfied the confidentiality and fee requirements of paragraphs (a)(2)(ii) and (iii) of this section.

(3) *Other tax-structured transactions.* A transaction is described in this paragraph (b)(3) if it has been structured to produce Federal income tax benefits that constitute an important part of the intended results of the transaction and the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably expects the transaction to be presented in the same or substantially similar form to more than one potential participant, unless the promoter reasonably determines that—

(i) The potential participant is expected to participate in the transaction in the ordinary course of its business in a form consistent with customary commercial practice (a transaction involving the acquisition, disposition, or restructuring of a business, including the acquisition, disposition, or other

change in the ownership or control of an entity that is engaged in a business, or a transaction involving a recapitalization or an acquisition of capital for use in the taxpayer's business, shall be considered a transaction carried out in the ordinary course of a taxpayer's business); and

(ii) There is a generally accepted understanding that the expected Federal income tax benefits from the transaction (taking into account any combination of intended tax consequences) are properly allowable under the Internal Revenue Code for substantially similar transactions. There is no minimum period of time for which such a generally accepted understanding must exist. In general, however, a tax shelter promoter (or other person who would be responsible for registration under this section) cannot reasonably determine whether the intended tax treatment of a transaction has become generally accepted unless information relating to the tax treatment and tax structure of such transactions has been in the public domain (*e.g.*, rulings, published articles, etc.) and widely known for a sufficient period of time (ordinarily a period of years) to provide knowledgeable tax practitioners and the IRS reasonable opportunity to evaluate the intended tax treatment. The mere fact that one or more knowledgeable tax practitioners have provided an opinion or advice to the effect that the intended tax treatment of the transaction should or will be sustained, if challenged by the IRS, is not sufficient to satisfy the requirements of this paragraph (b)(3)(ii).

(4) *Excepted transactions.* The avoidance or evasion of Federal income tax will not be considered a significant purpose of the structure of a transaction if the transaction is described in either paragraph (b)(4)(i), (ii), or (iii) of this section.

(i) In the case of a transaction other than a transaction described in paragraph (b)(2) of this section, the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no reasonable basis under Federal tax law for denial of any significant portion of the expected Federal income tax benefits from the transaction. This paragraph (b)(4)(i) applies only if the tax shelter promoter (or other person who would be responsible for registration under this section) reasonably determines that there is no basis that would meet the standard applicable to taxpayers under § 1.6662–3(b)(3) of this chapter under which the IRS could disallow any significant portion of the expected Federal income tax benefits of the transaction. Thus, the reasonable basis standard is not satisfied by an IRS position that would be merely arguable or that would constitute merely a colorable claim. However, the determination of whether the IRS would or would not have a reasonable basis for such a position must take into account the entirety of the transaction and any combination of tax consequences that are expected to result from any component steps of the transaction, must not be based on any unreasonable or unrealistic factual assumptions, and must take into account all relevant aspects of Federal tax law, including the statute and legislative history, treaties, administrative guidance, and judicial decisions that establish principles of general application in the tax law (*e.g.*, *Gregory* v. *Helvering*, 293 U.S. 465 (1935)). The determination of whether the IRS would or would not have such a reasonable basis is qualitative in nature and does not depend on any percentage or other quantitative assessment of the likelihood that the taxpayer would ultimately prevail if a significant portion of the expected tax benefits were disallowed by the IRS.

(ii) The IRS makes a determination by published guidance that the transaction is not subject to the registration requirements of this section.

(iii) The IRS makes a determination by individual ruling under paragraph (b)(5) of this section that a specific transaction is not subject to the registration requirements of this section for the taxpayer requesting the ruling.

(5) *Requests for ruling.* If a tax shelter promoter (or other person who would be responsible for registration under this section) is uncertain whether a transaction is properly classified as a confidential corporate tax shelter or is otherwise uncertain whether registration is required under this section, that

person may, on or before the date that registration would otherwise be required under this section, submit a request to the IRS for a ruling as to whether the transaction is subject to the registration requirements of this section. If the request fully discloses all relevant facts relating to the transaction, that person's potential obligation to register the transaction will be suspended during the period that the ruling request is pending and, if the IRS subsequently concludes that the transaction is a confidential corporate tax shelter subject to registration under this section, until the sixtieth day after the issuance of the ruling (or, if the request is withdrawn, sixty days from the date that the request is withdrawn). In the alternative, that person may register the transaction in accordance with the requirements of this section and append a statement to the Form 8264, ''Application for Registration of a Tax Shelter'', which states that the person is uncertain whether the transaction is required to be registered as a confidential corporate tax shelter, and that the Form 8264 is being filed on a protective basis.

(6) *Example*. The following example illustrates the application of paragraphs (b)(1) through (4) of this section. Assume, for purposes of the example, that the transaction is not the same as or substantially similar to any of the types of transactions that the IRS has identified as listed transactions under section 6111 and, thus, is not described in paragraph (b)(2) of this section. The example is as follows:

*Example*. (i) *Facts*. Y has designed a combination of financial instruments to be issued as a package by corporations. The financial instruments are expected to be treated as equity for financial accounting purposes and as debt giving rise to allowable interest deductions for Federal income tax purposes. Y reasonably expects to present this method of raising capital to more than one potential corporate participant. Assume that, because of the unusual nature of the combination of financial instruments, Y cannot conclude either that the transaction represented by the financial instruments is in customary commercial form or that there is a generally accepted understanding that interest deductions are available to issuers of substantially similar combinations of financial instruments. Further, assume that Y cannot reasonably determine that the IRS would have no reasonable basis to deny the deductions.

(ii) *Analysis*. The transaction represented by this combination of financial instruments is a transaction described in paragraph (b)(3) of this section. However, if Y is uncertain whether this transaction is described in paragraph (b)(3) of this section, or is otherwise uncertain whether registration is required, Y may apply for a ruling under paragraph (b)(5) of this section, and Y will not be required to register the transaction while the ruling is pending or for sixty days thereafter.

(c) *Conditions of confidentiality*—(1) *In general*. All the facts and circumstances relating to the transaction will be considered when determining whether an offer is made under conditions of confidentiality as described in section 6111(d)(2), including prior conduct of the parties. Pursuant to section 6111(d)(2)(A), if an offeree's disclosure of the tax treatment or tax structure of the transaction is limited in any manner by an express or implied understanding or agreement with or for the benefit of any tax shelter promoter, an offer is considered made under conditions of confidentiality, whether or not such understanding or agreement is legally binding. The tax treatment of a transaction is the purported or claimed Federal income tax treatment of the transaction. The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of the transaction. Pursuant to section 6111(d)(2)(B), an offer will also be considered made under conditions of confidentiality in the absence of any such understanding or agreement if any tax shelter promoter knows or has reason to know that the offeree's use or disclosure of information relating to the tax treatment or tax structure of the transaction is limited for the benefit of any person other than the offeree in any other manner, such as where the transaction is claimed to be proprietary or exclusive to the tax shelter promoter or any party other than the offeree.

(2) *Exceptions*—(i) *Securities law*. An offer is not considered made under conditions of confidentiality if disclosure of the tax treatment or tax structure of the transaction is subject to restrictions reasonably necessary to comply

with securities laws and such disclosure is not otherwise limited.

(ii) *Mergers and acquisitions.* In the case of a proposed taxable or tax-free acquisition of historic assets of a corporation (other than an investment company, as defined in section 351(e), that is not publicly traded) that constitute an active trade or business the acquirer intends to continue, or a proposed taxable or tax-free acquisition of more than 50 percent of the stock of a corporation (other than an investment company, as defined in section 351(e), that is not publicly traded) that owns historic assets used in an active trade or business the acquirer intends to continue, the transaction is not considered offered under conditions of confidentiality under paragraph (c)(1) of this section if the offeree is permitted to disclose the tax treatment and tax structure of the transaction no later than the earlier of the date of the public announcement of discussions relating to the transaction, the date of the public announcement of the transaction, or the date of the execution of an agreement (with or without conditions) to enter into the transaction. However, this exception is not available where the offeree's ability to consult any tax advisor (including a tax advisor independent from all other entities involved in the transaction) regarding the tax treatment or tax structure of the transaction is limited in any way.

(3) *Presumption.* Unless facts and circumstances indicate otherwise, an offer is not considered made under conditions of confidentiality if the tax shelter promoter provides express written authorization to each offeree permitting the offeree (and each employee, representative, or other agent of such offeree) to disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transaction, and all materials of any kind (including opinions or other tax analyses) that are provided to the offeree related to such tax treatment and tax structure. Except as provided in paragraph (c)(2) of this section, this presumption is available only in cases in which each written authorization permits the offeree to disclose the tax treatment and tax structure of the transaction immediately upon commencement of discussions with the tax shelter promoter providing the authorization and each written authorization is given no later than 30 days from the day the tax shelter promoter commenced discussions with the offeree. A transaction that is exclusive or proprietary to any party other than the offeree will not be considered offered under conditions of confidentiality if written authorization to disclose is provided to the offeree in accordance with this paragraph (c)(3) and the transaction is not otherwise confidential.

(d) *Determination of fees.* All the facts and circumstances relating to the transaction will be considered when determining the amount of fees, in the aggregate, that the tax shelter promoters may receive. For purposes of this paragraph (d), all consideration that tax shelter promoters may receive is taken into account, including contingent fees, fees in the form of equity interests, and fees the promoters may receive for other transactions as consideration for promoting the tax shelter. For example, if a tax shelter promoter may receive a fee for arranging a transaction that is a confidential corporate tax shelter and a separate fee for another transaction that is not a confidential corporate tax shelter, part or all of the fee paid with respect to the other transaction may be treated as a fee paid with respect to the confidential corporate tax shelter if the facts and circumstances indicate that the fee paid for the other transaction is in consideration for the confidential corporate tax shelter. For purposes of determining whether the tax shelter promoters may receive fees in excess of $100,000, the fees from all substantially similar transactions are considered part of the same tax shelter and must be aggregated.

(e) *Registration*—(1) *Time for registering*—(i) *In general.* A tax shelter must be registered not later than the day on which the first offering for sale of interests in the shelter occurs. An offer to participate in a confidential corporate tax shelter shall be treated as an offer for sale. If interests in a confidential corporate tax shelter were

first offered for sale on or before February 28, 2000, the first offer for sale of interests in the shelter that occurs after February 28, 2000 shall be considered the first offer for sale under this section.

(ii) *Special rule*. If a transaction becomes a confidential corporate tax shelter (*e.g.*, because of a change in the law or factual circumstances, or because the transaction becomes a listed transaction) subsequent to the first offering for sale after February 28, 2000, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section if interests are offered for sale after the transaction becomes a confidential corporate tax shelter. The transaction must be registered by the next offering for sale of interests in the shelter. If, subsequent to the first offering for sale, a transaction becomes a confidential corporate tax shelter because the transaction becomes a listed transaction on or after February 28, 2003, and the transaction was not previously required to be registered as a confidential corporate tax shelter under this section, the transaction must be registered under this section within 60 days after the transaction becomes a listed transaction/confidential corporate tax shelter if any interests were offered for sale within the previous six years.

(2) *Procedures for registering*. To register a confidential corporate tax shelter, the person responsible for registering the tax shelter must file Form 8264, ''Application for Registration of a Tax Shelter''. (Form 8264 is also used to register tax shelters defined in section 6111(c).) Similar to the treatment provided under Q&A-22 and Q&A-48 of § 301.6111–1T, transactions involving similar business assets and similar plans or arrangements that are offered to corporate taxpayers by the same person or related persons are aggregated and considered part of a single tax shelter. However, in contrast with the requirement of Q&A-48 of § 301.6111–1T, the tax shelter promoter may file a single Form 8264 with respect to any such aggregated tax shelter, provided an amended Form 8264 is filed to reflect any material changes and to include any additional or revised written materials presented in connection with an offer to participate in the shelter. Furthermore, all transactions that are part of the same tax shelter and that are to be carried out by the same corporate participant (or one or more other members of the same affiliated group within the meaning of section 1504) must be registered on the same Form 8264.

(f) *Definition of tax shelter promoter*. For purposes of section 6111(d)(2) and this section, the term *tax shelter promoter* includes a tax shelter organizer and any other person who participates in the organization, management or sale of a tax shelter (as those persons are described in section 6111(e)(1) and § 301.6111–1T (Q&A-26 through Q&A-33) or any person related (within the meaning of section 267 or 707) to such tax shelter organizer or such other person.

(g) *Person required to register*—(1) *Tax shelter promoters*. The rules in section 6111 (a) and (e) and § 301.6111–1T (Q&A-34 through Q&A-39) determine who is required to register a confidential corporate tax shelter. A promoter of a confidential corporate tax shelter must register the tax shelter only if it is a person required to register under the rules in section 6111(a) and (e) and § 301.6111–1T (Q&A-34 through Q&A-39).

(2) *Persons who discuss the transaction; all promoters are foreign persons*—(i) *In general*. If all of the tax shelter promoters of a confidential corporate tax shelter are foreign persons, any person who discusses participation in the transaction must register the shelter under this section within 90 days after beginning such discussions.

(ii) *Exceptions*. Registration by a person discussing participation in a transaction is not required if either—

(A) The person does not participate, directly or indirectly, in the shelter and notifies the tax shelter promoter in writing, within 90 days of beginning such discussions, that the person will not participate; or

(B) Within 90 days after beginning such discussions, the person obtains and reasonably relies on both—

(*1*) A written statement from one of the tax shelter promoters that such

promoter has registered the tax shelter under this section; and

(*2*) A copy of the registration.

(iii) *Determination of foreign status.* For purposes of this paragraph (g)(2), a person must presume that all tax shelter promoters are foreign persons unless the person either—

(A) Discusses participation in the tax shelter with a promoter that is a United States person; or

(B) Obtains and reasonably relies on a written statement from one of the promoters that at least one of the promoters is a United States person.

(iv) *Discussion.* Discussing participation in a transaction includes discussing such participation with any person that conveys the tax shelter promoter's proposal. For purposes of this paragraph (g)(2), any person that participates directly or indirectly in a transaction will be treated as having discussed participation in the transaction not later than the date of the agreement to participate. Thus, a tax shelter participant will be treated as having discussed participation in the transaction even if all discussions were conducted by an intermediary and the agreement to participate was made indirectly through another person acting on the participant's behalf (for example, through an intermediary empowered to commit the participant to participate in the shelter).

(v) *Special rule for controlled entities.* A person (first person) will be treated as participating indirectly in a confidential corporate tax shelter if a foreign person controlled by the first person participates in the shelter, and a significant purpose of the shelter is the avoidance or evasion of the first person's Federal income tax. For purposes of this paragraph (g)(2)(v), control of a foreign corporation or partnership will be determined under the rules of section 6038(e)(2) and (3), except that such section shall be applied by substituting ''10'' for ''50'' each place it appears and ''at least'' for ''more than'' each place it appears. In addition, section 6038(e)(2) shall be applied for these purposes without regard to the constructive ownership rules of section 318 and by treating stock as owned if it is owned directly or indirectly. Section 6038(e)(3) shall be applied for these purposes without regard to the last sentence of section 6038(e)(3)(B). Any beneficiary with a 10 percent or more interest in a foreign trust or estate shall be treated as controlling that trust or estate for purposes of this paragraph (g)(2)(v).

(vi) *Other rules.* (A) For purposes of the registration requirements under section 6111(d)(3), it is presumed that the tax shelter promoters will receive fees in excess of $100,000 in the aggregate unless the person responsible for registering the tax shelter can show otherwise.

(B) Any person treated as a tax shelter promoter under section 6111(d) solely by reason of being related (within the meaning of section 267 or 707) to a foreign promoter will be treated as a foreign promoter for purposes of this paragraph (g)(2).

(h) *Effective dates.* This section applies to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000. If an interest is sold after February 28, 2000, it is treated as offered for sale after February 28, 2000, unless the sale was pursuant to a written binding contract entered into on or before February 28, 2000. However, paragraphs (a) through (g) of this section apply to confidential corporate tax shelters in which any interests are offered for sale on or after February 28, 2003, and to transactions described in paragraph (e)(1)(ii) of this section. The rules that apply to confidential corporate tax shelters in which any interests are offered for sale after February 28, 2000, and before February 28, 2003, are contained in § 301.6111–2T in effect prior to February 28, 2003 (*see* 26 CFR part 301 revised as of April 1, 2002, 2002–28 I.R.B 91, and 2002–45 I.R.B. 823 (*see* § 601.601(d)(2) of this chapter)).

[T.D. 9046, 68 FR 10170, Mar. 4, 2003]

### § 301.6111–3T Disclosure of reportable transactions (temporary).

(a) through (g) [Reserved]

(h) *Rulings.* If a potential material advisor requests a ruling as to whether a specific transaction is a reportable transaction on or before the date that disclosure would otherwise be required under this section, the Commissioner in his discretion may determine that

the submission satisfies the disclosure rules under this section for that transaction if the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. The potential obligation of the person to disclose the transaction under this section (or to maintain or furnish the list under § 301.6112–1) will not be suspended during the period that the ruling request is pending.

(i) *Effective date*—(1) [Reserved]

(2) *Tolling provision*. Paragraph (h) of this section applies to ruling requests received on or after November 1, 2006. The applicability of this section expires on or before November 2, 2009.

[T.D. 9295, 71 FR 64460, Nov. 2, 2006]

### § 301.6112–1 Requirement to prepare, maintain, and furnish lists with respect to potentially abusive tax shelters.

(a) *In general*. Each organizer and seller, as described in paragraph (c) of this section, of a transaction that is a potentially abusive tax shelter, as described in paragraph (b) of this section, shall prepare and maintain a list of persons in accordance with paragraph (e) of this section and upon request shall furnish such list to the Internal Revenue Service (IRS) in accordance with paragraph (g) of this section.

(b) *Potentially abusive tax shelters*. For purposes of this section, a potentially abusive tax shelter is any transaction that is a section 6111 tax shelter, as described in paragraph (b)(1) of this section, or that has a potential for tax avoidance or evasion, as described in paragraph (b)(2) of this section. The term *transaction* includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan.

(1) *Transaction that is a section 6111 tax shelter*. A section 6111 tax shelter is any transaction that is required to be registered with the IRS under section 6111, regardless of whether that tax shelter is properly registered pursuant to section 6111.

(2) *Transaction that has a potential for tax avoidance or evasion*—(i) *In general*. A transaction that has a potential for tax avoidance or evasion includes—

(A) Any listed transaction as defined in § 1.6011–4(b)(2) of this chapter that is subject to disclosure under §§ 1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter;

(B) Any transaction that a potential material advisor (at the time the transaction is entered into or an interest is acquired) knows is or reasonably expects will become a reportable transaction under § 1.6011–4(b)(3) through (7) of this chapter; and

(C) Any interest in a type of transaction that is transferred if the transferor knows or reasonably expects that the transferee will sell or transfer an interest in that type of transaction to another transferee (subsequent participant), and the type of transaction would be a listed transaction under §§ 1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter, or a transaction described in § 1.6011–4(b)(3) through (7) of this chapter assuming that the relevant thresholds are met.

(ii) The determination of whether a transaction has the potential for tax avoidance or evasion does not depend upon whether the transaction is properly disclosed pursuant to §§ 1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter.

(iii) If a transaction becomes a potentially abusive tax shelter on or after February 28, 2003, because it is a listed transaction as defined in § 1.6011–4 of this chapter and is subject to disclosure under § 1.6011–4 of this chapter this section shall apply with respect to any such transaction entered into or any interest acquired therein after February 28, 2000 (including interests acquired before the transaction becomes a listed transaction). If a transaction becomes a listed transaction as defined in § 1.6011–4 of this chapter and is subject to disclosure under §§ 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter, this section shall apply with respect to any such transaction entered into or any interest acquired therein on or after January 1, 2003 (including interests acquired before the transaction becomes a listed transaction).

(c) *Organizer and seller*—(1) *In general.* A person is an organizer of, or a seller of an interest in, a transaction that is a potentially abusive tax shelter if that person is a material advisor, as described in paragraph (c)(2) of this section, with respect to that transaction.

(2) *Material advisor*—(i) *In general.* A person is a material advisor with respect to a transaction that is a potentially abusive tax shelter if the person is required to register the transaction under section 6111; or the person receives or expects to receive at least a minimum fee (as defined in paragraph (c)(3) of this section) with respect to the transaction, and the person makes a tax statement (as defined in paragraph (c)(2)(iii) of this section) to or for the benefit of—

(A) A taxpayer who is required to disclose the transaction under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter because the transaction is a listed transaction or who would have been required to disclose a listed transaction under §§1.6011–4, 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4, or 56.6011–4 of this chapter if the transaction had become a listed transaction within the statute of limitations period in §1.6011–4(e)(2);

(B) A taxpayer who the potential material advisor (at the time the transaction is entered into) knows is or reasonably expects to be required to disclose the transaction under §1.6011–4 because the transaction is or is reasonably expected to become a transaction described in §1.6011–4(b)(3) through (7);

(C) A person who is required to register the transaction under section 6111;

(D) A person who purchases (or otherwise acquires) an interest in a section 6111 tax shelter; or

(E) A transferee of an interest if the interest is described in paragraph (b)(2)(i)(C) of this section.

(ii) *Special rules.* A material advisor generally does not include a person who makes a tax statement solely in the person's capacity as an employee, shareholder, partner or agent of another person. Any tax statement made by that person will be attributed to that person's employer, corporation, partnership or principal. However, a person shall be treated as a material advisor if that person forms or avails of an entity with the purpose of avoiding the rules of section 6111 or 6112 or the penalties under section 6707 or 6708.

(iii) *Tax statement*—(A) *In general.* A tax statement means any statement, oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction as defined in §1.6011–4(b)(2) through (7) or a tax shelter as described in section 6111.

(B) *Confidential transactions.* A tax statement relates to an aspect of a transaction that causes it to be a confidential transaction if the statement concerns a tax benefit related to the transaction and either the taxpayer's disclosure of the tax treatment or tax structure of the transaction is limited in the manner described in §1.6011–4(b)(3) of this chapter by or for the benefit of the person making the statement, or the person making the statement knows the taxpayer's disclosure of the tax structure or tax aspects of the transaction is limited in the manner described in §1.6011–4(b)(3) of this chapter.

(C) *Transactions with contractual protection.* A tax statement relates to an aspect of a transaction that causes it to be a transaction with contractual protection if the statement concerns a tax benefit related to the transaction and either—

(*1*) The taxpayer has the right to a full or partial refund of fees paid to the person making the statement or if these fees are contingent in the manner described in §1.6011–4(b)(4) of this chapter; or

(*2*) The person making the statement knows that the taxpayer has the right to a full or partial refund of fees (as described in §1.6011–4(b)(4)(ii)) paid to another if all or part of the intended tax consequences from the transaction are not sustained or that fees (as described in §1.6011–4(b)(4)(ii)) paid by the taxpayer to another are contingent on the taxpayer's realization of tax benefits from the transaction in the manner described in §1.6011–4(b)(4) of this chapter.

(D) *Loss transactions.* A tax statement relates to an aspect of a transaction that causes it to be a loss transaction if the statement concerns an item that

gives rise to a loss described in § 1.6011–4(b)(5) of this chapter.

(E) *Transactions with a significant book-tax difference.* A tax statement relates to an aspect of a transaction that causes it to be a transaction with a significant book-tax difference if the statement concerns an item that gives rise to a book-tax difference described in § 1.6011–4(b)(6) of this chapter.

(F) *Transactions involving a brief asset holding period.* A tax statement relates to an aspect of a transaction involving a brief asset holding period if the statement concerns an item that gives rise to a tax credit described in § 1.6011–4(b)(7) of this chapter.

(iv) *Exceptions*—(A) *Post-filing advice.* A person will not be considered to be a material advisor with respect to a transaction if that person does not make or provide a tax statement regarding the transaction until after the first tax return reflecting tax benefit(s) of the transaction is filed with the IRS.

(B) *Publicly-filed statements.* A tax statement with respect to a transaction that includes only information about the transaction contained in publicly-available documents filed with the Securities and Exchange Commission no later than the close of the transaction will not be considered a tax statement to or for the benefit of a person described in paragraph (c)(2)(i)(A) through (E) of this section.

(3) *Minimum fee*—(i) *In general.* The minimum fee is $250,000 for a transaction if every person to whom or for whose benefit the potential material advisor makes or provides a tax statement with respect to the transaction is a corporation. The minimum fee is $50,000 for a transaction if any person to whom or for whose benefit a potential material advisor makes or provides a tax statement with respect to the transaction is a partnership or trust, unless all owners or beneficiaries are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is $250,000. For all other transactions, the minimum fee is $50,000. For purposes of this paragraph (c)(3)(i) a corporation means a corporation other than an S corporation.

(ii) *Listed transactions.* For listed transactions described in §§ 1.6011–4(b)(2), 20.6011–4(a), 25.6011–4(a), 31.6011–4(a), 53.6011–4(a), 54.6011–4(a), or 56.6011–4(a) of this chapter, the minimum fees in paragraph (c)(3)(i) of this section are reduced from $250,000 to $25,000 and from $50,000 to $10,000.

(iii) *Determination of fees.* In determining whether the minimum fee threshold is satisfied, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction that is a potentially abusive tax shelter are taken into account. For purposes of this section, the minimum fee threshold must be met independently for each transaction that is a potentially abusive tax shelter and aggregation of fees among transactions is not required. Fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable in light of all of the facts and circumstances. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property. The IRS will scrutinize carefully all of the facts and circumstances in determining whether consideration received in connection with a transaction that is a potentially abusive tax shelter constitutes fees for purposes of this section.

(d) *Definitions.* For purposes of this section, the following terms are defined as follows:

(1) *Interest.* The term *interest* includes, but is not limited to, any right to participate in a transaction by reason of a partnership interest, a shareholder interest, or a beneficial interest in a trust; any interest in property (including a leasehold interest); the entry into a leasing arrangement or a consulting, management or other agreement for the performance of services;

or any interest in any other investment, entity, plan, or arrangement. The term *interest* includes any interest that purportedly entitles the direct or indirect holder of the *interest* to any tax consequence (including, but not limited to, a deduction, loss, or adjustment to tax basis in an asset) arising from the transaction. An *interest* also includes information or services regarding the organization or structure of the transaction if the information or services are relevant to the potential tax consequences of the transaction.

(2) *Substantially similar*. The term *substantially similar* includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term *substantially similar* must be broadly construed in favor of list maintenance.

(3) *Person*. The term *person* means any person described in section 7701(a)(1), including an affiliated group of corporations that join in the filing of a consolidated return under section 1501.

(4) *Related party*. A person is a related party with respect to another person if such person bears a relationship to such other person described in section 267 or 707.

(5) *Tax*. For purposes of this section, the term *tax* means Federal tax.

(6) *Tax benefit*. A tax benefit includes deductions, exclusions from gross income, nonrecognition of gain, tax credits, adjustments (or the absence of adjustments) to the basis of property, status as an entity exempt from Federal income taxation, and any other tax consequences that may reduce a taxpayer's Federal tax liability by affecting the amount, timing, character, or source of any item of income, gain, expense, loss, or credit.

(7) *Tax return*. For purposes of this section, the term *tax return* means a Federal tax return and a Federal information return.

(8) *Tax treatment*. The tax treatment of a transaction is the purported or claimed Federal tax treatment of the transaction.

(9) *Tax structure*. The tax structure of a transaction is any fact that may be relevant to understanding the purported or claimed Federal tax treatment of the transaction.

(e) *Preparation and maintenance of lists*—(1) *In general*. A separate list of persons must be prepared and maintained for each transaction that is a potentially abusive tax shelter. However, one list must be maintained for substantially similar transactions that are potentially abusive tax shelters. A list may be maintained on paper, card file, magnetic media, or in any other form, provided the method of maintaining the list enables the IRS to determine without undue delay or difficulty the information required in paragraph (e)(3) of this section.

(2) *Persons required to be included on lists*—(i) *In general*. A material advisor is required to list each person described in paragraphs (c)(2)(i)(A) through (D) of this section to whom (or for whose benefit) the material advisor makes or provides a tax statement with respect to a transaction that is a potentially abusive tax shelter. However, a material advisor is not required to list a person described in paragraph (c)(2)(i)(A) of this section if that person entered into, or acquired an interest in, a listed transaction more than 6 years before the transaction was listed.

(ii) *Subsequent participant*. A material advisor must list any subsequent participant if the material advisor knows the identity of that subsequent participant, and the material advisor knows that the subsequent participant either entered into a transaction that must be disclosed under § 1.6011–4(b) of this chapter or sold or transferred to another subsequent participant an interest in that type of transaction.

(iii) *Section 6111 registrant*. A material advisor required to register a transaction under section 6111 also must list each person who purchases (or otherwise acquires) an interest in the transaction.

(iv) *Examples*. The following examples illustrate the provisions of this section:

*Example 1.* An investment firm provides a tax statement as to a type of transaction to three taxpayers: Corporation X, Corporation Y, and Corporation Z (all of which are C corporations). Each taxpayer agrees to pay the investment firm $300,000 in connection with the transaction, and each taxpayer engages in a separate transaction (transaction X, transaction Y, and transaction Z, respectively). At the time the transactions are entered into, the investment firm knows or reasonably expects that the transactions will result in a single taxable year loss of $9 million for Corporation X, $15 million for Corporation Y, and $12 million for Corporation Z. The transactions do not satisfy the definitions of a reportable transaction under §1.6011–4(b)(2), (3), (4), (6) or (7) of this chapter.

(i) *Transaction X.* At the time transaction X is entered into, the investment firm does not know or reasonably expect that the transaction is a reportable transaction, because the $9 million loss associated solely with transaction X does not satisfy the $10 million threshold under §1.6011–4(b)(5) of this chapter (relating to loss transactions). Accordingly, transaction X is not a potentially abusive tax shelter. The investment firm is not required to maintain a list with respect to transaction X.

(ii) *Transactions Y and Z.* The investment firm satisfies the requirements for being a material advisor with respect to transaction Y and transaction Z. First, both of the transactions are potentially abusive tax shelters with respect to the investment firm because the investment firm knows, or reasonably expects, at the time the transactions are entered into, that the losses for each of Corporation Y and Z will exceed the $10 million threshold and, thus, the investment firm knows or reasonably expects that the transactions are or will become reportable transactions under §1.6011–4(b)(5) of this chapter (relating to loss transactions). Second, the investment firm provides a tax statement to Corporation Y and Corporation Z as to the transactions. Third, the investment firm receives $300,000 in connection with each transaction (viewed independently of each other and without regard to any other transaction), which exceeds the minimum fee with respect to each transaction ($250,000). Accordingly, the investment firm must maintain a list with respect to transactions Y and Z. Because transactions Y and Z are based on the same or similar tax strategy, transactions Y and Z are substantially similar transactions, and the investment firm must keep one list with respect to both transactions. The list must contain information about Corporation Y and Corporation Z (see paragraph (e)(2)(i) of this section).

*Example 2.* (i) Corporation M provides a tax statement to Corporation N (a C corporation) describing the potential loss from a type of transaction. Corporation N pays Corporation M $300,000 for the information about that type of transaction. Corporation M knows that Corporation N will sell the information to Taxpayer O (a C corporation) and Taxpayer P (an individual), and that Taxpayer O and Taxpayer P will participate in transactions of the type that Corporation M described to Corporation N. Corporation N, in turn, provides a tax statement as to that type of transaction to Taxpayer O and Taxpayer P. Each taxpayer agrees to pay Corporation N $250,000 in connection with its transaction, and each taxpayer engages in a separate transaction (transaction O and transaction P, respectively). At the time the transactions are entered into, both Corporation M and Corporation N know that the transactions are or will become reportable transactions under §1.6011–4(b)(5) of this chapter.

(ii) Corporation N is a material advisor with respect to transaction O and transaction P. First, at the time the transactions are entered into, Corporation N knows that the transactions are reportable transactions. Thus, the transactions are potentially abusive tax shelters. Second, Corporation N provides a tax statement to Taxpayer O and Taxpayer P as to the transactions. Third, Corporation N receives $250,000 in connection with transaction O and transaction P (each viewed independently of any other transaction), which equals or exceeds the minimum fee for those transactions ($50,000 and $250,000, respectively). Accordingly, Corporation N must keep a list with respect to transaction O and transaction P. The list must contain information about Taxpayer P (see paragraph (e)(2)(i) of this section). Because transactions O and P are based on the same or similar tax strategy, transactions O and P are substantially similar transactions, and Corporation N must keep one list with respect to both transactions. The list must contain information about Taxpayer O and Taxpayer P (see (e)(2)(i) of this section).

(iii) Corporation M's tax statement to Corporation N constitutes a potentially abusive tax shelter under paragraph (b)(2)(C) of this section. Corporation M transferred information to Corporation N regarding the potential tax consequences of a type of transaction that, if entered into and if the relevant thresholds are met, would be a reportable transaction described in §1.6011–4(b)(5). In addition, Corporation M knew that Corporation N would transfer that information to another person. Corporation M is a material advisor with respect to that potentially abusive tax shelter. Corporation M made a tax statement to Corporation N and Corporation M received $300,000 in connection with the potentially abusive tax shelter, which exceeds the minimum fee for that transaction ($250,000). Accordingly, Corporation M

must keep a list with respect to that potentially abusive tax shelter. The list must contain information with respect to Corporation N (see paragraph (e)(2)(i) of this section). The list must also contain information about Taxpayer O and Taxpayer P because Corporation M knows the identity of Taxpayer O and Taxpayer P, and Corporation M knows that Taxpayer O and Taxpayer P entered into transaction O and transaction P, respectively (see paragraph (e)(2)(ii) of this section).

(3) *Contents*—(i) *In general.* Each list must contain the following information—

(A) The name of each transaction that is a potentially abusive tax shelter and the registration number, if any, obtained under section 6111;

(B) The TIN (as defined in section 7701(a)(41)), if any, of each transaction;

(C) The name, address, and TIN of each person required to be on the list;

(D) If applicable, the number of units (*i.e.*, percentage of profits, number of shares, etc.) acquired by each person required to be included on the list, if known by the material advisor;

(E) The date on which each person required to be included on the list entered into each transaction, if known by the material advisor;

(F) The amount invested in each transaction by each person required to be included on the list, if known by the material advisor;

(G) A detailed description of each transaction that describes both the tax structure and its expected tax treatment;

(H) A summary or schedule of the tax treatment that each person is intended or expected to derive from participation in each transaction, if known by the material advisor;

(I) Copies of any additional written materials, including tax analyses or opinions, relating to each transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired or may acquire an interest in the transactions, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor. However, a material advisor is not required to retain earlier drafts of a document provided the material advisor retains a copy of the final document (or, if there is no final document, the most recent draft of the document) and the final document (or most recent draft) contains all the information in the earlier drafts of such document that is material to an understanding of the purported tax treatment or the tax structure of the transaction; and

(J) For each person required to be on the list, if the interest in the transaction was not acquired from the material advisor maintaining the list, the name of the person from whom the interest was acquired.

(ii) [Reserved]

(f) *Retention of lists.* Each material advisor must maintain the list described in paragraph (e) of this section for seven years following the earlier of the date on which the material advisor last made a tax statement relating to the transaction, or the date the transaction was entered into, if known. If the material advisor required to prepare, maintain, and furnish the list is a corporation, partnership, or other entity (entity) that has dissolved or liquidated before completion of the seven-year period, the person responsible under state law for winding up the affairs of the entity must prepare, maintain and furnish the list on behalf of the entity, unless the entity submits the list to the Office of Tax Shelter Analysis (OTSA) within 60 days after the dissolution or liquidation. If state law does not specify any person as responsible for winding up the affairs, then each of the directors of the corporation, the general partners of the partnership, or the trustees, owners, or members of the entity are responsible for preparing, maintaining and furnishing the list on behalf of the entity, unless the entity submits the list to the Office of Tax Shelter Analysis (OTSA) within 60 days after the dissolution or liquidation. The responsible person must also provide notice to OTSA of such dissolution or liquidation within 60 days after the dissolution or liquidation. The list and the notice provided to OTSA may be sent to: IRS LM:PFTG:OTSA, Large & Mid-Size Business Division, 1111 Constitution Ave., NW., Washington, DC 20224, or to such other address as provided by the Commissioner.

(g) *Furnishing of lists*—(1) *In general.* Each material advisor and person responsible for maintaining a list of persons must, upon written request by the IRS, furnish the list to the IRS within 20 days from the day on which the request is provided. The request is not required to be in the form of an administrative summons. The list may be furnished to the IRS on paper, card file, magnetic media, or in any other form, provided the method of furnishing the list enables the IRS to determine without undue delay or difficulty the information required in paragraph (e)(3) of this section.

(2) *Claims of privilege*—(i) In any case in which an attorney or federally authorized tax practitioner within the meaning of section 7525 is required to maintain a list with respect to a transaction that is a potentially abusive tax shelter, and that person has a reasonable belief that information specified in paragraph (e)(3)(i)(I) required to be furnished under this paragraph (g) is protected by the attorney-client privilege or by the confidentiality privilege of section 7525(a), the attorney or federally authorized tax practitioner must still maintain the list of persons pursuant to the requirements of this section. When the list is requested by the IRS, as provided in paragraph (g)(1) of this section, the material advisor may assert a privilege claim as to the information specified in paragraph (e)(3)(i)(I) subject to the requirements of this paragraph (g)(2).

(ii) The claimed privilege must be supported by a statement that is signed by the attorney or federally authorized tax practitioner under penalties of perjury, must identify and describe (as set forth in this paragraph (g)(2)) the nature of each document that is not produced which will allow the IRS to determine the applicability of the privilege or protection claimed, without revealing the privileged information itself, and must include the following representations with respect to each document for which the privilege is claimed—

(A) Specifically represent that the information was a confidential practitioner-client communication and, in the case of information which a federally authorized tax practitioner claims is privileged under section 7525, that the omitted information was not part of tax advice that constituted the promotion of the direct or indirect participation of a corporation in any tax shelter (as defined in section 6662(d)(2)(C)(iii)); and

(B) Specifically represent that to the best of such person's knowledge and belief, that the person and all others in possession of the omitted information did not disclose the omitted information to any person whose receipt of such information would result in a waiver of the privilege.

(iii) Identification and description of a document includes, but is not limited to—

(A) The date appearing on such document or, if it has no date, the date or approximate date that such document was created;

(B) The general nature, description and purpose of such document and the identity of the person who signed such document, and, if it was not signed, the identity of each person who prepared it; and

(C) The identity of each person to whom such document was addressed and the identity of each person, other than such addressee, to whom such document, or a copy thereof, was given or sent.

(h) *Designation agreements.* If more than one material advisor is required to maintain a list of persons, in accordance with paragraph (e) of this section, for a potentially abusive tax shelter, the material advisors may designate by written agreement a single material advisor to maintain the list or a portion of the list. The designation of one material advisor to maintain the list does not relieve the other material advisors from their obligation to furnish the list to the IRS in accordance with paragraph (g)(1) of this section, if the designated material advisor fails to furnish the list to the IRS in a timely manner. A material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete.

(i) [Reserved] For further guidance, see § 301.6111–3T(h).

(j) *Effective date.* This section applies to any transaction that is a potentially abusive tax shelter entered into, or any interest acquired therein, on or after February 28, 2003. However, this section shall apply to any transaction that was entered into, or in which an interest was acquired, after February 28, 2000, if the transaction becomes a potentially abusive tax shelter on or after February 28, 2003 because it is a listed transaction as defined in § 1.6011–4 of this chapter, and is subject to disclosure under § 1.6011–4 of this chapter. This section also shall apply to any transaction that was entered into, or in which an interest was acquired, after January 1, 2003, if the transaction becomes a listed transaction as defined in § 1.6011–4 of this chapter and is subject to disclosure under §§ 20.6011–4, 25.6011–4, 31.6011–4, 53.6011–4, 54.6011–4 or 56.6011–4 of this chapter. The rules in § 301.6112–1T as contained in 2002–45 I.R.B. 826 (see § 601.601(d)(2) of this chapter) apply only to a transaction entered into, or an interest acquired therein, on or after January 1, 2003, and before February 28, 2003, if the transaction is a listed transaction as defined in § 1.6011–4 of this chapter or a section 6111 tax shelter. Otherwise, the rules that apply with respect to any transaction that is a potentially abusive tax shelter entered into, or any interest acquired therein, before January 1, 2003, are contained in § 301.6112–1T in effect prior to January 1, 2003 (see 26 CFR part 301 revised as of April 1, 2002). Additionally, the IRS will not ask to inspect any list for a potentially abusive tax shelter that is entered into, or any interest acquired therein, on or after January 1, 2003, until June 1, 2003, unless the potentially abusive tax shelter is a listed transaction as defined in § 1.6011–4 of this chapter or a transaction that is a section 6111 tax shelter.

[T.D. 9046, 68 FR 10173, Mar. 4, 2003, as amended by T.D. 9108, 68 FR 75130, Dec. 30, 2003; T.D. 9295, 71 FR 64460, Nov. 2, 2006]

### § 301.6114–1 Treaty-based return positions.

(a) *Reporting requirement*—(1) *General rule.* (i) Except as provided in paragraph (c) of this section, if a taxpayer takes a return position that any treaty of the United States (including, but not limited to, an income tax treaty, estate and gift tax treaty, or friendship, commerce and navigation treaty) overrules or modifies any provision of the Internal Revenue Code and thereby effects (or potentially effects) a reduction of any tax incurred as any time, the taxpayer shall disclose such return position on a statement (in the form required in paragraph (d) of this section) attached to such return.

(ii) If a return of tax would not otherwise be required to be filed, a return must nevertheless be filed for purposes of making the disclosure required by this section. For this purpose, such return need include only the taxpayer's name, address, taxpayer identifying number, and be signed under penalties of perjury (as well as the subject disclosure). Also, the taxpayer's taxable year shall be deemed to be the calendar year (unless the taxpayer has previously established, or timely chooses for this purpose to establish, a different taxable year). In the case of a disclosable return position relating solely to income subject to withholding (as defined in § 1.1441–2(a) of this chapter), however, the statement required to be filed in paragraph (d) of this section must instead be filed at times and in accordance with procedures published by the Internal Revenue Service.

(2) *Application.* (i) A taxpayer is considered to adopt a ''return position'' when the taxpayer determines its tax liability with respect to a particular item of income, deduction or credit. A taxpayer may be considered to adopt a return position whether or not a return is actually filed. To determine whether a return position is a ''treaty-based return position'' so that reporting is required under this paragraph (a), the taxpayer must compare:

(A) The tax liability (including credits, carrybacks, carryovers, and other tax consequences or attributes for the current year as well as for any other affected tax years) to be reported on a return of the taxpayer, and

(B) The tax liability (including such credits, carrybacks, carryovers, and other tax consequences or attributes)

that would be reported if the relevant treaty provision did not exist.

If there is a difference (or potential difference) in these two amounts, the position taken on a return is a treaty-based return position that must be reported.

(ii) In the event a taxpayer's return position is based on a conclusion that a treaty provision is consistent with a Code provision, but the effect of the treaty provision is to alter the scope of the Code provision from the scope that it would have in the absence of the treaty, then the return position is a treaty-based return position that must be reported.

(iii) A return position is a treaty-based return position unless the taxpayer's conclusion that no reporting is required under paragraphs (a)(2) (i) and (ii) of this section has a substantial probability of successful defense if challenged.

(3) *Examples*. The application of section 6114 and paragraph (a)(2) of this section may be illustrated by the following examples:

*Example 1:* X, a Country A corporation, claims the benefit of a provision of the income tax treaty between the United States and Country A that modifies a provision of the Code. This position does not result in a change of X's U.S. tax liability for the current tax year but does give rise to, or increases, a net operating loss which may be carried back (or forward) such that X's tax liability in the carryback (or forward) year may be affected by the position taken by X in the current year. X must disclose this treaty-based return position with its tax return for the current tax year.

*Example 2:* Z, a domestic corporation, is engaged in a trade or business in Country B. Country B imposes a tax on the income from certain of Z's petroleum activities at a rate significantly greater than the rate applicable to income from other activities. Z claims a foreign tax credit for this tax on its tax return. The tax imposed on Z is specifically listed as a creditable tax in the income tax treaty between the United States and Country B; however, there is no specific authority that such tax would otherwise be a creditable tax for U.S. purposes under sections 901 or 903 of the Code. Therefore, in the absence of the treaty, the creditability of this petroleum tax would lack a substantial probability of successful defense if challenged, and Z must disclose this treaty-based return position (see also paragraph (b)(7) of this section).

(b) *Reporting specifically required*. Reporting is required under this section except as expressly waived under paragraph (c) of this section. The following list is not a list of all positions for which reporting is required under this section but is a list of particular positions for which reporting is specifically required. These positions are as follows:

(1) That a nondiscrimination provision of a treaty precludes the application of any otherwise applicable Code provision, other than with respect to the making of or the effect of an election under section 897(i);

(2) That a treaty reduces or modifies the taxation of gain or loss from the disposition of a United States real property interest;

(3) That a treaty exempts a foreign corporation from (or reduces the amount of tax with respect to) the branch profits tax (section 884(a)) or the tax on excess interest (section 884(f)(1)(B));

(4) That, notwithstanding paragraph (c)(1)(i) of this section,

(i) A treaty exempts from tax, or reduces the rate of tax on, interest or dividends paid by a foreign corporation that are from sources within the United States by reason of section 861(a)(2)(B) or section 884(f)(1)(A); or

(ii) A treaty exempts from tax, or reduces the rate of tax on, fixed or determinable annual or periodical income subject to withholding under section 1441 or 1442 that a foreign person receives from a U.S. person, but only if described in paragraphs (b)(4)(ii)(A) and (B) of this section, or in paragraph (b)(4)(ii)(C) or (D) of this section as follows—

(A) the payment is not properly reported to the Service on a Form 1042S; and

(B) The foreign person is any of the following:

(*1*) A controlled foreign corporation (as defined in section 957) in which the U.S. person is a U.S. shareholder within the meaning of section 951(b);

(*2*) A foreign corporation that is controlled within the meaning of section 6038 by the U.S. person;

(*3*) A foreign shareholder of the U.S. person that, in the case of tax years beginning on or before July 10, 1989, is

controlled within the meaning of section 6038A by the foreign shareholder, or, in the case of tax years beginning after July 10, 1989, is 25-percent owned within the meaning of section 6038A by the foreign shareholder; or

(*4*) With respect to payments made after October 10, 1990, a foreign related party, as defined in section 6038A (c)(2)(B), the U.S. person; or

(C) For payments made after December 31, 2000, with respect to a treaty that contains a limitation on benefits article, that—

(*1*) The treaty exempts from tax, or reduces the rate of tax on income subject to withholding (as defined in § 1.1441–2(a) of this chapter) that is received by a foreign person (other than a State, including a political subdivision or local authority) that is the beneficial owner of the income and the beneficial owner is related to the person obligated to pay the income within the meaning of sections 267(b) and 707(b), and the income exceeds $500,000; and

(*2*) A foreign person (other than an individual or a State, including a political subdivision or local authority) meets the requirements of the limitation on benefits article of the treaty; or

(D) For payments made after December 31, 2000, with respect to a treaty that imposes any other conditions for the entitlement of treaty benefits, for example as a part of the interest, dividends, or royalty article, that such conditions are met;

(5) That, notwithstanding paragraph (c)(1)(i) of this section, under a treaty—

(i) Income that is effectively connected with a U.S. trade or business of a foreign corporation or a nonresident alien is not attributable to a permanent establishment or a fixed base of operations in the United States and, thus, is not subject to taxation on a net basis, or that

(ii) Expenses are allowable in determining net business income so attributable, notwithstanding an inconsistent provision of the Code;

(6) Except as provided in paragraph (c)(1)(iv) of this section, that a treaty alters the source of any item of income or deduction;

(7) That a treaty grants a credit for a specific foreign tax for which a foreign tax credit would not be allowed by the Code; or

(8) For returns relating to taxable years for which the due date for filing returns (without extensions) is after December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

(c) *Reporting requirement waived.* (1) Pursuant to the authority contained in section 6114 (b), reporting is waived under this section with respect to any of the following return positions taken by the taxpayer:

(i) For amounts received on or after January 1, 2001, reporting under paragraph (b)(4)(ii) is waived, unless reporting is specifically required under paragraphs (b)(4)(ii)(A) and (B) of this section, paragraph (b)(4)(ii)(C) of this section, or paragraph (b)(4)(ii)(D) of this section;

(ii) Notwithstanding paragraph (b)(4) or (5) of this section, that a treaty has reduced the rate of withholding tax otherwise applicable to a particular type of fixed or determinable annual or periodical income subject to withholding under section 1441 or 1442, such as dividends, interest, rents, or royalties to the extent such income is beneficially owned by an individual or a State (including a political subdivision or local authority);

(iii) For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

(iv) That a treaty reduces or modifies the taxation of income derived from dependent personal services, pensions, annuities, social security and other public pensions, or income derived by artistes, athletes, students, trainees or teachers;

(v) That income of an individual is resourced (for purposes of applying the foreign tax credit limitation) under a treaty provision relating to elimination of double taxation;

(vi) That a nondiscrimination provision of a treaty allows the making of an election under section 897(i);

(vii) That a Social Security Totalization Agreement or a Diplomatic or Consular Agreement reduces or modifies the taxation of income derived by the taxpayer; or

(viii) That a treaty exempts the taxpayer from the excise tax imposed by section 4371, but only if:

(A) The person claiming such treaty-based return position is an insured, as defined in section 4372(d) (without the limitation therein referring to section 4371(1)), or a U.S. or foreign broker of insurance risks,

(B) Reporting under this section that would otherwise be required to be made by foreign insurers or reinsurers on a Form 720 on a quarterly basis is made on an annual basis on a Form 720 by a date no later than the date on which the return is due for the first quarter after the end of the calendar year, or

(C) A closing agreement relating to entitlement to the exemption from the excise tax has been entered into with the Service by the foreign insurance company that is the beneficial recipient of the premium that is subject to the excise tax.

(2) Reporting is waived for an individual if payments or income items otherwise reportable under this section (other than by reason of paragraph (b)(8) of this section), received by the individual during the course of the taxable year do not exceed $10,000 in the aggregate or, in the case of payments or income items reportable only by reason of paragraph (b)(8) of this section, do not exceed $100,000 in the aggregate.

(3) Reporting with respect to payments or income items the treatment of which is mandated by the terms of a closing agreement with the Internal Revenue Service, and that would otherwise be subject to the reporting requirements of this section, is also waived.

(4) If a partnership, trust, or estate that has the taxpayer as a partner or beneficiary discloses on its information return a position for which reporting is otherwise required by the taxpayer, the taxpayer (partner or beneficiary) is then excused from disclosing that position on a return.

(5) This section does not apply to a withholding agent with respect to the performance of its withholding functions.

(6)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(6)(ii) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for amounts received by a related party, within the meaning of section 6038A(c)(2), from a withholding agent that is a reporting corporation, within the meaning of section 6038A(a), and that are properly reported on Form 1042–S.

(ii) Paragraph (c)(6)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(7)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(7)(iv) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for amounts properly reported on Form 1042–S (on either a specific payee or pooled basis) by a withholding agent described in paragraph (c)(7)(ii) of this section if the beneficial owner is described in paragraph (c)(7)(iii) of this section.

(ii) A withholding agent described in this paragraph (c)(7)(ii) is a U.S. financial institution, as defined in §1.1441–1(c)(5) of this chapter, a qualified intermediary, as defined in §1.1441–1(e)(5)(ii) of this chapter, a withholding foreign partnership, as defined §1.1441–5(c)(2)(i) of this chapter, or a withholding foreign trust, as defined in §1.1441–5(e)(5)(v) of this chapter.

(iii) A beneficial owner described in this paragraph (c)(7)(iii) of this section is a direct account holder of a U.S. financial institution or qualified intermediary, a direct partner of a withholding foreign partnership, or a direct beneficiary or owner of a simple or grantor trust that is a withholding foreign trust. A beneficial owner described in this paragraph (c)(7)(iii) also includes an account holder to which a qualified intermediary has applied section 4A.01 or 4A.02 of the qualified intermediary agreement, contained in Revenue Procedure 2000–12 (2000–1 C.B. 387), (as amended by Revenue Procedure 2003–64, (2003–2 C.B. 306); Revenue Procedure 2004–21 (2004–1 C.B. 702); Revenue Procedure 2005–77 (2005–51 I.R.B. 1176) (see §601.601(b)(2) of this chapter)

a partner to which a withholding foreign partnership has applied section 10.01 or 10.02 of the withholding foreign partnership agreement, and a beneficiary or owner to which a withholding foreign trust has applied section 10.01 or 10.02 of the withholding foreign trust agreement, contained in Revenue Procedure 2003–64, (2003–2 C.B. 306), (as amended by Revenue Procedure 2004–21 (2004–1 C.B. 702); Revenue Procedure 2005–77 (2005–51 I.R.B. 1176); (see § 601.601(b)(2) of this chapter).

(iv) Paragraph (c)(7)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(8)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(8)(ii) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for taxpayers that are not individuals or States and that receive amounts of income that have been properly reported on Form 1042–S, that do not exceed $500,000 in the aggregate for the taxable year and that are not received through an account with an intermediary, as defined in § 1.1441–1(c) (13), or with respect to interest in a flow-through entity, as defined in § 1.1441–1(c)(23),

(ii) The exception contained in paragraph (c)(8)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(d) *Information to be reported*—(1) *Returns due after* December 15, 1997. When reporting is required under this section for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, the taxpayer must furnish, in accordance with paragraph (a) of this section, as an attachment to the return, a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form.

(2) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the taxpayer must furnish information in accordance with paragraph (d) of this section in effect prior to December 15, 1997 (see § 301.6114–1(d) as contained in 26 CFR part 301, revised April 1, 1997).

(3) *In general*—(i) *Permanent establishment.* For purposes of determining the nature and amount (or reasonable estimate thereof) of gross receipts, if a taxpayer takes a position that it does not have a permanent establishment or a fixed base in the United States and properly discloses that position, it need not separately report its payment of actual or deemed dividends or interest exempt from tax by reason of a treaty (or any liability for tax imposed by reason of section 884).

(ii) *Single income item.* For purposes of the statement of facts relied upon to support each separate Treaty-Based Return Position taken, a taxpayer may treat payments or income items of the same type (e.g., interest items) received from the same ultimate payor (e.g., the obligor on a note) as a single separate payment or income item.

(iii) *Foreign source effectively connected income.* If a taxpayer takes the return position that, under the treaty, income that would be income effectively connected with a U.S. trade or business is not subject to U.S. taxation because it is income treated as derived from sources outside the United States, the taxpayer may treat payments or income items of the same type (e.g., interest items) as a single separate payment or income item.

(iv) *Sales or services income.* Income from separate sales or services, whether or not made or performed by an agent (independent or dependent), to different U.S. customers on behalf of a foreign corporation not having a permanent establishment in the United States may be treated as a single payment or income item.

(v) *Foreign insurers or reinsurers.* For purposes of reporting by foreign insurers or reinsurers, as described in paragraph (c)(1)(vii)(B) of this section, such reporting must separately set forth premiums paid with respect to casualty insurance and indemnity bonds (subject to section 4371(1)); life insurance, sickness and accident policies, and annuity contracts (subject to section 4371(2)); and reinsurance (subject to section 4371(3)). All premiums paid with

respect to each of these three categories may be treated as a single payment or income item within that category. For reports first due before May 1, 1991, the report may disclose, for each of the three categories, the total amount of premiums derived by the foreign insurer or reinsurer in U.S. dollars (even if a portion of these premiums relate to risks that are not U.S. situs). Reasonable estimates of the amounts required to be disclosed will satisfy these reporting requirements.

(e) *Effective date.* This section is effective for taxable years of the taxpayer for which the due date for filing returns (without extensions) occurs after December 31, 1988. However, if—

(1) A taxpayer has filed a return for such a taxable year, without complying with the reporting requirement of this section, before November 13, 1989, or

(2) A taxpayer is not otherwise than by paragraph (a) of this section required to file a return for a taxable year before November 13, 1989,

Such taxpayer must file (apart from any earlier filed return) the statement required by paragraph (d) of this section before June 12, 1990, by mailing the required statement to the Internal Revenue Service, P.O. Box 21086, Philadelphia, PA 19114. Any such statement filed apart from a return must be dated, signed and sworn to by the taxpayer under the penalties of perjury. In addition, with respect to any return due (without extensions) on or before March 10, 1990, the reporting required by paragraph (a) of this section must be made no later than June 12, 1990. If a taxpayer files or has filed a return on or before November 13, 1989, that provides substantially the same information required by paragraph (d) of this section, no additional submission will be required. Foreign insurers and reinsurers subject to reporting described in paragraph (c)(7)(ii) of this section must so report for calendar years 1988 and 1989 no later than August 15, 1990.

(f) *Cross reference.* For the provisions concerning penalties for failure to disclose a treaty-based return position, see section 6712 and § 301.6712–1.

[T.D. 8292, 55 FR 9440, Mar. 14, 1990; 55 FR 10237, Mar. 20, 1990, as amended by T.D. 8305, 55 FR 28609, July 12, 1990; T.D. 8733, 62 FR 53385, Oct. 14, 1997; T.D. 8734, 62 FR 53495, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73413, Dec. 30, 1999; T.D. 9253, 71 FR 13007, Mar. 14, 2006; 71 FR 27321, May 10, 2006]

## Time and Place for Paying Tax

PLACE AND DUE DATE FOR PAYMENT OF TAX

### § 301.6151–1 Time and place for paying tax shown on returns.

For provisions concerning the time and place for paying tax shown on returns with respect to a particular tax, see the regulations relating to such tax.

### § 301.6153–1 Installment payments of estimated income tax by individuals.

For provisions relating to installment payments of estimated income tax by individuals, see §§ 1.6153–1 to 1.6153–4, inclusive, of this chapter (Income Tax Regulations).

### § 301.6154–1 Installment payments of estimated income tax by corporations.

For provisions relating to installment payments of estimated income tax by corporations, see §§ 1.6154–1 to 1.6154–3, inclusive, of this chapter (Income Tax Regulations).

### § 301.6155–1 Payment on notice and demand.

Upon receipt of notice and demand from the district director (including the Director of International Operations) or the director of the regional service center, there shall be paid at the place and time stated in such notice the amount of any tax (including any interest, additional amounts, additions to the tax, and assessable penalties) stated in such notice and demand.

### § 301.6159–1 Agreements for payment of tax liability in installments.

(a) *Authority and definition.* A district director, a director of a service center,

or a director of a compliance center (the director) is authorized to enter into a written agreement with a taxpayer that allows the taxpayer to satisfy a tax liability by making scheduled periodic payments until the liability is fully paid if the director determines that such an installment agreement will facilitate the collection of the tax liability.

(b) *Acceptance, form, and term of installment agreement*—(1)(i) *Acceptance or rejection of installment agreement*. The director has the discretion to accept or reject any proposed installment agreement. As a condition to entering into an installment agreement with a taxpayer, the director may require that—

(A) The taxpayer agree to a reasonable extension of the period of limitations on collection; and

(B) The agreement contain terms and conditions that protect the interests of the government.

(ii) *Example*. The director may require that a taxpayer authorize direct debit bank transfers as the method of making installment payments under the agreement.

(2) *Form of installment agreement*. A written installment agreement may take the form of a document signed by the taxpayer and the director or a written confirmation of an agreement entered into by the taxpayer and the director that is mailed or personally delivered to the taxpayer.

(3) *Term of accepted installment agreement*. Except as otherwise provided in this section, an installment agreement is effective from the day the director signs the agreement to the day the agreement ends by its terms.

(c) *Alteration, modification, or termination of installment agreements by the Internal Revenue Service*—(1) *Inadequate information or jeopardy*. The director may terminate an installment agreement if—

(i) The director determines that the taxpayer or the taxpayer's representative has provided to the Internal Revenue Service information that is inaccurate or incomplete in any material respect in connection with the granting of the installment agreement; or

(ii) The director determines that collection of any tax liability to which the installment agreement applies is in jeopardy.

(2) *Subsequent change in financial condition, failure to timely pay an installment or another Federal tax liability, or failure to provide requested financial information*. The director may alter, modify, or terminate the terms of an installment agreement if—

(i) The director determines that the financial condition of a taxpayer that is a party to the installment agreement has significantly improved; or

(ii) The taxpayer that is a party to the installment agreement fails—

(A) To timely pay any installment in accordance with the terms of the installment agreement;

(B) To pay any other Federal tax liability when the liability becomes due; or

(C) To provide updated financial information requested by the director.

(3) *Request by taxpayer*. Upon request by a taxpayer that is a party to the installment agreement, the director may alter, modify, or terminate the terms of an installment agreement if the director determines that the financial condition of the taxpayer has significantly changed.

(4) *Notice*. Unless the director determines that collection of the tax is in jeopardy, the director will notify the taxpayer in writing at least 30 days before altering, modifying, or terminating an installment agreement pursuant to paragraph (c)(1) or (2) of this section. A notice provided pursuant to this paragraph must briefly describe the reason for the intended alteration, modification, or termination. Upon receiving notice, the taxpayer may provide information showing that the reason for the intended alteration, modification, or termination is incorrect.

(d) *Actions by the Internal Revenue Service during the term of the installment agreement*. Except as otherwise provided by the installment agreement, during the term of the agreement the director may take actions to protect the interests of the government with regard to the unpaid balance of the tax liability to which the installment agreement applies (other than actions pursuant to subchapter D of chapter 64 of subtitle F of the Internal Revenue Code against a person that is a party to

the agreement), including any actions enumerated in the agreement. The actions include, for example—

(1) Requesting updated financial information from any party to the agreement;

(2) Conducting further investigations (including the issuance and enforcement of summonses) in connection with the tax liability to which the installment agreement applies;

(3) Filing or refiling notices of federal tax lien; and

(4) Taking collection action against any person who is not a party to the agreement but who is liable for the tax to which the agreement applies.

(e) *Termination.* If an installment agreement is terminated by the director, the director may pursue collection of the unpaid balance of the tax liability.

(f) *Cross-reference.* Pursuant to section 6601(b)(1), the last day prescribed for payment is determined without regard to any installment agreement, including for purposes of computing penalties and interest provided by the Internal Revenue Code.

(g) *Effective date.* This section is effective December 23, 1994.

[T.D. 8583, 59 FR 66193, Dec. 23, 1994]

EXTENSION OF TIME FOR PAYMENT

**§ 301.6161–1 Extension of time for paying tax.**

For provisions concerning the extension of time for paying a particular tax or for paying an amount determined as a deficiency, see the regulations relating to such tax.

**§ 301.6162–1 Extension of time for payment of tax on gain attributable to liquidation of personal holding companies.**

For provisions relating to the extension of time for payment of tax on gain attributable to liquidation of personal holding companies, see § 1.6162–1 of this chapter (Income Tax Regulations).

**§ 301.6163–1 Extension of time for payment of estate tax on value of reversionary or remainder interest in property.**

For provisions relating to the extension of time for payment of estate tax on value of reversionary or remainder interest in property, see § 20.6163–1 of this chapter (Estate Tax Regulations).

**§ 301.6164–1 Extension of time for payment of taxes by corporations expecting carrybacks.**

For provisions relating to the extension of time for payment of taxes by corporations expecting carrybacks, see §§ 1.6164–1 to 1.6164–9, inclusive, of this chapter (Income Tax Regulations).

**§ 301.6165–1 Bonds where time to pay the tax or deficiency has been extended.**

For provisions concerning bonds where time to pay a tax or deficiency has been extended, see the regulations relating to the particular tax.

**§ 301.6166–1 Extension of time for payment of estate tax where estate consists largely of interest in closely held business.**

For provisions relating to the extension of time for payment of estate tax where estate consists largely of interest in closely held business, see §§ 20.6166–1 to 20.6166–4, inclusive, of this chapter (Estate Tax Regulations).

## Assessment

IN GENERAL

**§ 301.6201–1 Assessment authority.**

(a) *In general.* The district director is authorized and required to make all inquiries necessary to the determination and assessment of all taxes imposed by the Internal Revenue Code of 1954 or any prior internal revenue law. The district director is further authorized and required, and the director of the regional service center is authorized, to make the determinations and the assessments of such taxes. However, certain inquiries and determinations are, by direction of the Commissioner, made by other officials, such as assistant regional commissioners. The term ''taxes'' includes interest, additional amounts, additions to the taxes, and assessable penalties. The authority of the district director and the director of the regional service center to make assessments includes the following:

(1) *Taxes shown on return.* The district director or the director of the regional

service center shall assess all taxes determined by the taxpayer or by the district director or the director of the regional service center and disclosed on a return or list.

(2) *Unpaid taxes payable by stamp.* (i) If without the use of the proper stamp:

(*a*) Any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof, or

(*b*) Any transaction or act upon which a tax is required to be paid by means of a stamp occurs;

The district director, upon such information as he can obtain, must estimate the amount of the tax which has not been paid and the district director or the director of the regional service center must make assessment therefor upon the person the district director determines to be liable for the tax. However, the district director or the director of the regional service center may not assess any tax which is payable by stamp unless the taxpayer fails to pay such tax at the time and in the manner provided by law or regulations.

(ii) If a taxpayer gives a check or money order as a payment for stamps but the check or money order is not paid upon presentment, then the district director or the director of the regional service center shall assess the amount of the check or money order against the taxpayer as if it were a tax due at the time the check or money order was received by the district director.

(3) *Erroneous income tax prepayment credits.* If the amount of income tax withheld or the amount of estimated income tax paid is overstated by a taxpayer on a return or on a claim for refund, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund shall be assessed by the district director or the director of the regional service center in the same manner as in the case of a mathematical error on the return. See section 6213 (b)(1), relating to exceptions to restrictions on assessment.

(b) *Estimated income tax.* Neither the district director nor the director of the regional service center shall assess any amount of estimated income tax required to be paid under section 6153 or 6154 which is unpaid.

(c) *Compensation of child.* Any income tax assessed against a child, to the extent of the amount attributable to income included in the gross income of the child solely by reason of section 73(a) or the corresponding provision of prior law, if not paid by the child, shall, for the purposes of the income tax imposed by chapter 1 of the Code (or the corresponding provisions of prior law), be considered as having also been properly assessed against the parent. In any case in which the earnings of the child are included in the gross income of the child solely by reason of section 73(a) or the corresponding provision of prior law, the parent's liability is an amount equal to the amount by which the tax assessed against the child (and not paid by him) has been increased by reason of the inclusion of such earnings in the gross income of the child. Thus, if for the calendar year 1954 the child has income of $1,000 from investments and of $3,000 for services rendered, and the latter amount is includible in the gross income of the child under section 73(a) and the child has no wife or dependents, the tax liability determined under section 3 is $625. If the child had only the investment income of $1,000, his tax liability would be $62. If the tax of $625 is assessed against the child, the difference between $625 and $62, or $563, is the amount of such tax which is considered to have been properly assessed against the parent, if not paid by the child.

### § 301.6203–1 Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all

other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

### § 301.6204–1 Supplemental assessments.

If any assessment is incomplete or incorrect in any material respect, the district director or the director of the regional service center, subject to the restrictions with respect to the assessment of deficiencies in income, estate, gift, chapter 41, 42, 43, and 44 taxes, and subject to the applicable period of limitation, may make a supplemental assessment for the purpose of correcting or completing the original assessment.

[T.D. 7838, 47 FR 44249, Oct. 7, 1982]

### § 301.6205–1 Special rules applicable to certain employment taxes.

For regulations under section 6205, see § 31.6205–1 of this chapter (Employment Tax Regulations).

DEFICIENCY PROCEDURES

### § 301.6211–1 Deficiency defined.

(a) In the case of the income tax imposed by subtitle A of the Code, the estate tax imposed by chapter 11, subtitle B, of the Code, the gift tax imposed by chapter 12, subtitle B, of the Code, and any excise tax imposed by chapter 41, 42, 43, or 44 of the Code, the term ''deficiency'' means the excess of the tax, (income, estate, gift, or excise tax as the case may be) over the sum of the amount shown as such tax by the taxpayer upon his return and the amounts previously assessed (or collected without assessment) as a deficiency; but such sum shall first be reduced by the amount of rebates made. If no return is made, or if the return (except a return of income tax pursuant to sec. 6014) does not show any tax, for the purpose of the definition ''the amount shown as the tax by the taxpayer upon his return'' shall be considered as zero. Accordingly, in any such case, if no deficiencies with respect to the tax have been assessed, or collected without assessment, and no rebates with respect to the tax have been made, the deficiency is the amount of the income tax imposed by subtitle A, the estate tax imposed by chapter 11, the gift tax imposed by chapter 12, or any excise tax imposed by chapter 41, 42, 43, or 44. Any amount shown as additional tax on an ''amended return,'' so-called (other than amounts of additional tax which such return clearly indicates the taxpayer is protesting rather than admitting) filed after the due date of the return, shall be treated as an amount shown by the taxpayer ''upon his return'' for purposes of computing the amount of a deficiency.

(b) For purposes of the definition, the income tax imposed by subtitle A and the income tax shown on the return shall both be determined without regard to the credit provided in section 31 for income tax withheld at the source and without regard to so much of the credit provided in section 32 for income taxes withheld at the source as exceeds 2 percent of the interest on tax-free covenant bonds described in section 1451. Payments on account of estimated income tax, like other payments of tax by the taxpayer, shall likewise be disregarded in the determination of a deficiency. Any credit resulting from the collection of amounts assessed under section 6851 or 6852 as the result of a termination assessment shall not be taken into account in determining a deficiency.

(c) The computation by the Internal Revenue Service, pursuant to section 6014, of the income tax imposed by subtitle A shall be considered as having been made by the taxpayer and the tax so computed shall be considered as the tax shown by the taxpayer upon his return.

(d) If so much of the credit claimed on the return for income taxes withheld at the source as exceeds 2 percent of the interest on tax-free convenant bonds is greater than the amount of

such credit allowable, the unpaid portion of the tax attributable to such difference will be collected not as a deficiency but as an underpayment of the tax shown on the return.

(e) This section may be illustrated by the following examples:

*Example 1.* The amount of income tax shown by the taxpayer upon his return for the calendar year 1954 was $1,600. The taxpayer had no amounts previously assessed (or collected without assessment) as a deficiency. He claimed a credit in the amount of $2,050 for tax withheld at source on wages under section 3402, and a refund of $450 (not a rebate under section 6211) was made to him as an overpayment of tax for the taxable year. It is later determined that the correct tax for the taxable year is $1,850. A deficiency of $250 is determined as follows:

| | | |
|---|---|---|
| Tax imposed by subtitle A | $1,850 | |
| Tax shown on return | $1,600 | |
| Tax previously assessed (or collected without assessment) as a deficiency | None | |
| Total | 1,600 | |
| Amount of rebates made | None | |
| Balance | | 51,600 |
| Deficiency | | 250 |

*Example 2.* The taxpayer made a return for the calendar year 1954 showing a tax of $1,250 before any credits for tax withheld at the source. He claimed a credit in the amount of $800 for tax withheld at source on wages under section 3402 and $60 for tax paid at source under section 1451 upon interest on bonds containing a tax-free covenant. The taxpayer had no amounts previously assessed (or collected without assessment) as a deficiency. The district director determines that the 2 percent tax paid at the source on tax-free covenant bonds is $40 instead of $60 as claimed by the taxpayer and that the tax imposed by subtitle A is $1,360 (total tax $1,400 less $40 paid at source on tax-free covenant bonds). A deficiency in the amount of $170 is determined as follows:

| | | |
|---|---|---|
| Tax imposed by subtitle A ($1,400 minus $40) | | $1,360 |
| Tax shown on return ($1,250 minus $60) | $1,190 | |
| Tax previously assessed (or collected without assessment) as a deficiency | None | |
| Total | 1,190 | |
| Amount of rebates made | None | |
| Balance | | 1,190 |
| Deficiency | | 170 |

(f) As used in section 6211, the term *rebate* means so much of an abatement, credit, refund, or other repayment as is made on the ground that the income tax imposed by subtitle A, the estate tax imposed by chapter 11, the gift tax imposed by chapter 12, or the excise tax imposed by chapter 41, 42, 43, or 44, is less than the excess of (1) the amount shown as the tax by the taxpayer upon the return increased by the amount previously assessed (or collected without assessment) as a deficiency over (2) the amount of rebates previously made. For example, assume that the amount of income tax shown by the taxpayer upon his return for the taxable year is $600 and the amount claimed as a credit under section 31 for income tax withheld at the source is $900. If the district director determines that the tax imposed by subtitle A is $600 and makes a refund of $300, no part of such refund constitutes a ''rebate'' since the refund is not made on the ground that the tax imposed by subtitle A is less than the tax shown on the return. If, however, the district director determines that the tax imposed by subtitle A is $500 and refunds $400, the amount of $100 of such refund would constitute a rebate since it is made on the ground that the tax imposed by subtitle A ($500) is less than the tax shown on the return ($600). The amount of such rebate ($100) would be taken into account in arriving at the amount of any deficiency subsequently determined.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7102, 36 FR 5498, Mar. 24, 1971; T.D. 7575, 43 FR 58817, Dec. 18, 1978; T.D. 7838, 47 FR 44249, Oct. 7, 1982; T.D. 8628, 60 FR 62212, Dec. 5, 1995]

## § 301.6212–1 Notice of deficiency.

(a) *General rule.* If a district director or director of a service center (or regional director of appeals), determines that there is a deficiency in respect of income, estate, or gift tax imposed by subtitle A or B, or excise tax imposed by chapter 41, 42, 43, or 44, of the Code, such official is authorized to notify the taxpayer of the deficiency by either registered or certified mail.

(b) *Address for notice of deficiency*—(1) *Income, gift, and chapter 41, 42, 43, and 44 taxes.* Unless the district director for the district in which the return in question was filed has been notified under the provisions of section 6903 as to the existence of a fiduciary relationship, notice of a deficiency in respect of income tax, gift tax, or tax imposed

by chapter 41, 42, 43, or 44 shall be sufficient if mailed to the taxpayer at his last known address, even though such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) *Joint income tax returns.* If a joint income tax return has been filed by husband and wife, the district director (or assistant regional commissioner, appellate) may, unless the district director for the district in which such joint return was filed has been notified by either spouse that a separate residence has been established, send either a joint or separate notice of deficiency to the taxpayers at their last known address. If, however, the proper district director has been so notified, a separate notice of deficiency that is a duplicate original of the joint notice, must be sent by registered mail prior to September 3, 1958, and by either registered or certified mail on and after September 3, 1958, to each spouse at his or her last known address. The notice of separate residences should be addressed to the district director for the district in which the joint return was filed.

(3) *Estate tax.* In the absence of notice, under the provisions of section 6903 as to the existence of a fiduciary relationship, to the district director for the district in which the estate tax return was filed, notice of a deficiency in respect of the estate tax imposed by chapter 11, subtitle B, of the Code shall be sufficient if addressed in the name of the decedent or other person subject to liability and mailed to his last known address.

(c) *Further deficiency letters restricted.* If the district director or director of a service center (or regional director of appeals) mails to the taxpayer notice of a deficiency, and the taxpayer files a petition with the Tax Court within the prescribed period, no additional deficiency may be determined with respect to income tax for the same taxable year, gift tax for the same ''calendar period'' (as defined in § 25.2502–1(c)(1)), estate tax with respect to the taxable estate of the same decedent, chapter 41, 43, or 44 tax of the taxpayer for the same taxable year, section 4940 tax for the same taxable year, or chapter 42 tax of the taxpayer (other than under section 4940) with respect to the same act (or failure to act) to which such petition relates. This restriction shall not apply in the case of fraud, assertion of deficiencies with respect to any qualified tax (as defined in paragraph (b) of § 301.6361–4) in respect of which no deficiency was asserted for the taxable year in the notice, assertion of deficiencies with respect to the Federal tax when deficiencies with respect to only a qualified tax (and not the Federal tax) were asserted for the taxable year in the notice, assertion of greater deficiencies before the Tax Court as provided in section 6214(a), mathematical errors as provided in section 6213(b)(1), termination assessments in section 6851 or 6852, or jeopardy assessments as provided in section 6861(c). Solely for purposes of applying the restriction of section 6212(c), a notice of deficiency with respect to second tier tax under chapter 43 shall be deemed to be a notice of deficiency for the taxable year in which the taxable event occurs. See § 53.4963–1(e)(7)(iii) or (iv) for the date on which the taxable event occurs.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7238, 37 FR 28739, Dec. 29, 1972; T.D. 7579, 43 FR 59360, Dec. 20, 1978; T.D. 7838, 47 FR 44249, Oct. 7, 1982; T.D. 7910, 48 FR 40376, Sept. 7, 1983; T.D. 8084, 51 FR 16305, May 2, 1986; T.D. 8628, 60 FR 62212, Dec. 5, 1995]

### § 301.6212–2 Definition of last known address.

(a) *General rule.* Except as provided in paragraph (b)(2) of this section, a taxpayer's last known address is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and concise notification of a different address. Further information on what constitutes clear and concise notification of a different address and a properly processed Federal tax return can be found in Rev. Proc. 90–18 (1990–1 C.B. 491) or in procedures subsequently prescribed by the Commissioner.

(b) *Address obtained from third party*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, change of address information that a taxpayer provides to a third party, such as a payor or another government agency,

is not clear and concise notification of a different address for purposes of determining a last known address under this section.

(2) *Exception for address obtained from the United States Postal Service*—(i) *Updating taxpayer addresses.* The IRS will update taxpayer addresses maintained in IRS records by referring to data accumulated and maintained in the United States Postal Service (USPS) National Change of Address database that retains change of address information for thirty-six months (NCOA database). Except as provided in paragraph (b)(2)(ii) of this section, if the taxpayer's name and last known address in IRS records match the taxpayer's name and old mailing address contained in the NCOA database, the new address in the NCOA database is the taxpayer's last known address, unless the IRS is given clear and concise notification of a different address.

(ii) *Duration of address obtained from NCOA database.* The address obtained from the NCOA database under paragraph (b)(2)(i) of this section is the taxpayer's last known address until one of the following events occurs—

(A) The taxpayer files and the IRS properly processes a Federal tax return with an address different from the address obtained from the NCOA database; or

(B) The taxpayer provides the Internal Revenue Service with clear and concise notification of a change of address, as defined in procedures prescribed by the Commissioner, that is different from the address obtained from the NCOA database.

(3) *Examples.* The following examples illustrate the rules of paragraph (b)(2) of this section:

*Example 1.* (i) A is an unmarried taxpayer. The address on A's 1999 Form 1040, U.S. Individual Income Tax Return, filed on April 14, 2000, and 2000 Form 1040 filed on April 13, 2001, is 1234 Anyplace Street, Anytown, USA 43210. On May 15, 2001, A informs the USPS of a new permanent address (9876 Newplace Street, Newtown, USA 12345) using the USPS Form 3575, ''Official Mail Forwarding Change of Address Form.'' The change of address is included in the weekly update of the USPS NCOA database. On May 29, 2001, A's address maintained in IRS records is changed to 9876 Newplace Street, Newtown, USA 12345.

(ii) In June 2001 the IRS determines a deficiency for A's 1999 tax year and prepares to issue a notice of deficiency. The IRS obtains A's address for the notice of deficiency from IRS records. On June 15, 2001, the Internal Revenue Service mails the notice of deficiency to A at 9876 Newplace Street, Newtown, USA 12345. For purposes of section 6212(b), the notice of deficiency mailed on June 15, 2001, is mailed to A's last known address.

*Example 2.* (i) The facts are the same as in *Example 1,* except that instead of determining a deficiency for A's 1999 tax year in June 2001, the IRS determines a deficiency for A's 1999 tax year in May 2001.

(ii) On May 21, 2001, the IRS prepares a notice of deficiency for A and obtains A's address from IRS records. Because A did not inform the USPS of the change of address in sufficient time for the IRS to process and post the new address in Internal Revenue Service's records by May 21, 2001, the notice of deficiency is mailed to 1234 Anyplace Street, Anytown, USA 43210. For purposes of section 6212(b), the notice of deficiency mailed on May 21, 2001, is mailed to A's last known address.

*Example 3.* (i) C and D are married taxpayers. The address on C and D's 2000 Form 1040, U.S. Individual Income Tax Return, filed on April 13, 2001, and 2001 Form 1040 filed on April 15, 2002, is 2468 Spring Street, Little City, USA 97531. On August 15, 2002, D informs the USPS of a new permanent address (8642 Peachtree Street, Big City, USA 13579) using the USPS Form 3575, ''Official Mail Forwarding Change of Address Form.'' The change of address is included in the weekly update of the USPS NCOA database. On August 29, 2002, D's address maintained in IRS records is changed to 8642 Peachtree Street, Big City, USA 13579.

(ii) In October 2002 the IRS determines a deficiency for C and D's 2000 tax year and prepares to issue a notice of deficiency. The Internal Revenue Service obtains C's address and D's address for the notice of deficiency from IRS records. On October 15, 2002, the IRS mails a copy of the notice of deficiency to C at 2468 Spring Street, Little City, USA 97531, and to D at 8642 Peachtree Street, Big City, USA 13579. For purposes of section 6212(b), the notices of deficiency mailed on October 15, 2002, are mailed to C and D's respective last known addresses.

(c) *Last known address for all notices, statements, and documents.* The rules in paragraphs (a) and (b) of this section apply for purposes of determining whether all notices, statements, or other documents are mailed to a taxpayer's last known address whenever the term *last known address* is used in

the Internal Revenue Code or the regulations thereunder.

(d) *Effective Date*—(1) *In general*. Except as provided in paragraph (d)(2) of this section, this section is effective on January 29, 2001.

(2) *Individual moves in the case of joint filers*. In the case of taxpayers who file joint returns under section 6013, if the NCOA database contains change of address information for only one spouse, paragraphs (b)(2) and (3) of this section will not apply to notices, statements, and other documents mailed before the processing of the taxpayers' 2000 joint return.

[T.D. 8939, 66 FR 2820, Jan. 12, 2001]

### § 301.6213–1 Restrictions applicable to deficiencies; petition to Tax Court.

(a) *Time for filing petition and restrictions on assessment*—(1) *Time for filing petition*. Within 90 days after notice of the deficiency is mailed (or within 150 days after mailing in the case of such notice addressed to a person outside the States of the Union and the District of Columbia), as provided in section 6212, a petition may be filed with the Tax Court of the United States for a redetermination of the deficiency. In determining such 90-day or 150-day period, Saturday, Sunday, or a legal holiday in the District of Columbia is not counted as the 90th or 150th day. In determining the time for filing a petition with the Tax Court in the case of a notice of deficiency mailed to a resident of Alaska prior to 12:01 p.m., e.s.t., January 3, 1959, and in the case of a notice of deficiency mailed to a resident of Hawaii prior to 4 p.m., e.d.s.t., August 21, 1959, the term ''States of the Union'' does not include Alaska or Hawaii, respectively, and the 150-day period applies. In determining the time within which a petition to the Tax Court may be filed in the case of a notice of deficiency mailed to a resident of Alaska after 12:01 p.m., e.s.t., January 3, 1959, and in the case of a notice of deficiency mailed to a resident of Hawaii after 4 p.m., e.d.s.t., August 21, 1959, the term ''States of the Union'' includes Alaska and Hawaii, respectively, and the 90-day period applies.

(2) *Restrictions on assessment*. Except as otherwise provided by this section, by sections 6851, 6852, and 6861(a) (relating to termination and jeopardy assessments), by section 6871(a) (relating to immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership cases), or by section 7485 (in case taxpayer petitions for a review of a Tax Court decision without filing bond), no assessment of a deficiency in respect of a tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 of the Code and no levy or proceeding in court for its collection shall be made until notice of deficiency has been mailed to the taxpayer, nor until the expiration of the 90-day or 150-day period within which a petition may be filed with the Tax Court, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. As to the date on which a decision of the Tax court becomes final, see section 7481. Notwithstanding the provisions of section 7421(a), the making of an assessment or the beginning of a proceeding or levy which is forbidden by this paragraph may be enjoined by a proceeding in the proper court. In any case where the running of the time prescribed for filing a petition in the Tax Court with respect to a tax imposed by chapter 42 or 43 is suspended under section 6213(e), no assessment of a deficiency in respect of such tax shall be made until expiration of the entire period for filing the petition.

(b) *Exceptions to restrictions on assessment of deficiencies*—(1) *Mathematical errors*. If a taxpayer is notified of an additional amount of tax due on account of a mathematical error appearing upon the return, such notice is not deemed a notice of deficiency, and the taxpayer has no right to file a petition with the Tax Court upon the basis of such notice, nor is the assessment of such additional amount prohibited by section 6213(a).

(2) *Tentative carryback adjustments*. (i) If the district director or the director of the regional service center determines that any amount applied, credited, or refunded under section 6411(b) with respect to an application for a tentative carryback adjustment is in excess of the overassessment properly attributable to the carryback upon which such application was based, the district director or the director of the regional service center may assess the

amount of the excess as a deficiency as if such deficiency were due to a mathematical error appearing on the return. That is, the district director or the director of the regional service center may assess an amount equal to the excess, and such amount may be collected, without regard to the restrictions on assessment and collection imposed by section 6213(a). Thus, the district director or the director of the regional service center may assess such amount without regard to whether the taxpayer has been mailed a prior notice of deficiency. Either before or after assessing such an amount, the district director or the director of the regional service center will notify the taxpayer that such assessment has been or will be made. Such notice will not constitute a notice of deficiency, and the taxpayer may not file a petition with the Tax Court of the United States based on such notice. However, the taxpayer, within the applicable period of limitation, may file a regular claim for credit or refund based on the carryback, if he has not already filed such a claim, and may maintain a suit based on such claim if it is disallowed or if it is not acted upon by the Internal Revenue Service within 6 months from the date the claim was filed.

(ii) The method provided in subdivision (i) of this subparagraph to recover any amount applied, credited, or refunded in respect of an application for a tentative carryback adjustment which should not have been so applied, credited, or refunded is not an exclusive method. Two other methods are available to recover such amount: (*a*) By way of a deficiency notice under section 6212; or (*b*) by a suit to recover an erroneous refund under section 7405. Any one or more of the three available methods may be used to recover any amount which was improperly applied, credited, or refunded in respect of an application for a tentative carryback adjustment.

(3) *Assessment of amount paid.* Any payment made after the mailing of a notice of deficiency which is made by the taxpayer as a payment with respect to the proposed deficiency may be assessed without regard to the restrictions on assessment and collection imposed by section 6213(a) even though the taxpayer has not filed a waiver of restrictions on assessment as provided in section 6213(d). A payment of all or part of the deficiency asserted in the notice together with the assessment of the amount so paid will not affect the jurisdiction of the Tax Court. If any payment is made before the mailing of a notice of deficiency, the district director or the director of the regional service center is not prohibited by section 6213(a) from assessing such amount, and such amount may be assessed if such action is deemed to be proper. If such amount is assessed, the assessment is taken into account in determining whether or not there is a deficiency for which a notice of deficiency must be issued. Thus, if such a payment satisfies the taxpayer's tax liability, no notice of deficiency will be mailed and the Tax Court will have no jurisdiction over the matter. In any case in which there is a controversy as to the correct amount of the tax liability, the assessment of any amount pursuant to the provisions of section 6213(b)(3) shall in no way be considered to be the acceptance of an offer by the taxpayer to settle such controversy.

(4) *Jeopardy.* If the district director believes that the assessment or collection of a deficiency will be jeopardized by delay, such deficiency shall be assessed immediately, as provided in section 6861(a).

(c) *Failure to file petition.* If no petition is filed with the Tax Court within the period prescribed in section 6213(a), the district director or the director of the regional service center shall assess the amount determined as the deficiency and of which the taxpayer was notified by registered or certified mail and the taxpayer shall pay the same upon notice and demand therefor. In such case the district director will not be precluded from determining a further deficiency and notifying the taxpayer thereof by registered or certified mail. If a petition is filed with the Tax Court the taxpayer should notify the district director who issued the notice of deficiency that the petition has been filed in order to prevent an assessment of the amount determined to be the deficiency.

(d) *Waiver of restrictions.* The taxpayer may at any time by a signed notice in

writing filed with the district director waive the restrictions on the assessment and collection of the whole or any part of the deficiency. The notice must in all cases be filed with the district director or other authorized official under whose jurisdiction the audit or other consideration of the return in question is being conducted. The filing of such notice with the Tax Court does not constitute filing with the district director within the meaning of the Code. After such waiver has been acted upon by the district director and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

(e) *Suspension of filing period for certain chapter 42 and chapter 43 taxes.* The period prescribed by section 6213(a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941,4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975, shall be suspended for any other period which the Commissioner has allowed for making correction under § 53.4963–1(e)(3). Where the time for filing a petition with the Tax Court has been suspended under the authority of this paragraph (e), the extension shall not be reduced as a result of the correction being made prior to expiration of the period allowed for making correction.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7838, 47 FR 44250, Oct. 7, 1982; T.D. 8084, 51 FR 16035, May 2, 1986; T.D. 8628, 60 FR 62212, Dec. 5, 1995; T.D. 8920, 66 FR 2171, Jan. 10, 2001]

### § 301.6215–1 Assessment of deficiency found by Tax Court.

Where a petition has been filed with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed by the district director or the director of the regional service center and the unpaid portion of the amount so assessed shall be paid by the taxpayer upon notice and demand therefor.

### § 301.6221–1 Tax treatment determined at partnership level.

(a) *In general.* A partner's treatment of partnership items on the partner's return may not be changed except as provided in sections 6222 through 6231 and the regulations thereunder. Thus, for example, if a partner treats an item on the partner's return consistently with the treatment of the item on the partnership return, the IRS generally cannot adjust the treatment of that item on the partner's return except through a partnership-level proceeding. Similarly, the taxpayer may not put partnership items in issue in a proceeding relating to nonpartnership items. For example, the taxpayer may not offset a potential increase in taxable income based on changes to nonpartnership items by a potential decrease based on partnership items.

(b) *Restrictions inapplicable after items become nonpartnership items.* Section 6221 and paragraph (a) of this section cease to apply to items arising from a partnership with respect to a partner when those items cease to be partnership items with respect to that partner under section 6231(b).

(c) *Penalties determined at partnership level.* Any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item shall be determined at the partnership level. Partner-level defenses to such items can only be asserted through refund actions following assessment and payment. Assessment of any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item shall be made based on partnership-level determinations. Partnership-level determinations include all the legal and factual determinations that underlie the determination of any penalty, addition to tax, or additional amount, other than partner-level defenses specified in paragraph (d) of this section.

(d) *Partner-level defenses.* Partner-level defenses to any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item may not be asserted in the partnership-level proceeding, but may be asserted through separate refund actions following assessment and payment. See section 6230(c)(4). Partner-level defenses are limited to those that are personal to the partner or are dependent upon the partner's separate return and cannot be determined at the partnership level. Examples of these determinations are whether any applicable threshold underpayment of tax

has been met with respect to the partner or whether the partner has met the criteria of section 6664(b) (penalties applicable only where return is filed), or section 6664(c)(1) (reasonable cause exception) subject to partnership-level determinations as to the applicability of section 6664(c)(2).

(e) *Cross-references*. See §§ 301.6231(c)–1 and 301.6231(c)–2 for special rules relating to certain applications and claims for refund based on losses, deductions, or credits from abusive tax shelter partnerships.

(f) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6221–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50544, Oct. 4, 2001]

### § 301.6222(a)–1 Consistent treatment of partnership items.

(a) *In general*. The treatment of a partnership item on the partner's return must be consistent with the treatment of that item by the partnership on the partnership return in all respects including the amount, timing, and characterization of the item.

(b) *Treatment must be consistent with partnership return*. The treatment of a partnership item on the partner's return must be consistent with the treatment of that item on the partnership return. Thus, a partner who treats an item consistently with a schedule or other information furnished to the partner by the partnership has not satisfied the requirement of paragraph (a) of this section if the treatment of that item is inconsistent with the treatment of the item on the partnership return actually filed. For rules relating to the election to be treated as having reported the inconsistency where the partner treats an item consistently with an incorrect schedule, see § 301.6222(b)–3.

(c) *Examples*. The following examples illustrate the principles of this section:

*Example 1*. B is a partner of Partnership P. Both B and P use the calendar year as the taxable year. In December 2001, P receives an advance payment for services to be performed in 2002 and reports this amount as income for calendar year 2001. However, B reports B's distributive share of this amount on B's income tax return for 2002 and not on B's return for 2001. B's treatment of this partnership item is inconsistent with the treatment of the item by P.

*Example 2*. Partnership P incurred certain start-up costs before P was actively engaged in its business. P capitalized these costs. C, a partner in P, deducted C's proportionate share of these start-up costs. C's treatment of the partnership expenditure is inconsistent with the treatment of that item by P.

*Example 3*. D is a partner in partnership P. P reports a loss of $100,000 on its return, $5,000 of which it reports on the Schedule K–1 attached to its return as D's distributive share. However, P reports $15,000 as D's distributive share of P's loss on the Schedule K–1 furnished to D. D reports the $15,000 loss on D's income tax return. D has not satisfied the consistent reporting requirement. See, however, § 301.6222(b)–3 for an election to be treated as having reported the inconsistency.

(d) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001.

For years beginning prior to October 4, 2001, see § 301.6222(a)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50545, Oct. 4, 2001]

### § 301.6222(a)–2 Application of consistent reporting and notification rules to indirect partners.

(a) *In general*. The consistent reporting requirement of § 301.6222(a)–1 is generally applied with respect to the source partnership. For purposes of this section, the term *source partnership* means the partnership (within the meaning of section 6231(a)(1)) from which the partnership item originates.

(b) *Indirect partner files consistently with source partnership*. An indirect partner who treats an item from a source partnership in a manner consistent with the treatment of that item on the source partnership's return satisfies the consistency requirement of section 6222(a) regardless of whether the indirect partner treats that item in a manner consistent with the treatment of that item by the pass-thru partner through which the indirect partner holds the interest in the source partnership. Under these circumstances, therefore, the Internal Revenue Service shall not send to the indirect partner the notice described in section 6231(b)(1)(A).

(c) *Indirect partner files inconsistently with source partnership*—(1) *Indirect*

*partner notifies the Internal Revenue Service of inconsistency*. An indirect partner who—

(i) Treats an item from a source partnership in a manner inconsistent with the treatment of that item on the source partnership's return; and

(ii) Files a statement identifying the inconsistency with the source partnership in accordance with § 301.6222(c)–1, shall not be subject to a computational adjustment to conform the treatment of that item to the treatment of that item on the return of the source partnership.

(2) *Indirect partner does not notify the Internal Revenue Service of inconsistency*. Except as provided in paragraph (b)(3) of this section, an indirect partner who—

(i) Treats an item from a source partnership in a manner inconsistent with the treatment of that item on the source partnership's return; and

(ii) Fails to file a statement identifying the inconsistency with the source partnership in accordance with § 301.6222(b)–1, is subject to a computational adjustment to conform the treatment of that item to the treatment of that item on the return of the source partnership.

(3) *Indirect partner files consistently with a pass-thru partner that notifies the Internal Revenue Service of the inconsistency*. If an indirect partner treats an item from a source partnership in a manner consistent with the treatment of that item by a pass-thru partner through which the indirect partner holds the interest in the source partnership and that pass-thru partner—

(i) Treats that item in a manner inconsistent with the treatment of that item on the source partnership's return; and

(ii) Files a statement identifying the inconsistency with the source partnership in accordance with § 301.6222(b)–1, the indirect partner is not subject to a computational adjustment to conform to the treatment of that item on the return of the source partnership.

(d) *Examples*. The following examples illustrate the principles of this section:

*Example 1*. One of the partners in Partnership A is Partnership B, which has four equal partners C, D, E, and F. Both A and B are partnerships within the meaning of section 6231(a)(1). On its return, A reports $100,000 as B's distributive share of A's ordinary income. B, however, reports only $80,000 as its distributive share of the income and does not notify the Internal Revenue Service of this inconsistent treatment with respect to A. C reports $20,000 as its distributive share of the item. Although C reports the item consistently with B, C is subject to a computational adjustment to conform the treatment of that item on C's return to the treatment of that item on A's return.

*Example 2*. Assume the same facts as in Example 1, except that B notified the Internal Revenue Service of its inconsistent treatment with respect to source partnership A. C is not subject to a computational adjustment.

*Example 3*. Assume the same facts as in *Example 1*. D reports only $15,000 as D's distributive share of the income and does not report the inconsistency. F reports only $9,000 as its distributive share of the item but reports this inconsistency with respect to source partnership A. D is subject to a computational adjustment to conform the treatment of that item on D's return to the treatment of that item on A's return. F is not subject to a computational adjustment.

*Example 4*. Assume the same facts as in *Example 3*, except that F reported the inconsistency with respect to B and did not report the inconsistency with respect to source partnership A. F is subject to a computational adjustment to conform the treatment of that item on F's return to the treatment of that item on A's return.

*Example 5*. Assume the same facts as in Example 1. E reports $25,000 as its distributive share of the item. Regardless of whether E reports the inconsistency between its treatment of the item and that by B, E is neither subject to a computational adjustment to conform E's treatment of that item to that of B nor subject to the notice described in section 6231(b)(1)(A) with respect to any such notification of inconsistent treatment.

(e) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6222(a)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50545, Oct. 4, 2001]

### § 301.6222(b)–1 Notification to the Internal Revenue Service when partnership items are treated inconsistently.

(a) *In general*. The statement identifying an inconsistency described in section 6222(b)(1)(B) shall be filed by filing the form prescribed for that purpose in

accordance with the instructions accompanying that form.

(b) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6222(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50546, Oct. 4, 2001]

### § 301.6222(b)–2 Effect of notification of inconsistent treatment.

(a) *In general*. Generally, if a partner treats a partnership item on the partner's return in a manner inconsistent with the treatment of that item on the partnership return, the Internal Revenue Service may make a computational adjustment to conform the treatment of the item by the partner with the treatment of that item on the partnership return. Any additional tax resulting from that computational adjustment may be assessed without either the commencement of a partnership proceeding or notification to the partner that all partnership items arising from that partnership will be treated as nonpartnership items. However, if a partner notifies the Internal Revenue Service of the inconsistent treatment of a partnership item in the manner prescribed in § 301.6222(b)–1, the Internal Revenue Service generally may not make an adjustment with respect to that partnership item unless the Internal Revenue Service—

(1) Conducts a partnership-level proceeding; or

(2) Notifies the partner under section 6231(b)(1)(A) that all partnership items arising from that partnership will be treated as nonpartnership items. See, however, §§ 301.6231(c)–1 and 301.6231(c)–2 for special rules relating to certain applications and claims for refund based on losses, deductions, or credits from abusive tax shelter partnerships.

(b) *Partner protected only to extent of notification*. (1) A partner who reports the inconsistent treatment of partnership items on the partner's return is protected from computational adjustments under section 6222(c) only with respect to those partnership items the inconsistent treatment of which is reported. Thus, if a partner notifying the Internal Revenue Service with respect to one item fails to report the inconsistent treatment of another item, the partner is subject to a computational adjustment with respect to that other item.

(2) The following example illustrates the principles of this paragraph (b):

*Example*. Partner A of Partnership P treats a deduction and a capital gain arising from P on A's return in a manner that is inconsistent with the treatment of those items by P. A reports the inconsistent treatment of the deduction but not of the gain. A is subject to a computational adjustment under section 6222(c) with respect to the gain.

(c) *Adjustments in a separate proceeding not limited to conforming adjustments*. (1) If the Internal Revenue Service conducts a separate proceeding with a partner whose partnership items are treated as nonpartnership items under section 6231(b), the Internal Revenue Service is not limited to making adjustments that merely conform the partner's return to the partnership return.

(2) *Example*. The following example illustrates the principles of this paragraph (c):

*Example*. Partnership P allocates to E, one of its partners, a loss of $8,000. E, however, claims a loss of $9,000 and reports the inconsistent treatment. The Internal Revenue Service notifies E that it will treat all of E's partnership items arising from P as nonpartnership items. As a result of a separate proceeding with E, the Internal Revenue Service may issue a deficiency notice which could include reducing the loss to $3,000.

(d) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6222(b)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50546, Oct. 4, 2001]

### § 301.6222(b)–3 Partner receiving incorrect schedule.

(a) *In general*. A partner shall be treated as having complied with section 6222(b)(1)(B) and § 301.6222(b)–1 with respect to a partnership item if the partner—

(1) Demonstrates that the treatment of the partnership item on the partner's return is consistent with the treatment of that item on the schedule prescribed by the Internal Revenue Service and furnished to the partner by

the partnership showing the partner's share of income, credits, deductions, etc.; and

(2) Elects in accordance with the rules prescribed in paragraph (b) of this section to have this section apply with respect to that item.

(b) *Election provisions*—(1) *Time and manner of making election*. The election described in paragraph (a) of this section shall be made by filing a statement with the Internal Revenue Service office issuing the notice of computational adjustment within 30 days after the notice is mailed to the partner.

(2) *Contents of statement*. The statement described in paragraph (b)(1) of this section shall be—

(i) Clearly identified as an election under section 6222(b)(2);

(ii) Signed by the partner making the election; and

(iii) Accompanied by copies of the schedule furnished to the partner by the partnership and of the notice of computational adjustment. The partner need not enclose a copy of the notice of computational adjustment, however, if the partner clearly identifies the notice of computational adjustment. Generally, the requirement described in paragraph (a)(1) of this section will be satisfied by attaching to the statement a copy of the schedule furnished to the partner by the partnership. However, if it is not clear from the information contained on the schedule that the treatment of the partnership item on the schedule is consistent with the partner's treatment of such item on the partner's return the statement shall also include an explanation of how the treatment of such item on the schedule is consistent with the treatment on the partner's return with respect to the characterization, timing, and amount of such item.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6222(b)–3T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50546, Oct. 4, 2001]

### § 301.6223(a)–1 Notice sent to tax matters partner.

(a) *In general*. For purposes of subchapter C of chapter 63 of the Internal Revenue Code, a notice is treated as mailed to the tax matters partner on the earlier of—

(1) The date on which the notice is mailed to ''THE TAX MATTERS PARTNER'' at the address of the partnership (as provided on the partnership return, except as updated under § 301.6223(c)–1); or

(2) The date on which the notice is mailed to the person who is the tax matters partner at the address of that person (as provided on the partner's return, except as updated under § 301.6223(c)–1) or the partnership. See § 301.6223(c)–1 for rules relating to the information used by the Internal Revenue Service in providing notices, etc.

(b) *Example*. The provisions of this section may be illustrated by the following example:

*Example*. Partnership P designates B as its tax matters partner in accordance with § 301.6231(a)(7)–1(b). On December 1 a notice of the beginning of an administrative proceeding is mailed to ''THE TAX MATTERS PARTNER'' at the address of P. On January 10, a copy of the notice is mailed to B at B's address. December 1 is treated as the date that the notice was mailed to the tax matters partner.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(a)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50547, Oct. 4, 2001]

### § 301.6223(a)–2 Withdrawal of notice of the beginning of an administrative proceeding.

(a) *In general*. If the Internal Revenue Service, within 45 days after the day on which the notice specified in section 6223(a)(1) is mailed to the tax matters partner, decides not to propose any adjustments to the partnership return as filed, the Internal Revenue Service may withdraw the notice specified in section 6223(a)(1) by mailing a letter to that effect to the tax matters partner within that 45-day period. Even if the Internal Revenue Service does not

withdraw the notice specified in section 6223(a)(1), the Internal Revenue Service is not required to issue a notice of final partnership administrative adjustment. If the Internal Revenue Service withdraws the notice specified in section 6223(a)(1), neither the Internal Revenue Service nor the tax matters partner is required to furnish any notice with respect to that proceeding to any other partner. Except as provided in paragraph (b) of this section, a notice specified in section 6223(a)(1) which has been withdrawn shall be treated for purposes of subchapter C of chapter 63 of the Internal Revenue Code as if that notice had never been mailed to the tax matters partner.

(b) *Internal Revenue Service may not reissue notice except under certain circumstances.* If the notice specified in section 6223(a)(1) was mailed to the tax matters partner with respect to a partnership taxable year and that notice was later withdrawn as provided in paragraph (a) of this section, the Internal Revenue Service shall not mail a second notice specified in section 6223(a)(1) with respect to that taxable year unless—

(1) There is evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact;

(2) The prior proceeding involved the misapplication or erroneous interpretation of an established Internal Revenue Service position existing at the time of the previous examination, or the failure to make an adjustment based on such a position; or

(3) Other circumstances exist which indicate that failure to reissue the notice would be a serious administrative omission.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(a)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50547, Oct. 4, 2001]

### § 301.6223(b)–1 Notice group.

(a) *In general.* If a group of partners having in the aggregate a 5 percent or more interest in the profits of a partnership requests and designates one of their members to receive the notices described in section 6223(a)(1) and (2), the member so designated shall be treated as a partner to whom section 6223(a) applies. Thus, the designated representative is entitled to receive any notice described in section 6223(a) that is mailed to the tax matters partner 30 days or more after the day on which the Internal Revenue Service receives the request from the group.

(b) *Request for notice*—(1) *In general.* The Internal Revenue Service shall mail to the member of the notice group designated to receive such notice any notice described in section 6223(a) that is mailed to the tax matters partner 30 days or more after the day on which the Internal Revenue Service receives the request for notice from the group if such request for notice is made in accordance with the rules prescribed in this paragraph (b).

(2) *Content of request.* The request for notice from a notice group shall—

(i) Identify the partnership by name, address, and taxpayer identification number;

(ii) Specify the taxable year or years for which the notice group is formed;

(iii) Designate the member of the group to receive the notices;

(iv) Set out the name, address, taxpayer identification number, and profits interest of each member of the group; and

(v) Be signed by all partners comprising the notice group.

(3) *Place for filing.* The request for notice from a notice group generally must be filed with the service center where the partnership return is filed. However, if the notice group representative knows that the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement should be filed with the Internal Revenue Service office that mailed that notice.

(4) *Copy to be sent to the tax matters partner.* A copy of the request for notice from a notice group shall be provided to the tax matters partner by the notice group representative within 30 days after the request is filed with the Internal Revenue Service.

(5) *Years covered by request.* A request for notice by a notice group may relate only to partnership taxable years that have ended before the request is filed.

A request, however, may relate to more than one partnership taxable year if the 5 percent or more profits interest requirement of section 6223(b)(2) is satisfied for each year to which the request relates.

(c) *Composition of notice group*—(1) *In general.* A notice group shall be comprised only of persons who were partners at some time during the partnership taxable year for which the group is formed. If a notice group is formed for more than one taxable year, each member of the group must have been a partner at some time during at least one of the taxable years for which the group is formed. A notice group may include a partner entitled to separate notice. See section 6231(d) and § 301.6231(d)–1 for rules relating to determining the interest of a partner in the profits of a partnership for a partnership taxable year for purposes of section 6223(b). See paragraph (c)(6) of this section for rules relating to indirect and pass-thru partners.

(2) *Partner may be a member of only one group.* A partner cannot be a member of more than one notice group with respect to the same partnership for the same partnership taxable year. See paragraph (c)(6) of this section for rules relating to indirect and pass-thru partners.

(3) *Partner may join group after formation.* A partner may join a notice group at any time after the formation of that group by filing with the Internal Revenue Service office where the notice group filed its request a statement that it is joining the notice group. The statement shall identify the partner joining the notice group, the partnership, and the members of the notice group by name, address, and taxpayer identification number and shall be signed by the joining partner. A copy of the statement shall be provided by the joining partner to both the tax matters partner and the notice group representative within 30 days after the request is filed with the Internal Revenue Service. The partner shall become a member of the notice group for each partnership taxable year for which the group was formed and for which the partner was a partner at any time during such partnership taxable year.

(4) *Date on which a partner becomes a member of notice group.* A partner shall become a member of a notice group on the 30th day after the day on which the Internal Revenue Service receives—

(i) A request for notice from a notice group that identifies that partner as a member of that notice group; or

(ii) A statement filed in accordance with paragraph (c)(3) of this section that states that the partner is joining the notice group.

(5) *No withdrawal from notice group.* A partner who has signed a notice group request filed with the Internal Revenue Service remains a member of that notice group until the group terminates. A partner cannot withdraw from the notice group.

(6) *Indirect and pass-thru partners*—(i) *Pass-thru partners and unidentified indirect partners.* A pass-thru partner may become a member of a notice group as provided in this section. For purposes of applying the aggregate interest requirement specified in paragraph (a) of this section to a pass-thru partner, the partnership interest held by the pass-thru partner shall not include any interest held through the pass-thru partner by an indirect partner that has been identified as provided in section 6223(c)(3) and § 301.6223(c)–1 before the date on which the pass-thru partner becomes a member of the notice group.

(ii) *Indirect partners identified before the pass-thru partner joins a notice group.* An indirect partner may become a member of a notice group with respect to a partnership taxable year only if—

(A) The indirect partner held an interest in the partnership (either directly or through one or more pass-thru partners) at some time during that taxable year; and

(B) The indirect partner was identified as provided in section 6223(c)(3) and § 301.6223(c)–1 on or before the date on which the pass-thru partner became a member of a notice group.

(d) *Termination of notice group.* Unless the original request for notice from the notice group or a subsequent statement filed by the representative (in accordance with paragraphs (b)(3) and (4) of this section) designates a successor to the designated group representative,

the group terminates if the representative dies (or, in the case of an entity, if the entity is dissolved), resigns, or is adjudicated incompetent.

(e) *Notice group is not a 5-percent group.* The forming of a notice group under this section does not constitute the forming of a 5-percent group for purposes of litigation. A notice group is formed solely for the purpose of receiving notices. A 5-percent group is formed solely for the purpose of filing a petition for judicial review or appealing a judicial determination. See § 301.6226(b)–1. Thus, a member of a notice group may choose not to join a 5-percent group formed by other members of the notice group.

(f) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50547, Oct. 4, 2001]

### § 301.6223(c)–1 Additional information regarding partners furnished to the Internal Revenue Service.

(a) *In general.* In addition to the names, addresses, and profits interests as shown on the partnership return, the Internal Revenue Service will use additional information as provided in this section for purposes of administering subchapter C of chapter 63 of the Internal Revenue Code.

(b) *Procedure for furnishing additional information*—(1) *In general.* Any person may furnish additional information at any time by filing a written statement with the Internal Revenue Service. However, the information contained in the statement will be considered for purposes of determining whether a partner is entitled to a notice described in section 6223(a) only if the Internal Revenue Service receives the statement at least 30 days before the date on which the Internal Revenue Service mails the notice to the tax matters partner. Similarly, information contained in the statement generally will not be taken into account for other purposes by the Internal Revenue Service until 30 days after the statement is received.

(2) *Where statement must be filed.* A statement furnished under this section generally must be filed with the service center where the partnership return is filed. However, if the person filing the statement knows that the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement should be filed with the Internal Revenue Service office that mailed such notice.

(3) *Contents of statement.* The statement shall—

(i) Identify the partnership, each partner for whom information is supplied, and the person supplying the information by name, address, and taxpayer identification number;

(ii) Explain that the statement is furnished to correct or supplement earlier information with respect to the partners in the partnership;

(iii) Specify the taxable year to which the information relates;

(iv) Set out the corrected or additional information; and

(v) Be signed by the person supplying the information.

(c) *No incorporation by reference to previously furnished documents.* Incorporation by reference of information contained in another document previously furnished to the Internal Revenue Service will not be given effect for purposes of section 6223(c) or 6229(e). For example, reference to a return filed by a pass-thru partner which contains identifying information with respect to the indirect partners of that pass-thru partner is not sufficient to identify the indirect partners unless a copy of the document referred to is attached to the statement. Furthermore, reference to a prior general notification to the Internal Revenue Service that a partner who would otherwise be the tax matters partner is a debtor in a bankruptcy proceeding or has had a receiver appointed for the partner in a receivership proceeding is not sufficient unless a copy of the notification document referred to is attached to the statement.

(d) *Information supplied by a person other than the tax matters partner.* The Internal Revenue Service may require appropriate verification in the case of information furnished by a person other than the tax matters partner. The 30-day period referred to in paragraph (b)(1) of this section shall not

begin until that verification is supplied.

(e) *Power of attorney*—(1) *In general.* This paragraph (e) applies to powers of attorney with respect to proceedings under subchapter C of chapter 63 of the Internal Revenue Code (chapter 63C) that begin on or after January 2, 2002.

(2) *Specifically for purposes of subchapter C of chapter 63 of the Internal Revenue Code.* A power of attorney specifically for purposes of subchapter C of chapter 63 of the Internal Revenue Code shall be furnished in accordance with paragraph (b)(2) of this section.

(3) *Existing power of attorney.* A power of attorney granted to another person by a partner for other tax purposes shall not be given effect for purposes of subchapter C of chapter 63 unless the partner specifically requests that the power be given such effect in a statement furnished to the Internal Revenue Service in accordance with paragraph (b) of this section.

(f) *Internal Revenue Service may use other information.* In addition to the information on the partnership return and that supplied on statements filed under this section, the Internal Revenue Service may use other information in its possession (for example, a change in address reflected on a partner's return) in administering subchapter C of chapter 63 of the Internal Revenue Code. However, the Internal Revenue Service is not obligated to search its records for information not expressly furnished under this section.

(g) *Effective date.* Except as provided in paragraph (e)(1) of this section, this section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(c)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50548, Oct. 4, 2001]

### § 301.6223(e)–1 Effect of Internal Revenue Service's failure to provide notice.

(a) *Notice group.* Section 6223(e)(1)(B)(ii) applies with respect to a notice group only if the request for notice described in § 301.6223(b)–1 is received by the Internal Revenue Service at least 30 days before the notice is mailed to the tax matters partner.

(b) *Indirect partners*—(1) *In general.* For purposes of section 6223(e), the Internal Revenue Service's failure to provide notice to a pass-thru partner entitled to notice under section 6223(b) is deemed a failure to provide notice to indirect partners holding an interest in the partnership through the pass-thru partner. However, this rule does not apply if the indirect partner—

(i) Receives notice from the Internal Revenue Service;

(ii) Is identified as provided in section 6223(c)(3) and § 301.6223(c)–1 at least 30 days before the notice is mailed to the tax matters partner; or

(iii) Is a member of a notice group entitled to notice under paragraph (a) of this section.

(2) *Examples.* The provisions of paragraph (b)(1) of this section may be illustrated by the following examples:

*Example 1.* Partnership ABC has as one of its partners, A, a partnership with three partners, X, Y, and Z. ABC does not have more than 100 partners, and partnership A is entitled to notice under section 6223(a). In addition, Z was identified as provided in section 6223(c)(3) and § 301.6223(c)–1 on May 1, 2002. The Internal Revenue Service mailed a notice to the tax matters partner of ABC on July 1, 2002, but failed to provide notice to partnership A. Notwithstanding the Internal Revenue Service's notice to the tax matters partner, the Internal Revenue Service is deemed to have failed to provide notice to X and Y. The Internal Revenue Service's failure to provide notice to A, however, has no effect on Z; whether notice was provided to Z is determined independently.

*Example 2.* Assume the same facts as in *Example 1,* except that the Internal Revenue Service provided notice to partnership A but did not provide separate notice to Z. Notwithstanding the Internal Revenue Service's notice to partnership A, the Internal Revenue Service is deemed to have failed to provide notice to Z.

*Example 3.* Assume the same facts as in *Example 1,* except that partnership ABC has more than 100 partners and partnership A is entitled to notice under section 6223(b) because it had at least a 1 percent profits interest in partnership ABC. In addition, X became a member of a notice group on June 1, 2002, and the Internal Revenue Service mailed a notice to the designated member of that notice group. The Internal Revenue Service also mailed a separate notice to Z. The Internal Revenue Service's failure to provide notice to partnership A only affects Y, who is deemed not to have been provided notice by the Internal Revenue Service.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(e)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50549, Oct. 4, 2001]

**§ 301.6223(e)–2 Elections if Internal Revenue Service fails to provide timely notice.**

(a) *In general*. This section applies in any case in which the Internal Revenue Service fails to timely mail any notice described in section 6223(a) of the Internal Revenue Code to a partner entitled to such notice within the period specified in section 6223(d). The failure to issue any notice within the period specified in section 6223(d) does not invalidate the notice of the beginning of an administrative proceeding or final partnership administrative adjustment (FPAA). An untimely FPAA enables the recipient of the untimely notice to make the elections described in paragraphs (b), (c), and (d) of this section. The period within which to make the elections described in paragraphs (b), (c), and (d) of this section commences with the mailing of an FPAA to the partner. In the absence of an election, paragraphs (b) and (c) of this section provide for the treatment of a partner's partnership items.

(b) *Proceeding finished*. If at the time the Internal Revenue Service mails the partner an FPAA—

(1) The period within which a petition for review of the FPAA under section 6226 may be filed has expired and no petition has been filed; or

(2) The decision of a court in an action begun by such a petition has become final, the partner may elect in accordance with paragraph (d) of this section to have that adjustment, that decision, or a settlement agreement described in section 6224(c)(2) with respect to the partnership taxable year to which the adjustment relates apply to that partner. If the partner does not make an election in accordance with paragraph (d) of this section, the partnership items of the partner for the partnership taxable year to which the proceeding relates shall be treated as having become nonpartnership items as of the day on which the Internal Revenue Service mails the partner the FPAA.

(c) *Proceeding still going on*. If at the time the Internal Revenue Service mails the partner an FPAA, paragraphs (b)(1) and (2) of this section do not apply, the partner shall be a party to the proceeding unless the partner elects, in accordance with paragraph (d) of this section, to have—

(1) A settlement agreement described in section 6224(c)(2) with respect to the partnership taxable year to which the proceeding relates apply to the partner; or

(2) The partnership items of the partner for the partnership taxable year to which the proceeding relates treated as having become nonpartnership items as of the day on which the Internal Revenue Service mails the partner the FPAA.

(d) *Election*—(1) *In general*. The election described in paragraph (b) or (c) of this section shall be made in the manner prescribed in this paragraph (d). The election shall apply to all partnership items for the partnership taxable year to which the election relates.

(2) *Time and manner of making election*. The election shall be made by filing a statement with the Internal Revenue Service office mailing the FPAA within 45 days after the date on which the FPAA was mailed to the partner making the election.

(3) *Contents of statement*. The statement shall—

(i) Be clearly identified as an election under section 6223(e)(2) or (3);

(ii) Specify the election being made (that is, application of final partnership administrative adjustment, court decision, consistent settlement agreement, or nonpartnership item treatment);

(iii) Identify the partner making the election and the partnership by name, address, and taxpayer identification number;

(iv) Specify the partnership taxable year to which the election relates; and

(v) Be signed by the partner making the election.

(e) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4,

2001, see § 301.6223(e)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50550, Oct. 4, 2001]

### § 301.6223(f)–1 Duplicate copy of final partnership administrative adjustment.

(a) *In general.* Section 6223(f) does not prohibit the Internal Revenue Service from issuing a duplicate copy of the notice of final partnership administrative adjustment (for example, in the event the original notice is lost).

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(f)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50550, Oct. 4, 2001]

### § 301.6223(g)–1 Responsibilities of the tax matters partner.

(a) *Notices described in section 6223(a)*—(1) *Notice of beginning of proceeding.* Except as otherwise provided in § 301.6223(a)–2, the tax matters partner shall, within 75 days after the Internal Revenue Service mails the notice specified in section 6223(a)(1), forward a copy of that notice to each partner not entitled to notice from the Internal Revenue Service under section 6223. See § 301.6230(e)–1 for information to be furnished to the Internal Revenue Service.

(2) *Notice of final partnership administrative adjustment.* The tax matters partner shall, within 60 days after the Internal Revenue Service mails the notice specified in section 6223(a)(2), forward a copy of that notice to each partner not entitled to notice from the Internal Revenue Service under section 6223.

(3) *Requirement inapplicable in certain cases.* The tax matters partner is not required to send notice to a partner if—

(i) Before the expiration of the applicable 75-day or 60-day period the partnership items of that partner have become nonpartnership items (for example, by settlement);

(ii) That partner is an indirect partner and has not been identified to the tax matters partner at least 30 days before the tax matters partner is required to send such notice;

(iii) That partner is treated as a partner solely by virtue of § 301.6231(a)(2)–1;

(iv) That partner was a member of a notice group as of the date on which the notice was mailed to the tax matters partner (see § 301.6223(b)–1(c)(4) for the date on which a partner becomes a member of a notice group);

(v) The notice has already been provided to that partner by another person; or

(vi) The notice is withdrawn by the Internal Revenue Service under § 301.6223(a)–2.

(b) *Other notices or information*—(1) *In general.* The tax matters partner shall furnish to the partners specified in paragraph (b)(2) of this section information with respect to the following—

(i) Closing conference with the examining agent;

(ii) Proposed adjustments, rights of appeal, and requirements for filing of a protest;

(iii) Time and place of any Appeals conference;

(iv) Acceptance by the Internal Revenue Service of any settlement offer;

(v) Consent to the extension of the period of limitations with respect to all partners;

(vi) Filing of a request for administrative adjustment (including a request for substituted return treatment under § 301.6227(c)–1) on behalf of the partnership;

(vii) Filing by the tax matters partner or any other partner of any petition for judicial review under sections 6226 or 6228(a);

(viii) Filing of any appeal with respect to any judicial determination provided for in sections 6226 or 6228(a); and

(ix) Final judicial redetermination.

(2) *Partners to be notified.* The tax matters partner shall provide information with respect to any action or other matter specified in paragraph (b)(1) of this section to all notice group representatives and all other partners except partners—

(i) Whose partnership items become nonpartnership items before the expiration of the period specified in paragraph (b)(3) of this section for furnishing that information;

(ii) Who are indirect partners and who are not identified to the tax matters partner at least 30 days before the tax matters partner is required to provide the information;

(iii) Who are treated as partners solely by virtue of § 301.6231(a)(2)–1;

(iv) Who are members of a notice group as of the date on which the tax matters partner takes that action or receives information with respect to that matter (see § 301.6223(b)–1(c)(4) for the date on which a partner becomes a member of a notice group); or

(v) Who have already received information with respect to the action or matter from any other person.

(3) *Time for furnishing information.* The tax matters partner shall furnish information with respect to an action or other matter described in paragraph (b)(1) of this section within 30 days of taking the action or receiving information with respect to that matter.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(g)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50550, Oct. 4, 2001]

### § 301.6223(h)–1 Responsibilities of pass-thru partner.

(a) *In general.* The pass-thru partner shall, within 30 days of receiving notice or any other information regarding a partnership proceeding from the Internal Revenue Service, the tax matters partner, or another pass-thru partner, forward a copy of that notice or information to the person or persons holding an interest through the pass-thru partner in the profits or losses of the partnership for the partnership taxable year to which the notice or information relates. In the case of a pass-thru partner that is a partnership within the meaning of section 6231(a)(1), the tax matters partner of such partnership shall forward copies of the notice or information to the partners of such partnership.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(h)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50551, Oct. 4, 2001]

### § 301.6224(a)–1 Participation in administrative proceedings.

(a) *In general.* Every partner in the partnership, including an indirect partner, has the right to participate in any phase of administrative proceedings. However, except as provided in section 6223 and the regulations thereunder, neither the Internal Revenue Service nor the tax matters partner is required to provide notice of any proceeding to the partners. Consequently, a partner who wishes, for example, to be present during a preliminary discussion between an examining agent and the tax matters partner should make special arrangements with the tax matters partner to obtain information as to the time and place of the discussion. The Internal Revenue Service and the tax matters partner will determine the time and place for all administrative proceedings. Arrangements will generally not be changed merely for the convenience of another partner.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6224(a)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50551, Oct. 4, 2001]

### § 301.6224(b)–1 Partner may waive rights.

(a) *In general.* A partner may at any time waive any right that the partner has or any restriction on action by the Internal Revenue Service under subchapter C of chapter 63 of the Internal Revenue Code.

(b) *Form and manner of making waiver.* The waiver described in paragraph (a) of this section shall be made by a written statement. If the Internal Revenue Service furnishes a form to be used for this purpose, the partner may make the waiver by completing the form in accordance with the form's instructions. If such a form is not furnished, the statement shall—

(1) Be clearly identified as a waiver under section 6224(b);

(2) Identify the partner and the partnership by name, address, and taxpayer identification number;

(3) Specify the right or restriction being waived and the taxable year(s) to which the waiver applies;

(4) Be signed by the partner making the waiver; and

(5) Be filed with the service center where the partnership return is filed. However, if the person filing the statement knows that the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement shall be filed with the Internal Revenue Service office that mailed such notice.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6224(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50551, Oct. 4, 2001]

### § 301.6224(c)–1 Tax matters partner may bind nonnotice partners.

(a) *In general*. In the absence of a showing of fraud, malfeasance, or misrepresentation of fact, if the tax matters partner enters into a settlement agreement with the Internal Revenue Service with respect to partnership items, including partnership-level determinations relating to any penalty, addition to tax, or additional amounts that relate to adjustments to partnership items, and expressly states that the agreement shall be binding on the other partners, then that agreement shall be binding on all partners except those who—

(1) Are, as of the day on which the agreement is entered into, either notice partners or members of a notice group (see § 301.6223(b)–1(c)(4) for the date on which a partner becomes a member of a notice group); or

(2) Have, at least 30 days before the day on which the agreement is entered into, filed with the Internal Revenue Service the statement described in paragraph (c) of this section.

(b) *Indirect partners*—(1) *In general*. If, under paragraph (a) of this section, a pass-thru partner is not bound by an agreement entered into by the tax matters partner, all indirect partners holding an interest in the partnership through that pass-thru partner shall not be bound by that agreement. If, however, the pass-thru partner is bound by an agreement entered into by the tax matters partner, paragraph (a) of this section shall be applied separately to each indirect partner holding an interest in the partnership through the pass-thru partner to determine whether the indirect partner is also bound by the agreement.

(2) *Example*. The following example illustrates the principles of this section:

*Example*. Partnership P has over 100 partners. Partnership J is a partner in partnership P with a profits interest of less than 1 percent. Partnership J has three partners, A, B, and C. A is a member of a notice group with respect to partnership P, but B and C are not. On July 1, 2002, B filed the statement described in paragraph (c) of this section not to be bound by any settlement agreement entered into by the tax matters partner of partnership P. On August 1, 2002, the tax matters partner of partnership P enters into a settlement agreement with the Internal Revenue Service and states that the agreement is binding on other partners as provided in section 6224(c)(3). Because partnership J is bound by the settlement agreement, paragraph (a) of this section is applied separately to each of the indirect partners to determine whether they are bound. A is not bound by the agreement because A was a member of a notice group on the day the agreement was entered into and B is not bound because B filed the statement not to be bound at least 30 days before the agreement was entered into. C is bound by the settlement agreement.

(c) *Statement not to be bound*—(1) *Contents of statement*. The statement referred to in paragraph (a)(2) of this section shall—

(i) Be clearly identified as a statement to deny settlement authority to the tax matters partner under section 6224(c)(3)(B);

(ii) Identify the partner and partnership by name, address, and taxpayer identification number;

(iii) Specify the taxable year or years to which the statement applies; and

(iv) Be signed by the partner filing the statement.

(2) *Place where statement is to be filed*. The statement described in paragraph (c)(1) of this section generally shall be filed with the Internal Revenue Service service center where the partnership

return is filed. However, if the partner knows that the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement shall be filed with the Internal Revenue Service office that mailed that notice.

(3) *Consolidated statements*. The statement described in paragraph (c)(1) of this section may be filed with respect to more than one partner if the requirements of that paragraph (c)(1) (including signatures) are satisfied with respect to each partner.

(d) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6224(c)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50551, Oct. 4, 2001]

### § 301.6224(c)–2 Pass-thru partner binds indirect partners.

(a) *Pass-thru partner binds unidentified indirect partners*—(1) *In general*. If a pass-thru partner enters into a settlement agreement with the Internal Revenue Service with respect to partnership items, that agreement binds all indirect partners holding an interest in that partnership through the pass-thru partner except those indirect partners who have been identified as provided in section 6223(c)(3) and § 301.6223(c)–1 at least 30 days before the date on which the agreement is entered into. A settlement with respect to partnership items includes partnership-level determinations relating to any penalty, addition to tax, and additional amounts that relate to adjustments to partnership items. However, if, in addition to the interest in the partnership held through the pass-thru partner entering into a settlement agreement, an indirect partner holds a separate interest in that partnership, either directly or indirectly through a different pass-thru partner, then the indirect partner shall not be bound by that settlement agreement with respect to the interests held directly or indirectly through a pass-thru partner other than the pass-thru partner entering into the settlement agreement.

(2) *Example*. The provisions of paragraph (a)(1) of this section may be illustrated by the following example:

*Example*. Partnership J is a partner in partnership P. C is a partner in J but has not been identified as provided in section 6223(c)(3) and § 301.6223(c)–1. The only interest that C holds in P is through J. The tax matters partner of J enters into a settlement agreement with the Internal Revenue Service with respect to partnership items arising from P. C is bound by the settlement agreement entered into by the tax matters partner of J.

(b) *Person in pass-thru partner authorized to enter into settlement agreement that binds indirect partners*. In the case of a pass-thru partner that is—

(1) A partnership within the meaning of section 6231(a)(1), the tax matters partner of that partnership;

(2) A partnership other than a partnership described in paragraph (b)(1) of this section, any general partner of that partnership;

(3) An S corporation, any officer of that S corporation; or

(4) A trust, estate, or nominee, any person authorized in writing to act on behalf of that trust, estate, or nominee, may enter into a settlement agreement with the Internal Revenue Service on behalf of its respective entity that would bind the unidentified indirect partners that hold a partnership interest through the pass-thru partner.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6224(c)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50552, Oct. 4, 2001]

### § 301.6224(c)–3 Consistent settlements.

(a) *In general*. If the Internal Revenue Service enters into a settlement agreement with any partner with respect to partnership items, whether comprehensive or partial, the Internal Revenue Service shall offer to any other partner who so requests in accordance with paragraph (c) of this section, settlement terms consistent with those contained in the settlement agreement entered into.

(b) *Requirements for consistent settlement terms*—(1) *In general*. Consistent settlement terms are those based on

the same determinations with respect to partnership items. However, consistent settlement terms also may include partnership-level determinations of any penalty, addition to tax, or additional amount that relates to partnership items. Settlements with respect to partnership items shall be self-contained; thus, a concession by one party with respect to a partnership item may not be based upon a concession by another party with respect to any item that is not a partnership item other than a partnership-level determination of any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item. Consistent agreements must be identical to the original settlement (that is, the settlement upon which the offered settlement terms are based). A consistent agreement must mirror the original settlement and may not be limited to selected items from the original settlement. Once a partner has settled a partnership item, or a partnership-level determination of any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item, that partner may not subsequently request settlement terms consistent with a settlement that contains the previously settled item. The requirement for consistent settlement terms applies only if—

(i) The items were partnership items (or a partnership-level determination of any related penalty, addition to tax, or additional amount) for the partner entering into the original settlement immediately before the original settlement; and

(ii) The items are partnership items (or a partnership-level determination of any related penalty, addition to tax, or additional amount) for the partner requesting the consistent settlement at the time the partner files the request.

(2) *Effect of consistent agreement*. Consistent settlement terms are reflected in a consistent agreement. A consistent agreement is not a settlement agreement that gives rise to further consistent settlement rights because it is required to be given without volitional agreement of the Secretary. Therefore, a consistent agreement required to be offered to a requesting taxpayer is not a settlement agreement under section 6224(c)(2) or paragraph (c)(3) of this section which starts a new period for requesting consistent settlement terms. For all other purposes of the Internal Revenue Code, however, (e.g., binding effect under section 6224(c)(1) and conversion to nonpartnership items under section 6231(b)(1)(C)), a consistent agreement is treated as a settlement agreement.

(c) *Time and manner of requesting consistent settlements*—(1) *In general*. A partner desiring settlement terms consistent with the terms of any settlement agreement entered into between any other partner and the Internal Revenue Service shall submit a written statement to the Internal Revenue Service office that entered into the settlement.

(2) *Contents of statement*. Except as otherwise provided in instructions to the taxpayer from the Internal Revenue Service, the written statement described in paragraph (c)(1) of this section shall—

(i) Identify the statement as a request for consistent settlement terms under section 6224(c)(2);

(ii) Contain the name, address, and taxpayer identification number of the partnership and of the partner requesting the settlement offer (and, in the case of an indirect partner, of the passthru partner through which the indirect partner holds an interest);

(iii) Identify the earlier agreement to which the request refers; and

(iv) Be signed by the partner making the request.

(3) *Time for filing request*. The statement shall be filed not later than the later of—

(i) The 150th day after the day on which the notice of final partnership administrative adjustment is mailed to the tax matters partner; or

(ii) The 60th day after the day on which the settlement agreement was entered into.

(d) *Examples*. The following examples illustrate the principles of this section:

*Example 1*. The Internal Revenue Service seeks to disallow a $100,000 loss reported by Partnership P $20,000 of which was allocated to partner X, and $10,000 of which was allocated to partner Y. The Internal Revenue Service agrees to a settlement with X in which the Internal Revenue Service allows $12,000 of the loss, accepts the treatment of

all other partnership items on the partnership return, and imposes a penalty for negligence related to the $8,000 loss disallowance. Partner Y requests settlement terms consistent with the settlement made between X and the Internal Revenue Service. The items are partnership items (or a related penalty) for X immediately before X enters into the settlement agreement and are partnership items (or a related penalty) for Y at the time of the request. The Internal Revenue Service must offer Y settlement terms allowing a $6,000 loss, a negligence penalty on the $4,000 disallowance, and otherwise reflecting the treatment of partnership items on the partnership return.

*Example 2.* F files inconsistently with Partnership P and reports the inconsistency. The Internal Revenue Service notifies F that it will treat all partnership items arising from P as nonpartnership items with respect to F. Later, the Internal Revenue Service enters into a settlement with F on these items. The Internal Revenue Service is not required to offer the other partners of P settlement terms consistent with the settlement reached between F and the Internal Revenue Service because the items arising from P are not partnership items with respect to F.

*Example 3.* G, a partner in Partnership P, filed suit under section 6228(b) after the Internal Revenue Service failed to allow an administrative adjustment request with respect to a partnership item arising from P for a taxable year. Under section 6231(b)(1)(B), the partnership items of G for the partnership taxable year became nonpartnership items as of the date G filed suit. After G filed suit, another partner and the Internal Revenue Service entered into a settlement agreement with respect to items arising from P in that year. G is not entitled to consistent settlement terms because, at the time of the settlement, the items arising from P are no longer partnership items with respect to G.

(e) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6224(c)–3T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50552, Oct. 4, 2001]

### § 301.6226(a)–1 Principal place of business of partnership.

(a) *In general.* The principal place of a partnership's business for purposes of determining the appropriate district court in which a petition for a readjustment of partnership items may be filed is its principal place of business as of the date the petition is filed.

(b) *Example.* The provisions of paragraph (a) of this section may be illustrated by the following example:

*Example.* The principal place of Partnership A's business on the day that the notice of the final partnership administrative adjustment was mailed to A's tax matters partner was Cincinnati, Ohio. However, by the day on which a petition seeking judicial review of that adjustment was filed, A had moved its principal place of business to Louisville, Kentucky. For purposes of section 6226(a)(2), A's principal place of business is Louisville.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6226(a)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50553, Oct. 4, 2001]

### § 301.6226(b)–1 5-percent group.

(a) *In general.* All members of a 5-percent group shall join in filing any petition for judicial review. The designation of a partner as a representative of a notice group does not authorize that partner to file a petition for a readjustment of partnership items on behalf of the notice group.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6226(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50553, Oct. 4, 2001]

### § 301.6226(e)–1 Jurisdictional requirement for bringing an action in District Court or United States Court of Federal Claims.

(a) *Amount to be deposited*—(1) *In general.* The jurisdictional amount that the filing partner (or, in the case of a petition filed by a 5-percent group, each member of the group, or, for civil actions beginning on or after April 2, 2002, in the case of a petition filed by a pass-thru partner, each indirect partner holding an interest through the pass-thru partner) shall deposit is the amount by which the tax liability of the partner would be increased if the treatment of the partnership items on the partner's return were made consistent with the treatment of partnership items on the partnership return,

as adjusted by the notice of final partnership administrative adjustment. The partner is not required to pay other outstanding liabilities in order to deposit a jurisdictional amount.

(2) *Example*. The provisions of paragraph (a)(1) of this section may be illustrated by the following example:

*Example*. A files a petition for readjustment of partnership items in the United States Court of Federal Claims. A's tax liability would be increased by $4,000 if partnership items on A's return were conformed to the partnership return, as adjusted by the notice of final partnership administrative adjustment. A has an unpaid liability of $10,000 attributable to nonpartnership items. A is required to deposit $4,000 in order to satisfy the jurisdictional requirement.

(b) *Deposit taken into account in computing interest*. The amount deposited is treated as a payment of tax for purposes of chapter 67 of the Internal Revenue Code (relating to interest).

(c) *Deposit generally not treated as payment of tax*. Except as provided in paragraph (b) of this section, an amount deposited under section 6226(e) shall not be treated as a payment of tax. Thus, the Internal Revenue Service may proceed against the depositor for a deficiency based on nonpartnership items without regard to this deposit.

(d) *Amount deposited may be applied against assessment*. If the restriction on assessment provided under section 6225(a) lapses with respect to a deficiency attributable to partnership items for a partnership taxable year while an amount is on deposit under section 6226(e) in connection with a petition relating to those items, the Internal Revenue Service may apply the amount deposited against any such deficiency that is assessed.

(e) *Effective date*. Except as otherwise provided in paragraph (a)(1) of this section, this section is applicable to civil actions beginning on or after October 4, 2001. For civil actions beginning prior to October 4, 2001, see § 301.6226(e)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50554, Oct. 4, 2001]

### § 301.6226(f)–1 Scope of judicial review.

(a) *In general*. A court reviewing a notice of final partnership administrative adjustment has jurisdiction to determine all partnership items for the taxable year to which the notice relates and the proper allocation of such items among the partners. Thus, the review is not limited to the items adjusted in the notice. In addition, the court has jurisdiction in the partnership-level proceeding to determine any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item. However, the court does not have jurisdiction in the partnership-level proceeding to consider any partner-level defenses to any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item. See section 6230(c)(4) and § 301.6221–1(c) and (d).

(b) *Example*. The provisions of paragraph (a) of this section may be illustrated by the following example:

*Example*. The Internal Revenue Service issues a notice of final partnership administrative adjustment with respect to Partnership ABC in which the only item adjusted is depreciation. A petition for judicial review of that notice is filed. During the judicial proceeding, a partner of ABC, in accordance with the applicable court rules, raises an issue relating to the treatment of intangible drilling costs. The court reviewing the notice has jurisdiction to determine the intangible drilling cost issue in addition to the depreciation issue.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6226(f)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50554, Oct. 4, 2001]

### § 301.6227(c)–1 Administrative adjustment request by the tax matters partner on behalf of the partnership.

(a) *In general*. A request for an administrative adjustment filed by the tax matters partner on behalf of the partnership shall be filed on the form prescribed by the Internal Revenue Service for that purpose in accordance with that form's instructions. Except as otherwise provided in that form's instructions, the request shall be—

(1) Filed with the service center where the original partnership return was filed (but, if the notice described in

section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement should be filed with the Internal Revenue Service office that mailed such notice);

(2) Signed by the tax matters partner; and

(3) Accompanied by revised schedules showing the effects of the proposed changes on each partner and an explanation of the changes.

(b) *Denied request for treatment as a substituted return remains administrative adjustment request.* An administrative adjustment request filed by the tax matters partner on behalf of the partnership for which substituted return treatment is requested but not granted remains an administrative adjustment request. Thus, for example, the tax matters partner may file suit under section 6228(a) if the Internal Revenue Service fails to take timely action on the request.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6227(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50554, Oct. 4, 2001]

### § 301.6227(d)–1 Administrative adjustment request filed on behalf of a partner.

(a) *In general.* A request for an administrative adjustment on behalf of a partner shall be filed on the form prescribed by the Internal Revenue Service for that purpose in accordance with that form's instructions. Except as otherwise provided in that form's instructions, the request shall—

(1) Be filed in duplicate, the original copy filed with the partner's amended income tax return (on which the partner computes the amount by which the partner's tax liability should be adjusted if the request is granted) and the other copy filed with the service center where the partnership return is filed (but, if the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement should be filed with the Internal Revenue Service office that mailed such notice);

(2) Identify the partner and the partnership by name, address, and taxpayer identification number;

(3) Specify the partnership taxable year to which the administrative adjustment request applies;

(4) Relate only to partnership items; and

(5) Relate only to one partnership and one partnership taxable year.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6227(c)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50555, Oct. 4, 2001]

### § 301.6229(b)–1 Extension by agreement.

(a) *In general.* Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center where the partnership return is filed (but, if the notice described in section 6223(a)(1) (beginning of an administrative proceeding) has already been mailed to the tax matters partner, the statement should be filed with the Internal Revenue Service office that mailed such notice). The statement shall—

(1) Provide that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners;

(2) Identify the partnership and the person being authorized by name, address, and taxpayer identification number;

(3) Specify the partnership taxable year or years for which the authorization is effective; and

(4) Be signed by all persons who were general partners (or, in the case of an LLC, member-managers, as those terms are defined in § 301.6231(a)(7)–2(b)) at any time during the year or years for which the authorization is effective.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4,

2001, see § 301.6229(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50555, Oct. 4, 2001]

### § 301.6229(b)–2 Special rule with respect to debtors in Title 11 cases.

(a) *In general.* Notwithstanding any other law or rule of law, if an agreement is entered into under section 6229(b)(1)(B), and the agreement is signed by a person who would be the tax matters partner but for the fact that, at the time that the agreement is executed, the person is a debtor in a bankruptcy proceeding under Title 11 of the United States Code, such agreement shall be binding on all partners in the partnership unless the Internal Revenue Service has been notified of the bankruptcy proceeding in accordance with paragraph (b) of this section.

(b) *Procedures for notifying the Internal Revenue Service of a partner's bankruptcy proceeding.* (1) The Internal Revenue Service shall be notified of the bankruptcy proceeding of the tax matters partner in accordance with the procedures set forth in § 301.6223(c)–1.

(2) In addition to the information specified in § 301.6223(c)–1, notification that a person is (or was) a debtor in a bankruptcy proceeding shall include the date the bankruptcy proceeding was filed, the name and address of the court in which the bankruptcy proceeding exists (or took place), the caption of the bankruptcy proceeding (including the docket number or other identification number used by the court), and the status of the proceeding as of the date of notification.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6229(b)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50555, Oct. 4, 2001]

### § 301.6229(e)–1 Information with respect to unidentified partner.

(a) *In general.* A partner who is not properly identified on the partnership return (including an indirect partner) remains an unidentified partner for purposes of section 6229(e) until identifying information is furnished as provided in § 301.6223(c)–1.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6229(e)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50555, Oct. 4, 2001]

### § 301.6229(f)–1 Special rule for partial settlement agreements.

(a) *In general.* If a partner enters into a settlement agreement with the Internal Revenue Service with respect to the treatment of some of the partnership items or partnership-level determinations of any penalty, addition to tax, or additional amount in dispute for a partnership taxable year, but one or more other partnership items or determinations remain in dispute, the period of limitations for assessing any tax attributable to the settled items shall be determined as if such agreement had not been entered into.

(b) *Other items remaining in dispute.* Pursuant to section 6226(c), a partner is a party to a partnership-level judicial proceeding with respect to partnership items and partnership-level determinations of penalties, additions to tax or additional amounts. When a partner settles partnership items, the settled partnership items convert to nonpartnership items under section 6231(b)(1)(C) and will not be subject to any future or pending partnership-level proceeding pursuant to section 6226(d)(1). The remaining unsettled partnership items, as well as any unsettled penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item (regardless of whether the partnership item to which it relates has been settled), however, will remain subject to determination under partnership-level administrative and judicial procedures. Consequently, any remaining unsettled items, including any unsettled penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item, will be deemed to remain in dispute. Thus, the period for assessing any tax attributable to the settled items will be governed by the period for assessing any tax attributable to the remaining unsettled items.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6229(f)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50555, Oct. 4, 2001]

### § 301.6230(b)–1 Request that correction not be made.

(a) *In general.* The request that a correction not be made under section 6230(b)(2) shall be in writing and shall—

(1) State that it is a request that a correction not be made under section 6230(b);

(2) Identify the partnership and the partner filing the request by name, address, and taxpayer identification number;

(3) Be signed by the partner filing the request; and

(4) Be filed with the Internal Revenue Service office that provided the notice of the correction of the error.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6230(b)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50556, Oct. 4, 2001]

### § 301.6230(c)–1 Claim arising out of erroneous computation, etc.

(a) *In general.* A claim for refund under section 6230(c) shall state the grounds for the claim and shall be filed with the service center where the partner's return is filed.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6230(c)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50556, Oct. 4, 2001]

### § 301.6230(e)–1 Tax matters partner required to furnish names.

(a) *In general.* If a notice of the beginning of an administrative proceeding is mailed to the tax matters partner with respect to any partnership taxable year, the tax matters partner shall furnish to the Internal Revenue Service office that issued the notice the name, address, profits interest, and taxpayer identification number of each person who was a partner in the partnership at any time during that taxable year if that information was not provided on the partnership return filed for that year.

(b) *Revised or additional information.* If the tax matters partner discovers that any information furnished to the Internal Revenue Service on the partnership return or under paragraph (a) of this section was incorrect or incomplete, the tax matters partner shall furnish revised or additional information to the Internal Revenue Service within 15 days of discovering that the information furnished to the Internal Revenue Service was incorrect or incomplete.

(c) *Information required with respect to indirect partners.* The requirements of this section for identifying information apply with respect to indirect partners to the extent that the tax matters partner has such information.

(d) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6230(e)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50556, Oct. 4, 2001]

### § 301.6231(a)(1)–1 Exception for small partnerships.

(a) *In general.* For purposes of the exception for small partnerships under section 6231(a)(1)(B), the rules contained in this section shall apply.

(1) *10 or fewer.* The 10 or fewer limitation described in section 6231(a)(1)(B)(i) is applied to the number of natural persons, C corporations, and estates of deceased partners that were partners at any one time during the partnership taxable year. Thus, for example, a partnership that at no time during the taxable year had more than 10 partners may be treated as a small partnership even if, because of transfers of interests in the partnership, 11 or more natural persons, C corporations, or estates of deceased partners owned interests in the partnership for some portion of the taxable year. See section 1361(a)(2) for the definition of a *C corporation.* For purposes of section 6231(a)(1)(B) and this section, a husband and wife (and their estates) are treated as one person.

(2) *Pass-thru partner.* The exception provided in section 6231(a)(1)(B) does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner as defined in section 6231(a)(9). For purposes of this paragraph (a)(2), an estate shall not be treated as a pass-thru partner.

(3) *Determination made annually.* The determination of whether a partnership meets the requirements for the exception for small partnerships under section 6231(a)(1)(B) and this paragraph (a) shall be made with respect to each partnership taxable year. Thus, a partnership that does not qualify as a small partnership in one taxable year may qualify as a small partnership in another taxable year if the requirements for the exception under section 6231(a)(1)(B) and this paragraph (a) are met with respect to that other taxable year.

(b) *Election to have subchapter C of chapter 63 apply*—(1) *In general.* Any partnership that meets the requirements set forth in section 6231(a)(1)(B) and paragraph (a) of this section (relating to the exception for small partnerships) may elect under paragraph (b)(2) of this section to have the provisions of subchapter C of chapter 63 of the Internal Revenue Code apply with respect to that partnership.

(2) *Method of election.* A partnership shall make the election described in paragraph (b)(1) of this section by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under section 6231(a)(1)(B)(ii), shall be signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates, and shall be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return. However, for any partnership taxable year for which the due date of the return (determined without regard to extensions) is before January 2, 2002, the partnership may file the statement described in the preceding sentence on or before the date which is one year before the date specified in section 6229(a) for the expiration of the period of limitations with respect to that partnership (determined with regard to extensions of that period under section 6229(b)).

(3) *Years covered by election.* The election shall be effective for the partnership taxable year to which the return relates and all subsequent partnership taxable years unless revoked with the consent of the Commissioner.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(a)(1)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50556, Oct. 4, 2001]

### § 301.6231(a)(2)–1 Persons whose tax liability is determined indirectly by partnership items.

(a) *Spouse filing joint return with individual holding a separate interest*—(1) *In general.* Except as otherwise provided in this paragraph (a), a spouse who files a joint return with an individual holding a separate interest in the partnership shall be treated as a partner for purposes of subchapter C of chapter 63 of the Internal Revenue Code. Thus, the spouse who files a joint return with a partner will be permitted to participate in administrative and judicial proceedings.

(2) *Counting rules.* A spouse who files a joint return with an individual holding a separate interest in the partnership shall not be counted as a partner for purposes of applying section 6223(b) (relating to special rules for partnerships with more than 100 partners) and section 6231(a)(1)(B) (relating to the exception for small partnerships).

(3) *Notice rules*—(i) *In general.* Except as provided in paragraph (a)(3)(ii) of this section, for purposes of subchapter C of chapter 63 of the Internal Revenue Code, a spouse who files a joint return with an individual holding a separate interest in the partnership shall be treated as receiving any notice received by the individual holding the separate interest.

(ii) *Spouse identified on partnership return or by statement.* Paragraph (a)(3)(i) of this section shall not apply to a spouse who files a joint return with an individual holding a separate interest in the partnership if that spouse—

(A) Is identified on the partnership return; or

(B) Is identified as a partner entitled to notice as provided in § 301.6223(c)–1(b).

(4) *Conversion of partnership items*—(i) *Individual holding a separate interest.* A spouse who files a joint return with an individual holding a separate interest in the partnership shall cease to be treated as a partner in the partnership under paragraph (a)(1) of this section upon the conversion of the partnership items of the individual holding the separate interest in the partnership to nonpartnership items pursuant to section 6231(b). If each spouse holds a separate interest in the partnership, the previous sentence shall be applied separately with respect to each partnership interest.

(ii) *Spouse who files a joint return with an individual holding a separate interest in the partnership.* A spouse who files a joint return with an individual holding a separate interest in the partnership shall cease to be treated as a partner in the partnership under paragraph (a)(1) of this section upon the occurrence of an event that would convert the partnership items of the spouse to nonpartnership items if the spouse were the owner of a separate interest.

(iii) *Examples.* The following examples illustrate the application of paragraph (a)(4) of this section:

*Example 1.* Husband owns a separate interest in ABC partnership and files a joint return with Wife. Husband files for bankruptcy. Pursuant to § 301.6231(c)–7, upon filing for bankruptcy, the partnership items of the debtor convert to nonpartnership items. Thus, Husband's partnership items converted to nonpartnership items upon the filing of Husband's bankruptcy petition. Pursuant to paragraph (a)(4)(i) of this section, Wife is no longer treated as a partner of ABC partnership as of the date the partnership items of Husband converted to nonpartnership items.

*Example 2.* Wife owns a separate interest in XYZ partnership and files a joint return with Husband. Husband files for bankruptcy. Because the filing of the bankruptcy petition by Husband is an event that would convert Husband's partnership items to nonpartnership items if Husband were the owner of a separate interest, Husband shall no longer be treated as a partner as of the filing of the bankruptcy petition. Pursuant to paragraph (a)(4)(ii) of this section, the partnership items of Wife are not affected by Husband's bankruptcy.

(5) *Cross-reference.* See § 301.6231(a)(12)–1 for special rules relating to spouses holding a joint interest in a partnership.

(b) *Shareholder of C corporation.* A shareholder of a C corporation (as defined in section 1361(a)(2)) is not a partner in a partnership merely because the C corporation is a partner in that partnership.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(a)(2)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50557, Oct. 4, 2001]

### § 301.6231(a)(3)–1 Partnership items.

(a) *In general.* For purposes of subtitle F of the Internal Revenue Code of 1954, the following items which are required to be taken into account for the taxable year of a partnership under subtitle A of the Code are more appropriately determined at the partnership level than at the partner level and, therefore, are partnership items:

(1) The partnership aggregate and each partner's share of each of the following:

(i) Items of income, gain loss, deduction, or credit of the partnership;

(ii) Expenditures by the partnership not deductible in computing its taxable income (for example, charitable contributions);

(iii) Items of the partnership which may be tax preference items under section 57(a) for any partner;

(iv) Income of the partnership exempt from tax;

(v) Partnership liabilities (including determinations with respect to the amount of the liabilities, whether the liabilities are nonrecourse, and changes from the preceding taxable year); and

(vi) Other amounts determinable at the partnership level with respect to partnership assets, investments, transactions and operations necessary to enable the partnership or the partners to determine—

(A) The investment credit determined under section 46(a);

(B) Recapture under section 47 of the investment credit;

(C) Amounts at risk in any activity to which section 465 applies;

(D) The depletion allowance under section 613A with respect to oil and gas wells; and

(E) The application of section 751 (a) and (b);

(2) Guaranteed payments;

(3) Optional adjustments to the basis of partnership property pursuant to an election under section 754 (including necessary preliminary determinations, such as the determination of a transferee partner's basis in a partnership interest); and

(4) Items relating to the following transactions, to the extent that a determination of such items can be made from determinations that the partnership is required to make with respect to an amount, the character of an amount, or the percentage interest of a partner in the partnership, for purposes of the partnership books and records or for purposes of furnishing information to a partner:

(i) Contributions to the partnership;

(ii) Distributions from the partnership; and

(iii) Transactions to which section 707(a) applies (including the application of section 707(b)).

(b) *Factors that affect the determination of partnership items.* The term ''partnership item'' includes the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc. Examples of these determinations are: The partnership's method of accounting, taxable year, and inventory method; whether an election was made by the partnership; whether partnership property is a capital asset, section 1231 property, or inventory; whether an item is currently deductible or must be capitalized; whether partnership activities have been engaged in with the intent to make a profit for purposes of section 183; and whether the partnership qualifies for the research and development credit under section 30.

(c) *Illustrations*—(1) *In general.* This paragraph (c) illustrates the provisions of paragraph (a)(4) of this section. The determinations illustrated in this paragraph (c) that the partnership is required to make are not exhaustive; there may be additional determinations that the partnership is required to make which relate to a transaction listed in paragraph (a)(4) of this section. The critical element is that the partnership needs to make a determination with respect to a matter for the purposes stated; failure by the partnership actually to make a determination (for example, because it does not maintain proper books and records) does not prevent an item from being a partnership item.

(2) *Contributions.* For purposes of its books and records, or for purposes of furnishing information to a partner, the partnership needs to determine:

(i) The character of the amount received from a partner (for example, whether it is a contribution, a loan, or a repayment of a loan);

(ii) The amount of money contributed by a partner;

(iii) The applicability of the investment company rules of section 721(b) with respect to a contribution; and

(iv) The basis to the partnership of contributed property (including necessary preliminary determinations, such as the partner's basis in the contributed property).

To the extent that a determination of an item relating to a contribution can be made from these and similar determinations that the partnership is required to make, therefore, that item is a partnership item. To the extent that that determination requires other information, however, that item is not a partnership item. For example, it may be necessary to determine whether contribution of the property causes recapture by the contributing partner of the investment credit under section 47 in certain circumstances in which that determination is irrelevant to the partnership.

(3) *Distributions.* For purposes of its books and records, or for purposes of furnishing information to a partner, the partnership needs to determine:

(i) The character of the amount transferred to a partner (for example, whether it is a distribution, a loan, or a repayment of a loan);

(ii) The amount of money distributed to a partner;

(iii) The adjusted basis to the partnership of distributed property; and

(iv) The character of partnership property (for example, whether an item is inventory or a capital asset).

To the extent that a determination of an item relating to a distribution can be made from these and similar determinations that the partnership is required to make, therefore, that item is a partnership item. To the extent that that determination requires other information, however, that item is not a partnership item. Such other information would include those factors used in determining the partner's basis for the partnership interest that are not themselves partnership items, such as the amount that the partner paid to acquire the partnership interest from a transferor partner if that transfer was not covered by an election under section 754.

(4) *Transactions to which section 707 (a) applies.* For purposes of its books and records, the partnership needs to determine:

(i) The amount transferred from the partnership to a partner or from a partner to the partnership in any transaction to which section 707(a) applies;

(ii) The character of such an amount (for example, whether or not it is a loan; in the case of amounts paid over time for the purchase of an asset, what portion is interest); and

(iii) The percentage of the capital interests and profits interests in the partnership owned by each partner.

To the extent that a determination of an item relating to a transaction to which section 707(a) applies can be made from these and similar determinations that the partnership is required to make, therefore, that item is a partnership item. To the extent that that determination requires other information, however, that item is not a partnership item. An example of such other information is the cost to the partner of goods sold to the partnership.

(d) *Effective date.* This section shall apply with respect to partnership taxable years beginning after September 3, 1982. This section shall also apply with respect to any partnership taxable year ending after September 3, 1982, if with respect to that year there is an agreement entered into pursuant to section 407(a)(3) of the Tax Equity and Fiscal Responsibility Act of 1982.

[T.D. 8082, 51 FR 13214, Apr. 18, 1986; 51 FR 19062, May 27, 1986]

### § 301.6231(a)(5)–1 Definition of affected item.

(a) *In general.* The term *affected item* means any item to the extent such item is affected by a partnership item. It includes items unrelated to the items reflected on the partnership return (for example, an item, such as the threshold for the medical expense deduction under section 213, that varies if there is a change in an individual partner's adjusted gross income).

(b) *Basis in a partner's partnership interest.* The basis of a partner's partnership interest is an affected item to the extent it is not a partnership item.

(c) *At-risk limitation.* The application of the at-risk limitation under section 465 to a partner with respect to a loss incurred by a partnership is an affected item to the extent it is not a partnership item.

(d) *Passive losses.* The application of the passive loss rules under section 469 to a partner with respect to a loss incurred by a partnership is an affected item to the extent it is not a partnership item.

(e) *Penalty, addition to tax, or additional amount*—(1) *In general.* The term *affected item* includes any penalty, addition to tax, or additional amount provided by subchapter A of chapter 68 of the Internal Revenue Code of 1986 to the extent provided in this paragraph (e).

(2) *Penalty, addition to tax, or additional amount without floor.* If a penalty, addition to tax, or additional amount that does not contain a floor (that is, a threshold amount of underpayment or understatement necessary before the imposition of the penalty, addition to tax, or additional amount) is imposed on a partner as the result of an adjustment to a partnership item, the term *affected item* shall include the penalty, addition to tax, or additional amount computed with reference to the portion

of the underpayment that is attributable to the partnership item adjustment(s) to which the penalty, addition to tax, or additional amount applies.

(3) *Penalty, addition to tax, or additional amount containing floor*—(i) *Floor exceeded prior to adjustment.* If a partner would have been subject to a penalty, addition to tax, or additional amount that contains a floor in the absence of an adjustment to a partnership item (that is, the partner's understatement or underpayment exceeded the floor even without an adjustment to a partnership item) the term *affected item* shall include only the portion of the penalty, addition to tax, or additional amount computed with reference to the partnership item (or affected item) adjustments.

(ii) *Floor not exceeded prior to adjustment.* In the case of a penalty, addition to tax, or additional amount that contains a floor, if the taxpayer's understatement or underpayment does not exceed the floor prior to an adjustment to a partnership item but does so after such adjustment, the term *affected item* shall include the penalty, addition to tax, or additional amount computed with reference to the entire underpayment or understatement to which the penalty, addition to tax, or additional amount applies.

(4) *Examples.* The provisions of this paragraph (e) may be illustrated by the following examples:

*Example 1.* A, a partner of P, had an aggregate underpayment of $1,000 of which $100 is attributable to an adjustment to partnership items. A is negligent in reporting the partnership items. The accuracy-related penalty under section 6662 for negligence computed with reference to the $100 underpayment attributable to the partnership item adjustments is an affected item.

*Example 2.* B, a partner of P, understated B's income tax liability attributable to nonpartnership items by $6,000. An adjustment to a partnership item resulting from a partnership proceeding increased B's income tax by an additional $2,000. Prior to the adjustment, B would have been subject to the accuracy-related penalty under section 6662 for a substantial understatement of income tax with respect to the $6,000 understatement attributable to nonpartnership items. The portion of the accuracy-related penalty under section 6662 computed with reference to the $2,000 understatement attributable to partnership items to which the accuracy-related penalty applies is an affected item. The portion of the accuracy-related penalty under section 6662 computed with reference to the $6,000 pre-existing understatement is not an affected item.

*Example 3.* C, a partner in partnership P, understated C's income tax liability attributable to nonpartnership items by $4,000. As a result of an adjustment to partnership items, that understatement is increased to $10,000. Prior to the adjustment, C would not have been subject to the accuracy-related penalty under section 6662 for a substantial understatement of income tax. The accuracy-related penalty under section 6662 computed with reference to the entire $10,000 understatement to which the accuracy-related penalty applies is an affected item.

(f) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(a)(5)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50557, Oct. 4, 2001]

### § 301.6231(a)(6)–1 Computational adjustments.

(a) *Changes in a partner's tax liability*—(1) *In general.* A change in the tax liability of a partner to properly reflect the treatment of a partnership item under subchapter C of chapter 63 of the Internal Revenue Code is made through a computational adjustment. A computational adjustment includes a change in tax liability that reflects a change in an affected item where that change is necessary to properly reflect the treatment of a partnership item, or any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item. However, if a change in a partner's tax liability cannot be made without making one or more partner-level determinations, that portion of the change in tax liability attributable to the partner-level determinations shall be made under the deficiency procedures (as described in subchapter B of chapter 63 of the Internal Revenue Code), except for any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item.

(2) *Affected items that do not require partner-level determinations.* Changes in a partner's tax liability with respect to affected items that do not require partner-level determinations (such as the

threshold amount of medical deductions under section 213 that changes as the result of determinations made at the partnership level) are computational adjustments that are directly assessed. When making computational adjustments, the Internal Revenue Service may assume that amounts the partner reported on the partner's individual return include all amounts reported to the partner by the partnership (on the Schedule K–1s attached to the partnership's original return), absent contrary notice to the Internal Revenue Service (for example, a ''Notice of Inconsistent Treatment'' pursuant to § 301.6222(a)–2(c)). Such an assumption by the Internal Revenue Service does not constitute a partner-level determination. Moreover, substituting redetermined partnership items for the partner's previously reported partnership items (including partnership items included in carryover amounts) does not constitute a partner-level determination where the Internal Revenue Service otherwise accepts, for the sole purpose of determining the computational adjustment, all nonpartnership items (including, for example, nonpartnership item components of carryover amounts) as reported.

(3) *Affected items that require partner-level determinations.* Changes in a partner's tax liability with respect to affected items that require partner-level determinations (such as a partner's at-risk amount to the extent it depends upon the source from which the partner obtained the funds that the partner contributed to the partnership) are computational adjustments that are subject to the deficiency procedures. Notwithstanding the preceding sentence, any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item is not subject to the deficiency procedures, but rather may be directly assessed as part of the computational adjustment that is made following the partnership proceeding, based on determinations in that proceeding, regardless of whether any partner-level determinations may be required.

(b) *Interest.* A computational adjustment includes any interest due with respect to any underpayment or overpayment of tax attributable to adjustments to reflect properly the treatment of partnership items.

(c) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(a)(6)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50558, Oct. 4, 2001]

### § 301.6231(a)(7)–1 Designation or selection of tax matters partner.

(a) *In general.* A partnership may designate a partner as its tax matters partner for a specific taxable year only as provided in this section. Similarly, the designation of a partner as the tax matters partner for a specific taxable year may be terminated only as provided in this section. If a partnership does not designate a general partner as the tax matters partner for a specific taxable year, or if the designation is terminated without the partnership designating another general partner as the tax matters partner, the tax matters partner is the partner determined under this section.

(b) *Person who may be designated tax matters partner*—(1) *General requirement.* A person may be designated as the tax matters partner of a partnership for a taxable year only if that person—

(i) Was a general partner in the partnership at some time during the taxable year for which the designation is made; or

(ii) Is a general partner in the partnership as of the time the designation is made.

(2) *Limitation on designation of tax matters partner who is not a United States person.* If any United States person would be eligible under paragraph (a) of this section to be designated as the tax matters partner of a partnership for a taxable year, no person who is not a United States person may be designated as the tax matters partner of the partnership for that year without the consent of the Commissioner. For the definition of *United States person*, see section 7701(a)(30).

(c) *Designation of tax matters partner at time partnership return is filed.* The partnership may designate a tax matters partner for a partnership taxable year on the partnership return for that

taxable year in accordance with the instructions for that form.

(d) *Certification by current tax matters partner of selection of successor.* If a partner properly designated as the tax matters partner of a partnership for a partnership taxable year under this section certifies that another partner has been selected as the tax matters partner of the partnership for that taxable year, that other partner is thereby designated as the tax matters partner for that year. The current tax matters partner shall make the certification by filing with the service center with which the partnership return is filed a statement that—

(1) Identifies the partnership, the partner filing the statement, and the successor tax matters partner by name, address, and taxpayer identification number;

(2) Specifies the partnership taxable year to which the designation relates;

(3) Declares that the partner filing the statement has been properly designated as the tax matters partner of the partnership for the partnership taxable year and that that designation is in effect immediately before the filing of the statement;

(4) Certifies that the other named partner has been selected as the tax matters partner of the partnership for that taxable year in accordance with the partnership's procedure for making that selection; and

(5) Is signed by the partner filing the statement.

(e) *Designation by general partners with majority interest.* The partnership may designate a tax matters partner for a partnership taxable year at any time after the filing of a partnership return for that taxable year by filing a statement with the service center with which the partnership return was filed. The statement shall—

(1) Identify the partnership and the designated partner by name, address, and taxpayer identification number;

(2) Specify the partnership taxable year to which the designation relates;

(3) Declare that it is a designation of a tax matters partner for the taxable year specified; and

(4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year. For purposes of this paragraph (e)(4), all limited partnership interests held by general partners shall be included in determining the aggregate interest in partnership profits held by such general partners.

(f) *Designation by partners with majority interest under certain circumstances*—(1) *In general.* A tax matters partner may be designated for a partnership taxable year under this paragraph (f) only if, at the time the designation is made, each partner who was a general partner at the close of such partnership taxable year is described in one or more of paragraphs (f)(1)(i) through (iv) of this section as follows:

(i) The general partner is dead, or, if the general partner is an entity, has been liquidated or dissolved;

(ii) The general partner has been adjudicated by a court of competent jurisdiction to be no longer capable of managing his or her person or estate;

(iii) The general partner's partnership items have become nonpartnership items under section 6231(b); or

(iv) The general partner is no longer a partner in the partnership.

(2) *Method of making designation.* A tax matters partner for a partnership taxable year may be designated under this paragraph (f) at any time after the filing of the partnership return for such taxable year by filing a written statement with the service center with which the partnership return was filed. The statement shall—

(i) Identify the partnership and the designated tax matters partner by name, address, and taxpayer identification number;

(ii) Specify the partnership taxable year to which the designation relates;

(iii) Declare that it is a designation of a tax matters partner for the partnership taxable year specified; and

(iv) Be signed by persons who were partners at the close of such taxable year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all partners as of the close of such taxable year.

(g) *Designation of alternate tax matters partner*. If an individual is designated as the tax matters partner of a partnership under paragraph (c), (d), (e), or (f) of this section, the document by which that individual is designated may also designate an alternate tax matters partner who will become tax matters partner upon the occurrence of one or more of the events described in paragraph (l)(1) (i) or (ii) of this section. The person designated as the alternate tax matters partner becomes the tax matters partner as of the time the designation of the tax matters partner is terminated under paragraph (l)(1) (i) or (ii) of this section. The designation of a person as the alternate tax matters partner shall have no effect in any other case.

(h) *Prior designations superseded*. A designation of a tax matters partner for a partnership taxable year under paragraphs (d), (e), or (f) of this section shall supersede all prior designations of a tax matters partner for that year, including a prior designation of an alternate tax matters partner under paragraph (g) of this section.

(i) *Resignation of designated tax matters partner*. A person designated as the tax matters partner of a partnership under this section may resign at any time by a written statement to that effect. The statement shall specify the partnership taxable year to which the resignation relates and shall identify the partnership and the tax matters partner by name, address, and taxpayer identification number. The statement shall also be signed by the resigning tax matters partner and shall be filed with the service center with which the partnership return was filed.

(j) *Revocation of designation*. The partnership may revoke the designation of the tax matters partner for a partnership taxable year at any time after the filing of a partnership return for that taxable year by filing a statement with the service center with which the partnership return was filed. The statement shall—

(1) Identify by name, address, and taxpayer identification number the partnership and the general partner whose designation as tax matters partner is being revoked;

(2) Specify the partnership taxable year to which the revocation relates;

(3) Declare that it is a revocation of a designation of the tax matters partner for the taxable year specified; and

(4) Be signed by the persons described in paragraph (e)(4) of this section, or, if at the time that the revocation is made, each partner who was a general partner at the close of the partnership taxable year to which the revocation relates is described in one or more of paragraphs (f)(1) (i) through (iv) of this section, by the persons described in paragraph (f)(2)(iv) of this section.

(k) *When designation, etc., becomes effective*—(1) *In general*. Except as otherwise provided in paragraph (k)(2) of this section, a designation, resignation, or revocation provided for in this section becomes effective on the day that the statement required by the applicable paragraph of this section is filed.

(2) *Notice of proceeding mailed*. If a notice of beginning of an administrative proceeding with respect to a partnership taxable year is mailed before the date on which a statement of designation, resignation, or revocation provided for in this section with respect to that taxable year is filed, the Service is not required to give effect to such designation, resignation, or revocation until 30 days after the statement is filed.

(l) *Termination of designation*—(1) *In general*. A designation of a tax matters partner for a taxable year under this section shall remain in effect until—

(i) The death of the designated tax matters partner;

(ii) An adjudication by a court of competent jurisdiction that the individual designated as the tax matters partner is no longer capable of managing the individual's person or estate;

(iii) The liquidation or dissolution of the tax matters partner, if the tax matters partner is an entity;

(iv) The partnership items of the tax matters partner become nonpartnership items under section 6231(c) (relating to special enforcement areas); or

(v) The day on which—

(A) The resignation of the tax matters partner under paragraph (i) of this section;

(B) A subsequent designation under paragraph (d), (e), or (f) of this section; or

(C) A revocation of the designation under paragraph (j) of this section becomes effective.

(2) *Actions by the tax matters partner before termination of designation.* The termination of the designation of a partner as the tax matters partner under paragraph (l)(1) of this section does not affect the validity of any action taken by that partner as tax matters partner before the designation is terminated. For example, if that tax matters partner had previously consented to an extension of the period for assessments under section 6229(b)(1)(B), that extension remains valid even after termination of the designation.

(m) *Tax matters partner where no partnership designation made*—(1) *In general.* The tax matters partner for a partnership taxable year shall be determined under this paragraph (m) if—

(i) The partnership has not designated a tax matters partner under this section for that taxable year; or

(ii) The partnership has designated a tax matters partner under this section for that taxable year, that designation has been terminated under paragraph (l)(1) of this section, and the partnership has not made a subsequent designation under this section for that taxable year.

(2) *General partner having the largest profits interest is the tax matters partner.* The tax matters partner for any partnership taxable year to which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of that taxable year (or where there is more than one such partner, the one of such partners whose name would appear first in an alphabetical listing). For purposes of this paragraph (m)(2), all limited partnership interests held by a general partner shall be included in determining that general partner's profits interest in the partnership. For purposes of this paragraph (m)(2), the general partner with the largest profits interest is determined based on the year-end profits interests reported on the Schedules K–1 filed with the partnership income tax return for the taxable year for which the determination is being made.

(3) *Termination of designation.* A designation of a tax matters partner for a partnership taxable year under this paragraph (m) shall remain in effect until the earlier of the occurrence of one or more of the events described in paragraphs (l)(1) (i) through (iv) of this section or the day on which a designation under paragraph (d), (e), or (f) of this section becomes effective. If a designation of a tax matters partner for a partnership taxable year is terminated under this paragraph (m)(3) and the partnership has not subsequently designated a tax matters partner for that taxable year under paragraph (d), (e), or (f) of this section, the tax matters partner for that taxable year shall be determined under paragraph (m)(2) of this section, and, for purposes of applying paragraph (m)(2) of this section, the general partner whose designation was so terminated shall be treated as having no profits interest in the partnership for that taxable year.

(n) *Selection of tax matters partner by Commissioner when impracticable to apply the largest-profits-interest rule.* If the partnership has not designated a tax matters partner under this section for the taxable year and it is impracticable (as determined under paragraph (o) of this section) to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select a tax matters partner as described in paragraph (p) of this section.

(o) *Impracticability of largest-profits-interest rule.* It is impracticable to apply the largest-profits-interest rule of paragraph (m)(2) of this section if, on the date the rule is applied, any one of the following three conditions is met:

(1) *General partner with the largest profits interest is not apparent.* The general partner with the largest profits interest is not apparent from the Schedules K–1 and is not otherwise readily determinable.

(2) *Each general partner is deemed to have no profits interest in the partnership.* Each general partner is deemed to

have no profits interest in the partnership under paragraph (m)(3) of this section (concerning termination of a designation under the largest-profits-interest rule) because of the occurrence of one or more of the events described in paragraphs (l)(1) (i) through (iv) of this section (involving death, adjudication of incompetency, liquidation, and conversion of partnership items to nonpartnership items).

(3) *General partner with the largest profits interest is disqualified.* The general partner with the largest profits interest determined under paragraph (m)(2) of this section—

(i) Has been notified of suspension from practice before the Internal Revenue Service;

(ii) Is incarcerated;

(iii) Is residing outside the United States, its possessions, or territories; or

(iv) Cannot be located or cannot perform the functions of a tax matters partner for any reason, except that lack of cooperation with the Internal Revenue Service by the general partner with the largest profits interest is not a basis for finding that the partner cannot perform the functions of a tax matters partner.

(p) *Commissioner's selection of the tax matters partner*—(1) *When the general partner with the largest profits interest is not apparent.* If it is impracticable under paragraph (o)(1) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select (in accordance with the notification procedures set forth in paragraph (r) of this section) as the tax matters partner any person who was a general partner at any time during the taxable year under examination.

(2) *When each general partner is deemed to have no profits interest in the partnership.* If it is impracticable under paragraph (o)(2) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select a partner (including a general or limited partner) as the tax matters partner in accordance with the criteria set forth in paragraph (q) of this section. The Commissioner will notify both the partner selected and the partnership of the selection, effective as of the date specified in the notice. For regulations applicable on or after January 26, 1999 (reflecting statutory changes made effective July 22, 1998) and before January 25, 2002, see § 301.6231(a)(7)–1T(p)(2).

(2) *When each general partner is deemed to have no profits interest in the partnership.* If it is impracticable under paragraph (o)(2) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will select a partner (including a general or limited partner) as the tax matters partner in accordance with the criteria set forth in paragraph (q) of this section. The Commissioner will notify, within 30 days of the selection, the partner selected, the partnership, and all partners required to receive notice under section 6223(a) of the selection of the tax matters partner, effective as of the date specified in the notice.

(3) *When the general partner with the largest profits interest is disqualified*—(i) *In general.* Except as otherwise provided in paragraph (p)(3)(ii) of this section, if it is impracticable under paragraph (o)(3) of this section to apply the largest-profits-interest rule of paragraph (m)(2) of this section, the Commissioner will treat each general partner who fits the criteria contained in paragraph (o)(3) of this section as having no profits interest in the partnership for the taxable year and will select (in accordance with the notification procedures set forth in paragraph (r) of this section) a tax matters partner from the remaining persons who were general partners at any time during the taxable year.

(ii) *Partner selected if no general partner may be selected.* If all general partners during the taxable year either are treated as having no profits interest in the partnership for the taxable year under paragraph (m)(3) of this section (concerning termination of a designation under the largest-profits-interest rule) or are described in paragraph (o)(3) of this section (general partner with the largest profits interest is disqualified), the Commissioner will select a partner (including a general or limited partner) as the tax matters partner in accordance with the criteria

set forth in paragraph (q) of this section. The Commissioner will notify both the partner selected and the partnership of the selection, effective as of the date specified in the notice.

(q) *Criteria for selecting a partner as tax matters partner*—(1) *In general*. The Commissioner will select a partner as the tax matters partner under paragraph (p) (2) or (3)(ii) of this section only if the partner was a partner in the partnership at the close of the taxable year under examination.

(2) *Criteria to be considered*. The Commissioner may consider the following criteria in selecting a partner as the tax matters partner:

(i) The general knowledge of the partner in tax matters and the administrative operation of the partnership.

(ii) The partner's access to the books and records of the partnership.

(iii) The profits interest held by the partner.

(iv) The views of the partners having a majority interest in the partnership regarding the selection.

(v) Whether the partner is a partner of the partnership at the time the tax-matters-partner selection is made.

(vi) Whether the partner is a United States person (within the meaning of section 7701(a)(30)).

(3) *Limited restriction on subsequent designation of a tax matters partner by the partnership*. For purposes of paragraphs (p) (2) and (3)(ii) of this section, the partnership cannot designate a partner who is not a general partner to serve as tax matters partner in lieu of a partner selected by the Commissioner.

(r) *Notification of partnership*—(1) *In general*. If the Commissioner selects a tax matters partner under the provisions of paragraph (p)(1) or (p)(3)(i) of this section, the Commissioner will notify, within 30 days of the selection, the partner selected, the partnership, and all partners required to receive notice under section 6223(a) of the selection of the tax matters partner, effective as of the date specified in the notice.

(2) *Limited opportunity for partnership to designate the tax matters partner*. (i) Before the Commissioner selects a tax matters partner under paragraphs (p) (1) and (3)(i) of this section, the Commissioner will notify the partnership by mail that, after 30 days from the date of the notice, the Commissioner will make a determination that it is impracticable to apply the largest-profits-interest rule of paragraph (m)(2) of this section and will select the tax matters partner unless a prior designation is made by the partnership. This delay in making the determination will permit the partnership to designate a tax matters partner under paragraph (e) of this section (designation by general partners with a majority interest) or paragraph (f) of this section (designation by partners with a majority interest under certain circumstances), thereby avoiding a selection made by the Commissioner.

(ii) During the 30-day period and prior to a tax-matters-partner designation by the partnership, the Commissioner will communicate with the partnership by sending all correspondence or notices to ''The Tax Matters Partner'' in care of the partnership at the partnership's address.

(iii) Any subsequent designation of a tax matters partner by the partnership after the 30-day period will become effective as provided under paragraph (k)(2) of this section (concerning designations made after a notice of beginning of administrative proceeding is mailed).

(s) *Effective date*. This section applies to all designations, selections, and terminations of a tax matters partner occurring on or after December 23, 1996, except for paragraphs (p)(2) and (r)(1), that are applicable on or after October 4, 2001.

[T.D. 8698, 61 FR 67459, Dec. 23, 1996, as amended by T.D. 8808, 64 FR 3840, Jan. 26, 1999; T.D. 8965, 66 FR 50558, Oct. 4, 2001]

### § 301.6231(a)(7)–2 Designation or selection of tax matters partner for a limited liability company (LLC).

(a) *In general*. Solely for purposes of applying section 6231(a)(7) and § 301.6231(a)(7)–1 to an LLC, only a member-manager of an LLC is treated as a general partner, and a member of an LLC who is not a member-manager is treated as a partner other than a general partner.

(b) *Definitions*—(1) *LLC*. Solely for purposes of this section, *LLC* means an organization—

(i) Formed under a law that allows the limitation of the liability of all members for the organization's debts and other obligations within the meaning of § 301.7701–3(b)(2)(ii); and

(ii) Classified as a partnership for Federal tax purposes.

(2) *Member*. Solely for purposes of this section, *member* means any person who owns an interest in an LLC.

(3) *Member-manager*. Solely for purposes of this section, *member-manager* means a member of an LLC who, alone or together with others, is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the organization was formed. Generally, an LLC statute may permit the LLC to choose management by one or more managers (whether or not members) or by all of the members. If there are no elected or designated member-managers (as so defined in this paragraph (b)(3)) of the LLC, each member will be treated as a member-manager for purposes of this section.

(c) *Effective date*. This section applies to all designations, selections, and terminations of a tax matters partner of an LLC occurring on or after December 23, 1996. Any other reasonable designation or selection of a tax matters partner of an LLC is binding for periods prior to December 23, 1996.

[T.D. 8698, 61 FR 67462, Dec. 23, 1996]

### § 301.6231(a)(12)–1 Special rules relating to spouses.

(a) *Spouses holding a joint interest*—(1) *In general*. Except as otherwise provided in this section, spouses holding a joint interest in a partnership shall be treated as separate partners for purposes of subchapter C of chapter 63 of the Internal Revenue Code. Thus, both spouses may participate in administrative and judicial proceedings. The term *joint interest* includes tenancies in common, joint tenancies, tenancies by the entirety, and community property.

(2) *Identification of joint interest*. For purposes of this section, an interest shall be treated as a joint interest in a partnership only if both spouses are identified on the partnership return or are identified as partners entitled to notice as provided in § 301.6223(c)–1(b).

(3) *Failure to identify both spouses as partners*. If both spouses are not identified as set forth in paragraph (a)(2) of this section, then the partnership interest shall be treated as separately owned by the identified spouse.

(4) *Example*. The following example illustrates the application of paragraph (a)(3) of this section:

*Example*. Wife owns an interest in ABC Partnership and is identified on the Schedule K–1 of the partnership return. Wife and Husband live in a community property state. The partnership return of ABC partnership does not identify Husband, and Husband is not identified as a partner entitled to notice as provided in § 301.6223(c)–1(b). Pursuant to paragraph (a)(3) of this section, the partnership interest of Wife shall be treated as separately owned by Wife.

(b) *Notice and counting rules*—(1) *In general*. Except as provided in paragraph (b)(2) of this section, for purposes of applying section 6223 (relating to notice to partners of proceedings) and section 6231(a)(1)(B) (relating to the exception for small partnerships), spouses holding a joint interest in a partnership shall be treated as one partner. Except as provided in paragraph (b)(2) of this section, the Internal Revenue Service or the tax matters partner may send any required notice to either spouse.

(2) *Identified spouse entitled to notice*. For purposes of applying section 6223 (relating to notice to partners of proceeding) for a partnership taxable year, an individual who holds a joint interest in a partnership with a spouse who is entitled to notice under section 6223 shall be entitled to receive separate notice under section 6223 if such individual—

(i) Is identified as a partner on the partnership return for that taxable year; or

(ii) Is identified as a partner entitled to notice as provided in § 301.6223(c)–1(b).

(c) *Conversion of partnership items*—(1) *In general*. If spouses holding a joint interest in a partnership are treated as separate partners under this section, then section 6231(b) (relating to the conversion of partnership items) shall be applied separately to each spouse.

(2) *Example*. The following example illustrates the application of paragraph (c) of this section:

*Example*. Husband and Wife own a joint interest in XYZ Partnership. The partnership return identifies both spouses on the Schedule K–1. Under this section, each spouse is treated as a separate partner. If Wife enters into a settlement agreement, Wife's partnership items convert to nonpartnership items pursuant to section 6231(b)(1)(C). Accordingly, Wife no longer has the right to participate in the partnership proceeding subsequent to entering into the settlement agreement. Pursuant to paragraph (c) of this section, however, the partnership items of Husband are not affected by the conversion of the partnership items of Wife, and Husband continues to have the right to participate in the partnership proceeding. This result is the same regardless of whether the partnership items are reported on a joint return or on separate returns.

(d) *Cross-reference*. See § 301.6231(a)(2)–1(a) for special rules relating to spouses who file joint returns with individuals holding a separate interest in a partnership.

(e) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(a)(12)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50559, Oct. 4, 2001]

### § 301.6231(c)–1 Special rules for certain applications for tentative carryback and refund adjustments based on partnership losses, deductions, or credits.

(a) *Application subject to this section*. This section applies in the case of an application under section 6411 (relating to tentative carryback and refund adjustments) based on losses, deductions, or credits of a partnership if the Commissioner, or the Commissioner's delegate, determines, after review of the available relevant information, that it is highly likely that a person described in section 6700(a)(1) made, with respect to the partnership—

(1) A gross valuation overstatement; or

(2) A false or fraudulent statement with respect to the tax benefits to be secured by reason of holding an interest in the partnership that would be subject to a penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.). This section applies only with respect to an application based upon the original reporting on the partner's income tax return of partnership losses, deductions, or credits. Thus, this section does not apply to a request for administrative adjustment under section 6227 through which a partner seeks to change the partner's reporting of partnership items on the partner's income tax return (or on an earlier request for administrative adjustment).

(b) *Determination of special enforcement area*. In the case of an application under section 6411 described in paragraph (a) of this section, precluding an assessment under section 6225 that would be permitted under section 6213(b)(3) (relating to assessments arising out of tentative carryback or refund adjustments) with respect to any amount applied, credited, or refunded as a result of the application may encourage the proliferation of abusive tax shelter partnerships and make the eventual collection of taxes due more difficult. Consequently, the Secretary hereby determines that such applications present special enforcement considerations within the meaning of section 6231(c)(1)(E).

(c) *Assessment permitted under section 6213(b)(3)*. Notwithstanding section 6225 (relating to restrictions on assessment with respect to partnership items), an assessment that would be permitted under section 6213(b)(3) with respect to any amount applied, credited, or refunded as a result of an application described in paragraph (a) of this section may be made before there is a final partnership-level determination with respect to the losses, deductions, or credits on which the application is based. As provided in section 6213(b)(1), the Internal Revenue Service shall mail notice of any such assessment to the partner filing the application. The notice shall also inform the partner of the partner's limited right to elect to treat items as nonpartnership items as provided in paragraph (d) of this section.

(d) *Limited right to elect to treat items as nonpartnership items*—(1) *In general*.

A partner to whom the Internal Revenue Service mails a notice of suspension of action on a refund claim under paragraph (c) of this section may elect in accordance with this paragraph (d) to have all partnership items for the partnership taxable year in which the losses, deductions, or credits at issue arose treated as nonpartnership items.

(2) *Time and place of making election.* The election shall be made by filing a statement with the Internal Revenue Service office that mailed the notice of suspension. The statement may be filed at any time—

(i) After the date which is one year after the date on which the partnership return was filed for the partnership taxable year in which the items at issue arose; and

(ii) Before the date on which the Internal Revenue Service mails to the tax matters partner the notice of final partnership administrative adjustment for the partnership taxable year in which the items at issue arose. For purposes of this paragraph (d)(2), a partnership return filed before the last day prescribed by law for its filing (determined without regard to extensions) shall be treated as filed on the last day.

(3) *Contents of the statement.* The statement shall—

(i) Be clearly identified as an election to have partnership items treated as nonpartnership items because of notification of an assessment under section 6213(b)(3);

(ii) Identify the partnership by name, address, and taxpayer identification number;

(iii) Identify the partner making the election by name, address, and taxpayer identification number;

(iv) Specify the partnership taxable year to which the election applies; and

(v) Be signed by the partner making the election.

(e) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50559, Oct. 4, 2001]

**§ 301.6231(c)–2 Special rules for certain refund claims based on losses, deductions, or credits from abusive tax shelter partnerships.**

(a) *Claims subject to this section.* This section applies in the case of a claim for credit or refund based on losses, deductions or credits of a partnership if the Commissioner, or the Commissioner's delegate, determines, after review of available relevant information, that it is highly likely that a person described in section 6700(a)(1) made, with respect to the partnership—

(1) A gross valuation overstatement; or

(2) A false or fraudulent statement with respect to the tax benefits to be secured by reason of holding an interest in the partnership that would be subject to a penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.). This section applies only with respect to a claim that is based upon the partner's original reporting on the partner's income tax return of partnership losses, deductions, or credits. Thus, this section does not apply to a request for administrative adjustment under section 6227 through which a partner seeks to change the partner's reporting of partnership items on the partner's income tax return (or on an earlier request for administrative adjustment). For purposes of this section, any income tax return requesting a credit or refund shall be treated as a claim for a credit or refund.

(b) *Determination of special enforcement area.* Granting a claim for credit or refund described in paragraph (a) of this section may encourage the proliferation of abusive tax shelter partnerships and make the eventual collection of taxes more difficult. Consequently, the Secretary hereby determines that such claims present special enforcement considerations within the meaning of section 6231(c)(1)(E).

(c) *Action on refund claims suspended.* In the case of a claim described in paragraph (a) of this section, the Internal Revenue Service may mail to the partner filing the claim a notice stating that no action will be taken on the partner's claim until the completion of the partnership-level proceedings. The notice shall also inform the partner of

the partner's limited right to elect to treat items as nonpartnership items as provided in paragraph (d) of this section.

(d) *Limited right to elect to treat items as nonpartnership items*—(1) *In general.* A partner to whom the Internal Revenue Service mails a notice of suspension under paragraph (c) of this section may elect in accordance with this paragraph (d) to have all partnership items for the partnership taxable year in which the losses, deductions, or credits at issue arose treated as nonpartnership items.

(2) *Time and place of making election.* The election shall be made by filing a statement with the Internal Revenue Service office that mailed the notice of suspension. The statement may be filed at any time—

(i) After the date which is one year after the date on which the partnership return was filed for the partnership taxable year in which the items at issue arose; and

(ii) Before the date on which the Internal Revenue Service mails to the tax matters partner the notice of final partnership administrative adjustment for the partnership taxable year in which the items at issue arose. For purposes of this paragraph (d)(2), a partnership return filed before the last day prescribed by law for its filing (determined without regard to extensions) shall be treated as filed on the last day.

(3) *Contents of the statement.* The statement shall—

(i) Be clearly identified as an election to have partnership items treated as nonpartnership items because of notification of suspension of action on a refund claim;

(ii) Identify the partnership by name, address, and taxpayer identification number;

(iii) Identify the partner making the election by name, address, and taxpayer identification number;

(iv) Specify the partnership taxable year to which the election applies; and

(v) Be signed by the partner making the election.

(e) *Effective date.* This section applies with respect to any claim described in paragraph (a) of this section that is filed on or after October 4, 2001. For claims filed prior to October 4, 2001, see § 301.6231(c)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50560, Oct. 4, 2001]

### § 301.6231(c)–3 Limitation on applicability of §§ 301.6231(c)–4 through 301.6231(c)–8.

(a) *In general.* A provision of §§ 301.6231(c)–4 through 301.6231(c)–8 shall not apply with respect to partnership items arising in a partnership taxable year if, as of the date on which those items would otherwise begin to be treated as nonpartnership items under that provision—

(1) A notice of final partnership administrative adjustment with respect to those items has been mailed to the tax matters partner; and

(2) Either—

(i) The period during which an action with respect to that final partnership administrative adjustment may be brought under section 6226 has expired and no such action has been brought; or

(ii) The decision of the court in an action brought under section 6226 with respect to that final partnership administrative adjustment has become final.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–3T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50560, Oct. 4, 2001]

### § 301.6231(c)–4 Termination and jeopardy assessment.

(a) *In general.* The treatment of items as partnership items with respect to a partner against whom an assessment of income tax under section 6851 (termination assessment) or section 6861 (jeopardy assessment) is made will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending with or within the partner's taxable year for which an assessment of income tax under section 6851 or 6861 is made shall be treated as nonpartnership items as of the moment before such assessment is made.

(b) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–4T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50561, Oct. 4, 2001]

### § 301.6231(c)–5 Criminal investigations.

(a) *In general*. The treatment of items as partnership items with respect to a partner under criminal investigation for violation of the internal revenue laws relating to income tax will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the partner to which the criminal investigation relates shall be treated as nonpartnership items as of the date on which the partner is notified that the partner is the subject of a criminal investigation and written notification is sent by the Internal Revenue Service that the partner's partnership items shall be treated as nonpartnership items. The partnership items of a partner who is notified that the partner is the subject of a criminal investigation shall not be treated as nonpartnership items under this section unless and until such partner is sent written notification from the Internal Revenue Service of such treatment.

(b) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–5T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50561, Oct. 4, 2001]

### § 301.6231(c)–6 Indirect method of proof of income.

(a) *In general*. The treatment of items as partnership items with respect to a partner whose taxable income is determined by use of an indirect method of proof of income will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the taxable year of the partner for which a deficiency notice based upon an indirect method of proof of income is mailed to the partner shall be treated as nonpartnership items as of the date on which that deficiency notice is mailed to the partner.

(b) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–6T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50561, Oct. 4, 2001]

### § 301.6231(c)–7 Bankruptcy and receivership.

(a) *Bankruptcy*. The treatment of items as partnership items with respect to a partner named as a debtor in a bankruptcy proceeding will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the partner with respect to which the United States could file a claim for income tax due in the bankruptcy proceeding shall be treated as nonpartnership items as of the date the petition naming the partner as debtor is filed in bankruptcy.

(b) *Receivership*. The treatment of items as partnership items with respect to a partner for whom a receiver has been appointed in any receivership proceeding before any court of the United States or of any State or the District of Columbia will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the partner with respect to which the United States could file a claim for income tax due in the receivership proceeding shall be treated as nonpartnership items as of the date a receiver is appointed in any receivership proceeding before any court of the United States or of any State or the District of Columbia.

(c) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4,

2001, see § 301.6231(c)–7T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50561, Oct. 4, 2001]

### § 301.6231(c)–8 Prompt assessment.

(a) *In general*. The treatment of items as partnership items with respect to a partner on whose behalf a request for a prompt assessment of tax under section 6501(d) is filed will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending with or within any taxable year of the partner with respect to which a request for a prompt assessment of tax is filed shall be treated as nonpartnership items as of the date that the request is filed.

(b) *Effective date*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(c)–8T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50561, Oct. 4, 2001]

### § 301.6231(d)–1 Time for determining profits interest of partners for purposes of sections 6223(b) and 6231(a)(11).

(a) *Partner owns interest at close of year*. For purposes of section 6223(b) (relating to special rules for partnerships with more than 100 partners) and section 6231(a)(11) (relating to 5-percent groups), except as otherwise provided in this section, the profits interest held by a partner, directly or indirectly through one or more pass-thru partners, in a partnership (the source partnership) to which subchapter C of chapter 63 of the Internal Revenue Code applies shall be determined at the close of the source partnership's taxable year.

(b) *Partner does not own interest at close of year*. If the entire direct and indirect interest of a partner in a source partnership is terminated by virtue of a disposition by such partner of such interest (or by virtue of the disposition of an interest held by one or more pass-thru partners through which the partner holds an interest), then the profits interest of such partner in the source partnership shall be measured as of the moment before the disposition causing such termination. The preceding sentence shall not apply with respect to a termination if subsequent to such termination and before the close of the source partnership's taxable year the partner acquires a direct or indirect interest in the source partnership.

(c) *Disposition of last remaining portion of interest is disposition of entire interest*. If a partner (or a pass-thru partner through which a partner holds an interest) makes several partial dispositions of an interest in a source partnership during a taxable year of the source partnership, paragraph (b) of this section will apply with respect to the disposition which causes a termination of the partner's entire direct and indirect interest in the source partnership.

(d) *No profits interest in certain cases*. If—

(1) The interest of a partner in a partnership is entirely disposed of before the close of the taxable year of the partnership; and

(2) No items of the partnership for that taxable year are required to be taken into account by the partner, then that partner has no profits interest in the partnership for that taxable year.

(e) *Examples*. The provisions of this section may be illustrated by the following examples. Assume in all examples that there have been no reacquisitions prior to the close of the source partnership's taxable year. The examples are as follows:

*Example 1*. B holds an interest in partnership P through T, a pass-thru partner. P uses a fiscal year ending June 30 as P's taxable year; B and T use the calendar year as the taxable year. As of the close of P's taxable year ending June 30, 2002, T holds an interest in P and B holds an interest in P through T. The profits interest held by B in P through T for that year is determined as of June 30, 2002.

*Example 2*. Assume the same facts as in *Example 1*, except that B sold the entire interest that B held in P through T on November 5, 2001. The profits interest held by B in P through T for P's taxable year ending June 30, 2002, is determined as of the moment before the sale on November 5, 2001.

*Example 3*. C holds an interest in partnership P through T, a pass-thru partner. C, P, and T all use the calendar year as the taxable year. T disposes of T's interest in P on June 5, 2002. The profits interest held by C in

P through T for 2002 is determined as of the moment before the disposition on June 5, 2002.

*Example 4.* Assume the same facts as in *Example 3,* except that C sold C's entire interest in T (and, therefore, C's entire interest that C held in P through T) on March 15, 2002. The profits interest held by C in P through T for 2002 is determined as of the moment before the sale on March 15, 2002.

*Example 5.* On January 1, 2002, D held a 2 percent profits interest in partnership P. Both D and P use the calendar year as the taxable year. On August 1, 2002, D transfers three-fourths of D's profits interest in P to E. On September 1, 2002, D sells D's remaining .5 percent profits interest in P to F. For purposes of sections 6223(b) and 6231(a)(11), D had a .5 percent profits interest in P for 2002.

*Example 6.* Assume the same facts as in *Example 5,* except that on January 1, 2002, D also held a 1 percent profits interest in partnership P through T, a pass-thru partner which also uses the calendar year as the taxable year. In addition to the sale to E on August 1, 2002, D sold a portion of D's interest in T on December 1, 2002, such that after the sale, D held a .2 percent profits interest in P through T. D made no other transfers of interests in either P or T. For purposes of sections 6223(b) and 6231(a)(11), D had a .7 percent profits interest in P for 2002.

(f) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(d)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50562, Oct. 4, 2001]

### § 301.6231(e)–1 Effect of a determination with respect to a nonpartnership item on the determination of a partnership item.

(a) *In general.* The determination of an item after it has become a nonpartnership item with respect to a partner is not controlling in the determination of that item with respect to other partners. Thus, for example, the determination by a court in a separate proceeding relating to a partner that a certain partnership expenditure was deductible does not bind either the Internal Revenue Service or the other partners in a later partnership or other proceeding.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(e)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50562, Oct. 4, 2001]

### § 301.6231(e)–2 Judicial decision not a bar to certain adjustments.

(a) *In general.* A court decision with respect to a partner's income tax liability attributable to nonpartnership items shall not be a bar to further proceedings with respect to that partner's income tax liability if that partner's partnership items become nonpartnership items after the appropriate time to include such nonpartnership items in the earlier court proceeding has passed. Thus, the Internal Revenue Service could issue a later deficiency notice for the same taxable year with respect to that partner or that partner could bring a refund suit with respect to those items that have become nonpartnership items.

(b) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(e)–2T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50562, Oct. 4, 2001]

### § 301.6231(f)–1 Disallowance of losses and credits in certain cases.

(a) *Application of section.* This section applies if—

(1) A partnership, whether domestic or foreign, that is required to file a return under section 6031 for a taxable year fails to file the return within the time prescribed; and

(2) At any time after the close of that taxable year, either—

(i) The tax matters partner of that partnership resides outside the United States; or

(ii) The books and records of that partnership are maintained outside the United States.

(b) *Computational adjustment permitted if return is not filed after mailing of notice.* Except as otherwise provided in paragraph (c) of this section, if—

(1) This section applies with respect to a partnership for a partnership taxable year;

(2) The Internal Revenue Service mails notice to a partner that the losses and credits arising from that

partnership for that year will be disallowed to that partner unless the partnership files a return for that year within 60 days after the date on which the notice is mailed; and

(3) The partnership fails to file a return for that year within that 60-day period, the Internal Revenue Service may, without conducting a partnership-level proceeding, mail a notice of computational adjustment to that partner to reflect the disallowance of any loss (including a capital loss) or credit arising from that partnership for that year.

(c) *Restriction on notices under paragraph (b) of this section.* Neither the notice referred to in paragraph (b)(2) of this section nor the notice of computational adjustment referred to in paragraph (b) of this section may be mailed on a day on which—

(1) The tax matters partner of the partnership resides within the United States; and

(2) The books and records of the partnership are maintained within the United States. Thus, if this section applies with respect to a partnership for a taxable year solely because the tax matters partner of that partnership resided outside the United States for a period after the close of that taxable year and the tax matters partner later takes up residence within the United States, no notice may be mailed under paragraph (b) of this section while the tax matters partner resides within the United States.

(d) *No disallowance in certain circumstances.* If the person to whom the notice referred to in paragraph (b)(2) of this section is mailed establishes to the satisfaction of the Internal Revenue Service—

(1) That the losses and credits arising from the partnership for the year are proper; and

(2) That the partner has made a good faith effort to have the partnership file the required return; the Internal Revenue Service may allow the losses and credits in whole or in part.

(e) *Effective date.* This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6231(f)–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50563, Oct. 4, 2001]

### § 301.6233–1 Extension to entities filing partnership returns.

(a) *Entities filing a partnership return.* Except as provided in paragraph (c)(1) of this section, the provisions of subchapter C of chapter 63 of the Internal Revenue Code (subchapter C) and the regulations thereunder shall apply with respect to any taxable year of an entity for which such entity files a partnership return as well as to such entity's items for that taxable year and to any person holding an interest in such entity at any time during that taxable year. Any final partnership administrative adjustment or judicial determination resulting from a proceeding under subchapter C with respect to such taxable year may include a determination that the entity is not a partnership for such taxable year as well as determinations with respect to all items of the entity that would be partnership items, as defined in section 6231(a)(3) and the regulations thereunder, if such entity had been a partnership in such taxable year (including, for example, any amounts taxable to an entity determined to be an association taxable as a corporation). For example, a final determination under subchapter C that an entity that filed a partnership return is an association taxable as a corporation will serve as a basis for a computational adjustment reflecting the disallowance of any loss or credit claimed by a purported partner with respect to that entity.

(b) *Partnership return filed but no entity found to exist.* Paragraph (a) of this section shall apply where a partnership return is filed for a taxable year but it is determined that there is no entity for such taxable year. For purposes of applying paragraph (a) of this section, the partnership return shall be treated as if it were filed by an entity. However, any final partnership administrative adjustment or judicial determination resulting from a proceeding under subchapter C with respect to such taxable year may also include a determination that there is no entity for such taxable year.

(c) *Exceptions*. Paragraph (a) of this section shall not apply to—

(1) Entities for any taxable year in which such entity would be excepted from the provisions of subchapter C of the Internal Revenue Code under section 6231(a)(1)(B) and the regulations thereunder (relating to the exception for small partnerships) if such entity were a partnership for such taxable year; and

(2) Entities for any taxable year for which a partnership return was filed for the sole purpose of making the election described in section 761(a).

(d) *Effective dates*. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6233–1T contained in 26 CFR part 1, revised April 1, 2001.

[T.D. 8965, 66 FR 50563, Oct. 4, 2001]

**§ 301.6241–1T Tax treatment determined at corporate level.**

(a) *In general*. For a taxable year of an S corporation beginning after December 31, 1982, a shareholder's treatment of a subchapter S item (as defined in § 301.6245–1T) on the shareholder's return may not be changed except as provided in sections 6241–6245 of the Code and the regulations thereunder. Thus, for example, if a shareholder treats an item on the shareholder's return consistently with the treatment of that item on the S corporation return, the Internal Revenue Service generally cannot adjust the treatment of that item on the shareholder's return except through a corporate-level proceeding. Similarly, the shareholder may not put a subchapter S item in issue in a proceeding relating to nonsubchapter S items. For example, the shareholder may not offset a potential increase in taxable income based on changes in nonsubchapter S items by a potential decrease based on subchapter S items.

(b) *Restrictions inapplicable after items become nonsubchapter S items*. Section 6241 and paragraph (a) of this section cease to apply to items arising from an S corporation with respect to a shareholder when those items cease to be subchapter S items with respect to that shareholder under section 6231(b)(1) (as extended to and made applicable to subchapter S items under section 6244).

(c) *S corporation*—(1) *In general*. For purposes of subchapter D of chapter 63 of the Code, except as provided in paragraph (c)(2) of this section, the term ''S corporation'' means any corporation required to file a return under section 6037(a).

(2) *Exception for small S corporations*—(i) *Effective date*. This paragraph (c)(2) shall apply to any taxable year of an S corporation the due date of the return for which (determined without regard to extensions) is on or after January 30, 1987.

(ii) *Five or fewer shareholders*. For purposes of this paragraph (c), an S corporation shall not include a small S corporation. A small S corporation is defined as an S corporation with 5 or fewer shareholders, each of whom is a natural person or an estate. For purposes of this paragraph (c)(2), a husband and wife (and their estates) are treated as one shareholder. If stock (owned other than by a husband and wife) is owned by tenants in common or joint tenants, each tenant in common or joint tenant is considered to be a shareholder of the corporation. The limitation is applied to the number of natural persons and estates that were shareholders at any one time during the taxable year of the corporation. Thus, for example, an S corporation that at no time during the taxable year had more than 5 shareholders may be treated as a small S corporation even if, because of transfers of interests in the corporation, 6 or more natural persons or estates owned stock in the corporation for some portion of the taxable year.

(iii) *Special rule*. The exception provided in paragraph (c)(2)(ii) of this section does not apply to an S corporation for a taxable year if any shareholder in the corporation during that taxable year is a pass-through shareholder. For purposes of this paragraph (c)(2)(iii), a pass-through shareholder is—

(A) A trust;

(B) A nominee; or

(C) Other similar pass-through persons through whom other persons have an ownership interest in the stock of the S corporation. For purposes of the

preceding sentence, a shareholder's estate shall not be treated as a passthrough shareholder.

(iv) *Determination made annually*. The determination of whether an S corporation meets the requirements for the exception under paragraph (c)(2)(ii) of this section shall be made for each taxable year of the corporation. Thus, an S corporation which does not qualify as a small S corporation in one taxable year may qualify as a small S corporation in another taxable year if the requirements for the exception under paragraph (c)(2)(ii) of this section are met with respect to that other taxable year.

(v) *Election to have subchapter D of chapter 63 apply*—(A) *In general*. Notwithstanding paragraph (c)(2)(ii) of this section, a small S corporation may elect to have the provisions of subchapter D of chapter 63 of the Code apply with respect to that corporation.

(B) *Method of election*. A small S corporation shall make the election described in paragraph (c)(2)(v)(A) of this section for a taxable year of the corporation by attaching a statement to the corporate return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under § 301.6241–1T(c)(2)(v)(A), shall be signed by all persons who were shareholders of that corporation at any time during the corporate taxable year to which the return relates, and shall be filed at the time (determined with regard to any extensions of time for filing) and place prescribed for filing the corporate return.

(C) *Years covered by election*. The election shall be effective for the taxable year of the corporation to which the return relates and all subsequent taxable years of the corporation unless revoked with the consent of the Commissioner.

[T.D. 8122, 52 FR 3002, Jan. 30, 1987]

### § 301.6245–1T Subchapter S items.

(a) *In general*. For purposes of subtitle F of the Internal Revenue Code of 1986, the following items which are required to be taken into account for the taxable year of an S corporation under subtitle A of the Code are more appropriately determined at the corporate level than at the shareholder level and, therefore, are subchapter S items:

(1) The S corporation aggregate and each shareholder's share of, and any factor necessary to determine, each of the following:

(i) Items of income, gain, loss, deduction, or credit of the corporation;

(ii) Expenditures by the corporation not deductible in computing its taxable income (for example, charitable contributions);

(iii) Items of the corporation that may be tax preference items under section 57(a) for any shareholder;

(iv) Items of income of the corporation that are exempt from tax;

(v) Corporate liabilities (including determinations of the amount of the liability, whether the corporate liability is to a shareholder of the corporation, and changes from the preceding year); and

(vi) Other amounts determinable at the corporate level with respect to corporate assets, investments, transactions, and operations necessary to enable the S corporation or the shareholders to determine—

(A) The general business credit provided by section 38;

(B) Recapture under section 47 of the credit provided by section 38;

(C) Amounts at risk in any activity to which section 465 applies;

(D) The depletion allowance under section 613A with respect to oil and gas wells;

(E) Amortization of reforestation expenses under section 194;

(F) The credit provided by section 34 for certain uses of gasoline and special fuels; and

(G) The taxes imposed at the corporate level, such as the taxes imposed under section 56, 1374, or 1375;

(2) Any factor necessary to determine whether the entity is an S corporation under section 1361, such as the number, eligibility, and consent of shareholders and the classes of stock;

(3) Any factor necessary to determine whether the entity has properly elected to be an S corporation under section 1362 for the taxable year;

(4) Any factor necessary to determine whether and when the S corporation election of the entity has been revoked or terminated under section 1362 for

the taxable year (for example, the existence and amount of subchapter C earnings and profits, and passive investment income); and

(5) Items relating to the following transactions, to the extent that a determination of such items can be made from determinations that the corporation is required to make with respect to an amount, the character of an amount, or the percentage of stock ownership of a shareholder in the corporation, for purposes of the corporation's books and records or for purposes of furnishing information to a shareholder:

(i) Contributions to the corporation; and

(ii) Distributions from the corporation.

(b) *Factors that affect the determination of subchapter S items.* The term ''subchapter S item'' includes the accounting practices and the legal and factual determinations that underlie the determination of the existence, amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc. Examples of these determinations are: The S corporation's method of accounting, taxable year, and inventory method; whether an election was made by the corporation; whether corporate property is a capital asset, section 1231 property, or inventory; whether an item is currently deductible or must be capitalized; whether corporate activities had been engaged in with the intent to make a profit for purposes of section 183; whether the corporation qualified for the credit for increasing research activities under section 41; and whether the corporation qualified for the credit for clinical testing expenses for a rare disease or condition under section 28.

(c) *Illustrations*—(1) *In general.* This paragraph (c) illustrates the provisions of paragraph (a)(5) of this section. The determinations illustrated in this paragraph (c) that the corporation is required to make are not exhaustive; there may be additional determinations that the corporation is required to make which relate to a determination listed in paragraph (a)(5) of this section. The critical element is that the corporation is required to make a determination with respect to a matter for the purposes stated; failure by the corporation actually to make a determination (for example, because it does not maintain proper books and records) does not prevent an item from being a subchapter S item.

(2) *Contributions.* For purposes of its books and records, or for purposes of furnishing information to a shareholder, the S corporation must determine:

(i) The character of the amount received by the corporation (for example, whether it is a contribution, loan, or repayment of a loan);

(ii) The amount of money received by the corporation; and

(iii) The basis to the corporation of contributed property (including necessary preliminary determinations, such as the shareholder's basis in the contributed property).

To the extent that a determination of an item relating to a contribution can be made from these and similar determinations that the corporation is required to make, that item is a subchapter S item. To the extent that the determination requires other information, however, that item is not a subchapter S item. Such other information would include those factors used in determining whether there is recapture under section 47 by the contributing shareholder of the general business credit because of the contribution of property in circumstances in which that determination is irrelevant to the corporation.

(3) *Distributions.* For purposes of its books and records, or for purposes of furnishing information to a shareholder, the S corporation must determine:

(i) The character of the amount transferred to a shareholder (for example, whether it is a dividend, compensation, loan, or repayment of a loan);

(ii) The amount of money distributed to a shareholder;

(iii) The fair market value of property distributed to a shareholder;

(iv) The adjusted basis to the corporation of distributed property; and

(v) The character of corporation property (for example, whether an item is inventory or a capital asset).

To the extent that a determination of an item relating to a distribution can

be made from these and similar determinations that the corporation is required to make, that item is a subchapter S item. To the extent that the determination requires other information, however, that item is not a subchapter S item. Such other information would include the determination of a shareholder's basis in the shareholder's stock or in the indebtedness of the S corporation to the shareholder.

(d) *Cross reference.* For the definition of subchapter S item for purposes of the windfall profit tax, see § 51.6245–1T.

(e) *Effective date.* This section shall apply to taxable years beginning after December 31, 1982.

[T.D. 8122, 52 FR 3003, Jan. 30, 1987]

## Collection

GENERAL PROVISIONS

### § 301.6301–1 Collection authority.

The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue. See, however, section 6304, relating to the collection of certain taxes under the provisions of the Tariff Act of 1930 (19 U.S.C. ch. 4).

### § 301.6302–1 Mode or time of collection of taxes.

(a) *Employment and excise taxes.* For provisions relating to the mode or time of collection of certain employment and excise taxes and the use of authorized financial institutions in connection with the payment thereof, see the regulations relating to the particular tax.

(b) *Income taxes.* (1) For provisions relating to the use of authorized financial institutions in depositing income and estimated income taxes of certain corporations, see § 1.6302–1 of this chapter (Income Tax Regulations).

(2) For provisions relating to the use of authorized financial institutions in depositing the tax required to be withheld under chapter 3 of the Code on nonresident aliens and foreign corporations and tax-free covenant bonds, see § 1.6302–2 of this chapter.

[32 FR 15241, Nov. 2, 1967, as amended by T.D. 8952, 66 FR 33832, June 26, 2001]

### § 301.6303–1 Notice and demand for tax.

(a) *General rule.* Where it is not otherwise provided by the Code, the district director or the director of the regional service center shall, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be given as soon as possible and within 60 days. However, the failure to give notice within 60 days does not invalidate the notice. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address. For further guidance regarding the definition of last known address, see § 301.6212–2.

(b) *Assessment prior to last date for payment.* If any tax is assessed prior to the last date prescribed for payment of such tax, demand that such tax be paid will not be made before such last date, except where it is believed collection would be jeopardized by delay.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8939, 66 FR 2820, Jan. 12, 2001]

### § 301.6305–1 Assessment and collection of certain liability.

(a) *Scope.* Section 6305(a) requires the Secretary of the Treasury or his delegate to assess and collect amounts which have been certified by the Secretary of Health and Human Services as the amount of a delinquency determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child or of a child and the parent with whom the child is living. These amounts, referred to as ''child and spousal support'', are to be collected in the same manner and with the same powers exercised by the Secretary of the Treasury or his delegate in the collection of an employment tax which would be jeopardized by delay. However, where the assessment is the first assessment against an individual for a delinquency described in this paragraph for a particular individual or individuals, the collection is to be stayed for a period of 60 days following notice and demand. In addition, no interest or penalties (with the exception of the penalties imposed by sections

6332(c)(2) and 6657) shall be assessed or collected on the amounts, paragraphs (4), (6) and (8) of section 6334(a) (relating to property exempt from levy) shall not apply; and, there shall be exempt from levy so much of the salary, wages, or other income of the individual which is subject to garnishment pursuant to a judgment entered by a court for the support of his or her minor children. Section 6305(b) provides that sole jurisdiction for any action brought to restrain or review assessment and collection of the certified amounts shall be in a State court or a State administrative agency.

(b) *Assessment and collection*—(1) *General rule.* Upon receipt of a certification or recertification from the Secretary of Health and Human Services or his delegate under section 452(b) of title IV of the Social Security Act as amended (relating to collection of child and spousal support obligations with respect to an individual), the district director or his delegate shall assess and collect the certified amount (or recertified amount). Except as provided in paragraph (c) of this section, the amount so certified shall be assessed and collected in the same manner, with the same powers, and subject to the same limitations as if the amount were an employment tax the collection of which would be jeopardized by delay. However, the provisions of subtitle F with respect to assessment and collection of taxes shall not apply with respect to assessment and collection of a certified amount where such provisions are clearly inappropriate to, and incompatible with, the collection of certified amounts generally. For example, section 6861(g) which allows the Secretary or his delegate to abate a jeopardy assessment if he finds a jeopardy does not exist will not apply.

(2) *Method of assessment.* An assessment officer appointed by the district director pursuant to § 301.6203–1 to make assessments of tax shall also make assessments of certified amounts. The assessment of a certified amount shall be made by the assessment officer signing the summary record of assessment. The date of assessment is the date the summary record is signed by the assessment officer. The summary record, through supporting records as necessary, shall provide—

(i) The assessed amount;

(ii) The name, social security number, and last known address of the individual owing the assessed amount. For further guidance regarding the definition of last known address, see § 301.6212–2;

(iii) A designation of the assessed amount as a certified amount, together with the date on which the amount was certified and the name, position, and governmental address of the officer of the Department of Health and Human Services who certified the amount;

(iv) The period to which the child and spousal support obligation represented by the certified amount relates;

(v) The State in which was entered the court or administrative order giving rise to the child and spousal support obligation represented by the certified amount;

(vi) The name of the person or persons to whom the child and spousal support obligation represented by the certified amount is owed; and

(vii) The name of the child or children or the parent of the child or children for whose benefit the child and spousal support obligation exists.

Upon request, the individual assessed shall be furnished a copy of pertinent parts of this assessment which set forth the information listed in subdivision (i) through (vii) of this paragraph (b)(2).

(3) *Supplemental assessments and abatements.* If any assessment is incomplete or incorrect in any material respect, the district director or his delegate may make a supplemental assessment or abatement but only for the purpose of completing or correcting the original assessment. A supplemental assessment will not be used as a substitute for an additional assessment against an individual.

(4) *Method of collection.* (i) The district director or his delegate shall make notice and demand for immediate payment of certified amounts. Upon failure or refusal to pay such amounts, collection by levy shall be lawful without regard to the 10-day waiting period provided in section 6331(a). However, in the case of certain first assessments, paragraph (c)(4) of

this section provides a rule for a stay of collection for 60 days. For purposes of collection, refunds of any internal revenue tax owed to the individual may be offset against a certified amount.

(ii) The district director or his delegate shall make diligent and reasonable efforts to collect certified amounts as if such amounts were taxes. He shall have no authority to compromise a proceeding by collection of only part of a certified amount in satisfaction of the full certified amount owing. However, he may arrange for payment of a certified amount by installments where advisable.

(iii) The district director or his delegate may offset the amount of any overpayment of any internal revenue tax (as described in section 301.6401–1) to be refunded to the person making the overpayment by the amount of any past-due support (as defined in the regulations under section 6402) owed by the person making the overpayment. The amounts offset under section 6402(c) may be amounts of child and spousal support certified (or recertified) for collection under section 6305 and this section or they may be amounts of past-due support of which the Secretary of the Treasury has been notified under section 6402(c) and the regulations under that section.

(5) *Credits or refunds.* In the case of any overpayment of a certified amount, the Secretary of the Treasury or his delegate, within the period of limitations for credit or refund of employment taxes, may credit the amount of the overpayment against any liability in respect of an internal revenue tax on the part of the individual who made the overpayment and shall refund any balance to the individual. However, the full amount of any overpayment collected by levy upon property described in paragraph (c)(2) (i), (ii), or (iii) of this section shall be refunded to the individual. For purposes of applying this subparagraph, the rules of § 301.6402–2 apply where appropriate.

(6) *Disposition of certified amounts collected.* Any certified amount collected shall be deposited in the general fund of the United States, and the officer of the Department of Health and Human Services who certified the amount shall be promptly notified of its collection. There shall be established in the Treasury, pursuant to section 452 of title IV of the Social Security Act as amended, a revolving fund which shall be available to the Secretary of Health and Human Services or his delegate, without fiscal year limitation, for distribution to the States in accordance with the provisions of section 457 of the Act. Section 452(c)(2) of the Act appropriates to this revolving fund out of any monies not otherwise appropriated, amounts equal to the certified amounts collected under this paragraph reduced by the amounts credited or refunded as overpayments of the certified amounts so collected. The certified amounts deposited shall be transferred at least quarterly from the general fund of the Treasury to the revolving fund on the basis of estimates made by the Secretary of the Treasury or his delegate. Proper adjustments shall be made in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred. See, however, paragraph (c)(1) of this section for the special rule requiring retention in the general fund of certain penalties which may be collected.

(c) *Additional limitations and conditions*—(1) *Interest and penalties.* No interest, penalties or additional amounts, other than normal and reasonable collection costs, may be assessed or collected in addition to the certified amount, other than the penalty imposed by section 6332(c)(2) for failure to surrender property subject to levy and the penalty imposed by section 6657 for the tender of bad checks. Any such penalties and collection costs, if collected, will not be treated as part of the certified amount and will be retained by the United States as a part of its general fund. No interest shall be allowed or paid on any overpayment of a certified amount.

(2) *Property not exempt from levy.* In addition to property not exempt from levy under section 6334(c) and the regulations thereunder, the following property shall not be exempt from a levy to collect a certified amount:

(i) Unemployment benefits described in section 6334(a)(4);

(ii) Certain annuities and pension payments described in section 6334(a)(6); or

(iii) Salary, wages, or other income described in section 6334(a)(8).

(3) *Property exempt from levy*. In addition to property exempt from levy under section 6334(a) and the regulations thereunder, other than property described in paragraph (c)(2) (i), (ii), or (iii) of this section, there shall be exempt from levy to collect a certified amount so much of the salary, wages, or other income of an individual as is withheld therefrom in garnishment pursuant to judgment entered by a court of competent jurisdiction for the support of minor children of the individual.

(4) *First assessment*. In the case of a first assessment against an individual for a certified amount in whole or part for the benefit of a particular child or children or the child or children and their parent, the collection of the certified amount shall be stayed for the period of 60 days immediately following notice and demand as described in section 6303. However, no other stay of the collection of a certified amount may be granted. Thus, the provisions of section 6863(a), relating to bonds to stay collection of jeopardy assessments, shall not apply to the collection of certified amounts.

(5) *Priority of liens*. A lien for a certified amount shall be valid as against a lien for taxes imposed by section 6321 only if the date of assessment of the certified amount precedes the date of assessment of the taxes. However, no amount collected by levy upon property described in paragraph (c)(2) (i), (ii), or (iii) of this section may be applied other than in whole or partial satisfaction of certified amounts. In the case of two liens for certified amounts, the lien for the certified amount which is first assessed shall be valid as against the lien for the certified amount which is later assessed.

(6) *Statute of limitations on collections*. The periods of limitation on collection of taxes after assessment prescribed by section 6502 shall apply to the collection of certified (or recertified) amounts. Such periods of limitation with respect to a certified amount shall terminate upon recertification of the amount, and the period of limitation prescribed by section 6502 shall then apply and commence to run with respect to the recertified amount.

(d) *Review of assessments and collections*—(1) *Federal courts*. No court of the United States established under article I or article III of the Constitution has jurisdiction of any legal or equitable action to restrain or review the assessment or collection of certified amounts by the district director or his delegate. See, however, paragraph (d)(3) of this section for the rule that the prohibition of this paragraph (d)(1) does not preclude courts established for the District of Columbia from exercising jurisdiction over certain actions.

(2) *Secretary of the Treasury*. Neither the Secretary of the Treasury nor his delegate may subject to review the assessment or collection of certified amounts in any legal, equitable, or administrative proceeding.

(3) *State courts*. This paragraph (d) does not preclude a State court or appropriate State agency, as the case may be, from exercising jurisdiction over a legal, equitable, or administrative action against the State by an individual to determine his liability for any certified amount assessed against him and collected, or to recover any such certified amount collected, under section 6305 and this section. For purposes of the preceding sentence, the term ''State'' includes the District of Columbia.

(e) *Internal Revenue regional service centers*. For purposes of this section, the terms ''district director or his delegate'' and ''district director'' include the director of the Internal Revenue service center or his delegate, as the case may be.

(Sec. 7805, Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805); sec. 2332(a) of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357), amending sec. 464(a) of the Social Security Act (88 Stat. 2351))

[T.D. 7576, 43 FR 59376, Dec. 20, 1978, as amended by T.D. 7808, 47 FR 5713, Feb. 8, 1982; T.D. 8939, 66 FR 2820, Jan. 12, 2001]

RECEIPT OF PAYMENT

**§ 301.6311–1 Payment by check or money order.**

(a) *Authority to receive*—(1) *In general.* (i) District directors, Service Center directors, and Compliance Center directors (director) may accept checks or drafts drawn on any financial institution incorporated under the laws of the United States or under the laws of any State, the District of Columbia, or any possession of the United States, or money orders in payment for internal revenue taxes, provided the checks, drafts, or money orders are collectible in United States currency at par, and subject to the further provisions contained in this section. The director may accept the checks, drafts, or money orders in payment for internal revenue stamps to the extent and under the conditions prescribed in paragraph (a)(2) of this section. A check or money order in payment for internal revenue taxes or internal revenue stamps should be made payable to the United States Treasury. A check or money order is payable at par only if the full amount thereof is payable without any deduction for exchange or other charges. As used in this section, the term ''money order'' means: (*a*) U.S. postal, bank, express, or telegraph money order; (*b*) money order issued by a domestic building and loan association (as defined in section 7701(a)(19)) or by a similar association incorporated under the laws of a possession of the United States; (*c*) a money order issued by such other organization as the Commissioner may designate; and (*d*) a money order described in subdivision (ii) of this subparagraph in cases therein described. However, the director may refuse to accept any personal check whenever he or she has good reason to believe that such check will not be honored upon presentment.

(ii) An American citizen residing in a country with which the United States maintains direct exchange of money orders on a domestic basis may pay his tax by postal money order of such country. For a list of such countries, see section 171.27 of the Postal Manual of the United States.

(iii) If one check or money order is remitted to cover two or more persons' taxes, the remittance should be accompanied by a letter of transmittal clearly identifying—

(*a*) Each person whose tax is to be paid by the remittance;

(*b*) The amount of the payment on account of each such person; and

(*c*) The kind of tax paid.

(2) *Payment for internal revenue stamps.* The director may accept checks, drafts, and money orders described in paragraph (a)(1) of this section in payment for internal revenue stamps. However, the director may refuse to accept any personal check whenever he or she has good reason to believe that such check will not be honored upon presentment.

(b) *Checks or money orders not paid*—(1) *Ultimate liability.* The person who tenders any check (whether certified or uncertified, cashier's, treasurer's, or other form of check or draft) or money order in payment for taxes or stamps is not released from his or her liability until the check, draft, or money order is paid; and, if the check, draft, or money order is not duly paid, the person shall also be liable for all legal penalties and additions, to the same extent as if such check, draft, or money order had not been tendered.

(2) *Liability of financial institutions and others.* If any certified, treasurer's, or cashier's check, or other guaranteed draft, or money order, is not duly paid, the United States shall have a lien for the amount of such check or draft upon all assets of the financial institution on which drawn, or for the amount of such money order upon the assets of the issuer thereof. The unpaid amount shall be paid out of such assets in preference to any other claims against such financial institution or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such financial institution. In addition, the Government has the right to exact payment from the person required to make the payment.

(c) *Payment in nonconvertible foreign currency.* For rules relating to payment of income taxes and taxes under the Federal Insurance Contributions Act in nonconvertible foreign currency, see

section 6316 and the regulations thereunder.

(d) *Financial institution*. For purposes of section 6311 and this section, *financial institution* includes but is not limited to—

(1) A bank or trust company (as defined in section 581);

(2) A domestic building and loan association (as defined in section 7701(a)(19));

(3) A mutual savings bank (including but not limited to a mutual savings bank as defined in section 591(b));

(4) A credit union (including both state and federal credit unions, and including but not limited to a credit union as defined in section 501(c)(14)); and

(5) A regulated investment company (as defined in section 851(a)).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12795, June 29, 1972; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976; T.D. 8595, 60 FR 20899, Apr. 28, 1995; T.D. 8969, 66 FR 64743, Dec. 14, 2001]

### § 301.6311–2 Payment by credit card and debit card.

(a) *Authority to receive*—(1) *Payments by credit card and debit card*. Internal revenue taxes may be paid by credit card or debit card as authorized by this section. Payment of taxes by credit card or debit card is voluntary on the part of the taxpayer. Only credit cards or debit cards approved by the Commissioner may be used for this purpose, only the types of tax liabilities specified by the Commissioner may be paid by credit card or debit card, and all such payments must be made in the manner and in accordance with the forms, instructions and procedures prescribed by the Commissioner. All references in this section to *tax* also include interest, penalties, additional amounts, and additions to tax.

(2) *Payments by electronic funds transfer other than payments by credit card and debit card*. Provisions relating to payments by electronic funds transfer other than payments by credit card and debit card are contained in section 6302 and the Treasury Regulations promulgated pursuant to section 6302.

(3) *Definitions*—(i) *Credit card* means any credit card as defined in section 103(k) of the Truth in Lending Act (15 U.S.C. 1602(k)), including any credit card, charge card, or other credit device issued for the purpose of obtaining money, property, labor, or services on credit.

(ii) *Debit card* means any accepted card or other means of access as defined in section 903(1) of the Electronic Fund Transfer Act (15 U.S.C. 1693a(1)), including any debit card or similar device or means of access to an account issued for the purpose of initiating electronic fund transfers to obtain money, property, labor, or services.

(b) *When payment is deemed made*. A payment of tax by credit card or debit card shall be deemed made when the issuer of the credit card or debit card properly authorizes the transaction, provided that the payment is actually received by the United States in the ordinary course of business and is not returned pursuant to paragraph (d)(3) of this section.

(c) *Payment not made*—(1) *Continuing liability of taxpayer*. A taxpayer who tenders payment of taxes by credit card or debit card is not relieved of liability for such taxes until the payment is actually received by the United States and is not required to be returned pursuant to paragraph (d)(3) of this section. This continuing liability of the taxpayer is in addition to, and not in lieu of, any liability of the issuer of the credit card or debit card or financial institution pursuant to paragraph (c)(2) of this section.

(2) *Liability of financial institutions*. If a taxpayer has tendered a payment of internal revenue taxes by credit card or debit card, the credit card or debit card transaction has been guaranteed expressly by a financial institution, and the United States is not duly paid, then the United States shall have a lien for the guaranteed amount of the transaction upon all the assets of the institution making such guarantee. The unpaid amount shall be paid out of such assets in preference to any other claims whatsoever against such guaranteeing institution, except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such institution.

(d) *Resolution of errors relating to the credit card or debit card account*—(1) *In general.* Payments of taxes by credit card or debit card shall be subject to the applicable error resolution procedures of section 161 of the Truth in Lending Act (15 U.S.C. 1666), section 908 of the Electronic Fund Transfer Act (15 U.S.C. 1693f), or any similar provisions of state or local law, for the purpose of resolving errors relating to the credit card or debit card account, but not for the purpose of resolving any errors, disputes or adjustments relating to the underlying tax liability.

(2) *Matters covered by error resolution procedures.* (i) The error resolution procedures of paragraph (d)(1) of this section apply to the following types of errors—

(A) An incorrect amount posted to the taxpayer's account as a result of a computational error, numerical transposition, or similar mistake;

(B) An amount posted to the wrong taxpayer's account;

(C) A transaction posted to the taxpayer's account without the taxpayer's authorization; and

(D) Other similar types of errors that would be subject to resolution under section 161 of the Truth in Lending Act (15 U.S.C. 1666), section 908 of the Electronic Fund Transfer Act (15 U.S.C. 1693f), or similar provisions of state or local law.

(ii) An error described in paragraph (d)(2)(i) of this section may be resolved only through the procedures referred to in paragraph (d)(1) of this section and cannot be a basis for any claim or defense in any administrative or court proceeding involving the Commissioner or the United States.

(3) *Return of funds pursuant to error resolution procedures.* Notwithstanding section 6402, if a taxpayer is entitled to a return of funds pursuant to the error resolution procedures of paragraph (d)(1) of this section, the Commissioner may, in the Commissioner's sole discretion, effect such return by arranging for a credit to the taxpayer's account with the issuer of the credit card or debit card or any other financial institution or person that participated in the transaction in which the error occurred.

(4) *Matters not subject to error resolution procedures.* The error resolution procedures of paragraph (d)(1) of this section do not apply to any error, question, or dispute concerning the amount of tax owed by any person for any year. For example, these error resolution procedures do not apply to determine a taxpayer's entitlement to a refund of tax for any year for any reason, nor may they be used to pay a refund. All such matters shall be resolved through administrative and judicial procedures established pursuant to the Internal Revenue Code and the rules and regulations thereunder.

(5) *Section 170 of the Truth in Lending Act not applicable.* Payments of taxes by credit card or debit card are not subject to section 170 of the Truth in Lending Act (15 U.S.C. 1666i) or to any similar provision of state or local law.

(e) *Fees or charges.* The Internal Revenue Service may not impose any fee or charge on persons making payment of taxes by credit card or debit card. This section does not prohibit the imposition of fees or charges by issuers of credit cards or debit cards or by any other financial institution or person participating in the credit card or debit card transaction. The Internal Revenue Service may not receive any part of any fees that may be charged.

(f) *Authority to enter into contracts.* The Commissioner may enter into contracts related to receiving payments of tax by credit card or debit card if such contracts are cost beneficial to the Government. The determination of whether the contract is cost beneficial shall be based on an analysis appropriate for the contract at issue and at a level of detail appropriate to the size of the Government's investment or interest. The Commissioner may not pay any fee or charge or provide any other monetary consideration under such contracts for such payments.

(g) *Use and disclosure of information relating to payment of taxes by credit card and debit card.* Any information or data obtained directly or indirectly by any person other than the taxpayer in connection with payment of taxes by a credit card or debit card shall be treated as confidential, whether such information is received from the Internal

Revenue Service or from any other person (including the taxpayer).

(1) No person other than the taxpayer shall use or disclose such information except as follows—

(i) Card issuers, financial institutions, or other persons participating in the credit card or debit card transaction may use or disclose such information for the purpose and in direct furtherance of servicing cardholder accounts, including the resolution of errors in accordance with paragraph (d) of this section. This authority includes the following—

(A) Processing the credit card or debit card transaction, in all of its stages through and including the crediting of the amount charged on account of tax to the United States Treasury;

(B) Billing the taxpayer for the amount charged or debited with respect to payment of the tax liability;

(C) Collecting the amount charged or debited with respect to payment of the tax liability;

(D) Returning funds to the taxpayer in accordance with paragraph (d)(3) of this section;

(E) Sending receipts or confirmation of a transaction to the taxpayer, including secured electronic transmissions and facsimiles; and

(F) Providing information necessary to make a payment to state or local government agencies, as explicitly authorized by the taxpayer (e.g., name, address, taxpayer identification number).

(ii) Card issuers, financial institutions or other persons participating in the credit card or debit card transaction may use and disclose such information for the purpose and in direct furtherance of any of the following activities—

(A) Assessment of statistical risk and profitability;

(B) Transfer of receivables or accounts or any interest therein;

(C) Audit of account information;

(D) Compliance with federal, state, or local law; and

(E) Cooperation in properly authorized civil, criminal, or regulatory investigations by federal, state, or local authorities.

(2) Notwithstanding the provisions of paragraph (g)(1) of this section, use or disclosure of information relating to credit card and debit card transactions for purposes related to any of the following is not authorized—

(i) Sale of such information (or transfer of such information for consideration) separate from a sale of the underlying account or receivable (or transfer of the underlying account or receivable for consideration);

(ii) Marketing for any purpose, such as, marketing tax-related products or services, or marketing any product or service that targets those who have used a credit card or debit card to pay taxes; and

(iii) Furnishing such information to any credit reporting agency or credit bureau, except with respect to the aggregate amount of a cardholder's account, with the amount attributable to payment of taxes not separately identified.

(3) Use and disclosure of information other than as authorized by this paragraph (g) may result in civil liability under sections 7431(a)(2) and (h).

(h) *Effective date.* This section applies to payments of taxes made on and after December 14, 2001.

[T.D. 8969, 66 FR 64743, Dec. 14, 2001; 67 FR 1416, Jan. 11, 2001]

### § 301.6312–1 Treasury certificates of indebtedness, Treasury notes, and Treasury bills acceptable in payment of internal revenue taxes or stamps.

(a) Treasury certificates of indebtedness, Treasury notes, or Treasury bills of any series (not including interim receipts issued by Federal reserve banks in lieu of definitive certificates, notes, or bills) may be tendered at or before maturity in payment of internal revenue taxes due on the date (or in payment for stamps purchased on the date), on which the certificates, notes, or bills mature, or in payment of internal revenue taxes due on a specified prior date, but only if such certificates, notes, or bills, according to the express terms of their issue, are made acceptable in payment of such taxes or for the purchase of stamps. If the taxes for which the certificates, notes, or bills are tendered in payment become due, or the stamps are purchased, on the

same date as that on which such certificates, notes, or bills mature, they will be accepted at par plus accrued interest, if any, payable with the principal (not represented by coupons attached) in payment of such taxes or stamps. If the taxes for which the certificates, notes, or bills are tendered in payment become due, or the stamps are purchased, on a date prior to that on which the certificates, notes, or bills mature, they will be accepted at the value specified in the terms under which such certificates, notes, or bills were issued. All interest coupons attached to Treasury certificates of indebtedness or Treasury notes shall be detached by the taxpayer before such certificates or notes are tendered in payment of taxes or stamps.

(b) Receipts given by a district director for Treasury certificates of indebtedness, Treasury notes, or Treasury bills received in payment of internal revenue taxes or for stamps as provided in this section shall contain an adequate description of such certificates, notes, or bills, and a statement of the value, including accrued interest, if any, payable with the principal (not represented by coupons attached), at which accepted, and shall show that the certificates, notes, or bills are tendered by the taxpayer and received by the district director, subject to no conditions, qualification, or reservation whatsoever, in payment of an amount of taxes or for stamps no greater than such value. Any certificate, note, or bill offered in payment of internal revenue taxes or for stamps subject to any condition, qualification, or reservation, or for any greater amount than the value at which acceptable in payment of taxes or stamps, as specified in the terms under which such certificate, note, or bill was issued, shall not be deemed to be duly tendered and shall be returned to the taxpayer.

(c) For the purpose of saving taxpayers the expense of transmitting Treasury certificates of indebtedness, Treasury notes, or Treasury bills to the office of the district director in whose district the taxes are payable, or stamps are to be purchased, taxpayers desiring to pay taxes, or purchase stamps, with such certificates, notes, or bills acceptable in payment of taxes or for the purchase of stamps may deposit such certificates, notes, or bills with a Federal reserve bank or branch, or with the Office of the Treasurer of the United States, Treasury Building, Washington, D.C. In such cases, the Federal reserve bank or branch, or the Office of the Treasurer of the United States, shall issue a receipt in the name of the district director, describing the certificates, notes, or bills by par or dollar face amount and stating on the face of the receipt that the certificates, notes, or bills represented thereby are held by the bank or branch, or the Office of the Treasurer of the United States, for redemption at the value specified in the terms under which the certificates, notes, or bills were issued, and for application of the proceeds in payment of taxes due or for the purchase of stamps on a specified date by the taxpayer named therein.

(d) In the case of payments of tax required to be deposited with Government depositaries by regulations under section 6302 of the Code, certificates, notes, or bills referred to in paragraph (a) of this section may be deposited with a Federal Reserve bank or branch, or with the Office of the Treasurer of the United States, in part or full satisfaction of such tax liability. As in the case of all remittances of amounts so required to be deposited, each such deposit of certificates, notes, or bills shall be accompanied by the appropriate deposit form in accordance with the regulations under section 6302. In such cases, notwithstanding paragraphs (b) and (c) of this section, receipts for such certificates, notes or bills shall no longer be issued in the name of the district director.

### § 301.6312–2 Certain Treasury savings notes acceptable in payment of certain internal revenue taxes.

According to the express terms of their issue, the following series of Treasury savings notes are presently acceptable in payment of income taxes (current and back, personal and corporation taxes, and excess profits taxes) and estate and gift taxes (current and back):

(a) Treasury Savings Notes, Series A,
(b) Treasury Savings Notes, Series B,
(c) Treasury Savings Notes, Series C.

**§ 301.6313–1 Fractional parts of a cent.**

In the payment of any tax not payable by stamp, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. Fractional parts of a cent shall not be disregarded in the computation of taxes.

**§ 301.6314–1 Receipt for taxes.**

(a) *In general.* The district director or the director of a service center shall upon request, issue a receipt for each tax payment made (other than a payment for stamps sold and delivered). In addition, the district director or the director of a service center shall issue a receipt for each payment of 1 dollar or more made in cash, whether or not requested. In the case of payments made by check, the canceled check is usually a sufficient receipt. No receipt shall be issued in lieu of a stamp representing a tax, whether the payment is in cash or otherwise.

(b) *Duplicate receipt for payment of estate taxes.* Upon request, the district director or the director of a service center will issue duplicate receipts to the person paying the estate tax, either of which will be sufficient evidence of such payment and entitle the executor to be credited with the amount by any court having jurisdiction to audit or settle his accounts. For definition of the term ''executor'', see section 2203.

[T.D. 7214, 37 FR 23176, Oct. 31, 1972]

**§ 301.6315–1 Payments of estimated income tax.**

The payment of any installment of the estimated income tax (see sections 6015 and 6016) shall be considered payment on account of the income tax for the taxable year for which the estimate is made. The aggregate amount of the payments of estimated tax should be entered upon the income tax return for such taxable year as payments to be applied against the tax shown on such return.

**§ 301.6316–1 Payment of income tax in foreign currency.**

Subject to the provisions of §§ 301.6316–3 to 301.6316–5, inclusive, that portion of the income tax which is attributable to amounts received by a citizen of the United States in nonconvertible foreign currency may be paid in such currency—

(a) For any taxable year beginning on or after January 1, 1955, and before January 1, 1964, if such amounts—

(1) Are disbursed from funds made available to a foundation or commission established in a foreign country pursuant to an agreement made under the authority of section 32(b) of the Surplus Property Act of 1944, as amended (50 U.S.C. App. 1641(b)(2)), or reestablished under the authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 2451);

(2) Constitute either a grant made for authorized purposes of the agreement or compensation for personal services performed in the employ of the foundation or commission;

(3) Are at least 75 percent of the entire amount of the grant or compensation; and

(4) Are treated as income from sources without the United States under the provisions of sections 861 to 864, inclusive, and §§ 1.861–1 to 1.864, inclusive, of this chapter (Income Tax Regulations); and

(b) For any taxable year beginning on or after January 1, 1964, if such amounts—

(1) Are disbursed from funds made available either to a foundation or commission, established pursuant to an agreement made under the authority of section 32(b) of the Surplus Property Act of 1944, as amended, or to a foundation or commission established or continued pursuant to an agreement made under the authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended; or are paid from grants made to such citizen, or to a foundation or an educational or other institution, under the authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended, or section 104 (h), (j), (k), (o), or (p) of the Agricultural Trade Development and Assistance Act of 1954, as amended (7 U.S.C. 1704 (h), (j), (k), (o), (p));

(2) Constitute either a grant made for a purpose authorized under any such agreement or law, or compensation for

personal services performed in the employ of any organization engaged in administering any program or activity pursuant to any such agreement or law;

(3) Are at least 70 percent of the entire amount of the grant or compensation; and

(4) Are treated as income from sources without the United States under the provisions of sections 861 to 864, inclusive, and §§ 1.861–1 to 1.864, inclusive, of this chapter (Income Tax Regulations).

### § 301.6316–2 Definitions.

For purposes of §§ 301.6316–1 to 301.6316–9, inclusive:

(a) The term *tax*, as used in §§ 301.6316–1, 301.6316–3, 301.6316–4, 301.6316–5, and 301.6316–6 means the income tax imposed for the taxable year by chapter 1 of the Internal Revenue Code of 1954, and as used in § 301.6316–7 means the Federal Insurance Contributions Act taxes imposed by chapter 21 of the Code (or by the corresponding provisions of the Internal Revenue Code of 1939). The term ''tax'', as used in §§ 301.6316–3 and 301.6316–9 shall relate to either of such taxes, whichever is appropriate.

(b) The term *nonconvertible foreign currency* means currency of the government of a foreign country which, owing to (1) monetary, exchange, or other restrictions imposed by the foreign country, (2) an agreement entered into with the United States of America, or (3) the terms and conditions of the U.S. Government grant, is not convertible into U.S. dollars or into other money which is convertible into U.S. dollars. The term shall not, however, include currency which, notwithstanding such restrictions, agreement, terms, or conditions, is in fact converted into U.S. dollars or into property which is readily disposable for U.S. dollars.

(c) If the taxpayer computes taxable income under the accrual method, then the term *received* shall be construed to mean ''accrued.''

### § 301.6316–3 Allocation of tax attributable to foreign currency.

(a) *Adjusted gross income ratio*. The portion of the tax which is attributable to amounts received in nonconvertible foreign currency shall, for purposes of applying § 301.6316–1 to the currency of each foreign country, be the amount by which:

(1) The amount which bears the same ratio to the entire tax for the taxable year as (i) the taxpayer's adjusted gross income received in that currency bears to (ii) the adjusted gross income determined under section 62 by taking into account the entire gross income and all deductions allowable under that section without distinction as to amounts received in foreign currency, exceeds

(2) The total of the allowable credits against tax, and payments on account of tax, which are properly allocable to the amount of that currency included in gross income.

(b) *Example*. (1) For the calendar year 1955 Mr. Jones and his wife filed a joint return on which the adjusted gross income is as follows, after amounts received in foreign currency had been properly translated into United States dollars for tax computation purposes:

| | |
|---|---|
| Fulbright grant received by Mr. Jones in nonconvertible foreign currency | $8,000 |
| Dividends received by Mr. Jones entitled to dividends-received credit | 500 |
| Compensation for personal services of Mrs. Jones | 3,000 |
| Net profit from business carried on by Mrs. Jones | 2,500 |
| Total adjusted gross income | 14,000 |

(2) The following amounts are allowable as properly deductible from adjusted gross income, no determination being made as to whether or not any part of them is properly allocable to the Fulbright grant:

| | |
|---|---|
| Deduction for personal exemptions | $3,000 |
| Charitable contributions | 500 |
| Interest expense | 400 |
| Taxes | 300 |
| Total allowable deductions | 4,200 |

(3) For the taxable year the following amounts are allowable as credits against the tax, or as payments on account of the tax:

| | | |
|---|---|---|
| Foreign tax credit for foreign taxes paid on Fulbright grant | | $300.00 |
| Dividends-received credit | | 20.00 |
| Credit for income tax withheld upon compensation of Mrs. Jones | | 304.80 |
| Payments of estimated tax (see § 301.6316–6(b)(2) for determination of amounts): | | |
| U.S. dollars | $426.32 | |
| Foreign currency | 893.88 | 1,320.20 |
| Total allowable credits and payments | | 1,945.00 |

(4) The portion of the tax which is attributable to amounts received in nonconvertible foreign currency is $33.49, determined as follows:

| | | |
|---|---|---|
| Adjusted gross income | | $14,000.00 |
| Less: Allowable deductions | | 4,200.00 |
| Taxable income | | 9,800.00 |
| Tax computed under section 2 | | 2,148.00 |
| Ratio of adjusted gross income received in nonconvertible foreign currency to entire adjusted gross income ($8,000÷$14,000) (percent) | | 57.14 |
| Portion of tax attributable to nonconvertible foreign currency ($2,148×57.14 percent) | | $1,227.37 |
| Less: | | |
| Credit for foreign taxes paid on Fulbright grant | $300.00 | |
| Payment in foreign currency of estimated tax | 893.88 | 1,193.88 |
| Portion of tax attributable to amounts received in nonconvertible foreign currency | | 83.49 |

### § 301.6316–4 Return requirements.

(a) *Place for filing*. A return of income which includes amounts received in foreign currency on which the tax is paid in accordance with § 301.6316–1 shall be filed with the Director of International Operations, Internal Revenue Service, Washington, D.C. 20225. For the time for filing income tax returns, see sections 6072 and 6081 and §§ 1.6072–1, 1.6081–1, and 1.6081–2 of this chapter (Income Tax Regulations).

(b) *Statements required*. (1) A statement, prepared by the taxpayer, and certified by the foundation, commission, or other person having control of the payments made to the taxpayer in nonconvertible foreign currency, shall be attached to the return showing that for the taxable year involved the taxpayer is entitled to pay tax in foreign currency in accordance with section 6316 and the regulations thereunder. This statement shall disclose the total amount of grants or compensation received by the taxpayer during the taxable year under the authority of section 32(b) of the Surplus Property Act of 1944, as amended (50 U.S.C. App. 1641(b)(2)), or of the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 2451), or section 104 (h), (j), (k), (o), or (p) of the Agricultural Trade Development and Assistance Act of 1954, as amended (7 U.S.C. 1704 (h), (j), (k), (o), (p)), and the amount thereof paid in nonconvertible foreign currency. It shall also state that with respect to the grant or compensation the applicable percentage requirement of § 301.6316–1 is satisfied.

(2) The taxpayer shall also attach to the return a detailed statement showing (i) the computation, in the manner prescribed by § 301.6316–3, of the portion of the tax attributable to amounts received in nonconvertible foreign currency and (ii) the rates of exchange used in determining the tax liability in U.S. dollars. See paragraph (c) of § 301.6316–5.

### § 301.6316–5 Manner of paying tax by foreign currency.

(a) *Time and place to pay*. The unpaid tax required to be shown on a return filed in accordance with § 301.6316–4, whether payable in whole or in part in foreign currency, is due and payable to the Director of International Operations, Internal Revenue Service, Washington, D.C. 20225, at the time the return is filed. However, see paragraph (d) of this section with respect to the depositing of the foreign currency with the disbursing officer of the Department of State.

(b) *Certified statement*. Every taxpayer who desires to pay tax in foreign currency under the provisions of § 301.6316–1 shall first obtain the certified statement referred to in paragraph (b)(1) of § 301.6316–4.

(c) *Determination of the tax*. In determining the tax payable for the taxable year in U.S. dollars, the taxpayer, with respect to amounts described in paragraph (a) of § 301.6316–1, or amounts described in paragraph (b) of § 301.6316–1 received before November 1, 1965, shall use the rates of exchange which most clearly reflect the correct tax liability in dollars, whether it be the official rate, the open market rate, or any other appropriate rate. With respect to amounts described in paragraph (b) of § 301.6316–1 received on or after November 1, 1965, the taxpayer shall use the official rate of exchange in determining the tax payable for the taxable year in U.S. dollars. After determining the correct tax liability in U.S. dollars the taxpayer shall then ascertain, in accordance with the principles of § 301.6316–3, the portion of the tax which is attributable to amounts received in nonconvertible foreign currency.

(d) *Deposit of foreign currency with disbursing officer.* (1) After the portion of the tax which is attributable to amounts received in nonconvertible foreign currency is determined in U.S. dollars, the amount so determined shall be deposited in the same nonconvertible foreign currency with the disbursing officer of the Department of State for the foreign country where the fund is located from which the payments in nonconvertible foreign currency are made to the taxpayer. The amount of foreign currency to be deposited shall be that amount which, when converted at the rate of exchange used on the date of deposit by that disbursing officer for the acquisition of such currency for his official disbursements, equals the portion of the tax so determined in U.S. dollars.

(2) The disbursing officer may rely upon the taxpayer for the determination of the amount of tax payable in foreign currency but may not accept any such currency for deposit until the taxpayer has presented for inspection the certified statement referred to in paragraph (b)(1) of § 301.6316–4. Upon acceptance of foreign currency for deposit the disbursing officer shall give the taxpayer a receipt in duplicate showing the name and address of the depositor, the date of the deposit, the amount of foreign currency deposited, and its equivalent in U.S. dollars on the date of deposit.

(3) Every taxpayer making a deposit of foreign currency in accordance with this paragraph shall attach to the return required to be filed in accordance with § 301.6316–4, in part or full payment of the taxes shown thereon, the original of the receipt given by the disbursing officer and shall pay to the Director of International Operations in U.S. dollars the balance, if any, of the tax shown to be due. Tender of such receipt to the Director of International Operations shall be considered as payment of tax in an amount equal to the U.S. dollars represented by the receipt.

(4) A taxpayer shall make the deposit required by this paragraph in ample time to permit him to attach the receipt to his return for filing within the time prescribed by section 6072 or 6081 and §§ 1.6072–1, 1.6081–1, and 1.6081–2 of this chapter (Income Tax Regulations).

**§ 301.6316–6 Declarations of estimated tax.**

(a) *Filing of declaration.* A declaration of estimated tax in respect of amounts on which the tax is to be paid in foreign currency under the provisions of § 301.6316–1 shall be filed with the Director of International Operations, Internal Revenue Service, Washington, D.C. 20225, and shall have attached thereto the statements required by paragraph (b) (1) and (2)(i) of § 301.6316–4 in respect of the tax return except that the statement certified by the foundation, commission, or other person having control of the payments to the taxpayer in nonconvertible foreign currency may be based upon amounts expected to be received by the taxpayer during the taxable year if they are not in fact known at the time of certification. A copy of this certified statement shall be retained by the taxpayer for the purpose of exhibiting it to the disbursing officer when making installment deposits of foreign currency under the provisions of paragraph (c) of this section. For the time for filing declarations of estimated tax, see sections 6073 and 6081 and §§ 1.6073–1 to 1.6073–4, inclusive, and §§ 1.6081–1 and 1.6081–2 of this chapter (Income Tax Regulations).

(b) *Determination of estimated tax*—(1) *Allocation of tax attributable to foreign currency.* In determining the amount of estimated tax for purposes of this section, all items of income, deduction, and credit, whether or not attributable to amounts received in nonconvertible foreign currency, shall be taken into account. The portion of the estimated tax which is attributable to amounts to be received during the taxable year in nonconvertible foreign currency shall be determined consistently with the manner prescribed by § 301.6316–3.

(2) *Example.* (i) For the calendar year 1955 Mr. Jones and his wife filed a joint declaration of estimated tax in the determination of which the adjusted gross income was estimated to be as follows, after amounts to be received in foreign currency had been properly translated into U.S. dollars for tax computation purposes:

| | |
|---|---|
| Fulbright grant to be received by Mr. Jones in nonconvertible foreign currency | $8,000 |
| Dividends to be received by Mr. Jones entitled to dividends-received credit | 875 |

| | |
|---|---|
| Compensation to be received by Mrs. Jones for personal services | 3,000 |
| Net profit to be derived from business carried on by Mrs. Jones | 1,625 |
| Total estimated adjusted gross income | 13,000 |

(ii) The following amounts were determined to be allowable as properly deductible from estimated adjusted gross income, no determination being made as to whether or not any part of them was properly allocable to the Fulbright grant:

| | |
|---|---|
| Deduction for personal exemptions | $3,000 |
| Charitable contributions | 300 |
| Interest expense | 400 |
| Taxes | 300 |
| Total allowable deductions | 4,000 |

(iii) The following estimated amounts were determined to be allowable as credits against the tax for the taxable year:

| | |
|---|---|
| Foreign tax credit for foreign taxes to be paid on Fulbright grant | $300.00 |
| Credit for income tax expected to be withheld upon compensation of Mrs. Jones | 304.80 |
| Dividends-received credit | 15.00 |
| Total allowable estimated credits | 619.80 |

(iv) The portion of the estimated tax which is attributable to amounts to be received during the taxable year in nonconvertible foreign currency is $893.88, determined as follows:

| | |
|---|---|
| Estimated adjusted gross income | $13,000.00 |
| Less: Allowable deductions | 4,000.00 |
| Estimated taxable income | 9,000.00 |
| Tax computed under section 2 | 1,940.00 |
| Ratio of estimated adjusted gross income to be received in nonconvertible foreign currency to entire estimated adjusted gross income ($8,000÷$13,000) (percent) | 61.54 |
| Portion of above tax attributable to nonconvertible foreign currency ($1,940×61.54 percent) | 1,193.88 |
| Less: Credit for foreign taxes expected to be paid on Fulbright grant | 300.00 |
| Portion of estimated tax which is attributable to amounts to be received during the taxable year in nonconvertible foreign currency | 893.88 |

(v) The portion of the estimated tax which is payable in U.S. dollars is $426.32, determined as follows:

| | |
|---|---|
| Tax computed under section 2 | $1,940.00 |
| Less: Total allowable estimated credits | 619.80 |
| Total estimated tax | 1,320.20 |
| Less: Portion of estimated tax payable in foreign currency | 893.88 |
| Portion of estimated tax payable in U.S. dollars | 426.32 |

(c) *Payment of estimated tax.* (1) The provisions of § 301.6316–5 relating to the certified statement, determination of the tax, and the depositing of the foreign currency shall apply for purposes of this section. The full amount of estimated tax payable in foreign currency, as determined under paragraph (b) of this section, may be deposited before the date prescribed for the payment thereof.

(2) Every taxpayer making a deposit of foreign currency in accordance with this paragraph shall tender to the Director of International Operations, Internal Revenue Service, Washington, D.C. 20225, the original of the receipt from the disbursing officer as payment, to the extent of the amount represented thereby in U.S. dollars, of the estimated tax. For the dates prescribed for the payment of estimated tax, see sections 6153 and 6161 and §§ 1.6153–1 to 1.6153–4, inclusive, and § 1.6161–1 of this chapter (Income Tax Regulations). A taxpayer should make the deposit required by this paragraph in ample time to permit him to tender such receipt by the date prescribed for payment of the estimated tax.

(d) *Credit on return for the taxable year.* The receipt given by the disbursing officer of the Department of State and tendered in payment of estimated tax under this section shall, for purposes of paragraph (a)(2) of § 301.6316–3, be considered as payment on account of the tax for the taxable year. The amount so considered to be paid shall be the amount in U.S. dollars represented by the receipt.

### § 301.6316–7 Payment of Federal Insurance Contributions Act taxes in foreign currency.

(a) *In general.* The taxes imposed on employees and employers by sections 3101 and 3111, respectively, of chapter 21 of the Code (Federal Insurance Contributions Act) or the corresponding sections of the Internal Revenue Code of 1939 may, with respect to wages (as defined in section 3121(a) of chapter 21 of the Code or the corresponding section of the Internal Revenue Code of 1939) paid in nonconvertible foreign currency (as defined in paragraph (b) of § 301.6316–2) for services performed on or after January 1, 1951, be paid in that currency if all such wages—

(1) Are paid from funds made available to a foundation or commission established in a foreign country pursuant to an agreement made under the authority of section 32(b) of the Surplus Property Act of 1944, as amended (50 U.S.C. App. 1641(b)(2)), or established or continued pursuant to an agreement made under authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 2451); and

(2) Are paid to a U.S. citizen for services performed in the employ of such foundation or commission.

(b) *Return requirements*—(1) *Statements required*. (i) A return on which payment of Federal Insurance Contributions Act taxes is made in accordance with this section shall have attached thereto a statement, certified by the foundation or commission filing the return, stating that the foundation or commission is an organization established pursuant to an agreement made under authority of section 32(b) of the Surplus Property Act of 1944, as amended, or established or continued pursuant to an agreement made under authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended.

(ii) The taxpayer shall also attach to the return a statement showing the rates of exchange used in determining in United States dollars the wages reported on the return and the taxes due with respect thereto. See paragraph (c)(1) of this section.

(2) *Cross references*. For the place for filing returns of the Federal Insurance Contributions Act taxes, see § 31.6091–1(c) of this chapter (Employment Tax Regulations). For the time for filing returns of the Federal Insurance Contributions Act taxes, see § 31.6071(a)–1 of this chapter (Employment Tax Regulations).

(c) *Payment of tax*—(1) *Determination of the tax*. In determining in U.S. dollars the wages required to be reported on the return and the taxes due with respect thereto, the taxpayer shall use the rate of exchange which most clearly reflects the correct equivalent in dollars, whether it be the official rate, the open market rate, or any other appropriate rate.

(2) *Deposit of foreign currency with disbursing officer*. (i) After determination is made in U.S. dollars of the Federal Insurance Contributions Act taxes with respect to wages paid in nonconvertible foreign currency, the amount so determined shall be deposited in the same nonconvertible foreign currency with the disbursing officer of the Department of State for the foreign country where the fund is located from which such wages were paid. The amount of the foreign currency to be deposited shall be that amount which, when converted at the rate of exchange used on the date of deposit by the disbursing officer for the acquisition of such currency for his official disbursements, equals the taxes determined in U.S. dollars.

(ii) The disbursing officer may rely upon the taxpayer for the determination of the amount of tax payable in foreign currency but may not accept any such currency for deposit until the taxpayer has presented for inspection the certified statement referred to in paragraph (b)(1) of this section. Upon acceptance of foreign currency for deposit the disbursing officer shall give the taxpayer a receipt in duplicate showing the name and address of the depositor, the date of the deposit, the amount of foreign currency deposited and its equivalent in U.S. dollars on the date of deposit, and the kind of tax for which the deposit is made.

(iii) Every taxpayer making a deposit of foreign currency in accordance with this paragraph shall attach to the return required to be filed in accordance with paragraph (b) of this section the original of the receipt given by the disbursing officer. Tender of such receipt to the Director of International Operations shall be considered as payment of tax in an amount equal to the U.S. dollars represented by the receipt.

(iv) A taxpayer shall make the deposit required by this paragraph in ample time to permit it to attach the receipt to its return for filing within the time prescribed by § 31.6071(a)–1 of this chapter (Employment Tax Regulations).

### § 301.6316–8 Refunds and credits in foreign currency.

(a) *Refunds*. The refund of any overpayment of tax which has been paid under section 6316 in foreign currency

may, in the discretion of the Commissioner, be made in the same foreign currency by which the tax was paid. The amount of any such refund made in foreign currency shall be the amount of the overpayment in U.S. dollars converted, on the date of the refund check, at the rate of exchange then used for his official disbursements by the disbursing officer of the Department of State in the country where the foreign currency was originally deposited.

(b) *Credits*. Unless otherwise in the best interest of the Internal Revenue Service, no credit of any overpayment of tax which has been paid under section 6316 in foreign currency shall be allowed against any outstanding liability of the person making the overpayment except in respect of that portion or the liability which, in accordance with § 301.6316–1 or § 301.6316–7, would otherwise be permitted to be paid in the same foreign currency.

### § 301.6316–9 Interest, additions to tax, etc.

Any reference in §§ 301.6316–1 to 301.6316–8, inclusive, to ''tax'' shall be deemed also to refer to the interest, additions to the tax, additional amounts, and penalties attributable to the tax.

## LIEN FOR TAXES

### § 301.6320–1 Notice and opportunity for hearing upon filing of notice of Federal tax lien.

(a) *Notification*—(1) *In general*. For a notice of Federal tax lien (NFTL) filed on or after January 19, 1999, the Commissioner, or his or her delegate (the Commissioner), will prescribe procedures to notify the person described in section 6321 of the filing of a NFTL not more than five business days after the date of any such filing. The Collection Due Process Hearing Notice (CDP Notice) and other notices given under section 6320 must be given in person, left at the dwelling or usual place of business of such person, or sent by certified or registered mail to such person's last known address, not more than five business days after the day the NFTL was filed. For further guidance regarding the definition of last known address, see Sec. 301.6212–2.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (a) as follows:

Q-A1. Who is the person entitled to notice under section 6320?

A-A1. Under section 6320(a)(1), notification of the filing of a NFTL on or after January 19, 1999, is required to be given only to the person described in section 6321 who is named on the NFTL that is filed. The person described in section 6321 is the person liable to pay the tax due after notice and demand who refuses or neglects to pay the tax due (hereinafter, referred to as the taxpayer).

Q-A2. When will the Internal Revenue Service (IRS) provide the notice required under section 6320?

A-A2. The IRS will provide this notice within five business days after the filing of the NFTL.

Q-A3. Will the IRS give notification to the taxpayer for each tax period listed in a NFTL filed on or after January 19, 1999?

A-A3. Yes. A NFTL can be filed for more than one tax period. The notification of the filing of a NFTL will specify each unpaid tax and tax period listed in the NFTL.

Q-A4. Will the IRS give notification to the taxpayer of any filing of a NFTL for the same tax period or periods at another place of filing?

A-A4. Yes. The IRS will notify a taxpayer when a NFTL is filed on or after January 19, 1999, for a tax period or periods at any recording office.

Q-A5. Will the IRS give notification to the taxpayer if a NFTL is filed on or after January 19, 1999, for a tax period or periods for which a NFTL was filed in another recording office prior to that date?

A-A5. Yes. The IRS will notify a taxpayer when each NFTL is filed on or after January 19, 1999, for a tax period or periods at any recording office.

Q-A6. Will the IRS give notification to the taxpayer when a NFTL is refiled on or after January 19, 1999?

A-A6. No. Section 6320(a)(1) does not require the IRS to notify the taxpayer of the refiling of a NFTL. A taxpayer may, however, seek reconsideration by the IRS office that is collecting the tax or refiling the NFTL, an administrative hearing before the IRS Office of

Appeals (Appeals), or assistance from the National Taxpayer Advocate.

Q-A7. Will the IRS give notification to a known nominee of, or a person holding property of, the taxpayer of the filing of the NFTL?

A-A7. No. Such person is not the person described in section 6321 and, therefore, is not entitled to notice, but such persons have other remedies. See A-B5 of paragraph (b)(2) of this section.

Q-A8. Will the IRS give notification to the taxpayer when a subsequent NFTL is filed for the same period or periods?

A-A8. Yes. If the IRS files an additional NFTL with respect to the same tax period or periods for which an original NFTL was filed, the IRS will notify the taxpayer when the subsequent NFTL is filed. Not all such notices will, however, give rise to a right to a CDP hearing (see paragraph (b) of this section).

Q-A9. How will notification under section 6320 be accomplished?

A-A9. The IRS will notify the taxpayer by letter. Included with this letter will be the additional information the IRS is required to provide taxpayers as well as, when appropriate, a Form 12153, Request for a Due Process Hearing. The IRS may effect delivery of the letter (and accompanying materials) in one of three ways: by delivering the notice personally to the taxpayer; by leaving the notice at the taxpayer's dwelling or usual place of business; or by mailing the notice to the taxpayer at his last known address by certified or registered mail.

Q-A10. What must a CDP Notice given under section 6320 include?

A-A10. These notices must include, in simple and nontechnical terms:

(i) The amount of the unpaid tax.

(ii) A statement concerning the taxpayer's right to request a CDP hearing during the 30-day period that commences the day after the end of the five business day period within which the IRS is required to provide the taxpayer with notice of the filing of the NFTL.

(iii) The administrative appeals available to the taxpayer with respect to the NFTL and the procedures relating to such appeals.

(iv) The statutory provisions and the procedures relating to the release of liens on property.

Q-A11. What are the consequences if the taxpayer does not receive or accept a CDP Notice that is properly left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail to the taxpayer's last known address?

A-A11. A CDP Notice properly sent by certified or registered mail to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business is sufficient to start the 30-day period, commencing the day after the end of the five business day notification period, within which the taxpayer may request a CDP hearing. Actual receipt is not a prerequisite to the validity of the CDP Notice.

Q-A12. What if the taxpayer does not receive the CDP Notice because the IRS did not send that notice by certified or registered mail to the taxpayer's last known address, or failed to leave it at the dwelling or usual place of business of the taxpayer, and the taxpayer fails to request a CDP hearing with Appeals within the 30-day period commencing the day after the end of the five business day notification period?

A-A12. A NFTL becomes effective upon filing. The validity and priority of a NFTL is not conditioned on notification to the taxpayer pursuant to section 6320. Therefore, the failure to notify the taxpayer concerning the filing of a NFTL does not affect the validity or priority of the NFTL. When the IRS determines that it failed properly to provide a taxpayer with a CDP Notice, it will promptly provide the taxpayer with a substitute CDP Notice and provide the taxpayer with an opportunity to request a CDP hearing. Substitute CDP Notices are discussed in Q&A-B3 of paragraph (b)(2) and Q&A-C8 of paragraph (c)(2) of this section.

(3) *Examples*. The following examples illustrate the principles of this paragraph (a):

*Example 1.* H and W are jointly and severally liable with respect to a jointly filed income tax return for 1996. IRS files a NFTL with respect to H and W in County X on January 26, 1999. This is the first NFTL filed on

or after January 19, 1999, for their 1996 liability. H and W will each be notified of the filing of the NFTL.

*Example 2.* Employment taxes for 1997 are assessed against ABC Corporation. A NFTL is filed against ABC Corporation for the 1997 liability in County X on June 5, 1998. A NFTL is filed against ABC Corporation for the 1997 liability in County Y on June 17, 1999. The IRS will notify the ABC Corporation with respect to the filing of the NFTL in County Y.

*Example 3.* Federal income tax liability for 1997 is assessed against individual D. D buys an asset and puts it in individual E's name. A NFTL is filed against D in County X on June 5, 1999, for D's federal income tax liability for 1997. On June 17, 1999, a NFTL for the same tax liability is filed in County Y against E, as nominee of D. The IRS will notify D of the filing of the NFTL in both County X and County Y. The IRS will not notify E of the NFTL filed in County X. The IRS is not required to notify E of the NFTL filed in County Y. Although E is named on the NFTL filed in County Y, E is not the person described in section 6321 (the taxpayer) who is named on the NFTL.

(b) *Entitlement to a CDP hearing*—(1) *In general.* A taxpayer is entitled to one CDP hearing with respect to the first filing of a NFTL (on or after January 19, 1999) for a given tax period or periods with respect to the unpaid tax shown on the NFTL if the taxpayer timely requests such a hearing. The taxpayer must request such a hearing during the 30-day period that commences the day after the end of the five business day period within which the IRS is required to provide the taxpayer with notice of the filing of the NFTL.

(2) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (b) as follows:

Q-B1. Is a taxpayer entitled to a CDP hearing with respect to the filing of a NFTL for a type of tax and tax periods previously subject to a CDP Notice with respect to a NFTL filed in a different location on or after January 19, 1999?

A-B1. No. Although the taxpayer will receive notice of each filing of a NFTL, under section 6320(b)(2), the taxpayer is entitled to only one CDP hearing under section 6320 for the type of tax and tax periods with respect to the first filing of a NFTL that occurs on or after January 19, 1999, with respect to that unpaid tax. Accordingly, if the taxpayer does not timely request a CDP hearing with respect to the first filing of a NFTL on or after January 19, 1999, for a given tax period or periods with respect to an unpaid tax, the taxpayer forgoes the right to a CDP hearing with Appeals and judicial review of the Appeals determination with respect to the NFTL. Under such circumstances, the taxpayer may request an equivalent hearing as described in paragraph (i) of this section.

Q-B2. Is the taxpayer entitled to a CDP hearing when a NFTL for an unpaid tax is filed on or after January 19, 1999, in one recording office and a NFTL was previously filed for the same unpaid tax in another recording office prior to that date?

A-B2. Yes. Under section 6320(b)(2), the taxpayer is entitled to a CDP hearing under section 6320 for each tax period with respect to the first filing of a NFTL on or after January 19, 1999, with respect to an unpaid tax, whether or not a NFTL was filed prior to January 19, 1999, for the same unpaid tax and tax period or periods.

Q-B3. When the IRS provides the taxpayer with a substitute CDP Notice and the taxpayer timely requests a CDP hearing, is the taxpayer entitled to a CDP hearing before Appeals?

A-B3. Yes. Unless the taxpayer provides the IRS a written withdrawal of the request that Appeals conduct a CDP hearing, the taxpayer is entitled to a CDP hearing before Appeals. Following the hearing, Appeals will issue a Notice of Determination, and the taxpayer is entitled to seek judicial review of that Notice of Determination.

Q-B4. If the IRS sends a second CDP Notice under section 6320 (other than a substitute CDP Notice) for a tax period and with respect to an unpaid tax for which a section 6320 CDP Notice was previously sent, is the taxpayer entitled to a section 6320 CDP hearing based on the second CDP Notice?

A-B4. No. The taxpayer is entitled to a CDP hearing under section 6320 for each tax period only with respect to the first filing of a NFTL on or after January 19, 1999, with respect to an unpaid tax.

Q-B5. Is a nominee of, or a person holding property of, the taxpayer entitled to a CDP hearing or an equivalent hearing?

A-B5. No. Such person is not the person described in section 6321 and is, therefore, not entitled to a CDP hearing or an equivalent hearing (as discussed in paragraph (i) of this section). Such person, however, may seek reconsideration by the IRS office collecting the tax or filing the NFTL, an administrative hearing before Appeals under its Collection Appeals Program, or assistance from the National Taxpayer Advocate. However, any such administrative hearing would not be a CDP hearing under section 6320 and any determination or decision resulting from the hearing would not be subject to judicial review under section 6320. Such person also may avail himself of the administrative procedure included in section 6325(b)(4) or of any other procedures to which he is entitled.

(3) *Examples*. The following examples illustrate the principles of this paragraph (b):

*Example 1*. H and W are jointly and severally liable with respect to a jointly filed income tax return for 1996. The IRS files a NFTL with respect to H and W in County X on January 26, 1999. This is the first NFTL filed on or after January 19, 1999, for their 1996 liability. H and W are each entitled to a CDP hearing with respect to the NFTL filed in County X. On June 17, 1999, a NFTL for the same tax liability is filed against H and W in County Y. The IRS will give H and W notification of the NFTL filed in County Y. H and W, however, are not entitled to a CDP hearing or an equivalent hearing with respect to the NFTL filed in County Y.

*Example 2*. Federal income tax liability for 1997 is assessed against individual D. D buys an asset and puts it in individual E's name. A NFTL is filed against E, as nominee of D in County X on June 5, 1999, for D's federal income tax liability for 1997. The IRS will give D a CDP Notice with respect to the NFTL filed in County X. The IRS will not notify E of the NFTL filed in County X. The IRS is not required to notify E of the filing of the NFTL in County X. Although E is named on the NFTL filed in County X, E is not the person described in section 6321 (the taxpayer) who is named on the NFTL.

(c) *Requesting a CDP hearing*—(1) *In general*. When a taxpayer is entitled to a CDP hearing under section 6320, the CDP hearing must be requested during the 30-day period that commences the day after the end of the five business day period within which the IRS is required to provide the taxpayer with a CDP Notice with respect to the filing of the NFTL.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (c) as follows:

Q-C1. What must a taxpayer do to obtain a CDP hearing?

A-C1. (i) The taxpayer must make a request in writing for a CDP hearing. The request for a CDP hearing shall include the information and signature specified in A–C1(ii) of this paragraph (c)(2). See A–D7 and A–D8 of paragraph (d)(2).

(ii) The written request for a CDP hearing must be dated and must include the following:

(A) The taxpayer's name, address, daytime telephone number (if any), and taxpayer identification number (e.g., SSN, ITIN or EIN).

(B) The type of tax involved.

(C) The tax period at issue.

(D) A statement that the taxpayer requests a hearing with Appeals concerning the filing of the NFTL.

(E) The reason or reasons why the taxpayer disagrees with the filing of the NFTL.

(F) The signature of the taxpayer or the taxpayer's authorized representative.

(iii) If the IRS receives a timely written request for CDP hearing that does not satisfy the requirements set forth in A–C1(ii) of this paragraph (c)(2), the IRS will make a reasonable attempt to contact the taxpayer and request that the taxpayer comply with the unsatisfied requirements. The taxpayer must perfect any timely written request for a CDP hearing that does not satisfy the requirements set forth in A–C1(ii) of this paragraph (c)(2) within a reasonable period of time after a request from the IRS.

(iv) Taxpayers are encouraged to use Form 12153, ''Request for a Collection Due Process Hearing,'' in requesting a CDP hearing so that the request can be readily identified and forwarded to Appeals. Taxpayers may obtain a copy of Form 12153 by contacting the IRS office that issued the CDP Notice, by downloading a copy from the IRS Internet site, *http://www.irs.gov/pub/irs-pdf/f12153.pdf*, or by calling, toll-free, 1–800–829–3676.

(v) The taxpayer must affirm any timely written request for a CDP hearing which is signed or alleged to have been signed on the taxpayer's behalf by the taxpayer's spouse or other unauthorized representative by filing, within a reasonable period of time after a request from the IRS, a signed, written affirmation that the request was originally submitted on the taxpayer's behalf. If the affirmation is filed within a reasonable period of time after a request, the timely CDP hearing request will be considered timely with respect to the non-signing taxpayer. If the affirmation is not filed within a reasonable period of time after a request, the CDP hearing request will be denied with respect to the non-signing taxpayer.

Q-C2. Must the request for the CDP hearing be in writing?

A-C2. Yes. There are several reasons why the request for a CDP hearing must be in writing. The filing of a timely request for a CDP hearing is the first step in what may result in a court proceeding. A written request will provide proof that the CDP hearing was requested and thus permit the court to verify that it has jurisdiction over any subsequent appeal of the Notice of Determination issued by Appeals. In addition, the receipt of the written request will establish the date on which the periods of limitation under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) are suspended as a result of the CDP hearing and any judicial appeal. Moreover, because the IRS anticipates that taxpayers will contact the IRS office that issued the CDP Notice for further information or assistance in filling out Form 12153, or to attempt to resolve their liabilities prior to going through the CDP hearing process, the requirement of a written request should help prevent any misunderstanding as to whether a CDP hearing has been requested. If the information requested on Form 12153 is furnished by the taxpayer, the written request also will help to establish the issues for which the taxpayer seeks a determination by Appeals.

Q-C3. When must a taxpayer request a CDP hearing with respect to a CDP Notice issued under section 6320?

A-C3. A taxpayer must submit a written request for a CDP hearing within the 30-day period that commences the day after the end of the five business day period following the filing of the NFTL. Any request filed during the five business day period (before the beginning of the 30-day period) will be deemed to be filed on the first day of the 30-day period. The period for submitting a written request for a CDP hearing with respect to a CDP Notice issued under section 6320 is slightly different from the period for submitting a written request for a CDP hearing with respect to a CDP Notice issued under section 6330. For a CDP Notice issued under section 6330, the taxpayer must submit a written request for a CDP hearing within the 30-day period commencing the day after the date of the CDP Notice.

Q-C4. How will the timeliness of a taxpayer's written request for a CDP hearing be determined?

A-C4. The rules and regulations under section 7502 and section 7503 will apply to determine the timeliness of the taxpayer's request for a CDP hearing, if properly transmitted and addressed as provided in A-C6 of this paragraph (c)(2).

Q-C5. Is the 30-day period within which a taxpayer must make a request for a CDP hearing extended because the taxpayer resides outside the United States?

A-C5. No. Section 6320 does not make provision for such a circumstance. Accordingly, all taxpayers who want a CDP hearing under section 6320 must request such a hearing within the 30-day period that commences the day after the end of the five business day notification period.

Q-C6. Where must the written request for a CDP hearing be sent?

A-C6. The written request for a CDP hearing must be sent, or hand delivered (if permitted), to the IRS office and address as directed on the CDP Notice. If the address of that office does not appear on the CDP Notice, the taxpayer should obtain the address of the office to which the written request should be sent or hand delivered by calling, toll-

free, 1–800–829–1040 and providing the taxpayer's identification number (e.g., SSN, ITIN or EIN).

Q-C7. What will happen if the taxpayer does not request a CDP hearing in writing within the 30-day period that commences the day after the end of the five business day notification period?

A-C7. If the taxpayer does not request a CDP hearing in writing within the 30-day period that commences on the day after the end of the five-business-day notification period, the taxpayer foregoes the right to a CDP hearing under section 6320 with respect to the unpaid tax and tax periods shown on the CDP Notice. A written request submitted within the 30-day period that does not satisfy the requirements set forth in A–C1(ii)(A), (B), (C), (D) or (F) of this paragraph (c)(2) is considered timely if the request is perfected within a reasonable period of time pursuant to A–C1(iii) of this paragraph (c)(2). If the request for CDP hearing is untimely, either because the request was not submitted within the 30-day period or not perfected within the reasonable period provided, the taxpayer will be notified of the untimeliness of the request and offered an equivalent hearing. In such cases, the taxpayer may obtain an equivalent hearing without submitting an additional request. See paragraph (i) of this section.

Q-C8. When must a taxpayer request a CDP hearing with respect to a substitute CDP Notice?

A-C8. A CDP hearing with respect to a substitute CDP Notice must be requested in writing by the taxpayer prior to the end of the 30-day period commencing the day after the date of the substitute CDP Notice.

Q-C9. Can taxpayers attempt to resolve the matter of the NFTL with an officer or employee of the IRS office collecting the tax or filing the NFTL either before or after requesting a CDP hearing?

A-C9. Yes. Taxpayers are encouraged to discuss their concerns with the IRS office collecting the tax or filing the NFTL, either before or after they request a CDP hearing. If such a discussion occurs before a request is made for a CDP hearing, the matter may be resolved without the need for Appeals consideration. However, these discussions do not suspend the running of the 30-day period, commencing the day after the end of the five business day notification period, within which the taxpayer is required to request a CDP hearing, nor do they extend that 30-day period. If discussions occur after the request for a CDP hearing is filed and the taxpayer resolves the matter with the IRS office collecting the tax or filing the NFTL, the taxpayer may withdraw in writing the request that a CDP hearing be conducted by Appeals. The taxpayer can also waive in writing some or all of the requirements regarding the contents of the Notice of Determination.

(3) *Examples*. The following examples illustrate the principles of this paragraph (c):

*Example 1*. A NFTL for a 1997 income tax liability assessed against individual A is filed in County X on June 17, 1999. The IRS mails a CDP Notice to individual A's last known address on June 18, 1999. Individual A has until July 26, 1999, a Monday, to request a CDP hearing. The five business day period within which the IRS is required to notify individual A of the filing of the NFTL in County X expires on June 24, 1999. The 30-day period within which individual A may request a CDP hearing begins on June 25, 1999. Because the 30-day period expires on July 24, 1999, a Saturday, individual A's written request for a CDP hearing will be considered timely if it is properly transmitted and addressed to the IRS in accordance with section 7502 and the regulations thereunder no later than July 26, 1999.

*Example 2*. Same facts as in *Example 1*, except that individual A is on vacation, outside the United States, or otherwise does not receive or read the CDP Notice until July 19, 1999. As in *Example 1*, individual A has until July 26, 1999, to request a CDP hearing. If individual A does not request a CDP hearing, individual A may request an equivalent hearing as to the NFTL at a later time. The taxpayer should make a request for an equivalent hearing at the earliest possible time.

*Example 3*. Same facts as in *Example 2*, except that individual A does not receive or read the CDP Notice until after July 26, 1999, and does not request a hearing by July 26, 1999. Individual A is not entitled to a CDP hearing. Individual A may request an equivalent hearing as to the NFTL at a later time. The taxpayer should make a request for an equivalent hearing at the earliest possible time.

*Example 4*. Same facts as in *Example 1*, except the IRS determines that the CDP Notice

mailed on June 18, 1999, was not mailed to individual A's last known address. As soon as practicable after making this determination, the IRS will mail a substitute CDP Notice to individual A at individual A's last known address, hand deliver the substitute CDP Notice to individual A, or leave the substitute CDP Notice at individual A's dwelling or usual place of business. Individual A will have 30 days commencing on the day after the date of the substitute CDP Notice within which to request a CDP hearing.

(d) *Conduct of CDP hearing*—(1) *In general*. If a taxpayer requests a CDP hearing under section 6320(a)(3)(B) (and does not withdraw that request), the CDP hearing will be held with Appeals. The taxpayer is entitled under section 6320 to a CDP hearing for the unpaid tax and tax periods set forth in a NFTL only with respect to the first filing of a NFTL on or after January 19, 1999. To the extent practicable, the CDP hearing requested under section 6320 will be held in conjunction with any CDP hearing the taxpayer requests under section 6330. A CDP hearing will be conducted by an employee or officer of Appeals who, prior to the first CDP hearing under section 6320 or section 6330, has had no involvement with respect to the unpaid tax for the tax periods to be covered by the hearing, unless the taxpayer waives this requirement.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (d) as follows:

Q-D1. Under what circumstances can a taxpayer receive more than one CDP hearing under section 6320 with respect to a tax period?

A-D1. The taxpayer may receive more than one CDP hearing under section 6320 with respect to a tax period where the tax involved is a different type of tax (for example, an employment tax liability, where the original CDP hearing for the tax period involved an income tax liability), or where the same type of tax for the same period is involved, but where the amount of the unpaid tax has changed as a result of an additional assessment of tax (not including interest or penalties) for that period or an additional accuracy-related or filing-delinquency penalty has been assessed. The taxpayer is not entitled to another CDP hearing under section 6320 if the additional assessment represents accruals of interest, accruals of penalties, or both.

Q-D2. Will a CDP hearing with respect to one tax period be combined with a CDP hearing with respect to another tax period?

A-D2. To the extent practicable, a CDP hearing with respect to one tax period shown on the NFTL will be combined with any and all other CDP hearings which the taxpayer has requested.

Q-D3. Will a CDP hearing under section 6320 be combined with a CDP hearing under section 6330?

A-D3. To the extent practicable, a CDP hearing under section 6320 will be held in conjunction with a CDP hearing under section 6330.

Q-D4. What is considered to be prior involvement by an employee or officer of Appeals with respect to the unpaid tax and tax period involved in the hearing?

A-D4. Prior involvement by an Appeals officer or employee includes participation or involvement in a matter (other than a CDP hearing held under either section 6320 or section 6330) that the taxpayer may have had with respect to the tax and tax period shown on the CDP Notice. Prior involvement exists only when the taxpayer, the tax and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP matter, and the Appeals officer or employee actually participated in the prior matter.

Q-D5. How can a taxpayer waive the requirement that the officer or employee of Appeals have no prior involvement with respect to the tax and tax periods involved in the CDP hearing?

A-D5. The taxpayer must sign a written waiver.

Q-D6. How are CDP hearings conducted?

A-D6. The formal hearing procedures required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, do not apply to CDP hearings. CDP hearings are much like Collection Appeal Program (CAP) hearings in that they are informal in nature and do not require the Appeals officer or employee and the taxpayer, or the taxpayer's representative, to hold a face-to-face meeting. A CDP hearing may, but is not required to, consist of a face-to-

face meeting, one or more written or oral communications between an Appeals officer or employee and the taxpayer or the taxpayer's representative, or some combination thereof. A transcript or recording of any face-to-face meeting or conversation between an Appeals officer or employee and the taxpayer or the taxpayer's representative is not required. The taxpayer or the taxpayer's representative does not have the right to subpoena and examine witnesses at a CDP hearing.

Q-D7. If a taxpayer wants a face-to-face CDP hearing, where will it be held?

A-D7. Except as provided in A–D8 of this paragraph (d)(2), a taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the NFTL filing will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to taxpayer's residence. A business taxpayer will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to the taxpayer's principal place of business. If that is not satisfactory to the taxpayer, the taxpayer will be given an opportunity for a hearing by telephone or by correspondence. In all cases, the Appeals officer or employee will review the case file, as described in A–F4 of paragraph (f)(2). If no face-to-face or telephonic conference is held, or other oral communication takes place, review of the documents in the case file, as described in A–F4 of paragraph (f)(2), will constitute the CDP hearing for purposes of section 6320(b).

Q-D8. In what circumstances will a face-to-face CDP conference not be granted?

A-D8. A taxpayer is not entitled to a face-to-face CDP conference at a location other than as provided in A–D7 of this paragraph (d)(2) and this A–D8. If all Appeals officers or employees at the location provided for in A–D7 of this paragraph (d)(2) have had prior involvement with the taxpayer as provided in A–D4 of this paragraph (d)(2), the taxpayer will not be offered a face-to-face conference at that location, unless the taxpayer elects to waive the requirement of section 6320(b)(3). The taxpayer will be offered a face-to-face conference at another Appeals office if Appeals would have offered the taxpayer a face-to-face conference at the location provided in A–D7 of this paragraph (d)(2), but for the disqualification of all Appeals officers or employees at that location. A face-to-face CDP conference concerning a taxpayer's underlying liability will not be granted if the request for a hearing or other taxpayer communication indicates that the taxpayer wishes only to raise irrelevant or frivolous issues concerning that liability. A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances. For example, because the IRS does not consider offers to compromise from taxpayers who have not filed required returns or have not made certain required deposits of tax, as set forth in Form 656, ''Offer in Compromise,'' no face-to-face conference will be granted to a taxpayer who wishes to make an offer to compromise but has not fulfilled those obligations. Appeals in its discretion, however, may grant a face-to-face conference if Appeals determines that a face-to-face conference is appropriate to explain to the taxpayer the requirements for becoming eligible for a collection alternative. In all cases, a taxpayer will be given an opportunity to demonstrate eligibility for a collection alternative and to become eligible for a collection alternative, in order to obtain a face-to-face conference. For purposes of determining whether a face-to-face conference will be granted, the determination of a taxpayer's eligibility for a collection alternative is made without regard to the taxpayer's ability to pay the unpaid tax. A face-to-face conference need not be granted if the taxpayer does not provide the required information set forth in A–C1(ii)(E) of paragraph (c)(2). See also A–C1(iii) of paragraph (c)(2).

(3) *Examples*. The following examples illustrate the principles of this paragraph (d):

*Example 1*. Individual A timely requests a CDP hearing concerning a NFTL filed with

respect to the 1998 income tax liability assessed against individual A. Appeals employee B previously conducted a CDP hearing regarding a proposed levy for individual A's 1998 income tax liability. Because employee B's only prior involvement with individual A's 1998 income tax liability was in connection with a section 6330 CDP hearing, employee B may conduct the CDP hearing under section 6320 involving the NFTL filed for the 1998 income tax liability.

*Example 2.* Individual C timely requests a CDP hearing concerning a NFTL filed with respect to the 1998 income tax liability assessed against individual C. Appeals employee D previously conducted a Collection Appeals Program (CAP) hearing regarding a NFTL filed with respect to individual C's 1998 income tax liability. Because employee D's prior involvement with individual C's 1998 income tax liability was in connection with a non-CDP hearing, employee D may not conduct the CDP hearing under section 6320 unless individual C waives the requirement that the hearing will be conducted by an Appeals officer or employee who has had no prior involvement with respect to individual C's 1998 income tax liability.

*Example 3.* Same facts as in *Example 2*, except that the prior CAP hearing only involved individual C's 1997 income tax liability and employment tax liabilities for 1998 reported on Form 941, ''Employer's Quarterly Federal Tax Return.'' Employee D would not be considered to have prior involvement because the prior CAP hearing in which she participated did not involve individual C's 1998 income tax liability.

*Example 4.* Appeals employee F is assigned to a CDP hearing concerning a NFTL filed with respect to a trust fund recovery penalty (TFRP) assessed pursuant to section 6672 against individual E. Appeals employee F participated in a prior CAP hearing involving individual E's 1999 income tax liability, and participated in a CAP hearing involving the employment taxes of business entity X, which incurred the employment tax liability to which the TFRP assessed against individual E relates. Appeals employee F would not be considered to have prior involvement because the prior CAP hearings in which he participated did not directly involve the TFRP assessed against individual E.

*Example 5.* Appeals employee G is assigned to a CDP hearing concerning a NFTL filed with respect to a TFRP assessed pursuant to section 6672 against individual H. In preparing for the CDP hearing, Appeals employee G reviews the Appeals case file concerning the prior CAP hearing involving the TFRP assessed pursuant to section 6672 against individual H. Appeals employee G is not deemed to have participated in the previous CAP hearing involving the TFRP assessed against individual H by such review.

(e) *Matters considered at CDP hearing*—(1) *In general.* Appeals will determine the timeliness of any request for a CDP hearing that is made by a taxpayer. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure with respect to the filing of the NFTL have been met. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the NFTL filing, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the underlying liability, including a liability reported on a self-filed return, for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6330 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

(2) *Spousal defenses.* A taxpayer may raise any appropriate spousal defenses at a CDP hearing unless the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. To claim a spousal defense under section 66 or section 6015, the taxpayer must do so in writing according to rules prescribed by the Commissioner or the Secretary. Spousal defenses raised under sections 66 and 6015 in a CDP hearing are governed in all respects by the provisions of sections 66 and section 6015 and the regulations and procedures thereunder.

(3) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (e) as follows:

Q-E1. What factors will Appeals consider in making its determination?

A-E1. Appeals will consider the following matters in making its determination:

(i) Whether the IRS met the requirements of any applicable law or administrative procedure.

(ii) Any issues appropriately raised by the taxpayer relating to the unpaid tax.

(iii) Any appropriate spousal defenses raised by the taxpayer.

(iv) Any challenges made by the taxpayer to the appropriateness of the NFTL filing.

(v) Any offers by the taxpayer for collection alternatives.

(vi) Whether the continued existence of the filed NFTL represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

Q-E2. When is a taxpayer entitled to challenge the existence or amount of the tax liability specified in the CDP Notice?

A-E2. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. An opportunity for a conference with Appeals prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose.

Q-E3. Are spousal defenses subject to the limitations imposed under section 6330(c)(2)(B) on a taxpayer's right to challenge the tax liability specified in the CDP Notice at a CDP hearing?

A-E3. The limitations imposed under section 6330(c)(2)(B) do not apply to spousal defenses. When a taxpayer asserts a spousal defense, the taxpayer is not disputing the amount or existence of the liability itself, but asserting a defense to the liability which may or may not be disputed. A spousal defense raised under section 66 or section 6015 is governed by section 66 or section 6015 and the regulations and procedures thereunder. Any limitation under those sections, regulations, and procedures therefore will apply.

Q-E4. May a taxpayer raise at a CDP hearing a spousal defense under section 66 or section 6015 if that defense was raised and considered administratively and the Commissioner has issued a statutory notice of deficiency or final determination letter addressing the spousal defense?

A-E4. No. A taxpayer is precluded from raising a spousal defense at a CDP hearing when the Commissioner has made a final determination under section 66 or section 6015 in a final determination letter or statutory notice of deficiency. However, a taxpayer may raise spousal defenses in a CDP hearing when the taxpayer has previously raised spousal defenses, but the Commissioner has not yet made a final determination regarding this issue.

Q-E5. May a taxpayer raise at a CDP hearing a spousal defense under section 66 or section 6015 if that defense was raised and considered in a prior judicial proceeding that has become final?

A-E5. No. A taxpayer is precluded by the doctrine of res judicata and by the specific limitations under section 66 or section 6015 from raising a spousal defense in a CDP hearing under these circumstances.

Q-E6. What collection alternatives are available to the taxpayer?

A-E6. Collection alternatives include, for example, a proposal to withdraw the NFTL in circumstances that will facilitate the collection of the tax liability, subordination of the NFTL, discharge of the NFTL from specific property, an installment agreement, an offer to compromise, the posting of a bond, or the substitution of other assets. A collection alternative is not available unless the alternative would

be available to other taxpayers in similar circumstances. See A–D8 of paragraph (d)(2).

Q-E7. What issues may a taxpayer raise in a CDP hearing under section 6320 if the taxpayer previously received a notice under section 6330 with respect to the same tax and tax period and did not request a CDP hearing with respect to that notice?

A–E7. The taxpayer may raise appropriate spousal defenses, challenges to the appropriateness of the NFTL filing, and offers of collection alternatives. The existence or amount of the underlying liability for any tax period specified in the CDP Notice may be challenged only if the taxpayer did not have a prior opportunity to dispute the tax liability. If the taxpayer previously received a CDP Notice under section 6330 with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice, the taxpayer had a prior opportunity to dispute the existence or amount of the underlying tax liability.

Q-E8. How will Appeals issue its determination?

A-E8. (i) Taxpayers will be sent a dated Notice of Determination by certified or registered mail. The Notice of Determination will set forth Appeals' findings and decisions. It will state whether the IRS met the requirements of any applicable law or administrative procedure; it will resolve any issues appropriately raised by the taxpayer relating to the unpaid tax; it will include a decision on any appropriate spousal defenses raised by the taxpayer; it will include a decision on any challenges made by the taxpayer to the appropriateness of the NFTL filing; it will respond to any offers by the taxpayer for collection alternatives; and it will address whether the continued existence of the filed NFTL represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. The Notice of Determination will also set forth any agreements that Appeals reached with the taxpayer, any relief given the taxpayer, and any actions the taxpayer or the IRS are required to take. Lastly, the Notice of Determination will advise the taxpayer of the taxpayer's right to seek judicial review within 30 days of the date of the Notice of Determination.

(ii) Because taxpayers are encouraged to discuss their concerns with the IRS office collecting the tax or filing the NFTL, certain matters that might have been raised at a CDP hearing may be resolved without the need for Appeals consideration. Unless, as a result of these discussions, the taxpayer agrees in writing to withdraw the request that Appeals conduct a CDP hearing, Appeals will still issue a Notice of Determination. The taxpayer can, however, waive in writing Appeals' consideration of some or all of the matters it would otherwise consider in making its determination.

Q-E9. Is there a period of time within which Appeals must conduct a CDP hearing or issue a Notice of Determination?

A-E9. No. Appeals will, however, attempt to conduct a CDP hearing and issue a Notice of Determination as expeditiously as possible under the circumstances.

Q-E10. Why is the Notice of Determination and its date important?

A-E10. The Notice of Determination will set forth Appeals' findings and decisions with respect to the matters set forth in A-E1 of this paragraph (e)(3). The 30-day period within which the taxpayer is permitted to seek judicial review of Appeals' determination commences the day after the date of the Notice of Determination.

Q-E11. If an Appeals officer considers the merits of a taxpayer's liability in a CDP hearing when the taxpayer had previously received a statutory notice of deficiency or otherwise had an opportunity to dispute the liability prior to the NFTL, will the Appeals officer's determination regarding those liability issues be considered part of the Notice of Determination?

A-E11. No. An Appeals officer may consider the existence and amount of the underlying tax liability as a part of the CDP hearing only if the taxpayer did not receive a statutory notice of deficiency for the tax liability in question or otherwise have a prior opportunity to dispute the tax liability. Similarly, an Appeals officer may not

consider any other issue if the issue was raised and considered at a previous hearing under section 6330 or in any other previous administrative or judicial proceeding in which the person seeking to raise the issue meaningfully participated. In the Appeals officer's sole discretion, however, the Appeals officer may consider the existence or amount of the underlying tax liability, or such other precluded issues, at the same time as the CDP hearing. Any determination, however, made by the Appeals officer with respect to such a precluded issue shall not be treated as part of the Notice of Determination issued by the Appeals officer and will not be subject to any judicial review. Because any decisions made by the Appeals officer on such precluded issues are not properly a part of the CDP hearing, such decisions are not required to appear in the Notice of Determination issued following the hearing. Even if a decision concerning such precluded issues is referred to in the Notice of Determination, it is not reviewable by the Tax Court because the precluded issue is not properly part of the CDP hearing.

(4) *Examples*. The following examples illustrate the principles of this paragraph (e):

*Example 1*. The IRS sends a statutory notice of deficiency to the taxpayer at his last known address asserting a deficiency for the tax year 1995. The taxpayer receives the notice of deficiency in time to petition the Tax Court for a redetermination of the asserted deficiency. The taxpayer does not timely file a petition with the Tax Court. The taxpayer is precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

*Example 2*. Same facts as in *Example 1*, except the taxpayer does not receive the notice of deficiency in time to petition the Tax Court and did not have another prior opportunity to dispute the tax liability. The taxpayer is not precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

*Example 3*. The IRS properly assesses a trust fund recovery penalty against the taxpayer. The IRS offers the taxpayer the opportunity for a conference with Appeals at which the taxpayer would have the opportunity to dispute the assessed liability. The taxpayer declines the opportunity to participate in such a conference. The taxpayer is precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

(f) *Judicial review of Notice of Determination*—(1) *In general*. Unless the taxpayer provides the IRS a written withdrawal of the request that Appeals conduct a CDP hearing, Appeals is required to issue a Notice of Determination in all cases where a taxpayer has timely requested a CDP hearing. The taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination to the Tax Court.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (f) as follows:

Q-F1. What must a taxpayer do to obtain judicial review of a Notice of Determination?

A-F1. Subject to the jurisdictional limitations described in A–F2 of this paragraph (f)(2), the taxpayer must, within the 30-day period commencing the day after the date of the Notice of Determination, appeal the determination by Appeals to the Tax Court.

Q-F2. With respect to the relief available to the taxpayer under section 6015, what is the time frame within which a taxpayer may seek Tax Court review of Appeals' determination following a CDP hearing?

A-F2. If the taxpayer seeks Tax Court review not only of Appeals' denial of relief under section 6015, but also of relief requested with respect to other issues raised in the CDP hearing, the taxpayer should request Tax Court review within the 30-day period commencing the day after the date of the Notice of Determination. If the taxpayer only seeks Tax Court review of Appeals' denial of relief under section 6015, then the taxpayer should request Tax Court review, as provided by section 6015(e), within 90 days of Appeals' determination. If a request for Tax Court review is filed after the 30-day period for seeking judicial review under section 6320, then only the taxpayer's section 6015 claims may be reviewable by the Tax Court.

Q-F3. What issue or issues may the taxpayer raise before the Tax Court if the taxpayer disagrees with the Notice of Determination?

A-F3. In seeking Tax Court review of a Notice of Determination, the taxpayer can only ask the court to consider an issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.

Q-F4. What is the administrative record for purposes of Tax Court review?

A-F4. The case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the record in the Tax Court review of the Notice of Determination issued by Appeals.

(g) *Effect of request for CDP hearing and judicial review on periods of limitation and collection activity*—(1) *In general.* The periods of limitation under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) are suspended until the date the IRS receives the taxpayer's written withdrawal of the request for a CDP hearing by Appeals or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking judicial review or the exhaustion of any rights to appeals following judicial review. In no event shall any of these periods of limitation expire before the 90th day after the date on which the IRS receives the taxpayer's written withdrawal of the request that Appeals conduct a CDP hearing or the determination with respect to such hearing becomes final upon either the expiration of the time for seeking judicial review or upon exhaustion of any rights to appeals following judicial review.

(2) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (g) as follows:

Q-G1. For what period of time will the periods of limitation under sections 6502, 6531, and 6532 remain suspended if the taxpayer timely requests a CDP hearing concerning the filing of a NFTL?

A-G1. The suspension period commences on the date the IRS receives the taxpayer's written request for a CDP hearing. The suspension period continues until the IRS receives a written withdrawal by the taxpayer of the request for a CDP hearing or the Notice of Determination resulting from the CDP hearing becomes final. In no event shall any of these periods of limitation expire before the 90th day after the day on which the IRS receives the taxpayer's written withdrawal of the request that Appeals conduct a CDP hearing or there is a final determination with respect to such hearing. The periods of limitation that are suspended under section 6320 are those which apply to the taxes and the tax period or periods to which the CDP Notice relates.

Q-G2. For what period of time will the periods of limitation under sections 6502, 6531, and 6532 be suspended if the taxpayer does not request a CDP hearing concerning the filing of a NFTL, or the taxpayer requests a CDP hearing, but his request is not timely?

A-G2. Under either of these circumstances, section 6320 does not provide for a suspension of the periods of limitation.

Q-G3. What, if any, enforcement actions can the IRS take during the suspension period?

A-G3. Section 6330(e), made applicable to section 6320 CDP hearings by section 6320(c), provides for the suspension of the periods of limitation discussed in paragraph (g)(1) of these regulations. Section 6330(e) also provides that levy actions that are the subject of the requested CDP hearing under that section shall be suspended during the same period. Levy actions, however, are not the subject of a CDP hearing

under section 6320. The IRS may levy for tax periods and taxes covered by the CDP Notice under section 6320 and for other taxes and periods if the CDP requirements under section 6330 for those taxes and periods have been satisfied. The IRS also may file NFTLs for tax periods or taxes not covered by the CDP Notice, may file a NFTL for the same tax and tax period stated on the CDP Notice at another recording office, and may take other non-levy collection actions such as initiating judicial proceedings to collect the tax shown on the CDP Notice or offsetting overpayments from other periods, or of other taxes, against the tax shown on the CDP Notice. Moreover, the provisions in section 6330 do not apply when the IRS levies for the tax and tax period shown on the CDP Notice to collect a state tax refund due the taxpayer, or determines that collection of the tax is in jeopardy. Finally, section 6330 does not prohibit the IRS from accepting any voluntary payments made for the tax and tax period stated on the CDP Notice.

(3) *Examples*. The following examples illustrate the principles of this paragraph (g):

*Example 1*. The period of limitation under section 6502 with respect to the taxpayer's tax period listed in the NFTL will expire on August 1, 1999. The IRS sent a CDP Notice to the taxpayer on April 30, 1999. The taxpayer timely requested a CDP hearing. The IRS received this request on May 15, 1999. Appeals sends the taxpayer its determination on June 15, 1999. The taxpayer timely seeks judicial review of that determination. The period of limitation under section 6502 would be suspended from May 15, 1999, until the determination resulting from that hearing becomes final by expiration of the time for seeking review or reconsideration before the Tax Court, plus 90 days.

(h) *Retained jurisdiction of Appeals*—(1) *In general*. The Appeals office that makes a determination under section 6320 retains jurisdiction over that determination, including any subsequent administrative hearings that may be requested by the taxpayer regarding the NFTL and any collection actions taken or proposed with respect to Appeals' determination. Once a taxpayer has exhausted his other remedies, Appeals' retained jurisdiction permits it to consider whether a change in the taxpayer's circumstances affects its original determination. Where a taxpayer alleges a change in circumstances that affects Appeals' original determination, Appeals may consider whether changed circumstances warrant a change in its earlier determination.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (h) as follows:

Q-H1. Are the periods of limitation suspended during the course of any subsequent Appeals consideration of the matters raised by a taxpayer when the taxpayer invokes the retained jurisdiction of Appeals under section 6330(d)(2)(A) or (d)(2)(B)?

A-H1. No. Under section 6320(b)(2), a taxpayer is entitled to only one CDP hearing under section 6320 with respect to the tax and tax period or periods specified in the CDP Notice. Any subsequent consideration by Appeals pursuant to its retained jurisdiction is not a continuation of the original CDP hearing and does not suspend the periods of limitation.

Q-H2. Is a decision of Appeals resulting from a retained jurisdiction hearing appealable to the Tax Court?

A-H2. No. As discussed in A–H1, a taxpayer is entitled to only one CDP hearing under section 6320 with respect to the tax and tax period or periods specified in the CDP Notice. Only determinations resulting from CDP hearings are appealable to the Tax Court.

(i) *Equivalent hearing*—(1) *In general*. A taxpayer who fails to make a timely request for a CDP hearing is not entitled to a CDP hearing. Such a taxpayer may nevertheless request an administrative hearing with Appeals, which is referred to herein as an ''equivalent hearing.'' The equivalent hearing will be held by Appeals and generally will follow Appeals' procedures for a CDP hearing. Appeals will not, however, issue a Notice of Determination. Under such circumstances, Appeals will issue a Decision Letter.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (i) as follows:

Q-I1. What must a taxpayer do to obtain an equivalent hearing?

A-I1. (i) A request for an equivalent hearing must be made in writing. A

written request in any form that requests an equivalent hearing will be acceptable if it includes the information and signature required in A-I1(ii) of this paragraph (i)(2).

(ii) The request must be dated and must include the following:

(A) The taxpayer's name, address, daytime telephone number (if any), and taxpayer identification number (e.g., SSN, ITIN or EIN).

(B) The type of tax involved.

(C) The tax period at issue.

(D) A statement that the taxpayer is requesting an equivalent hearing with Appeals concerning the filing of the NFTL.

(E) The reason or reasons why the taxpayer disagrees with the filing of the NFTL.

(F) The signature of the taxpayer or the taxpayer's authorized representative.

(iii) The taxpayer must perfect any timely written request for an equivalent hearing that does not satisfy the requirements set forth in A–I1(ii) of this paragraph (i)(2) within a reasonable period of time after a request from the IRS. If the requirements are not satisfied within a reasonable period of time, the taxpayer's equivalent hearing request will be denied.

(iv) The taxpayer must affirm any timely written request for an equivalent hearing that is signed or alleged to have been signed on the taxpayer's behalf by the taxpayer's spouse or other unauthorized representative, and that otherwise meets the requirements set forth in A–I1(ii) of this paragraph (i)(2), by filing, within a reasonable period of time after a request from the IRS, a signed written affirmation that the request was originally submitted on the taxpayer's behalf. If the affirmation is filed within a reasonable period of time after a request, the timely equivalent hearing request will be considered timely with respect to the non-signing taxpayer. If the affirmation is not filed within a reasonable period of time, the equivalent hearing request will be denied with respect to the non-signing taxpayer.

Q-I2. What issues will Appeals consider at an equivalent hearing?

A-I2. In an equivalent hearing, Appeals will consider the same issues that it would have considered at a CDP hearing on the same matter.

Q-I3. Are the periods of limitation under sections 6502, 6531, and 6532 suspended if the taxpayer does not timely request a CDP hearing and is subsequently given an equivalent hearing?

A-I3. No. The suspension period provided for in section 6330(e) relates only to hearings requested within the 30-day period that commences on the day after the end of the five business day period following the filing of the NFTL, that is, CDP hearings.

Q-I4. Will collection action, including the filing of additional NFTLs, be suspended if a taxpayer requests and receives an equivalent hearing?

A-I4. Collection action is not required to be suspended. Accordingly, the decision to take collection action during the pendency of an equivalent hearing will be determined on a case-by-case basis. Appeals may request the IRS office with responsibility for collecting the taxes to suspend all or some collection action or to take other appropriate action if it determines that such action is appropriate or necessary under the circumstances.

Q-I5. What will the Decision Letter state?

A-I5. The Decision Letter will generally contain the same information as a Notice of Determination.

Q-I6. Will a taxpayer be able to obtain Tax Court review of a decision made by Appeals with respect to an equivalent hearing?

A-I6. Section 6320 does not authorize a taxpayer to appeal the decision of Appeals with respect to an equivalent hearing. A taxpayer may under certain circumstances be able to seek Tax Court review of Appeals' denial of relief under section 6015. Such review must be sought within 90 days of the issuance of Appeals' determination on those issues, as provided by section 6015(e).

Q-I7. When must a taxpayer request an equivalent hearing with respect to a CDP Notice issued under section 6320?

A-I7. A taxpayer must submit a written request for an equivalent hearing within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL. This period is

slightly different from the period for submitting a written request for an equivalent hearing with respect to a CDP Notice issued under section 6330. For a CDP Notice issued under section 6330, a taxpayer must submit a written request for an equivalent hearing within the one-year period commencing the day after the date of the CDP Notice issued under section 6330.

Q-I8. How will the timeliness of a taxpayer's written request for an equivalent hearing be determined?

A-I8. The rules and regulations under section 7502 and section 7503 will apply to determine the timeliness of the taxpayer's request for an equivalent hearing, if properly transmitted and addressed as provided in A–I10 of this paragraph (i)(2).

Q-I9. Is the one-year period within which a taxpayer must make a request for an equivalent hearing extended because the taxpayer resides outside the United States?

A-I9. No. All taxpayers who want an equivalent hearing concerning the filing of the NFTL must request the hearing within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL.

Q-I10. Where must the written request for an equivalent hearing be sent?

A-I10. The written request for an equivalent hearing must be sent, or hand delivered (if permitted), to the IRS office and address as directed on the CDP Notice. If the address of the issuing office does not appear on the CDP Notice, the taxpayer should obtain the address of the office to which the written request should be sent or hand delivered by calling, toll-free, 1–800–829–1040 and providing the taxpayer's identification number (e.g., SSN, ITIN or EIN).

QI11. What will happen if the taxpayer does not request an equivalent hearing in writing within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL?

AI11. If the taxpayer does not request an equivalent hearing with Appeals within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL, the taxpayer foregoes the right to an equivalent hearing with respect to the unpaid tax and tax periods shown on the CDP Notice. A written request submitted within the one-year period that does not satisfy the requirements set forth in A–I1(ii) of this paragraph (i)(2) is considered timely if the request is perfected within a reasonable period of time pursuant to A–I1(iii) of this paragraph (i)(2). If a request for equivalent hearing is untimely, either because the request was not submitted within the one-year period or not perfected within the reasonable period provided, the equivalent hearing request will be denied. The taxpayer, however, may seek reconsideration by the IRS office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before Appeals under its Collection Appeals Program or any successor program.

(j) *Effective date.* This section is applicable on or after November 16, 2006, with respect to requests made for CDP hearings or equivalent hearings on or after November 16, 2006.

[T.D. 8979, 67 FR 2561, Jan. 18, 2002, as amended by T.D. 9290, 71 FR 60839, Oct. 17, 2006]

### § 301.6321–1 Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, tangible or intangible, belonging to such person. For purposes of section 6321 and this section, the term ''any tax'' shall include a State individual income tax which is a ''qualified tax'', as defined in paragraph (b) of § 301.6361–4. The lien attaches to all property and rights to property belonging to such person at any time during the period of the lien, including any property or rights to property acquired by such person after the lien arises. Solely for purposes of sections 6321 and 6331, any interest in restricted land held in trust by the United States for an individual noncompetent Indian (and not for a tribe)

shall not be deemed to be property, or a right to property, belonging to such Indian. For the method of allocating amounts collected pursuant to a lien between the Federal Government and a State or States imposing a qualified tax with respect to which the lien attached, see paragraph (f) of § 301.6361–1. For the special lien for estate and gift taxes, see section 6324 and § 301.6324–1

[T.D. 7577, 43 FR 59361, Dec. 20, 1978]

### § 301.6323(a)–1 Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.

(a) *Invalidity of lien without notice.* The lien imposed by section 6321 is not valid against any purchaser (as defined in paragraph (f) of § 301.6323(h)—1), holder of a security interest (as defined in paragraph (a) of § 301.6323(h)—1), mechanic's lienor (as defined in paragraph (b) of § 301.6323(h)–1), or judgment lien creditor (as defined in paragraph (g) of § 301.6323(h)–1) until a notice of lien is filed in accordance with § 301.6323(f)–1). Except as provided by section 6323, if a person becomes a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor after a notice of lien is filed in accordance with § 301.6323(f)–1, the interest acquired by such person is subject to the lien imposed by section 6321.

(b) *Cross references.* For provisions relating to the protection afforded a security interest arising after tax lien filing, which interest is covered by a commercial transactions financing agreement, real property construction or improvement financing agreement, or an obligatory disbursement agreement, see §§ 301.6323(c)–1, 301.6323(c)–2, and 301.6323(c)–3, respectively. For provisions relating to the protection afforded to a security interest coming into existence by virtue of disbursements, made before the 46th day after the date of tax lien filing, see § 301.6323(d)–1. For provisions relating to priority afforded to interest and certain other expenses with respect to a lien or security interest having priority over the lien imposed by section 6321, see § 301.6323(e)–1. For provisions relating to certain other interests arising after tax lien filing, see § 301.6323(b)–1.

[T.D. 7429, 41 FR 35498, Aug. 23, 1976]

### § 301.6323(b)–1 Protection for certain interests even though notice filed.

(a) *Securities—*(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a security (as defined in paragraph (d) of § 301.6323(h)–1) against—

(i) A purchaser (as defined in paragraph (f) of § 301.6323(h)–1) of the security who at the time of purchase did not have actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the existence of the lien;

(ii) A holder of a security interest (as defined in paragraph (a) of § 301.6323(h)–1) in the security who did not have actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the existence of the lien at the time the security interest came into existence or at the time such security interest was acquired from a previous holder for a consideration in money or money's worth; or

(iii) A transferee of an interest protected under subdivision (i) or (ii) of this subparagraph to the same extent the lien is invalid against his transferor.

For purposes of subdivision (iii) of this subparagraph, no person can improve his position with respect to the lien by reacquiring the interest from an intervening purchaser or holder of a security interest against whom the lien is invalid.

(2) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* On May 1, 1969, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to A's delinquent tax liability. On May 20, 1969. A sells 100 shares of common stock in X corporation to B, who, on the date of the sale, does not have actual notice or knowledge of the existence of the lien. Because B purchased the stock without actual notice or knowledge of the lien, under subdivision (i) of subparagraph (1) of this paragraph, the stock purchased by B is not subject to the lien.

*Example 2.* Assume the same facts as in example 1 except that on May 30, 1969, B sells

the 100 shares of common stock in X corporation to C who on May 5, 1969, had actual notice of the existence of the tax lien against A. Because the X stock when purchased by B was not subject to the lien, under subdivision (iii) of subparagraph (1) of this paragraph, the stock purchased by C is not subject to the lien. C succeeds to B's rights, even though C had actual notice of the lien before B's purchase.

*Example 3.* On June 1, 1970, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to D's delinquent tax liability. D owns 20 $1,000 bonds issued by the Y company. On June 10, 1970, D obtains a loan from M bank for $5,000 using the Y company bonds as collateral. At the time the loan is made M bank does not have actual notice or knowledge of the existence of the tax lien. Because M bank did not have actual notice or knowledge of the lien when the security interest came into existence, under subdivision (ii) of subparagraph (1) of this paragraph, the tax lien is not valid against M bank to the extent of its security interest.

*Example 4.* Assume the same facts as in example 3 except that on June 19, 1970, M bank assigns the chose in action and its security interest to N, who had actual notice or knowledge of the existence of the lien on June 1, 1970. Because the security interest was not subject to the lien to the extent of M bank's security interest, the security interest held by N is to the same extent entitled to priority over the tax lien because N succeeds to M bank's rights. See subdivision (iii) of subparagraph (1) of this paragraph.

*Example 5.* On July 1, 1970, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to E's delinquent tax liability. E owns ten $1,000 bonds issued by the Y company. On July 5, 1970, E borrows $4,000 from F and delivers the bonds to F as collateral for the loan. At the time the loan is made, F has actual knowledge of the existence of the tax lien and, therefore, holds the security interest subject to the lien on the bonds. On July 10, 1970, F sells the security interest to G for $4,000 and delivers the Y company bonds pledged as collateral. G does not have actual notice or knowledge of the existence of the lien on July 10, 1970. Because G did not have actual notice or knowledge of the lien at the time he purchased the security interest, under subdivision (ii) of subparagraph (1) of this paragraph, the tax lien is not valid against G to the extent of his security interest.

*Example 6.* Assume the same facts as in example 5 except that, instead of purchasing the security interest from F on July 10, 1970, G lends $4,000 to F and takes a security interest in F's security interest in the bonds on that date. Because G became the holder of a security interest in a security interest after notice of lien was filed and does not directly have a security interest in a security, the security interest held by G is not entitled to a priority over the tax lien under the provisions of subparagraph (1) of this paragraph.

(b) *Motor vehicles*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against a purchaser (as defined in paragraph (f) of § 301.6323(h)–1) of a motor vehicle (as defined in paragraph (c) of § 301.6323(h)–1) if—

(i) At the time of the purchase, the purchaser did not have actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the existence of the lien, and

(ii) Before the purchaser obtains such notice or knowledge, he has acquired actual possession of the motor vehicle and has not thereafter relinquished actual possession to the seller or his agent.

(2) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* A, a delinquent taxpayer against whom a notice of tax lien has been filed in accordance with § 301.6323(f)–1, sells his automobile (which qualifies as a motor vehicle under paragraph (c) of § 301.6323(h)–1) to B, an automobile dealer. B takes actual possession of the automobile and does not thereafter relinquish actual possession to the seller or his agent. Subsequent to his purchase, B learns of the existence of the tax lien against A. Even though notice of lien was filed before the purchase, the lien is not valid against B, because B did not know of the existence of the lien before the purchase and before acquiring actual possession of the vehicle.

*Example 2.* C is a wholesaler of used automobiles. A notice of lien has been filed with respect to C's delinquent tax liability in accordance with § 301.6323(f)–1. Subsequent to such filing, D, a used automobile dealer, purchases and takes actual possession of 20 automobiles (which qualify as motor vehicles under the provisions of paragraph (c) of § 301.6323(h)–1) from C at an auction and places them on his lot for sale. C does not reacquire possession of any of the automobiles. At the time of his purchase, D does not have actual notice or knowledge of the existence of the lien against C. Even though notice of lien was filed before D's purchase, the lien was not valid against D because D did not know of the existence of the lien before the purchase and before acquiring actual possession of the vehicles.

(3) *Cross reference*. For provisions relating to additional circumstances in which the lien imposed by section 6321 may not be valid against the purchaser of tangible personal property (including a motor vehicle) purchased at retail, see paragraph (c) of this section.

(c) *Personal property purchased at retail*—(1) *In general*. Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against a purchaser (as defined in paragraph (f) of § 301.6323(h)–1) of tangible personal property purchased at a retail sale (as defined in subparagraph (2) of this paragraph (c)) unless at the time of purchase the purchaser intends the purchase to (or knows that the purchase will) hinder, evade, or defeat the collection of any tax imposed by the Internal Revenue Code of 1954.

(2) *Definition of retail sale*. For purposes of this paragraph, the term ''retail sale'' means a sale, made in the ordinary course of the seller's trade or business, of tangible personal property of which the seller is the owner. Such term includes a sale in customary retail quantities by a seller who is going out of business, but does not include a bulk sale or an auction sale in which goods are offered in quantities substantially greater than are customary in the ordinary course of the seller's trade or business or an auction sale of goods the owner of which is not in the business of selling such goods.

(3) *Example*. The application of this paragraph may be illustrated by the following example:

*Example*. A purchases a refrigerator from the M company, a retail appliance dealer. Prior to such purchase, a notice of lien was filed with respect to M's delinquent tax liability in accordance with § 301.6323(f)–1. At the time of the purchase A knows of the existence of the lien. However, A does not intend the purchase to hinder, evade, or defeat the collection of any internal revenue tax, and A does not have any reason to believe that the purchase will affect the collection of any internal revenue tax. Even though notice of lien was filed before the purchase, the lien is not valid against A because A in good faith purchased the refrigerator at retail in the ordinary course of the M company's business.

(d) *Personal property purchased in casual sale*—(1) *In general*. Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against a purchaser (as defined in § 301.6323(h)–1(f)) of household goods, personal effects, or other tangible personal property of a type described in § 301.6334–1 (which includes wearing apparel; school books; fuel, provisions, furniture, arms for personal use, livestock, and poultry (whether or not the seller is the head of a family); and books and tools of a trade, business, or profession (whether or not the trade, business, or profession of the seller)), purchased, other than for resale, in a casual sale for less than $250 (excluding interest and expenses described in § 301.6323(e)–1). For purposes of this paragraph, a casual sale is a sale not made in the ordinary course of the seller's trade or business.

(2) *Limitation*. This paragraph applies only if the purchaser does not have actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1)—

(i) Of the existence of the tax lien, or

(ii) That the sale is one of a series of sales.

For purposes of subdivision (ii) of this subparagraph, a sale is one of a series of sales if the seller plans to dispose of, in separate transactions, substantially all of his household goods, personal effects, and other tangible personal property described in § 301.6334–1.

(3) *Examples*. The application of this paragraph may be illustrated by the following examples:

*Example 1*. A, an attorney's widow, sells a set of law books for $200 to B, for B's own use. Prior to the sale a notice of lien was filed with respect to A's delinquent tax liability in accordance with § 301.6323(f)–1. B has no actual notice or knowledge of the tax lien. In addition, B does not know that the sale is one of a series of sales. Because the sale is a casual sale for less than $250 and involves books of a profession (tangible personal property of a type described in § 301.6334–1, irrespective of the fact that A has never engaged in the legal profession), the tax lien is not valid against B even though a notice of lien was filed prior to the time of B's purchase.

*Example 2*. Assume the same facts as in example 1 except that B purchases the books for resale in his second-hand bookstore. Because B purchased the books for resale, he purchased the books subject to the lien.

*Example 3*. In an advertisement appearing in a local newspaper, G indicates that he is

offering for sale a lawn mower, a used television set, a desk, a refrigerator, and certain used dining room furniture. In response to the advertisement, H purchases the dining room furniture for $200. H does not receive any information which would impart notice of a lien, or that the sale is one of a series of sales, beyond the information contained in the advertisement. Prior to the sale a notice of lien was filed with respect to G's delinquent tax liability in accordance with § 301.6323(f)–1. Because H had no actual notice or knowledge that substantially all of G's households goods were being sold, or that the sale is one of a series of sales and because the sale is a casual sale for less than $250, H does not purchase the dining room furniture subject to the lien. The household goods are of a type described in § 301.6334–1(a)(2) irrespective of whether G is the head of a family or whether all such household goods offered for sale exceed $500 in value.

(e) *Personal property subject to possessory liens.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against a holder of a lien on tangible personal property which under local law secures the reasonable price of the repair or improvement of the property if the property is, and has been, continuously in the possession of the holder of the lien from the time the possessory lien arose. For example, if local law gives an automobile repairman the right to retain possession of an automobile he has repaired as security for payment of the repair bill and the repairman retains continuous possession of the automobile until his lien is satisfied, a tax lien filed in accordance with section 6323(f)(1) which has attached to the automobile will not be valid to the extent of the reasonable price of the repairs. It is immaterial that the notice of tax lien was filed before the repairman undertook his work or that he knew of the lien before undertaking the work.

(f) *Real property tax and special assessment liens*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against the holder of another lien upon the real property (regardless of when such other lien arises), if such other lien is entitled under local law to priority over security interests in real property which are prior in time and if such other lien on real property secures payment of—

(i) A tax of general application levied by any taxing authority based upon the value of the property;

(ii) A special assessment imposed directly upon the property by any taxing authority, if the assessment is imposed for the purpose of defraying the cost of any public improvement; or

(iii) Charges for utilities or public services furnished to the property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(2) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* A owns Blackacre in the city of M. A notice of lien affecting Blackacre is filed in accordance with § 301.6323(f)–1. Subsequent to the filing of the notice of lien, the city of M acquires a lien against Blackacre to secure payment of real estate taxes. Such taxes are levied against all property in the city in proportion to the value of the property. Under local law, the holder of a lien for real property taxes is entitled to priority over a security interest in real property even though the security interest is prior in time. Because the real property tax lien held by the city of M secures payment of a tax of general application and is entitled to priority over security interests which are prior in time, the lien held by the city of M is entitled to priority over the Federal tax lien with respect to Blackacre.

*Example 2.* B owns Whiteacre in N county. A notice of lien affecting Whiteacre is filed in accordance with § 301.6323(f)–1. Subsequent to the filing of the notice of lien, N county constructs a sidewalk, paves the street, and installs water and sewer lines adjacent to Whiteacre. In order to defray the cost of these improvements, N county imposes upon Whiteacre a special assessment which under local law results in a lien upon Whiteacre that is entitled to priority over security interests that are prior in time. Because the special assessment lien is (i) entitled under local law to priority over security interests which are prior in time, and (ii) imposed directly upon real property to defray the cost of a public improvement, the special assessment lien has priority over the Federal tax lien with respect to Whiteacre.

*Example 3.* C owns Greenacre in town O. A notice of lien affecting Greenacre is filed in accordance with § 301.6323(f)–1. Town O furnishes water and electricity to Greenacre and periodically collects a fee for these services. Subsequent to the filing of the notice of lien, town O supplies water and electricity to Greenacre, and C fails to pay the charges for

these services. Under local law, town O acquires a lien to secure charges for the services, and this lien has priority over security interests which are prior in time. Because the lien of town O (i) is for services furnished to the real property and (ii) has priority over earlier security interests, town O's lien has priority over the Federal tax lien with respect to Greenacre.

(g) *Residential property subject to a mechanic's lien for certain repairs and improvements*—(1) *In general*. Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against a mechanic's lienor (as defined in § 301.6323(h)–(b)) who holds a lien for the repair or improvement of a personal residence if—

(i) The residence is occupied by the owner and contains no more than four dwelling units, and

(ii) The contract price on the prime contract with the owner for the repair or improvement (excluding interest and expenses described in § 301.6323(e)–1) is not more than $1,000.

For purposes of subdivision (ii) of this subparagraph, the amounts of subcontracts under the prime contract with the owner are not to be taken into consideration for purposes of computing the $1,000 prime contract price. It is immaterial that the notice of tax lien was filed before the contractor undertakes his work or that he knew of the lien before undertaking the work.

(2) *Examples*. The application of this paragraph may be illustrated by the following examples:

*Example 1*. A owns a building containing four apartments, one of which he occupies as his personal residence. A notice of lien which affects the building is filed in accordance with § 301.6323(f)–1. Thereafter, A enters into a contract with B in the amount of $800, which includes labor and materials, to repair the roof of the building. B purchases roofing shingles from C for $300. B completes the work and A fails to pay B the agreed amount. In turn, B fails to pay C for the shingles. Under local law, B and C acquire mechanic's liens on A's building. Because the contract price on the prime contract with A is not more than $1,000 and under local law B and C acquire mechanic's liens on A's building, the liens of B and C have priority over the Federal tax lien.

*Example 2*. Assume that same facts as in example 1, except that the amount of the prime contract between A and B is $1,100. Because the amount of the prime contract with the owner, A, is in excess of $1,000, the tax lien has priority over the entire amount of each of the mechanic's liens of B and C, even though the amount of the contract between B and C is $300.

*Example 3*. Assume the same facts as in example 1, except that A and B do not agree in advance upon the amount due under the prime contract but agree that B will perform the work for the cost of materials and labor plus 10 percent of such cost. When the work is completed, it is determined that the total amount due is $850. Because the prime contract price is not more than $1,000 and under local law B and C acquire mechanic's liens on A's residence, the liens of B and C have priority over the Federal tax lien.

(h) *Attorney's liens*—(1) *In general*. Even though notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against an attorney who, under local law, holds a lien upon, or a contract enforceable against, a judgment or other amount in settlement of a claim or of a cause of action. The priority afforded an attorney's lien under this paragraph shall not exceed the amount of the attorney's reasonable compensation for obtaining the judgment or procuring the settlement. For purposes of this paragraph, reasonable compensation means the amount customarily allowed under local law for an attorney's services for litigating or settling a similar case or administrative claim. However, reasonable compensation shall be determined on the basis of the facts and circumstances of each individual case. It is immaterial that the notice of tax lien is filed before the attorney undertakes his work or that the attorney knows of the tax lien before undertaking his work. This paragraph does not apply to an attorney's lien which may arise from the defense of a claim or cause of action against a taxpayer except to the extent such lien is held upon a judgment or other amount arising from the adjudication or settlement of a counterclaim in favor of the taxpayer. In the case of suits against the taxpayer, see § 301.6325–1(d)(2) for rules relating to the subordination of the tax lien to facilitate tax collection.

(2) *Claim or cause of action against the United States*. Paragraph (h)(1) of this section does not apply to an attorney's lien with respect to—

(i) Any judgment or other fund resulting from the successful litigation or settlement of an administrative claim or cause of action against the United States to the extent that the United States, under any legal or equitable right, offsets its liability under the judgment or settlement against any liability of the taxpayer to the United States, or

(ii) Any amount credited against any liability of the taxpayer in accordance with section 6402.

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

*Example 1.* A notice of lien is filed against A in accordance with § 301.6323(f)–1. Subsequently, A is struck by an automobile and retains B, an attorney to institute suit on A's behalf against the operator of the automobile. B knows of the tax lien before he begins his work. Under local law, B is entitled to a lien upon any recovery in order to secure payment of his fee. A is awarded damages of $10,000. B charges a fee of $3,000 which is the fee customarly allowed under local law in similar cases and which is found to be reasonable under the circumstances of this particular case. Because, under local law, B holds a lien for the amount of his reasonable compensation for obtaining the judgment, B's lien has priority over the Federal tax lien.

*Example 2.* Assume the same facts as in example 1, except that before suit is instituted A and the owner of the automobile settle out of court for $7,500. B charges a reasonable and customary fee of $1,800 for procuring the settlement and under local law holds a lien upon the settlement in order to secure payment of the fee. Because, under local law, B holds a lien for the amount of his reasonable compensation for obtaining the settlement, B has priority over the Federal tax lien.

*Example 3.* In accordance with § 301.6323(f)–1, a notice of lien in the amount of $8,000 is filed against C, a contractor. Subsequently C retains D, an attorney, to initiate legal proceedings to recover the amount allegedly due him for construction work he has performed for the United States. C and D enter into an agreement which provides that D will receive a reasonable and customary fee of $2,500 as compensation for his services. Under local law, the agreement will give rise to a lien which is enforceable by D against any amount recovered in the suit. C is successful in the suit and is awarded $10,000. D claims $2,500 of the proceeds as his fee. The United States, however, exercises its right of set-off and applies $8,000 of the $10,000 award to satisfy C's tax liability. Because the $10,000 award resulted from the successful litigation of a cause of action against the United States, B's contract for attorney's fees is not enforceable against the amount recovered to the extent the United States offsets its liability under the judgment against C's tax liability. It is immaterial that D had no notice or knowledge of the tax lien at the time he began work on the case.

(i) *Certain insurance contracts*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a life insurance, endowment, or annuity contract, against an organization which is the insurer under the contract, at any time—

(i) Before the insuring organization has actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the existence of the tax lien,

(ii) After the insuring organization has actual notice or knowledge of the lien (as defined in paragraph (a) of § 301.6323(i)–1), with respect to advances (including contractual interest thereon as provided in paragraph (a) of § 301.6323(e)–1) required to be made automatically to maintain the contract in force under an agreement entered into before the insuring organization had such actual notice or knowledge, or

(iii) After the satisfaction of a levy pursuant to section 6332(b), unless and until the district director delivers to the insuring organization a notice (for example, another notice of levy, a letter, etc.), executed after the date of such satisfaction, that the lien exists.

Delivery of the notice described in subdivision (iii) of this subparagraph may be made by any means, including regular mail, and delivery of the notice shall be effective only from the time of actual receipt of the notification by the insuring organization. The provisions of this paragraph are applicable to matured as well as unmatured insurance contracts.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

*Example 1.* On May 1, 1964, the X insurance company issues a life insurance policy to A. On June 1, 1970, a tax assessment is made against A, and on June 2, 1970, a notice of lien with respect to the assessment is filed in accordance with § 301.6323(f)–1. On July 1, 1970, without actual notice or knowledge of

the tax lien, the X company makes a ''policy loan'' to A. Under subparagraph (1)(i) of this paragraph, the loan, including interest (in accordance with the provisions of paragraph (a) of § 301.6323(e)–1), will have priority over the tax lien because X company did not have actual notice or knowledge of the tax lien at the time the policy loan was made.

*Example 2.* On May 1, 1964, B enters into a life insurance contract with the Y insurance company. Under one of the provisions of the contract, in the event a premium is not paid, Y is to advance out of the cash loan value of the policy the amount of an unpaid premium in order to maintain the contract in force. The contract also provides for interest on any advances so made. On June 1, 1971, a tax assessment is made against B, and on June 2, 1971, in accordance with section 6323(f)–1, a notice of lien is filed. On July 1, 1971, B fails to pay the premium due on that date, and Y makes an automatic premium loan to keep the policy in force. At the time the automatic premium loan is made, Y had actual knowledge of the tax lien. Under subparagraph (1)(ii) of this paragraph, the lien is not valid against Y with respect to the advance (and the contractual interest thereon), because the advance was required to be made automatically under an agreement entered into before Y had actual notice or knowledge of the tax lien.

*Example 3.* On May 1, 1964, C enters into a life insurance contract with the Z insurance company. On January 4, 1971, an assessment is made against C for $5,000 unpaid income taxes, and on January 11, 1971, in accordance with § 301.6323(f)–1, a notice of lien is filed. On January 29, 1971, a notice of levy with respect to C's delinquent tax is served on Z company. The amount which C could have had advanced to him from Z company under the contract on the 90th day after service of the notice of levy on Z company is $2,000. The Z company pays $2,000 pursuant to the notice of levy, thereby satisfying the levy upon the contract in accordance with § 6332(b). On February 1, 1973, Z company advances $500 to C, which is the increment in policy loan value since satisfaction of the levy of January 29, 1971. On February 5, 1973, a new notice of levy for the unpaid balance of the delinquent taxes, executed after the first levy was satisfied, is served upon Z company. Because the new notification was not received by Z company until after the policy loan was made, under paragraph (1)(iii) of this paragraph, the tax lien is not valid against Z company with respect to the policy loan (including interest thereon in accordance with paragraph (a) of § 301.6323(e)–1).

*Example 4.* On June 1, 1973, a tax assessment is made against D and on June 2, 1973, in accordance with § 301.6323(f)–1, a notice of lien with respect to the assessment is filed. On July 2, 1973, D executes an assignment of his rights, as the insured, under an insurance contract to M bank as security for a loan. M bank holds its security interest subject to the lien because it is not an insurer entitled to protection under section 6323(b)(9) and did not become a holder of the security interest prior to the filing of the notice of lien for purposes of section 6323(a). It is immaterial that a notice of levy had not been served upon the insurer before the assignment to M bank was made.

(j) *Passbook loans*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid against an institution described in section 581 or 591 to the extent of any loan made by the institution which is secured by a savings deposit, share, or other account evidenced by a passbook (as defined in subparagraph (2) of this paragraph (j)) if the institution has been continuously in possession of the passbook from the time the loan is made. This paragraph applies only to a loan made without actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the existence of the lien. Even though an original passbook loan is made without actual notice or knowledge of the existence of the lien, this paragraph does not apply to any additional loan made after knowledge of the lien is acquired by the institution even if it continues to retain the passbook from the time the original passbook loan is made.

(2) *Definition of passbook.* For purposes of this paragraph, the term ''passbook'' includes—

(i) Any tangible evidence of a savings deposit, share, or other account which, when in the possession of the bank or other savings institution, will prevent a withdrawal from the account to the extent of the loan balance, and

(ii) Any procedure or system, such as an automatic data processing system, the use of which by the bank or other savings institution will prevent a withdrawal from the account to the extent of the loan balance.

(3) *Example.* On June 1, 1970, a tax assessment is made against A and on June 2, 1970, a notice of lien with respect to the assessment is filed in accordance with § 301.6323(f)–1. A owns a savings account at the M bank with a balance of $1,000. On June 10, 1970, A borrows $300 from the M bank using the

savings account as security therefor. The M bank is continuously in possession of the passbook from the time the loan is made and does not have actual notice or knowledge of the lien at the time of the loan. The tax lien is not valid against M bank with respect to the passbook loan of $300 and accrued interest and expenses entitled to priority under § 301.6323(e)–1. Upon service of a notice of levy, the M bank must pay over the savings account balance in excess of the amount of its protected interest in the account as determined on the date of levy.

[T.D. 7429, 41 FR 35501, Aug. 23, 1976]

### § 301.6323(c)–1 Protection for commercial transactions financing agreements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a security interest which:

(1) Comes into existence after the tax lien filing,

(2) Is in qualified property covered by the terms of a commercial transactions financing agreement entered into before the tax lien filing, and

(3) Is protected under local law against a judgment lien arising, as of the time of the tax lien filing, out of an unsecured obligation.

See paragraphs (a) and (e) of § 301.6323(h)–1 for definitions of the terms ''security interest'' and ''tax lien filing,'' respectively. For purposes of this section, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)–1.

(b) *Commercial transactions financing agreement.* For purposes of this section, the term ''commercial transactions financing agreement'' means a written agreement entered into by a person in the course of his trade or business—

(1) To make loans to the taxpayer (whether or not at the option of the person agreeing to make such loans) to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(2) To purchase commercial financing security, other than inventory, acquired by the taxpayer in the ordinary course of his trade or business.

Such an agreement qualifies as a commercial transactions financing agreement only with respect to loans or purchases made under the agreement before (i) the 46th day after the date of tax lien filing or, (ii) the time when the lender or purchaser has actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)–1) of the tax lien filing, if earlier. For purposes of this paragraph, a loan or purchase is considered to have been made in the course of the lender's or purchaser's trade or business if such person is in the business of financing commercial transactions (such as a bank or commercial factor) of if the agreement is incidental to the conduct of such person's trade or business. For example, if a manufacturer finances the accounts receivable of one of his customers, he is considered to engage in such financing in the course of his trade or business. The extent of the priority of the lender or purchaser over the tax lien is the amount of his disbursements made before the 46th day after the date the notice of tax lien is filed, or made before the day (before such 46th day) on which the lender or purchaser has actual notice or knowledge of the filing of the notice of the tax lien.

(c) *Commercial financing security*—(1) *In general.* The term ''commercial financing security'' means—

(i) Paper of a kind ordinarily arising in commercial transactions.

(ii) Accounts receivable (as defined in subparagraph (2) of this paragraph (c)),

(iii) Mortgages on real property, and

(iv) Inventory.

For purposes of this subparagraph, the term ''paper of a kind ordinarily arising in commercial transactions'' in general includes any written document customarily used in commercial transactions. For example, such written documents include paper giving contract rights (as defined in subparagraph (2) of this paragraph (c)), chattel paper, documents of title to personal property, and negotiable instruments or securities. The term ''commercial financing security'' does not include general intangibles such as patents or copyrights. A mortgage on real estate (including a deed of trust, contract for sale, and similar instrument) may be commercial financing security if the

taxpayer has an interest in the mortgage as a mortgagee or assignee. The term ''commercial financing security'' does not include a mortgage where the taxpayer is the mortgagor or realty owned by him. For purposes of this subparagraph, the term ''inventory'' includes raw materials and goods in process as well as property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *Definitions.* For purposes of §§ 301.6323(d)–1, 301.6323(h)–1 and this section—

(i) A contract right is any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper, and

(ii) An account receivable is any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

(d) *Qualified property.* For purposes of paragraph (a) of this section, qualified property consists solely of commercial financing security acquired by the taxpayer-debtor before the 46th day after the date of tax lien filing: Commercial financing security acquired before such day may be qualified property even though it is acquired by the taxpayer after the lender received actual notice or knowledge of the filing of the tax lien. For example, although the receipt of actual notice or knowledge of the filing of the notice of the tax lien has the effect of ending the period within which protected disbursements may be made to the taxpayer, property which is acquired by the taxpayer after the lender receives actual notice or knowledge of such filing and before such 46th day, which otherwise qualifies as commercial financing security, becomes commercial financing security to which the priority of the lender extends for loans made before he received the actual notice or knowledge. An account receivable (as defined in paragraph (c)(2)(ii) of this section) is acquired by a taxpayer at the time, and to the extent, a right to payment is earned by performance. Chattel paper, documents of title, negotiable instruments, securities, and mortgages on real estate are acquired by a taxpayer when he obtains rights in the paper or mortgage. Inventory is acquired by the taxpayer when title passes to him. A contract right (as defined in paragraph (c)(2)(i) of this section) is acquired by a taxpayer when the contract is made. Identifiable proceeds, which arise from the collection or disposition of qualified property by the taxpayer, are considered to be acquired at the time such qualified property is acquired if the secured party has a continuously perfected security interest in the proceeds under local law. The term ''proceeds'' includes whatever is received when collateral is sold, exchanged, or collected. For purposes of this paragraph, the term ''identifiable proceeds'' does not include money, checks and the like which have been commingled with other cash proceeds. Property acquired by the taxpayer after the 45th day following tax lien filing, by the expenditure of proceeds, is not qualified property.

(e) *Purchaser treated as acquiring security interest.* A person who purchases commercial financing security, other than inventory, pursuant to a commercial transactions financing agreement is treated, for purposes of this section, as having acquired a security interest in the commercial financing security. In the case of a bona fide purchase at a discount, a purchaser of commercial financing security who satisfies the requirements of this section has priority over the tax lien to the full extent of the security.

(f) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* (i) On June 1, 1970, a tax is assessed against M, a tool manufacturer, with respect to his delinquent tax liability. On June 15, 1970, M enters into a written financing agreement with X, a bank. The agreement provides that, in consideration of such sums as X may advance to M, X is to have a security interest in all of M's presently owned and subsequently acquired commercial paper, accounts receivable, and inventory (including inventory in the manufacturing stages and raw materials). On July 6, 1970, notice of the tax lien is filed in accordance with § 301.6323(f)–1. On August 3, 1970, without actual notice or knowledge of the tax lien filing, X advances $10,000 to M. On August 5, 1970, M acquires additional inventory through the purchase of raw materials.

On August 20, 1970, M has accounts receivable, arising from the sale of tools, amounting to $5,000. Under local law, X's security interest arising by reason of the $10,000 advance on August 3, 1970, has priority, with respect to the raw materials and accounts receivable, over a judgment lien against M arising July 6, 1970 (the date of tax lien filing) out of an unsecured obligation.

(ii) Because the $10,000 advance was made before the 46th day after the tax lien filing, and the accounts receivable in the amount of $5,000 and the raw materials were acquired by M before such 46th day, X's $10,000 security interest in the accounts receivable and the inventory has priority over the tax lien. The priority of X's security interest also extends to the proceeds, received on or after the 46th day after the tax lien filing, from the liquidation of the accounts receivable and inventory held by M on August 20, 1970, if X has a continuously perfected security interest in identifiable proceeds under local law. However, the priority of X's security interest will not extend to other property acquired with such proceeds.

*Example 2.* Assume the same facts as in example 1 except that on July 15, 1970, X has actual knowledge of the tax lien filing. Because an agreement does not qualify as a commercial transactions financing agreement when a disbursement is made after tax lien filing with actual knowledge of the filing, X's security interest will not have priority over the tax lien with respect to the $10,000 advance made on August 3, 1970.

*Example 3.* Assume the same facts as in example 1 except that, instead of additional inventory, on August 5, 1970, M acquires an account receivable as the result of the sale of machinery which M no longer needs in his business. Even though the account receivable was acquired by taxpayer M before the 46th day after tax lien filing, the tax lien will have priority over X's security interest arising in the account receivable pursuant to the earlier written agreement because the account receivable was not acquired by the taxpayer in the ordinary course of his trade or business.

*Example 4.* Pursuant to a written agreement with the N Manufacturing Company entered into on January 4, 1971, Y a commercial factor, purchases the accounts receivable arising out of N's regular sales to its customers. On November 1, 1971, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to N's delinquent tax liability. On December 6, 1971, Y, without actual notice or knowledge of the tax lien filing, purchases all of the accounts receivable resulting from N's November 1971 sales. Y has taken appropriate steps under local law so that the December 6, 1971, purchase is protected against a judgment lien arising November 1, 1971 (the date of tax lien filing) out of an unsecured obligation. Because the purchaser of commercial financing security, other than inventory, is treated as having acquired a security interest in commercial financing security, and because Y otherwise meets the requirements of this section, the tax lien is not valid with respect to Y's December 6, 1971, purchase of N's accounts receivable.

[T.D. 7429, 41 FR 35503, Aug. 23, 1976]

### § 301.6323(c)–2 Protection for real property construction or improvement financing agreements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a security interest which:

(1) Comes into existence after the tax lien filing,

(2) Is in qualified property covered by the terms of a real property construction or improvement financing agreement entered into before the tax lien filing, and

(3) Is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

For purposes of this section, it is immaterial that the holder of the security interest had actual notice or knowledge of the lien at the time disbursements are made pursuant to such an agreement. See paragraphs (a) and (e) of § 301.6323(h)–1 for general definitions of the terms ''security interest'' and ''tax lien filing.'' For purposes of this section, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)–1.

(b) *Real property construction or improvement financing agreement.* For purposes of this section, the term ''real property construction or improvement financing agreement'' means any written agreement to make cash disbursements (whether or not at the option of the party agreeing to make such disbursements):

(1) To finance the construction, improvement, or demolition of real property if the agreement provides for a security interest in the real property with respect to which the construction, improvement, or demolition has been or is to be made;

(2) To finance a contract to construct or improve, or demolish real property if the agreement provides for a security

interest in the proceeds of the contract; or

(3) To finance the raising or harvesting of a farm crop or the raising of livestock or other animals if the agreement provides for a security interest in any property subject to the lien imposed by section 6321 at the time of tax lien filing, in the crop raised or harvested, or in the livestock or other animals raised.

For purposes of subparagraphs (1) and (2) of this paragraph (b), construction or improvement may include demolition. For purposes of any agreement described in subparagraph (3) of this paragraph (b), the furnishing of goods and services is treated as the disbursement of cash.

(c) *Qualified property*. For purposes of this section, the term ''qualified property'' includes only—

(1) In the case of an agreement described in paragraph (b)(1) of this section, the real property with respect to which the construction or improvement has been or is to be made;

(2) In the case of an agreement described in paragraph (b)(2) of this section, the proceeds of the contract to construct or improve real property; or

(3) In the case of an agreement described in paragraph (b)(3) of this section, property subject to the lien imposed by section 6321 at the time of tax lien filing, the farm crop raised or harvested, or the livestock or other animals raised.

(d) *Examples*. The provisions of this paragraph may be illustrated by the following examples:

*Example 1*. A, in order to finance the construction of a dwelling on a lot owned by him, mortgages the property to B. The mortgage, executed January 4, 1971, includes an agreement that B will make cash disbursements to A as the construction progresses. On February 1, 1971, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to A's delinquent tax liability. A continues the construction, and B makes cash disbursements on June 10, 1971, and December 10, 1971. Under local law B's security interest arising by virtue of the disbursements is protected against a judgment lien arising February 1, 1971 (the date of tax lien filing) out of an unsecured obligation. Because B is the holder of a security interest coming into existence by reason of cash disbursements made pursuant to a written agreement, entered into before tax lien filing, to make cash disbursements to finance the construction of real property, and because B's security interest is protected, under local law, against a judgment lien arising as of the time of tax lien filing out of an unsecured obligation, B's security interest has priority over the tax lien.

*Example 2*. (i) C is awarded a contract for the demolition of several buildings. On March 3, 1969, C enters into a written agreement with D which provides that D will make cash disbursements to finance the demolition and also provides that repayment of the disbursements is secured by any sums due C under the contract. On April 1, 1969, in accordance with § 301.6323(f)–1, a notice of lien is filed with respect to C's delinquent tax liability. With actual notice of the tax lien, D makes cash disbursements to C on August 1, September 1, and October 1, 1969. Under local law D's security interest in the proceeds of the contract with respect to the disbursements is entitled to priority over a judgment lien arising on April 1, 1969 (the date of tax lien filing) out of an unsecured obligation.

(ii) Because D's security interest arose by reason of disbursements made pursuant to a written agreement, entered into before tax lien filing, to make cash disbursements to finance a contract to demolish real property, and because D's security interest is valid under local law against a judgment lien arising as of the time of tax lien filing out of an unsecured obligation, the tax lien is not valid with respect to D's security interest in the proceeds of the demolition contract.

*Example 3*. Assume the same facts as in example 2 and, in addition, assume that, as further security for the cash disbursements, the March 3, 1969 agreement also provides for a security interest in all of C's demolition equipment. Because the protection of the security interest arising from the disbursements made after tax lien filing under the agreement is limited under section 6323(c)(3) to the proceeds of the demolition contract and because, under the circumstances, the security interest in the equipment is not otherwise protected under section 6323, the tax lien will have priority over D's security interest in the equipment.

*Example 4*. (i) On January 2, 1969, F and G enter into a written agreement, whereby F agrees to provide G with cash disbursements, seed, fertilizer, and insecticides as needed by G, in order to finance the raising and harvesting of a crop on a farm owned by G. Under the terms of the agreement F is to have a security interest in the crop, the farm, and all other property then owned or thereafter acquired by G. In accordance with § 301.6323(f)–1, on January 10, 1969, a notice of lien is filed with respect to G's delinquent tax liability. On March 3, 1969, with actual notice of the tax lien, F makes a cash disbursement of $5,000 to G and furnishes him

seed, fertilizer, and insecticides having a value of $10,000. Under local law F's security interest, coming into existence by reason of the cash disbursement and the furnishing of goods, has priority over a judgment lien arising January 10, 1969 (the date of tax lien filing) out of an unsecured obligation.

(ii) Because F's security interest arose by reason of a disbursement (including the furnishing of goods) made under a written agreement which was entered into before tax lien filing and which constitutes an agreement to finance the raising or harvesting of a farm crop, and because F's security interest is valid under local law against a judgment lien arising as of the time of tax lien filing out of an unsecured obligation, the tax lien is not valid with respect to F's security interest in the crop even though a notice of lien was filed before the security interest arose. Furthermore, because the farm is property subject to the tax lien at the time of tax lien filing, F's security interest with respect to the farm also has priority over the tax lien.

*Example 5.* Assume the same facts as in example 4 and in addition that on October 1, 1969, G acquires several tractors to which F's security interest attaches under the terms of the agreement. Because the tractors are not property subject to the tax lien at the time of tax lien filing, the tax lien has priority over F's security interest in the tractors.

[T.D. 7429, 41 FR 35503, Aug. 23, 1976]

### § 301.6323(c)–3 Protection for obligatory disbursement agreements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a security interest which:

(1) Comes into existence after the tax lien filing,

(2) Is in qualified property covered by the terms of an obligatory disbursement agreement entered into before the tax lien filing, and

(3) Is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

See paragraphs (a) and (e) of § 301.6323(h)–1 for definitions of the terms ''security interest'' and ''tax lien filing.'' For purposes of this section, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)–1.

(b) *Obligatory disbursement agreement.* For purposes of this section the term ''obligatory disbursement agreement'' means a written agreement, entered into by a person in the course of his trade or business, to make disbursements. An agreement is treated as an obligatory disbursement agreement only with respect to disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer. The obligation to pay must be conditioned upon an event beyond the control of the obligor. For example, the provisions of this section are applicable where an issuing bank obligates itself to honor drafts or other demands for payment on a letter of credit and a bank, in good faith, relies upon that letter of credit in making advances. The provisions of this section are also applicable, for example, where a bonding company obligates itself to make payments to indemnify against loss or liability and, under the terms of the bond, makes a payment with respect to a loss. The priority described in this section is not applicable, for example, in the case of an accommodation endorsement by an endorser who assumes his obligation other than in the course of his trade or business.

(c) *Qualified property.* Except as provided under paragraph (d) of this section, the term ''qualified property,'' for purposes of this section, means property subject to the lien imposed by section 6321 at the time of tax lien filing and, to the extent that the acquisition is directly traceable to the obligatory disbursement, property acquired by the taxpayer after tax lien filing.

(d) *Special rule for surety agreements.* Where the obligatory disbursement agreement is an agreement insuring the performance of a contract of the taxpayer and another person, the term ''qualified property'' shall be treated as also including—

(1) The proceeds of the contract the performance of which was insured, and

(2) If the contract the performance of which was insured is a contract to construct or improve real property, to produce goods, or to furnish services, any tangible personal property used by the taxpayer in the performance of the insured contract.

For example, a surety company which holds a security interest, arising from cash disbursements made after tax lien

filing under a payment or performance bond on a real estate construction project, has priority over the tax lien with respect to the proceeds of the construction contract and, in addition, with respect to any tangible personal property used by the taxpayer in the construction project if its security interest in the tangible personal property is protected under local law against a judgment lien arising, as of the time the tax lien was filed, out of an unsecured obligation.

(3) *Examples.* This section may be illustrated by the following examples:

*Example 1.* (i) On January 2, 1969, H, an appliance dealer, in order to finance the acquisition from O of a large inventory of appliances, enters into a written agreement with Z, a bank. Under the terms of the agreement, in return for a security interest in all of H's inventory, presently owned and subsequently acquired, Z issues an irrevocable letter of credit to allow H to make the purchase. On December 31, 1968 and January 10, 1969, in accordance with § 301.6323(f)–1, separate notices of lien are filed with respect to H's delinquent tax liabilities. On March 31, 1969, Z honors the letter of credit. Under local law, Z's security interest in both existing and after-acquired inventory is protected against a judgment lien arising on or after January 10, 1969, out of an unsecured obligation. Under local law, Z's security interest in the inventory purchased under the letter of credit qualifies as a purchase money security interest and is valid against persons acquiring security interests in or liens upon such inventory at any time.

(ii) Because Z's security interest in H's inventory did not arise under a written agreement entered into before the filing of notice of the first tax lien on December 31, 1968, that lien is superior to Z's security interest except to the extent of Z's purchase money security interest. Because Z's interest qualifies as a purchase money security interest with respect to the inventory purchased under the letter of credit, the tax liens attach under section 6321 only to the equity acquired by H, and the rights of Z in the inventory so purchased as superior even to the lien filed on December 31, 1968, without regard to this section.

(iii) Because Z's security interest arose by reason of disbursements made under a written agreement which was entered into before the filing of notice of the second tax lien on January 10, 1969, and which constitutes an agreement to make disbursements required to be made by reason of the intervention of the rights of O, a person other than the taxpayer, and because Z's security interest is valid under local law against a judgment lien arising as of the time of such tax lien filing on January 10, 1969, out of an unsecured obligation, the second tax lien is, under this section, not valid with respect to Z's security interest in inventory owned by H on January 10, 1969, as well as any after-acquired inventory directly traceable to Z's disbursements (apart from such greater protection as Z enjoys, with respect to the latter, under its purchase money security interest). No protection against the second tax lien is provided under this section with respect to a security interest in any other inventory acquired by H after January 10, 1969, because such other inventory is neither subject to the tax lien at the time of tax lien filing nor directly traceable to Z's disbursements.

*Example 2.* On June 1, 1971, K is awarded a contract to construct an office building. At the same time, S, a surety company, agrees in writing to insure the performance of the contract. The agreement provides that in the event S must complete the job as the result of a default by K, S will be entitled to the proceeds of the contract. In addition, the agreement provides that S is to have a security interest in all property belonging to K. On December 1, 1971, prior to the completion of the building, K defaults. On the same date, under § 301.6323(f)–1, a notice of lien is filed with respect to K's delinquent tax liability. S completes the building on June 1, 1972. Under local law S's security interest in the proceeds of the contract and S's security interest in the property of K are entitled to priority over a judgment lien arising December 1, 1971 (the date of tax lien filing) out of an unsecured obligation. Because, for purposes of an obligatory disbursement agreement which is a surety agreement, the security interest may be in the proceeds of the insured contract, S's security interest in the proceeds of the contract has priority over the tax lien even though a notice of lien was filed before S's security interest arose. Furthermore, because the insured contract was a contract to construct real property, S's security interest in any of K's tangible personal property used in the performance of the contract also has priority over the tax lien.

*Example 3.* (i) On February 2, 1970, L enters into an agreement with M, a contractor, to construct an apartment building on land owned by L. Under a separate agreement, N bank agrees to furnish funds on a short-term basis to L for the payment of amounts due to M during the course of construction. Simultaneously, X, a financial institution, makes a binding commitment to N bank and L to provide long-term financing for the project after its completion. Under its commitment, X is obligated to pay off the balance of the construction loan held by N bank upon the execution by L of a new promissory note secured by a mortgage deed of trust upon the improved property. On September 4, 1970, in

accordance with § 301.6323(f)–1, notice of lien is properly filed with respect to L's delinquent tax liability. On September 8, 1970. X obtains actual notice of the tax lien filing. On September 14, 1970, the documents creating X's security interest are executed and recorded, N bank's lien for its construction loan is released, and X makes the required disbursements to N bank. Under local law, X's security interest is protected against a judgment lien arising on September 4, 1970 (the time of tax lien filing) out of an unsecured obligation.

(ii) Because X's security interest arose by reason of a disbursement made under a written agreement entered into before tax lien filing, which constitutes an agreement to make disbursements required to be made by reason of the intervention of the rights of N bank, a person other than the taxpayer, and because X's security interest is valid under local law against a judgment lien arising as of the time of the tax lien filing out of an unsecured obligation, the tax lien is not valid with respect to X's security interest to the extent of the disbursement to N bank. The obligatory disbursement is protected under section 6323(c)(4) even if X is not subrogated to N bank's rights or X's agreement is not itself a real property construction financing agreement.

[T.D. 7429, 41 FR 35504, Aug. 23, 1976]

### § 301.6323(d)–1 45-day period for making disbursements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)–1, the lien is not valid with respect to a security interest which comes into existence, after tax lien filing, by reason of disbursements made before the 46th day after the date of tax lien filing, or if earlier, before the person making the disbursements has actual notice or knowledge of the tax lien filing, but only if the security interest is—

(1) In property which is subject, at the time of tax lien filing, to the lien imposed by section 6321 and which is covered by the terms of a written agreement entered into before tax lien filing, and

(2) Protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

For purposes of subparagraph (1) of this paragraph (a), a contract right (as defined in paragraph (c)(2)(i) of § 301.6323(c)–1) is subject, at the time of tax lien filing, to the lien imposed by section 6321 if the contract has been made by such time. An account receivable (as defined in paragraph (c)(2)(ii) of § 301.6323(c)–1) is subject, at the time of tax lien filing, to the lien imposed by section 6321 if, and to the extent, a right to payment has been earned by performance at such time. For purposes of subparagraph (2) of this paragraph (a), a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)–1. For purposes of this section, it is immaterial that the written agreement provides that the disbursements are to be made at the option of the person making the disbursements. See paragraphs (a) and (e) of § 301.6323(h)–1 for definitions of the terms ''security interest'' and ''tax lien filing,'' respectively. See paragraph (a) of § 301.6323(i)–1 for certain circumstances under which a person is deemed to have actual notice or knowledge of a fact.

(b) *Examples.* The application of this section may be illustrated by the following examples:

*Example 1.* On December 1, 1967, an assessment is made against A with respect to his delinquent tax liability. On January 2, 1968, A enters into a written agreement with B whereby B agrees to lend A $10,000 in return for a security interest in certain property owned by A. On January 10, 1968, in accordance with § 301.6323(f)–1 notice of the tax lien affecting the property is filed. On February 1, 1968, B, without actual notice or knowledge of the tax lien filing, disburses the loan to A. Under local law, the security interest arising by reason of the disbursement is entitled to priority over a judgment lien arising January 10, 1968 (the date of tax lien filing) out of an unsecured obligation. Because the disbursement was made before the 46th day after tax lien filing, because the disbursement was made pursuant to a written agreement entered into before tax lien filing, and because the resulting security interest is protected under local law against a judgment lien arising as of the date of tax lien filing out of an unsecured obligation, B's $10,000 security interest has priority over the tax lien.

*Example 2.* Assume the same facts as in example 1 except that when B disburses the $10,000 to A on February 10, 1968, B has actual knowledge of the tax lien filing. Because the disbursement was made with actual knowledge of tax lien filing, B's security interest does not have priority over the tax lien even though the disbursement was made before the 46th day after the tax lien filing. Furthermore, B is not protected under

§ 301.6323(a)–1(a) as a holder of a security interest because he had not parted with money or money's worth prior to the time the notice of tax lien was filed (January 10, 1968) even though he had made a firm commitment to A before that time.

[T.D. 7429, 41 FR 35505, Aug. 23, 1976]

### § 301.6323(e)–1 Priority of interest and expenses.

(a) *In general.* If the lien imposed by section 6321 is not valid as against another lien or security interest, the priority of the other lien or security interest also extends to each of the following items to the extent that under local law the item has the same priority as the lien or security interest to which it relates:

(1) Any interest or carrying charges (including finance, service, and similar charges) upon the obligation secured,

(2) The reasonable charges and expenses of an indenture trustee (including, for example, the trustee under a deed of trust) or agent holding the security interest for the benefit of the holder of the security interest,

(3) The reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) The reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) The reasonable costs of insuring payment of the obligation secured (including amounts paid by the holder of the security interest for mortgage insurance, such as that issued by the Federal Housing Administration), and

(6) Amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321.

(b) *Collection expenses.* The reasonable expenses described in paragraph (a)(3) of this section include expenditures incurred by the protected holder of the lien or security interest to establish the priority of his interest or to collect, by foreclosure or otherwise, the amount due him from the property subject to his lien. Accordingly, the amount of the encumbrance which is protected is increased by the amounts so expended by the holder of the security interest.

(c) *Costs of insuring, preserving, etc.* The reasonable costs of insuring, preserving, or repairing described in paragraph (a)(4) of this section include expenditures by the holder of a security interest for fire and casualty insurance on the property subject to the security interest and amounts paid by the holder of the lien or security interest to repair the property. Such reasonable costs also include the amounts paid by the holder of the lien or security interest in a leasehold to the lessor of the leasehold to preseve the leasehold subject to the lien or security interest. Accordingly, the amount of the lien or security interest which is protected is increased by the amounts so expended by the holder of the lien or security interest.

(d) *Satisfaction of liens.* The amounts described in paragraph (a)(6) of this section include expenditures incurred by the protected holder of a lien or security interest to discharge a statutory lien for State sales taxes on the property subject to his lien or security interest if both his lien or security interest and the sales tax lien have priority over a Federal tax lien. Accordingly, the amount of the lien or security interest is increased by the amounts so expended by the holder of the lien or security interest even though under local law the holder of the lien or security interest is not subrogated to the rights of the holder of the State sales tax lien. However, if the holder of the lien or security interest is subrogated, within the meaning of paragraph (b) of § 301.6323(i)–1, to the rights of the holder of the sales tax lien, he will also be entitled to any additional protection afforded by section 6323(i)(2).

[T.D. 7429, 41 FR 35506, Aug. 23, 1976]

### § 301.6323(f)–1 Place for filing notice; form.

(a) *Place for filing.* The notice of lien referred to in § 301.6323(a)–1 shall be filed as follows:

(1) *Under State laws*—(i) *Real property.* In the case of real property, notice shall be filed in one office within the State (or the county or other governmental subdivision), as designated by the laws of the State, in which the property subject to the lien is deemed

situated under the provisions of paragraph (b)(1) of this section.

(ii) *Personal property*. In the case of personal property, whether tangible or intangible, the notice shall be filed in one office within the State (or the county or other governmental subdivision), as designated by the laws of the State, in which the property subject to the lien is deemed situated under the provisions of paragraph (b)(2) of this section.

(2) *With the clerk of the United States district court*. Whenever a State has not by law designated one office which meets the requirements of subparagraph (1)(i) or (1)(ii) of this paragraph (a), the notice shall be filed in the office of the clerk of the U.S. district court for the judicial district in which the property subject to the lien is deemed situated under the provisions of paragraph (b) of this section. For example, a State has not by law designated one office meeting the requirements of subparagraph (1)(i) of this paragraph (a), if more than one office is designated within the State, county, or other governmental subdivision for filing notices with respect to all real property located in such State, county, or other governmental subdivision. A State has not by law designated one office meeting the requirements of subparagraph (1)(ii) of this paragraph (a), if more than one office is designated in the State, county, or other governmental subdivision for filing notices with respect to all of the personal property of a particular taxpayer. A state law that conforms to or reenacts a federal law establishing a national filing system does not constitute a designation by state law of an office for filing liens against personal property. Thus, if state law provides that a notice of lien affecting personal property must be filed in the office of the county clerk for the county in which the taxpayer resides and also adopts a federal law that requires a notice of lien to be filed in another location in order to attach to a specific type of property, the state is considered to have designated only one office for the filing of the notice of lien, and to protect its lien the Internal Revenue Service need only file its notice in the office of the county clerk for the county in which the taxpayer resides.

(3) *With the Recorder of Deeds of the District of Columbia*. If the property subject to the lien imposed by section 5321 is deemed situated, under the provisions of paragraph (b) of this section, in the District of Columbia, the notice shall be filed in the office of the Recorder of Deeds of the District of Columbia.

(b) *Situs of property subject to lien*. For purposes of paragraph (a) of this section, property is deemed situated as follows:

(1) *Real property*. Real property is deemed situated at its physical location.

(2) *Personal property*. Personal property, whether tangible or intangible, is deemed situated at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of subparagraph (2) of this paragraph (b), the residence of a corporation or partnership is deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is not within the United States is deemed to be in the District of Columbia.

(c) *National filing system*. The filing of federal tax liens is to be governed solely by the Internal Revenue Code and is not subject to any other federal law that may establish a national system for filing liens and encumbrances against a particular type of personal property. Thus, for example, the Service is not subject to the requirements established by the Federal Aviation Agency for filing liens against civil aircraft in Oklahoma City, Oklahoma.

(d) *Form*—(1) *In general*. The notice referred to in § 301.6323(a)–1 shall be filed on Form 668, ''Notice of Federal Tax Lien Under Internal Revenue Laws''. Such notice is valid notwithstanding any other provision of law regarding the form or content of a notice of lien. For example, omission from the notice of lien of a description of the property subject to the lien does not affect the validity thereof even though State law may require that the notice contain a description of the property subject to the lien.

(2) *Form 668 defined*. The term ''Form 668'' generally means a paper form. However, if a state in which a notice referred to in § 301.6323(a)–1 is filed permits a notice of Federal tax lien to be filed by the use of an electronic or magnetic medium, the term ''Form 668'' includes a Form 668 filed by the use of any electronic or magnetic medium permitted by that state. A Form 668 must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose regardless of the method used to file the notice of Federal tax lien.

(e) *Examples*. The provisions of this section may be illustrated by the following examples:

*Example 1*. The law of State X provides that notices of Federal tax lien affecting personal property are to be filed in the Office of the Recorder of Deeds of the county where the taxpayer resides. The laws of State X also provide that notices of lien affecting real property are to be filed with the recorder of deeds of the county where the real property is located. On June 1, 1970, in accordance with § 301.6323(f)–1, a notice of lien is filed in county M with respect to the delinquent tax liability of A. At the time the notice is filed, A is a resident of county M and owns real property in that county. One year later A moves to county N and one year after that A moves to county O. Because the situs of personal property is deemed to be at the residence of the taxpayer at the time the notice of lien is filed, the notice continues to be effectively filed with respect to A's personal property even though A no longer resides in county M. Furthermore, because the situs of real property is deemed to be at its physical location, the notice of lien also continues to be effectively filed with respect to A's real property.

*Example 2*. B is a resident of Canada but owns personal property in the United States. On January 4, 1971, in accordance with § 301.6323(f)–1, a notice of lien is filed with the Office of the Recorder of Deeds of the District of Columbia. On January 2, 1973, B changes his residence to State Y in the United States. Because the residence of a taxpayer who is not a resident of the United States is deemed to be in the District of Columbia and the situs of personal property is deemed to be at the residence of the taxpayer at the time of filing, the lien continues to be effectively filed with respect to the personal property of B located in the United States even though B has returned to the United States and taken up residence in State Y and even though B has at no time been in the District of Columbia.

*Example 3*. The law of State Z in effect before July 1, 1967, provides that notices of lien affecting real property are to be filed in the office of the recorder of deeds of the county in which the real property is located, but that if the real property is registered under the Torrens system of title registration the notice is to be filed with the registrar of titles rather than the recorder of deeds. The law of State Z in effect after June 30, 1967, provides that all notices of lien affecting real property are to be filed with the recorder of deeds of the county in which the real property is located. Accordingly, where the Torrens system is adopted by a county in State Z, there were before July 1, 1967, two offices designated for filing notices of Federal tax lien affecting real property in the county because one office was designated for Torrens real property and another office was designated for non-Torrens real property. Because State Z had not designated one office within the State, county, or other governmental subdivision for filing notices before July 1, 1967, with respect to all real property located in the State, county, or governmental subdivision, before July 1, 1967, the place for filing notices of lien under this section, affecting property located in counties adopting the Torrens system, was with the clerk of the U.S. district court for the judicial district in which the real property is located. However, after June 30, 1967, the place for filing notices of lien under this section, affecting both Torrens and non-Torrens real property in counties adopting the Torrens system is with the recorder of deeds for each such county. Notices of lien filed under this section with the clerk of the U.S. district court before July 1, 1967, remain validly filed whether or not refiled with the recorder of deeds after the change in State law or upon refiling during the required refiling period.

*Example 4*. The law of State W provides that notices of lien affecting personal property of corporations and partnerships are to be filed in the office of the Secretary of State. Notices of lien affecting personal property of any other person are to be filed in the office of the clerk of court for the county where the person resides. Because the State law designates only one filing office within State W with respect to personal property of any particular taxpayer, notices of lien filed under this section, affecting personal property, shall be filed in the office designated under State law.

*Example 5*. The law of State F provides that notices of lien affecting personal property are to be filed with the clerk of the circuit court in the county in which the personal property is located. State F has conformed state law to federal law to provide that all instruments affecting title to an interest in any civil aircraft of the United States must be recorded in the Office of the Federal Aviation Administrator (FAA) in Oklahoma City,

Oklahoma. On July 1, 1990, a tax lien arises against ABC airline, which owns aircraft situated in State F. The Internal Revenue Service files a Notice of Federal Tax Lien with the clerk of the circuit court in the county in which the aircraft is located but does not file the notice with the FAA in Oklahoma City, Oklahoma. Because the FAA system adopted by State F does not constitute a second place of filing pursuant to section 6323(f), the federal tax lien is validly filed.

*Example 6*. Assume the same facts as *Example 5* except that State F did not reenact or conform state law to the FAA requirements. The result is the same because the filing of federal tax liens is governed solely by the Internal Revenue Code, and is not subject to any other national filing system.

[T.D. 7429, 41 FR 35507, Aug. 23, 1976; 41 FR 41690, Sept. 23, 1976, as amended by T.D. 8234, 53 FR 47676, Nov. 25, 1988; T.D. 8557, 59 FR 38120, July 27, 1994]

### § 301.6323(g)–1 Refiling of notice of tax lien.

(a) *In general*—(1) *Requirement to refile*. In order to continue the effect of a notice of lien, the notice must be refiled in the place described in paragraph (b) of this section during the required refiling period (described in paragraph (c) of this section). In the event that two or more notices of lien are filed with respect to a particular tax assessment, the failure to comply with the provisions of paragraphs (b)(1)(i) and (c) of this section in respect of one of the notices of lien does not affect the effectiveness of the refiling of any other notice of lien. Except for the filing of a notice of lien required by paragraph (bb)(1)(ii) of this section (relating to a change of residence) the validity of any refiling of a notice of lien is not affected by the refiling or nonrefiling of any other notice of lien.

(2) *Effect of refiling*. A timely refiled notice of lien is effective as of the date on which the notice of lien to which it relates was effective.

(3) *Effect of failure to refile* If the district director fails to refile a notice of lien in the manner described in paragraphs (b) and (c) of this section, the notice of lien is not effective, after the expiration of the required refiling period, as against any person without regard to when the interest of the person in the property subject to the lien was acquired. However, the failure of the district director to refile a notice of lien during the required refiling period will not, following the expiration of the refiling period, affect the effectiveness of the notice with respect to:

(i) Property which is the subject matter of a suit, to which the United States is a party, commenced prior to the expiration of the required refiling period, or

(ii) Property which has been levied upon by the United States prior to the expiration of the refiling period.

However, if a suit or levy referred to in the preceding sentence is dismissed or released and the property is subject to the lien at such time, a notice of lien with respect to the property is not effective after the suit or levy is dismissed or released unless refiled during the required refiling period. Failure to refile a notice of lien does not affect the existence of the lien.

(4) *Filing of new notice*. If a notice of lien is not refiled, and if the lien remains in existence, the Internal Revenue Service may nevertheless file a new notice of lien either on the form prescribed for the filing of a notice of lien or on the form prescribed for refiling a notice of lien. This new filing must meet the requirements of section 6323(f) and § 301.6323(f)–1 and is effective from the date on which such filing is made.

(b) *Place for refiling notice of lien*—(1) *In general*. A notice of lien refiled during the required refiling period (described in paragraph (c) of this section) shall be effective only—

(i) If the notice of lien is refiled in the office in which the prior notice of lien (including a refiled notice) was filed under the provisions of section 6323; and

(ii) In any case in which 90 days or more prior to the date the refiling of the notice of lien under subdivision (i) is completed, the Internal Revenue Service receives written information (in the manner described in subparagraph (2) of this paragraph (b)) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with section 6323(f)(1)(A)(ii) in the State in which such new residence is located (or, if such new residence is located without

the United States, in the District of Columbia).

A notice of lien is considered as refiled in the office in which the prior notice or refiled notice was filed under the provisions of section 6323 if it is refiled in the office which, pursuant to a change in the applicable local law, assumed the functions of the office in which the prior notice or refiled notice was filed. If on or before the 90th day referred to in subdivision (ii) more than one written notice is received concerning a change in the taxpayer's residence, a notice of lien is required by this subdivision to be filed only with respect to the residence shown on the written notice received on the most recent date. Subdivision (ii) is applicable regardless of whether the taxpayer resides at the new residence on the date the refiling of notice of lien under subdivision (i) of this subparagraph is completed.

(2) *Notice of change of taxpayer's residence*—(i) *In general*. Except as provided in subdivision (ii) or (iii) of this subparagraph, for purposes of this section, a notice of change of a taxpayer's residence will be effective only if it (A) is received, in writing, from the taxpayer or his representative by the district director or the service center director having jurisdiction where the original notice of lien was filed, (B) relates to an unpaid tax liability of the taxpayer, and (C) states the taxpayer's name and the address of his new residence. Although it is not necessary that a written notice contain the taxpayer's identifying number authorized by section 6109, it is preferable that it include such number. For purposes of this subdivision, a notice of change of a taxpayer's residence shown on a return or an amended return (including a return of the same tax) will not be effective to notify the Internal Revenue Service.

(ii) *Notice received before August 23, 1976*. For purposes of this section, a notice of a change of a taxpayer's residence will also be effective if it (A) is received, in writing, by any office of the Internal Revenue Service before August 23, 1976, from the taxpayer or his representative, (B) relates to an unpaid tax liability of the taxpayer, and (C) states the taxpayer's name and the address of his new residence.

(iii) *By return or amended return*. For purposes of this section, in the case of a notice of lien which relates to an assessment of tax made after December 31, 1966, a notice of change of a taxpayer's residence will also be effective if it is contained in a return or amended return of the same type of tax filed with the Internal Revenue Service by the taxpayer or his representative which on its face indicates that there is a change in the taxpayer's address and correctly states the taxpayer's name, the address of his new residence, and his identifying number required by section 6109.

(iv) *Other rules applicable*. Except as provided in subdivisions (i), (ii), and (iii) of this subparagraph, no communication (either written or oral) to the Internal Revenue Service will be considered effective as notice of a change of a taxpayer's residence under this section, whether or not the Service has actual notice or knowledge of the taxpayer's new residence. For the purpose of determining the date on which a notice of change of a taxpayer's residence is received under this section, the notice shall be treated as received on the date it is actually received by the Internal Revenue Service without reference to the provisions of section 7502.

(3) *Examples*. The provisions of this section may be illustrated by the following examples:

*Example 1*. A, a delinquent taxpayer, is a resident of State M and owns real property in State N. In accordance with § 301.6323(f)–1, notices of lien are filed in States M and N. In order to continue the effect of the notice of lien filed in M, the Internal Revenue Service must refile, during the required refiling period, the notice of lien with the appropriate office in M but is not required to refile the notice of lien with the appropriate office in N. Similarly, in order to continue the effect of the notice of lien filed in State N, the Internal Revenue Service must refile, during the required refiling period, the notice of lien with the appropriate office in N but is not required to refile the notice of lien with the appropriate office in M.

*Example 2*. B, a delinquent taxpayer, is a resident of State M. In accordance with § 301.6323(f)–1, notice of lien is properly filed in that State. One year before the beginning of the required refiling period, B establishes his residence in State N, and B immediately notifies the Internal Revenue Service of his change in residence in accordance with the provisions of paragraph (b)(2) of this section.

In order to continue the effect of the notice of lien filed in M, the Internal Revenue Service must refile, during the required refiling period, notices of lien with (i) the appropriate office in M, and (ii) the appropriate office in N, because B properly notified the Internal Revenue Service of his change in residence to N more than 89 days prior to the date refiling of the notice of lien in M is completed. Even if the Internal Revenue Service had acquired actual notice or knowledge of B's change in residence by other means, if B had not properly notified the Internal Revenue Service of his change in residence, the effect of the notice of lien in State M could have been continued without any refiling in State N.

*Example 3.* C, a delinquent taxpayer, is a resident of State O. In accordance with § 301.6323(f)–1, notice of lien is properly filed in that State. Four years before the required refiling period, C establishes his residence in State P, and C immediately notifies the Internal Revenue Service of his change in residence in accordance with the provisions of paragraph (b)(2) of this section. Three years before the required refiling period, C establishes his residence in State R, and again C immediately notifies the Internal Revenue Service of his change in residence in accordance with the provisions of paragraph (2) of this section. In order to continue the effect of the notice of lien filed in O, the Internal Revenue Service must refile, during the required refiling period, notices of lien with (i) the appropriate office in O, and (ii) the appropriate office in R. Refiling in R is required because the notice received by the Service of C's change in residence to R was the most recent notice received more than 89 days prior to the date refiling in O is completed. The notice of lien is not required to be filed in P, even though C properly notified the Internal Revenue Service of his change in residence to P, because such notice is not the most recent one received.

*Example 4.* Assume the same facts as in example 3, except that C does not notify the Internal Revenue Service of his change in residence to R in accordance with the provisions of paragraph (b)(2) of this section. In order to continue the effect of the notice of lien filed in O, the Internal Revenue Service must refile, during the required refiling period, the notice of lien with (i) the appropriate office in O, and (ii) the appropriate office in P. Refiling in P is required because C properly notified the Internal Revenue Service of his change in residence to P, even though C is not a resident of P on the date refiling of the notice of lien in O is completed. The Internal Revenue Service is not required to file a notice of lien in R because C did not properly notify the Service of his change in residence to R.

*Example 5.* D, a delinquent taxpayer, is a resident of State M and owns real property in States N and O. In accordance with § 301.6323(f)–1, the Internal Revenue Service files notices of lien in M, N, and O States. Five years and 6 months after the date of the assessment shown on the notice of lien, D establishes his residence in P, and at that time the Internal Revenue Service received from D a notification of his change in residence in accordance with the provisions of paragraph (b)(2) of this section. On a date which is 5 years and 7 months after the date of the assessment shown on the notice of lien, the Internal Revenue Servbice properly refiles notices of lien in M, N, and O which refilings are sufficient to continue the effect of each of the notice of lien. The Internal Revenue Service is not required to file a notice of lien in P because D did not notify the Internal Revenue Service of his change of residence to P more than 89 days prior to the date each of the refilings in M, N, and O was completed.

*Example 6.* Assume the same facts as in example 5 except that the refiling of the notice of lien in O occurs 100 days after D notifies the Internal Revenue Service of hischange in residence to P in accordance with the provisions of paragraph (b)(2) of this section. In order to continue the effect of the notice of lien filed in O, in addition to refiling the notice of lien in O, the Internal Revenue Service must also refile, during the required refiling period, a notice of lien in P because D properly notified the Internal Revenue Service of his change of residence to P more than 89 days prior to the date the refiling in O was completed. However, the Internal Revenue Service is not required to refile the notice of lien in P to maintain the effect of the notices of lien in M and N because D did not notify the Internal Revenue Service of his change in residence to P more than 89 days prior to the date the refilings in M and N were completed.

*Example 7.* E, a delinquent taxpayer, is a resident of State T. Because T has not designated one office in the case of personal property for filing notices of lien in accordance with the provisions of section 6323(f)(1)(A)(ii), the Internal Revenue Service properly files a notice of lien with the clerk of the appropriate United States district court. However, solely as a matter of convenience for those who may have occasion to search for notices of lien, and not as a matter of legal effectiveness, the Internal Revenue Service also files notice of lien with the recorder of deeds of the county in T where E resides. In addition, the Internal Revenue Service sends a copy of the notice of lien to the X life insurance company to give the company actual notice of the notice of lien. In order to continue the effect of the notice of lien, the Internal Revenue Service must refile the notice of lien with the clerk of the appropriate United States district court during the required refiling period. In order to

continue the effect of the notice of the lien, it is not necessary to refile the notice of lien with the Recorder of Deeds of the county where E resides, because the refiling of the notice of lien with the recorder of deeds does not constitute a proper filing for the purposes of section 6323(f). In addition, to continue the effect of the notice of lien under this section it is not necessary to send a copy of the notice of lien to the X life insurance company, because the sending of a notice of lien to an insurance company does not constitute a proper filing for the purposes of section 6323(f).

(c) *Required refiling period*—(1) *In general*. For the purpose of this section, except as provided in subparagraph (2) of this paragraph (c), the term ''required refiling period'' means—

(i) The 1-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax, and

(ii) The 1-year period ending with the expiration of 6 years after the close of the preceding required refiling period for such notice of lien.

(2) *Tax assessments made before January 1, 1962*. If the assessment of the tax is made before January 1, 1962, the first required refiling period shall be the calendar year 1967. Thus, to maintain the effectiveness of any notice of lien on file which relates to a lien which arose before January 1, 1962, the Internal Revenue Service will refile the notice of lien during the calendar year 1967.

(3) *Examples*. The provisions of this paragraph may be illustrated by the following examples:

*Example 1*. On March 1, 1963, an assessment of tax is made against B, a delinquent taxpayer, and a lien for the amount of the assessment arises on that date. On July 1, 1963, in accordance with § 301.6323(f)–1, a notice of lien is filed. The notice of lien filed on July 1, 1963, is effective through March 31, 1969. The first required refiling period for the notice of lien begins on April 1, 1968, and ends on March 31, 1969. A refiling of the notice of lien during that period will extend the effectiveness of the notice of lien filed on July 1, 1963, through March 31, 1975. The second required refiling period for the notice of lien begins on April 1, 1974, and ends of March 31, 1975.

*Example 2*. Assume the same facts as in example 1, except that although the Internal Revenue Service fails to refile a notice of lien during the first required refiling period (April 1, 1963, through March 31, 1969), a notice of lien is filed on June 2, 1971, in accordance with § 301.6323(f)–1. Because of this filing, the notice of lien filed on June 2, 1971, is effective as of June 2, 1971. That notice must be refiled during the 1-year period ending on March 31, 1975, if it is to continue in effect after March 31, 1975.

*Example 3*. On April 1, 1960, an assessment of tax is made against B, a delinquent taxpayer, and a tax lien for the amount of the assessment arises on that date. On June 1, 1962, in accordance with § 301.6323(f)–1, a notice of lien is filed. Because the assessment of tax was made before January 1, 1962, the notice of lien filed on June 1, 1962, is effective through December 31, 1967. The first required refiling period for the notice of lien is the calendar year 1967. A refiling of the notice of lien during 1967 will extend the effectiveness of the notice of lien filed on June 1, 1962, through December 31, 1973.

[T.D. 7429, 41 FR 35509, Aug. 23, 1976]

### § 301.6323(h)–0 Scope of definitions.

Except as otherwise provided by § 301.6323(h)–1 the definitions provided by § 301.6323(h)–1 apply for purposes of §§ 301.6323(a)–1 through 301.6324–1.

[T.D. 7429, 41 FR 35509, Aug. 23, 1976]

### § 301.6323(h)–1 Definitions.

(a) *Security interest*—(1) *In general*. The term ''security interest'' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time—

(i) If, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien (as provided in subparagraph (2) of this paragraph (a)) arising out of an unsecured obligation; and

(ii) To the extent that, at such time, the holder has parted with money or money's worth (as defined in subparagraph (3) of this paragraph (a)).

For purposes of this subparagraph, a contract right (as defined in paragraph (c)(2)(i) of § 301.6323(c)–1) is in existence when the contract is made. An account receivable (as defined in paragraph (c)(2)(ii) of § 301.6323(c)–1) is in existence when, and to the extent, a right to payment is earned by performance.

A security interest must be in existence, within the meaning of this paragraph, at the time as of which its priority against a tax lien is determined. For example, to be afforded priority under the provisions of paragraph (a) of § 301.6323(a)–1 a security interest must be in existence within the meaning of this paragraph before a notice of lien is filed.

(2) *Protection against a subsequent judgment lien.* (i) For purposes of this paragraph, a security interest is deemed to be protected against a subsequent judgment lien on—

(A) The date on which all actions required under local law to establish the priority of a security interest against a judgment lien have been taken, or

(B) If later, the date on which all required actions are deemed effective, under local law, to establish the priority of the security interest against a judgment lien.

For purposes of this subdivision, the dates described in (A) and (B) of this subdivision (i) shall be determined without regard to any rule or principle of local law which permits the relation back of any requisite action to a date earlier than the date on which the action is actually performed. For purposes of this paragraph, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of this section.

(ii) The application of this subparagraph may be illustrated by the following example:

*Example.* (i) Under the law of State X, a security interest in negotiable instruments, stocks, bonds, or other securities may be perfected, and hence protected against a judgment lien, only by the secured party taking possession of the instruments or securities. However, a security interest in such intangible personal property is considered to be temporarily perfected for a period of 21 days from the time the security interest attaches, to the extent consideration other than past consideration is given under a written security agreement. Under the law of X, a security interest attaches to such collateral when there is an agreement between the creditor and debtor that the interest attaches, the debtor has rights in the property, and consideration is given by the creditor. Under the law of X, in the case of temporary perfection, the security interest in such property is protected during the 21-day period against a judgment lien arising, after the security interest attaches, out of an unsecured obligation. Upon expiration of the 21-day period, the holder of the security interest must take possession of the collateral to continue perfection.

(ii) Because the security interest is protected during the 21-day period against a subsequent judgment lien arising out of an unsecured obligation, and because the taking of possession before the conclusion of the period of temporary perfection is not considered, for purposes of subdivision (i) of this subparagraph, to be a requisite action which relates back to the beginning of such period, the requirements of this paragraph are satisfied. However, because taking possession is a condition precedent to continued perfection, possession of the collateral is a requisite action to establish such priority after expiration of the period of temporary perfection. If there is a lapse of perfection for failure to take possession, the determination of when the security interest exists (for purposes of protection against the tax lien) is made without regard to the period of temporary perfection.

(3) *Money or money's worth.* For purposes of this paragraph, the term ''money or money's worth'' includes money, a security (as defined in paragraph (d) of this section), tangible or intangible property, services, and other consideration reducible to a money value. Money or money's worth also includes any consideration which otherwise would constitute money or money's worth under the preceding sentence which was parted with before the security interest would otherwise exist if, under local law, past consideration is sufficient to support an agreement giving rise to a security interest. A relinquishing or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights is not a consideration in money or money's worth. Nor is love and affection, promise of marriage, or any other consideration not reducible to a money value a consideration in money or money's worth.

(4) *Holder of a security interest.* For purposes of this paragraph, the holder of a security interest is the person in whose favor there is a security interest. For provisions relating to the treatment of a purchaser of commercial financing security as a holder of a security interest, see § 301.6323(c)–1(e).

(b) *Mechanic's lienor*—(1) *In general.* The term ''mechanic's lienor'' means

any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement (including demolition) of the property. A mechanic's lienor is treated as having a lien on the later of—

(i) The date on which the mechanic's lien first becomes valid under local law against subsequent purchasers of the real property without actual notice, or

(ii) The date on which the mechanic's lienor begins to furnish the services, labor, or materials.

(2) *Example*. The provisions of this paragraph may be illustrated by the following example:

*Example*. On February 1, 1968, A lets a contract for the construction of an office building on property owned by him. On March 1, 1968, in accordance with § 301.6323(f)–1, a notice of lien for delinquent Federal taxes owed by A is filed. On April 1, 1968, B, a lumber dealer, delivers lumber to A's property. On May 1, 1968, B records a mechanic's lien against the property to secure payment of the price of the lumber. Under local law, B's mechanic's lien is valid against subsequent purchasers of real property without notice from February 1, 1968, which is the date the construction contract was entered into. Because the date on which B's mechanic's lien is valid under local law against subsequent purchasers is February 1, and the date on which B begins to furnish the materials is April 1, the date on which B becomes a mechanic's lienor within the meaning of this paragraph is April 1, the later of these two dates. Under paragraph (a) of § 301.6323(a)–1, B's mechanic's lien will not have priority over the Federal tax lien, even though under local law the mechanic's lien relates back to the date of the contract.

(c) *Motor vehicle*. (1) The term ''motor vehicle'' means a self-propelled vehicle which is registered for highway use under the laws of any State, the District of Columbia, or a foreign country.

(2) A motor vehicle is ''registered for highway use'' at the time of a sale if immediately prior to the sale it is so registered under the laws of any State, the District of Columbia, or a foreign country. Where immediately prior to the sale of a motor vehicle by a dealer, the dealer is permitted under local law to operate it under a dealer's tag, license, or permit issued to him, the motor vehicle is considered to be registered for highway use in the name of the dealer at the time of the sale.

(d) *Security*. The term ''security'' means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(e) *Tax lien filing*. The term ''tax lien filing'' means the filing of notice of the lien imposed by section 6321 in accordance with § 301.6323(f)–1.

(f) *Purchaser*—(1) *In general*. The term ''purchaser'' means a person who, for adequate and full consideration in money or money's worth (as defined in subparagraph (3) of this paragraph (f)), acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice.

(2) *Interest in property*. For purposes of this paragraph, each of the following interest is treated as an interest in property, if it is not a lien or security interest:

(i) A lease of property,

(ii) A written executory contract to purchase or lease property,

(iii) An option to purchase or lease property and any interest therein, or

(iv) An option to renew or extend a lease of property.

(3) *Adequate and full consideration in money or money's worth*. For purposes of this paragraph, the term ''adequate and full consideration in money or money's worth'' means a consideration in money or money's worth having a reasonable relationship to the true value of the interest in property acquired. See paragraph (a)(3) of this section for definition of the term ''money or money's worth.'' Adequate and full consideration in money or money's worth may include the consideration in a bona fide bargain purchase. The term also includes the consideration in a transaction in which the purchaser has

not completed performance of his obligation, such as the consideration in an installment purchase contract, even though the purchaser has not completed the installment payments.

(4) *Examples*. The provisions of this paragraph may be illustrated by the following examples:

*Example 1*. A enters into a contract for the purchase of a house and lot from B. Under the terms of the contract A makes a down payment and is to pay the balance of the purchase price in 120 monthly installments. After payment of the last installment, A is to receive a deed to the property. A enters into possession, which under local law protects his interest in the property against subsequent purchasers without actual notice. After A has paid five monthly installments, a notice of lien for Federal taxes is filed against B in accordance with § 301.6323(f)–1. Because the contract is an executory contract to purchase property and is valid under local law against subsequent purchasers without actual notice, A qualifies as a purchaser under this paragraph.

*Example 2*. C owns a residence which he leases to his son-in-law, D, for a period of 5 years commencing January 1, 1968. The lease provides for payment of $100 a year, although the fair rental value of the residence is $2,500 a year. The lease is recorded on December 31, 1967. On March 1, 1968, a notice of tax lien for unpaid Federal taxes of C is filed in accordance with § 301.6323(f)–1. Under local law, D's interest is protected against subsequent purchasers without actual notice. However, because the rental paid by D has no reasonable relationship to the value of the interest in property acquired, D does not qualify as a purchaser under this paragraph.

(g) *Judgment lien creditor*. The term ''judgment lien creditor'' means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term ''judgment'' does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.

[T.D. 7429, 41 FR 35511, Aug. 23, 1976]

### § 301.6323(i)–1 Special rules.

(a) *Actual notice or knowledge*. For purposes of subchapter C (section 6321 and following), chapter 64 of the Code, an organization is deemed, in any transaction, to have actual notice or knowledge of any fact from the time the fact is brought to the attention of the individual conducting the transaction, and in any event from the time the fact would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(b) *Subrogation*—(1) *In general*. Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324. Thus, if a tax lien imposed by section 6321 or 6324 is not valid with respect to a particular interest as against the holder of that interest, then the tax lien also is not valid

with respect to that interest as against any person who, under local law, is a successor in interest to the holder of that interest.

(2) *Example*. The application of this paragraph may be illustrated by the following example:

*Example*. On February 1, 1968, an assessment is made and a tax lien arises with respect to A's delinquent tax liability. On February 25, 1968, in accordance with § 301.6323(f)–1, a notice of lien is properly filed. On March 1, 1968, A negotiates a loan from B, the security for which is a second mortgage on property owned by A. The first mortgage on the property is held by C and has priority over the tax lien. Upon default by A, C begins proceedings to foreclose upon the first mortgage. On September 1, 1968, B pays the amount of principal and interest in default to C in order to protect the second mortgage against the pending foreclosure of C's senior mortgage. Under local law, B is subrogated to C's rights to the extent of the payment to C. Therefore, the tax lien is invalid against B to the extent he became subrogated to C's rights even though the tax lien is valid against B's second mortgage on the property.

(c) *Disclosure of amount of outstanding lien*. If a notice of lien has been filed (see § 301.6323(f)–1), the amount of the outstanding obligation secured by the lien is authorized to be disclosed as a matter of public record on Form 668 ''Notice of Federal Tax Lien Under Internal Revenue Laws.'' The amount of the outstanding obligation secured by the lien remaining unpaid at the time of an inquiry is authorized to be disclosed to any person who has a proper interest in determining this amount. Any person who has a right in the property or intends to obtain a right in the property by purchase or otherwise will, upon presentation by him of satisfactory evidence be considered to have a proper interest. Any person desiring this information may make his request to the office of the Internal Revenue Service named on the notice of lien with respect to which the request is made. The request should clearly describe the property subject to the lien, identify the applicable lien, and give the reasons for requesting the information.

[T.D. 7429, 41 FR 35511, Aug. 23, 1976]

**§ 301.6323(j)–1 Withdrawal of notice of federal tax lien in certain circumstances.**

(a) *In general*. The Commissioner or his delegate (Commissioner) may withdraw a notice of federal tax lien filed under this section, if the Commissioner determines that any of the conditions in paragraph (b) of this section exist. A notice of federal tax lien is withdrawn by the filing by the Commissioner of a notice of withdrawal in the office in which the notice of federal tax lien is filed. If a notice of withdrawal is filed, chapter 64 of subtitle F, relating to collection, will be applied as if the withdrawn notice had never been filed. A copy of the notice of withdrawal will be provided to the taxpayer. Upon written request by a taxpayer with respect to whom a notice of federal tax lien has been or will be withdrawn, the Commissioner will promptly make reasonable efforts to notify any credit reporting agency and any financial institution or creditor identified by the taxpayer of the withdrawal of such notice. The withdrawal of a notice of federal tax lien will not affect the underlying federal tax lien.

(b) *Conditions authorizing withdrawal*. The Commissioner may authorize the withdrawal of a notice of federal tax lien upon determining that one of the following conditions exists:

(1) *Premature or not in accordance with administrative procedures*. The filing of the notice of federal tax lien was premature or otherwise not in accordance with the administrative procedures of the Secretary.

(2) *Installment agreement*. The taxpayer has entered into an agreement under section 6159 to satisfy the liability for which the lien was imposed by means of installment payments. Entry into an installment agreement may not, however, be the basis for withdrawal of a notice of lien if the installment agreement specifically provides that a notice of federal tax lien will not be withdrawn.

(3) *Facilitate collection*. The withdrawal of the notice of federal tax lien will facilitate the collection of the tax liability for which the lien was imposed.

(4) *Best interests of the United States and the taxpayer*—(i) *In general*. The

taxpayer or the National Taxpayer Advocate (or his delegate) has consented to the withdrawal of the notice of federal tax lien, and withdrawal of the notice would be in the best interest of the taxpayer, as determined by the taxpayer or the National Taxpayer Advocate (or his delegate), and in the best interest of the United States, as determined by the Commissioner.

(ii) *Best interest of the taxpayer*. When a taxpayer requests the withdrawal of notice of federal tax lien based on the best interests of the United States and the taxpayer, the National Taxpayer Advocate (or his delegate) generally will determine whether the withdrawal of the notice of federal tax lien is in the best interest of the taxpayer. If, however, a taxpayer requests the Commissioner to withdraw a notice and has not specifically requested the National Taxpayer Advocate (or his delegate) to determine the taxpayer's best interest, a finding by the Commissioner that the withdrawal of notice is in the best interest of the taxpayer will be sufficient to support withdrawal. If the Commissioner decides independently of a request by the taxpayer to withdraw a notice of federal tax lien, the taxpayer or the National Taxpayer Advocate (or his delegate) must consent to the withdrawal.

(5) *Examples*. The following examples illustrate the provisions of this paragraph (b):

*Example 1*. A owes $1,000 in Federal income taxes. The IRS files a notice of federal tax lien to secure A's tax liability. However, the IRS failed to follow procedure provided by the Internal Revenue Manual (but not required by statute) with regard to managerial approval prior to the filing of a notice of federal tax lien. The Commissioner may withdraw the notice of federal tax lien because the filing of the notice was not in accordance with the Secretary's administrative procedures.

*Example 2*. A owes $1,000 in federal income taxes. A enters into an agreement to pay the outstanding federal income tax liability in installments. The agreement provides that a notice of federal tax lien may be filed if the taxpayer defaults. A timely pays the installments each month and has not defaulted in any way. Eleven months after entering into the installment agreement, the Internal Revenue Service files a notice of federal tax lien. Noting that there has been no default, the taxpayer asks the Internal Revenue Service to withdraw the notice of federal tax lien. In this situation, the Commissioner may withdraw the notice of federal tax lien because the taxpayer has entered into an installment agreement.

*Example 3*. A is an employee of X Corporation. A notice of federal tax lien has been filed to secure an outstanding tax liability against A. A, who has no assets and no other secured creditors, has agreed to pay the balance of tax due through payroll deductions at a rate higher than the Internal Revenue Service could obtain through a wage levy in order to get the notice of federal tax lien withdrawn. X Corporation has agreed to allow A to enter into a payroll deduction agreement. In this situation, the Commissioner may withdraw the notice of federal tax lien to facilitate collection.

*Example 4*. A is owner of a farm machinery dealership against whom a notice of federal tax lien has been filed to secure an outstanding tax liability. A currently is paying the tax liability by an installment agreement. X Corporation has agreed to provide A with 100 tractors to increase A's inventory if the notice of federal tax lien is withdrawn. A asks the Internal Revenue Service to withdraw the notice of federal tax lien. The Commissioner determines that the larger inventory would enable A to generate additional tractor sales. Increased sales would enable A to increase the amount of installment payments and, consequently, reduce the amount of time needed to satisfy the liability. A, who has no other assets or secured creditors, has agreed to modify the installment agreement. The Commissioner may withdraw the notice of federal tax lien because the withdrawal is in the best interest of the taxpayer and the United States.

(c) *Determinations by the Commissioner*. The Commissioner must determine whether any of the conditions authorizing the withdrawal of a notice of federal tax lien exist if a taxpayer submits a request for withdrawal in accordance with paragraph (d) of this section. The Commissioner may also make this determination independent of a request from the taxpayer based on information received from a source other than the taxpayer. If the Commissioner determines that conditions authorizing the withdrawal are not present, the Commissioner may not authorize the withdrawal. If the Commissioner determines conditions for withdrawal are present, the Commissioner may (but is not required to) authorize the withdrawal.

(d) *Procedures for request for withdrawal*—(1) *Manner*. A request for the

withdrawal of a notice of federal tax lien must be made in writing in accordance with procedures prescribed by the Commissioner.

(2) *Form.* The written request will include the following information and documents—

(i) Name, current address, and taxpayer identification number of the person requesting the withdrawal of notice of federal tax lien;

(ii) A copy of the notice of federal tax lien affecting the taxpayer's property, if available;

(iii) The grounds upon which the withdrawal of notice of federal tax lien is being requested;

(iv) A list of the names and addresses of any credit reporting agency and any financial institution or creditor that the taxpayer wishes the Commissioner to notify of the withdrawal of notice of federal tax lien; and

(v) A request to disclose the withdrawal of notice of federal tax lien to the persons listed in paragraph (d)(2)(iv) of this section.

(e) *Supplemental list of credit agencies, financial institutions, and creditors*—(1) *In general.* If the Commissioner grants a withdrawal of notice of federal tax lien, the taxpayer may supplement the list in paragraph (d)(2)(iv) of this section. If no list was provided in the request to withdraw the notice of federal tax lien, the list in paragraph (d)(2)(iv) of this section and the request for notification in paragraph (d)(2)(v) of this section may be submitted after the notice is withdrawn.

(2) *Manner.* A request to supplement the list of any credit agencies and any financial institutions or creditors that the taxpayer wishes the Commissioner to notify of the withdrawal of notice of federal tax lien must be made in writing in accordance with procedures prescribed by the Commissioner.

(3) *Form.* The request must include the following information and documents—

(i) Name, current address, and taxpayer identification number of the taxpayer requesting the notification of any credit agency or any financial institution or creditor of the withdrawal of notice of federal tax lien;

(ii) A copy of the notice of withdrawal, if available;

(iii) A supplemental list, identified as such, of the names and addresses of any credit reporting agency and any financial institution or creditor that the taxpayer wishes the Commissioner to notify of the withdrawal of notice of federal tax lien; and

(iv) A request to disclose the withdrawal of notice of federal tax lien to the persons listed in paragraph (e)(3)(iii) of this section.

(f) *Effective date.* This section applies on or after June 22, 2001, with respect to a withdrawal of any notice of federal tax lien.

[T.D. 8951, 66 FR 33465, June 22, 2001]

### § 301.6324–1 Special liens for estate and gift taxes; personal liability of transferees and others.

(a) *Estate tax.* (1) A lien for estate tax attaches at the date of the decedent's death to every part of the gross estate, whether or not the property comes into possession of the duly qualified executor or administrator. The lien attaches to the extent of the tax shown to be due by the return and of any deficiency in tax found to be due upon review and audit. If the estate tax is not paid when due, then the spouse, transferee, trustee (except the trustee of an employee's trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, shall be personally liable for the tax to the extent of the value, at the time of the decedent's death, of the property.

(2) Unless the tax is paid in full or becomes unenforceable by reason of lapse of time, and except as otherwise provided in paragraph (c) of this section, the lien upon the entire property constituting the gross estate continues for a period of 10 years after the decedent's death, except that the lien shall be divested with respect to—

(i) The portion of the gross estate used for the payment of charges against the estate and expenses of its administration allowed by any court having jurisdiction thereof;

(ii) Property included in the gross estate under sections 2034 to 2042, inclusive, which is transferred by (or transferred by the transferee of) the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary to a purchaser or holder of a security interest. In such case a like lien attaches to all the property of the spouse, transferee, trustee, surviving tenant, person in possession, beneficiary, or transferee of any such person, except the part which is transferred to a purchaser or a holder of a security interest. See section 6323(h) (1) and (6) and the regulations thereunder, respectively, for the definitions of ''security interest'' and ''purchaser'';

(iii) The portion of the gross estate (or any interest therein) which has been transferred to a purchaser or holder of a security interest if payment is made of the full amount of tax determined by the district director pursuant to a request of the fiduciary (executor, in the case of the estate of a decedent dying before January 1, 1971) for discharge from personal liability as authorized by section 2204 (relating to discharge of fiduciary from personal liability) but there is substituted a like lien upon the consideration received from the purchaser or holder of a security interest; and

(iv) Property as to which the district director has issued a certificate releasing a lien under section 6325(a) and the regulations thereunder.

(b) *Lien for gift tax*. Except as provided in paragraph (c) of this section, a lien attaches upon all gifts made during the period for which the return was filed (see § 25.6019–1 of this chapter) for the amount of tax imposed upon the gifts made during such period. The lien extends for a period of 10 years from the time the gifts are made, unless the tax is sooner paid in full or becomes unenforceable by reason of lapse of time. If the tax is not paid when due, the donee of any gift becomes personally liable for the tax to the extent of the value of his gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest is divested of the lien, but a like lien, to the extent of the value of the gift, attaches to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest. See section 6323(h) (1) and (6) and the regulations thereunder, respectively, for the definitions of ''security interest'' and ''purchaser.''

(c) *Exceptions*. (1) A lien described in either paragraph (a) or paragraph (b) of this section is not valid against a mechanic's lienor (as defined in section 6323(h) (2) and the regulations thereunder) and, subject to the conditions set forth under section 6323(b) (relating to protection for certain interests even though notice filed), is not valid with respect to any lien or interest described in section 6323(b) and the regulations thereunder.

(2) If a lien described in either paragraph (a) or paragraph (b) of this section is not valid against a lien or security interest (as defined in section 6323(h) (1) and the regulations thereunder), the priority of the lien or security interest extends to any item described in section 6323(e) (relating to priority of interest and expenses) to the extent that, under local law, the item has the same priority as the lien or security interest to which it relates.

(d) *Application of lien imposed by section 6321*. The general lien under section 6321 and the special lien under subsection (a) or (b) of section 6324 for the estate or gift tax are not exclusive of each other, but are cumulative. Each lien will arise when the conditions precedent to the creation of such lien are met and will continue in accordance with the provisions applicable to the particular lien. Thus, the special lien may exist without the general lien being in force, or the general lien may exist without the special lien being in force, or the general lien and the special lien may exist simultaneously, depending upon the facts and pertinent statutory provisions applicable to the respective liens.

[T.D. 7238, 37 FR 28740, Dec. 29, 1972]

**§ 301.6324A-1 Election of and agreement to special lien for estate tax deferred under section 6166 or 6166A.**

(a) *Election of lien*. If payment of a portion of the estate tax is deferred under section 6166 or 6166A (as in effect prior to its repeal by Economic Recovery Tax Act of 1981), an executor of a decedent's estate who seeks to be discharged from personal liability may elect a lien in favor of the United States in lieu of the bonds required by sections 2204 and 6165. This election is made by applying to the Internal Revenue Service office where the estate tax return is filed at any time prior to payment of the full amount of estate tax and interest due. The application is to be a notice of election requesting the special lien provided by section 6324A and is to be accompanied by the agreement described in paragraph (b)(1) of this section.

(b) *Agreement to lien*—(1) *In general*. A lien under this section will not arise unless all parties having any interest in all property designated in the notice of election as property to which the lien is to attach sign an agreement in which they consent to the creation of the lien. (Property so designated need not be property included in the decedent's estate.) The agreement is to be attached to the notice in which the lien under section 6324A is elected. It must be in a form that is binding on all parties having any interest on the property and must contain the following:

(i) The decedent's name and taxpayer identification number as they appear on the estate tax return;

(ii) The amount of the lien;

(iii) The fair market value of the property to be subject to the lien as of the date of the decedent's death and the date of the election under this section;

(iv) The amount, as of the date of the decedent's death and the date of the election, of all encumbrances on the property, including mortgages and any lien under section 6324B;

(v) A clear description of the property which is to be subject to the lien, and in the case of property other than land, a statement of its estimated remaining useful life; and

(vi) Designation of an agent (including the agent's address) for the beneficiaries of the estate and the consenting parties to the lien for all dealings with the Internal Revenue Service on matters arising under section 6166 or 6166A (as in effect prior to its repeal by Economic Recovery Tax Act of 1981), or under section 6324A.

(2) *Persons having an interest in designated property*. An interest in property is any interest which as of the date of the election can be asserted under applicable local law so as to affect the disposition of any property designated in the agreement required under this section. Any person in being at the date of the election who has any such interest in the property, whether present or future, or vested or contingent, must enter into the agreement. Included among such persons are owners of remainder and executory interests, the holders of general or special powers of appointment, beneficiaries of a gift over in default of exercise of any such power, co-tenants, joint tenants, and holders of other undivided interests when the decedent held a joint or undivided interest in the property, and trustees of trusts holding any interest in the property. An heir who has the power under local law to caveat (challenge) a will and thereby affect disposition of the property is not, however, considered to be a person with an interest in property under section 6324A solely by reason of that right. Likewise, creditors of an estate are not such persons solely by reason of their status as creditors.

(3) *Consent on behalf of interested party*. If any person required to enter into the agreement provided for by this paragraph either desires that an agent act for him or her or cannot legally bind himself or herself due to infancy or other incompetency, a representative authorized under local law to bind the interested party in an agreement of this nature is permitted to sign the agreement on his or her behalf.

(4) *Duties of agent designated in agreement*. The Internal Revenue Service will contact the agent designated in the agreement under paragraph (b)(1) on all matters relating to continued qualification of the estate under section 6166 or 6166A (as in effect prior to

its repeal by Economic Recovery Tax Act of 1981) and on all matters relating to the special lien arising under section 6324A. It is the duty of the agent as attorney-in-fact for the parties with interests in the property subject to the lien under section 6324A to furnish the Service with any requested information and to notify the Service of any event giving rise to acceleration of the deferred amount of tax.

(c) *Partial substitution of bond for lien.* If the amount of unpaid estate tax plus interest exceeds the value (determined for purposes of section 6324A(b)(2)) of property listed in the agreement under paragraph (b) of this section, the Internal Revenue Service may condition the release from personal liability upon the executor's submitting an agreement listing additional property or furnishing an acceptable bond in the amount of such excess.

(d) *Relation of sections 6324A and 2204.* The lien under section 6324A is deemed to be a bond under section 2204 for purposes of determining an executor's release from personal liability. If an election has been made under section 6324A, the executor may not substitute a bond pursuant to section 2204 in lieu of that lien. If a bond has been supplied under section 2204, however, the executor may, by filing a proper notice of election and agreement, substitute a lien under section 6324A for any part or all of such bond.

(e) *Relation of sections 6324A and 6324.* If there is a lien under this section on any property with respect to an estate, that lien is in lieu of the lien provided by section 6324 on such property with respect to the same estate.

(f) *Section 6324A lien to be in lieu of bond under section 6165.* The lien under section 6324A is in lieu of any bond otherwise required under section 6165 with respect to tax to be paid in installments under section 6166 or section 6166A (as in effect prior to its repeal by Economic Recovery Tax Act of 1981).

(g) *Special rule for estates for which elections under section 6324A are made on or before August 30, 1980.* If a lien is elected under section 6324A on or before August 30, 1980, the original election may be revoked. To revoke an election, the executor must file a notice of revocation containing the decedent's name, date of death, and taxpayer identification number with the Internal Revenue Service office where the original estate tax return for the decedent was filed. The notice must be filed on or before January 31, 1981 (or if earlier, the date on which the period of limitation for assessment expires).

(Approved by the Office of Management and Budget under control number 1545–0754)

(Secs. 2032A and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1856, 68A Stat. 917; 26 U.S.C. 2032A, 7805); secs. 6324A(a) and 7805 of the Internal Revenue Code of 1954 (90 Stat. 1808, 68A Stat. 917; 26 U.S.C. 6324A(a), 7805))

[T.D. 7710, 45 FR 50747, July 31, 1980, as amended by T.D. 7941, 49 FR 4469, Feb. 7, 1984]

### § 301.6325–1 Release of lien or discharge of property.

(a) *Release of lien*—(1) *Liability satisfied or unenforceable.* Any district director may issue a certificate of release of a lien imposed with respect to any internal revenue tax, whenever he finds that the entire liability for the tax has been satisfied or has become unenforceable as a matter of law (and not merely uncollectible or unenforceable as a matter of fact). Tax liabilities frequently are unenforceable in fact for the time being, due to the temporary nonpossession by the taxpayer of discoverable property or property rights. In all cases the liability for the payment of the tax continues until satisfaction of the tax in full or until the expiration of the statutory period for collection, including such extension of the period for collection as may be agreed upon in writing by the taxpayer and the district director.

(2) *Bond accepted.* The district director may, in his discretion, issue a certificate of release of any tax lien if he is furnished and accepts a bond that is conditioned upon the payment of the amount assessed (together with all interest in respect thereof), within the time agreed upon in the bond, but not later than 6 months before the expiration of the statutory period for collection, including any period for collection agreed upon in writing by the district director and the taxpayer. For provisions relating to bonds, see sections 7101 and 7102 and §§ 301.7101–1 and 301.7102–1.

(b) *Discharge of specific property from the lien*—(1) *Property double the amount of the liability*. (i) The district director may, in his discretion, issue a certificate of discharge of any part of the property subject to a lien imposed under chapter 64 of the Code if he determines that the fair market value of that part of the property remaining subject to the lien is at least double the sum of the amount of the unsatisfied liability secured by the lien and of the amount of all other liens upon the property which have priority over the lien. In general, fair market value is that amount which one ready and willing but not compelled to buy would pay to another ready and willing but not compelled to sell the property.

(ii) The following example illustrates a case in which a certificate of discharge may not be given under this subparagraph:

*Example*. The Federal tax liability secured by a lien is $1,000. The fair market value of all property which after the discharge will continue to be subject to the Federal tax lien is $10,000. There is a prior mortgage on the property of $5,000, including interest, and the property is subject to a prior lien of $100 for real estate taxes. Accordingly, the taxpayer's equity in the property over and above the amount of the mortgage and real estate taxes is $4,900, or nearly five times the amount required to pay the assessed tax on which the Federal tax lien is based. Nevertheless, a discharge under this subparagraph is not permissible. In the illustration, the sum of the amount of the Federal tax liability ($1,000) and of the amount of the prior mortgage and the lien for real estate taxes ($5,000+$100=$5,100) is $6,100. Double this sum is $12,200, but the fair market value of the remaining property is only $10,000. Hence, a discharge of the property is not permissible under this subparagraph, since the Code requires that the fair market value of the remaining property be at least double the sum of two amounts, one amount being the outstanding Federal tax liability and the other amount being all prior liens upon such property. In order that the discharge may be issued, it would be necessary that the remaining property be worth not less than $12,200.

(2) *Part payment; interest of United States valueless*—(i) *Part payment*. The district director may, in his discretion, issue a certificate of discharge of any part of the property subject to a lien imposed under chapter 64 of the Code if there is paid over to him in partial satisfaction of the liability secured by the lien an amount determined by him to be not less than the value of the interest of the United States in the property to be so discharged. In determining the amount to be paid, the district director will take into consideration all the facts and circumstances of the case, including the expenses to which the Government has been put in the matter. In no case shall the amount to be paid be less than the value of the interest of the United States in the property with respect to which the certificate of discharge is to be issued.

(ii) *Interest of the United States valueless*. The district director may, in his discretion, issue a certificate of discharge of any part of the property subject to the lien if he determines that the interest of the United States in the property to be so discharged has no value.

(iii) *Valuation of interest of United States*. For purposes of this subparagraph, in determining the value of the interest of the United States in the property, or any part thereof, with respect to which the certificate of discharge is to be issued, the district director shall give consideration to the value of the property and the amount of all liens and encumbrances thereon having priority over the Federal tax lien. In determining the value of the property, the district director may, in his discretion, give consideration to the forced sale value of the property in appropriate cases.

(3) *Discharge of property by substitution of proceeds of sale*. A district director may, in his discretion, issue a certificate of discharge of any part of the property subject to a lien imposed under chapter 64 of the Code if such part of the property is sold and, pursuant to a written agreement with the district director, the proceeds of the sale are held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as the lien or claim had with respect to the discharged property. This subparagraph does not apply unless the sale divests the taxpayer of all right, title, and interest in the property sought to be discharged. Any reasonable and necessary expenses incurred in connection with the sale of

the property and the administration of the sale proceeds shall be paid by the applicant or from the proceeds of the sale before satisfaction of any lien or claim of the United States.

(4) *Application for certificate of discharge.* Any person desiring a certificate of discharge under this paragraph shall submit an application in writing to the district director responsible for collection of the tax. The application shall contain such information as the district director may require.

(c) *Estate or gift tax liability fully satisfied or provided for*—(1) *Certificate of discharge.* If the district director determines that the tax liability for estate or gift tax has been fully satisfied, he may issue a certificate of discharge of any or all property from the lien imposed thereon. If the district director determines that the tax liability for estate or gift tax has been adequately provided for, he may issue a certificate discharging particular items of property from the lien. If a lien has arisen under section 6324B (relating to special lien for additional estate tax attributable to farm, etc., valuation) and the district director determines that the liability for additional estate tax has been fully secured in accordance with § 20.6324B–1(c) of this chapter, the district director may issue a certificate of discharge of the real property from the section 6324B lien. The issuance of such a certificate is a matter resting within the discretion of the district director, and a certificate will be issued only in case there is actual need therefor. The primary purpose of such discharge is not to evidence payment or satisfaction of the tax, but to permit the transfer of property free from the lien in case it is necessary to clear title. The tax will be considered fully satisfied only when investigation has been completed and payment of the tax, including any deficiency determined, has been made.

(2) *Application for certificate of discharge.* An application for a certificate of discharge of property from the lien for estate or gift tax should be filed with the district director responsible for the collection of the tax. It should be made in writing under penalties of perjury and should explain the circumstances that require the discharge, and should fully describe the particular items for which the discharge is desired. Where realty is involved each parcel sought to be discharged from the lien should be described on a separate page and each such description submitted in duplicate. In the case of an estate tax lien, the application should show the applicant's relationship to the estate, such as executor, heir, devisee, legatee, beneficiary, transferee, or purchaser. If the estate or gift tax return has not been filed, a statement under penalties of perjury may be required showing (i) the value of the property to be discharged, (ii) the basis for such valuation, (iii) in the case of the estate tax, the approximate value of the gross estate and the approximate value of the total real property included in the gross estate, (iv) in the case of the gift tax, the total amount of gifts made during the calendar year and the prior calendar years subsequent to the enactment of the Revenue Act of 1932 and the approximate value of all real estate subject to the gift tax lien, and (v) if the property is to be sold or otherwise transferred, the name and address of the purchaser or transferee and the consideration, if any, paid or to be paid by him.

(3) For provisions relating to transfer certificates in the case of nonresident estates, see § 20.6325–1 of this chapter (Estate Tax Regulations).

(d) *Subordination of lien*—(1) *By payment of the amount subordinated.* A district director may, in his discretion, issue a certificate of subordination of a lien imposed under chapter 64 of the Code upon any part of the property subject to the lien if there is paid over to the district director an amount equal to the amount of the lien or interest to which the certificate subordinates the lien of the United States. For this purpose, the tax lien may be subordinated to another lien or interest on a dollar-for-dollar basis. For example, if a notice of a Federal tax lien is filed and a delinquent taxpayer secures a mortgage loan on a part of the property subject to the tax lien and pays over the proceeds of the loan to a district director after an application for a certificate of subordination is approved, the district director will issue

a certificate of subordination. This certificate will have the effect of subordinating the tax lien to the mortgage.

(2) *To facilitate tax collection*—(i) *In general*. A district director may, in his discretion, issue a certificate of subordination of a lien imposed under chapter 64 of the Code upon any part of the property subject to the lien if the district director believes that the subordination of the lien will ultimately result in an increase in the amount realized by the United States from the property subject to the lien and will facilitate the ultimate collection of the tax liability.

(ii) *Examples*. The provisions of this subparagraph may be illustrated by the following examples:

*Example 1*. A, a farmer needs money in order to harvest his crop. A Federal tax lien, notice of which has been filed, is outstanding with respect to A's property. B, a lending institution is willing to make the necessary loan if the loan is secured by a first mortgage on the farm which is prior to the Federal tax lien. Upon examination, the district director believes that ultimately the amount realizable from A's property will be increased and the collection of the tax liability will be facilitated by the availability of cash when the crop is harvested and sold. In this case, the district director may, in his discretion, subordinate the tax lien on the farm to the mortgage securing the crop harvesting loan.

*Example 2*. C owns a commercial building which is deteriorating and in unsalable condition. Because of outstanding Federal tax liens, notices of which have been filed, C is unable to finance the repair and rehabilitation of the building. D, a contractor, is willing to do the work if his mechanic's lien on the property is superior to the Federal tax liens. Upon examination, the district director believes that ultimately the amount realizable from C's property will be increased and the collection of the tax liability will be facilitated by arresting deterioration of the property and restoring it to salable condition. In this case, the district director may, in his discretion, subordinate the tax lien on the building to the mechanic's lien.

*Example 3*. E, a manufacturer of electronic equipment, obtains financing from F, a lending institution, pursuant to a security agreement, with respect to which a financing statement was duly filed under the Uniform Commercial Code on June 1, 1970. On April 15, 1971, F gains actual notice or knowledge that notice of a Federal tax lien had been filed against E on March 31, 1971, and F refuses to make further advances unless its security interest is assured of priority over the Federal tax lien. Upon examination, the district director believes that ultimately the amount realizable from E's property will be increased and the collection of the tax liability will be facilitated if the work in process can be completed and the equipment sold. In this case, the district director may, in his discretion, subordinate the tax lien to F's security interest for the further advances required to complete the work.

*Example 4*. Suit is brought against G by H, who claims ownership of property the legal title to which is held by G. A Federal tax lien against G, notice of which has previously been filed, will be enforceable against the property if G's title is confirmed. Because section 6323(b)(8) is inapplicable, J, an attorney, is unwilling to defend the case for G unless he is granted a contractual lien on the property, superior to the Federal tax lien. Upon examination, the district director believes that the successful defense of the case by G will increase the amount ultimately realizable from G's property and will facilitate collection of the tax liability. In this case, the district director may, in his discretion, subordinate the tax lien to J's contractual lien on the disputed property to secure J's reasonable fees and expenses.

(3) *Subordination of section 6324B lien*. The district director may issue a certificate of subordination with respect to a lien imposed by section 6324B if the district director determines that the interests of the United States will be adequately secured after such subordination. For example, *A*, a qualified heir of qualified real property, needs to borrow money for farming purposes. If the current fair market value of the real property is $150,000, the amount of the claim to which the special lien is to be subordinated is $40,000, the potential liability for additional tax (as defined in section 2032A(c)) is less than $55,000, and there are no other facts to indicate that the interest of the United States will not be adequately secured, the district director may issue a certificate of subordination. The result would be the same if the loan were for bona fide purposes other than farming.

(4) *Application for certificate of subordination*. Any person desiring a certificate of subordination under this paragraph shall submit an application therefor in writing to the district director responsible for the collection of the tax. The application shall contain such information as the district director may require.

(e) *Nonattachment of lien.* If a district director determines that, because of confusion of names or otherwise, any person (other than the person against whom the tax was assessed) is or may be injured by the appearance that a notice of lien filed in accordance with § 301.6323(f)–1 refers to such person, the district director may issue a certificate of nonattachment. Such certificate shall state that the lien, notice of which has been filed, does not attach to the property of such person. Any person desiring a certificate of nonattachment under this paragraph shall submit an application therefor in writing to the district director responsible for the collection of the tax. The application shall contain such information as the district director may require.

(f) *Effect of certificate*—(1) *Conclusiveness.* Except as provided in subparagraphs (2) and (3) of this paragraph, if a certificate is issued under section 6325 by a district director and the certificate is filed in the same office as the notice of lien to which it relates (if the notice of lien has been filed), the certificate shall have the following effect—

(i) In the case of a certificate of release issued under paragraph (a) of this section, the certificate shall be conclusive that the tax lien referred to in the certificate is extinguished;

(ii) In the case of a certificate of discharge issued under paragraph (b) or (c) of this section, the certificate shall be conclusive that the property covered by the certificate is discharged from the tax lien;

(iii) In the case of a certificate of subordination issued under paragraph (d) of this section, the certificate shall be conclusive that the lien or interest to which the Federal tax lien is subordinated is superior to the tax lien; and

(iv) In the case of a certificate of nonattachment issued under paragraph (e) of this section, the certificate shall be conclusive that the lien of the United States does not attach to the property of the person referred to in the certificate.

(2) *Revocation of certificate of release or nonattachment*—(i) *In general.* If a district director determines that either—

(*a*) A certificate of release or a certificate of nonattachment of the general tax lien imposed by section 6321 was issued erroneously or improvidently, or

(*b*) A certificate of release of such lien was issued in connection with a compromise agreement under section 7122 which has been breached,

and if the period of limitation on collection after assessment of the tax liability has not expired, the district director may revoke the certificate and reinstate the tax lien. The provisions of this subparagraph do not apply in the case of the lien imposed by section 6324 relating to estate and gift taxes.

(ii) *Method of revocation and reinstatement.* The revocation and reinstatement described in subdivision (i) of this subparagraph is accompanied by—

(*a*) Mailing notice of the revocation to the taxpayer at his last known address (see § 301.6212–2 for further guidance regarding the definition of last known address); and

(*b* ) Filing notice of the revocation of the certificate in the same office in which the notice of lien to which it relates was filed (if the notice of lien has been filed).

(iii) *Effect of reinstatement*—(*a*) *Effective date.* A tax lien reinstated in accordance with the provisions of this subparagraph is effective on and after the date the notice of revocation is mailed to the taxpayer in accordance with the provisions of subdivision (ii)(*a*) of this subparagraph, but the reinstated lien is not effective before the filing of notice of revocation, in accordance with the provisions of subdivision (ii)(*b*) of this subparagraph, if the filing is required by reason of the fact that a notice of the lien had been filed.

(*b*) *Treatment of reinstated lien.* As of the effective date of reinstatement, a reinstated lien has the same force and effect as a general tax lien imposed by section 6321 which arises upon assessment of a tax liability. The reinstated lien continues in existence until the expiration of the period of limitation on collection after assessment of the tax liability to which it relates. The reinstatement of the lien does not retroactively reinstate a previously filed notice of lien. The reinstated lien is not valid against any holder of a lien or interest described in § 301.6323(a)–1 until

notice of the reinstated lien has been filed in accordance with the provisions of § 301.6323(f)–1 subsequent to or concurrent with the time the reinstated lien became effective.

(iv) *Example*. The provisions of this subparagraph may be illustrated by the following example:

*Example*. On March 1, 1967, an assessment of an unpaid Federal tax liability is made against A. On March 1, 1968, notice of the Federal tax lien, which arose at the time of assessment, is filed. On April 1, 1968, A executes a bona fide mortgage on property belonging to him to B. On May 1, 1968, a certificate of release of the tax lien is erroneously issued and is filed by A in the same office in which the notice of lien was filed. On June 3, 1968, the lien is reinstated in accordance with the provisions of this subparagraph. On July 1, 1968, A executes a bona fide mortgage on property belonging to him to C. On August 1, 1968, a notice of the lien which was reinstated is properly filed in accordance with the provisions of § 301.6323(f)–1. The mortgages of both B and C will have priority over the rights of the United States with respect to the tax liability in question. Because a reinstated lien continues in existence only until the expiration of the period of limitation on collection after assessment of the tax liability to which the lien relates, in the absence of any extension or suspension of the period of limitation on collection after assessment, the reinstated lien will become unenforceable by reason of lapse of time after February 28, 1973.

(3) *Certificates void under certain conditions*. Notwithstanding any other provisions of subtitle F of the Code, any lien for Federal taxes attaches to any property with respect to which a certificate of discharge has been issued if the person liable for the tax reacquires the property after the certificate has been issued. Thus, if property subject to a Federal tax lien is discharged therefrom and is later reacquired by the delinquent taxpayer at a time when the lien is still in existence, the tax lien attaches to the reacquired property and is enforceable against it as in the case of after-acquired property generally.

(g) *Filing of certificates and notices*. If a certificate or notice described in this section may not be filed in the office designated by State law in which the notice of lien imposed by section 6321 (to which the certificate or notice relates) is filed, the certificate or notice is effective if filed in the office of the clerk of the United States district court for the judicial district in which the State office where the notice of lien is filed is situated.

(Secs. 6324B (90 Stat. 1861, 26 U.S.C. 6324B) and 7805 (68A Stat. 917, 26 U.S.C. 7805))

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7429, 41 FR 35512, Aug. 23, 1976; T.D. 7847, 47 FR 50857, Nov. 10, 1982; T.D. 8939, 66 FR 2821, Jan. 12, 2001]

### § 301.6326–1 Administrative appeal of the erroneous filing of notice of federal tax lien.

(a) *In general*. Any person may appeal to the district director of the district in which a notice of federal tax lien was filed on the property or rights to property of such person for a release of lien alleging an error in the filing of notice of lien. Such appeal may be used only for the purpose of correcting the erroneous filing of a notice of lien, not to challenge the underlying deficiency that led to the imposition of a lien. If the district director determines that the Internal Revenue Service has erroneously filed the notice of any federal tax lien, the district director shall expeditiously, and, to the extent practicable, within 14 days after such determination, issue a certificate of release of lien. The certificate of release of such lien shall include a statement that the filing of notice of lien was erroneous.

(b) *Appeal alleging an error in the filing of notice of lien*. For purposes of paragraph (a) of this section, an appeal of the filing of notice of federal tax lien must be based on any one of the following allegations:

(1) The tax liability that gave rise to the lien, plus any interest and additions to tax associated with said liability, was satisfied prior to the filing of notice of lien;

(2) The tax liability that gave rise to the lien was assessed in violation of the deficiency procedures set forth in section 6213 of the Internal Revenue Code;

(3) The tax liability that gave rise to the lien was assessed in violation of title 11 of the United States Code (the Bankruptcy Code); or

(4) The statutory period for collection of the tax liability that gave rise

to the lien expired prior to the filing of notice of federal tax lien.

(c) *Notice of federal tax lien that lists multiple liabilities.* When a notice of federal tax lien lists multiple liabilities, a person may appeal the filing of notice of lien with respect to one or more of the liabilities listed in the notice, if the notice was erroneously filed with respect to such liabilities. If a notice of federal tax lien was erroneously filed with respect to one or more liabilities listed in the notice, the district director shall issue a certificate of release with respect to such liabilities. For example, if a notice of federal tax lien lists tax liabilities for years 1980, 1981 and 1982, and the entire liabilities for 1981 and 1982 were paid prior to the filing of notice of lien, the taxpayer may appeal the filing of notice of lien with respect to the 1981 and 1982 liabilities and the district director must issue a certificate of release with respect to the 1981 and 1982 liabilities.

(d) *Procedures for appeal*—(1) *Manner.* An appeal of the filing of notice of federal tax lien shall be made in writing to the district director (marked for the attention of the Chief, Special Procedures Function) of the district in which the notice of federal tax lien was filed.

(2) *Form.* The appeal shall include the following information and documents:

(i) Name, current address, and taxpayer identification number of the person appealing the filing of notice of federal tax lien;

(ii) A copy of the notice of federal tax lien affecting the property, if available; and

(iii) The grounds upon which the filing of notice of federal tax lien is being appealed.

(A) If the ground upon which the filing of notice is being appealed is that the tax liability in question was satisfied prior to the filing, proof of full payment as defined in paragraph (e) of this section must be provided.

(B) If the ground upon which the filing of notice is being appealed is that the tax liability that gave rise to lien was assessed in violation of the deficiency procedures set forth in section 6213 of the Internal Revenue Code, the appealing party must explain how the assessment was erroneous.

(C) If the ground upon which the filing of notice is being appealed is that the tax liability that gave rise to the lien was assessed in violation of title 11 of the United States Code (the Bankruptcy Code), the appealing party must provide the following:

(*1*) The identity of the court and the district in which the bankruptcy petition was filed; and

(*2*) The docket number and the date of filing of the bankruptcy petition.

(*3*) *Time.* An administrative appeal of the erroneous filing of notice of federal tax lien shall be made within 1 year after the taxpayer becomes aware of the erroneously filed tax lien.

(e) *Proof of full payment.* As used in paragraph (d)(2)(iii) of this section, the term ''proof of full payment'' means:

(1) An internal revenue cashier's receipt reflecting full payment of the tax liability in question prior to the date the federal tax lien issue was filed;

(2) A canceled check to the Internal Revenue Service in an amount which was sufficient to satisfy the tax liability for which release is being sought; or

(3) Any other manner of proof acceptable to the district director.

(f) *Exclusive remedy.* The appeal established by section 6326 of the Internal Revenue Code and by this section shall be the exclusive administrative remedy with respect to the erroneous filing of a notice of federal tax lien.

(g) *Effective date.* The provisions of this section are effective July 7, 1989.

[T.D. 8250, 54 FR 19569, May 8, 1989. Redesignated at 56 FR 19948, May 1, 1991]

## Seizure of Property for Collection of Taxes

### § 301.6330–1 Notice and opportunity for hearing prior to levy.

(a) *Notification*—(1) *In general.* Except as specified in paragraph (a)(2) of this section, the Commissioner, or his or her delegate (the Commissioner), will prescribe procedures to provide persons upon whose property or rights to property the IRS intends to levy (hereinafter referred to as the taxpayer) on or after January 19, 1999, notice of that intention and to give them the right to, and the opportunity for, a pre-levy Collection Due Process (CDP) hearing with

the Internal Revenue Service (IRS) Office of Appeals (Appeals). This pre-levy Collection Due Process Hearing Notice (CDP Notice) must be given in person, left at the dwelling or usual place of business of the taxpayer, or sent by certified or registered mail, return receipt requested, to the taxpayer's last known address. For further guidance regarding the definition of last known address, see § 301.6212–2.

(2) *Exceptions*—(i) *state tax refunds.* Section 6330(f) does not require the Commissioner to provide the taxpayer with notification of the taxpayer's right to a CDP hearing prior to issuing a levy to collect state tax refunds owing to the taxpayer. However, the Commissioner will prescribe procedures to give the taxpayer notice of the right to, and the opportunity for, a CDP hearing with Appeals with respect to any such levy issued on or after January 19, 1999, within a reasonable time after the levy has occurred. The notification required to be given following a levy on a state tax refund is referred to as a post-levy CDP Notice.

(ii) *Jeopardy.* Section 6330(f) does not require the Commissioner to provide the taxpayer with notification of the taxpayer's right to a CDP hearing prior to a levy when there has been a determination that collection of the tax is in jeopardy. However, the Commissioner will prescribe procedures to provide notice of the right to, and the opportunity for, a CDP hearing with Appeals to the taxpayer with respect to any such levy issued on or after January 19, 1999, within a reasonable time after the levy has occurred. The notification required to be given following a jeopardy levy also is referred to as post-levy CDP Notice.

(3) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (a) as follows:

*Q-A1.* Who is the person to be notified under section 6330?

*A-A1.* Under section 6330(a)(1), a pre-levy or post-levy CDP Notice is required to be given only to the person whose property or right to property is intended to be levied upon, or, in the case of a levy made on a state tax refund or a jeopardy levy, the person whose property or right to property was levied upon. The person described in section 6330(a)(1) is the same person described in section 6331(a)—i.e., the person liable to pay the tax due after notice and demand who refuses or neglects to pay (referred to here as the taxpayer). A pre-levy or post-levy CDP Notice therefore will be given only to the taxpayer.

*Q-A2.* Will the IRS give notification to a known nominee of, a person holding property of, or a person who holds property subject to a lien with respect to, the taxpayer of the IRS' intention to issue a levy?

*A-A2.* No. Such a person is not the person described in section 6331(a)(1), but such persons have other remedies. See A-B5 of paragraph (b)(2) of this section.

*Q-A3.* Will the IRS give notification for each tax and tax period it intends to include or has included in a levy issued on or after January 19, 1999?

*A-A3.* Yes. The notification of an intent to levy or of the issuance of a jeopardy or state tax refund levy will specify each tax and tax period that will be or was included in the levy.

*Q-A4.* Will the IRS give notification to a taxpayer with respect to levies for a tax and tax period issued on or after January 19, 1999, even though the IRS had issued a levy prior to January 19, 1999, with respect to the same tax and tax period?

*A-A4.* Yes. The IRS will provide appropriate pre-levy or post-levy notification to a taxpayer regarding the first levy it intends to issue or has issued on or after January 19, 1999, with respect to a tax and tax period, even though it had issued a levy with respect to that same tax and tax period prior to January 19, 1999.

*Q-A5.* When will the IRS provide this notice?

*A-A5.* Beginning on January 19, 1999, the IRS will give a pre-levy CDP Notice to the taxpayer of the IRS' intent to levy on property or rights to property, other than in state tax refund and jeopardy levy situations, at least 30 days prior to the first such levy with respect to a tax and tax period. If the taxpayer has not received a pre-levy CDP Notice and the IRS levies on a state tax refund or issues a jeopardy levy on or

after January 19, 1999, the IRS will provide a post-levy CDP Notice to the taxpayer within a reasonable time after that levy.

*Q-A6*. What must a pre-levy CDP Notice include?

*A-A6*. Pursuant to section 6330(a)(3), a pre-levy CDP Notice must include, in simple and nontechnical terms:

(i) The amount of the unpaid tax.

(ii) Notification of the right to request a CDP hearing.

(iii) A statement that the IRS intends to levy.

(iv) The taxpayer's rights with respect to the levy action, including a brief statement that sets forth—

(A) The statutory provisions relating to the levy and sale of property;

(B) The procedures applicable to the levy and sale of property;

(C) The administrative appeals available to the taxpayer with respect to the levy and sale and the procedures relating to those appeals;

(D) The alternatives available to taxpayers that could prevent levy on the property (including installment agreements); and

(E) The statutory provisions and the procedures relating to the redemption of property and the release of liens on property.

*Q-A7*. What must a post-levy CDP Notice include?

*A-A7*. A post-levy CDP Notice must include, in simple and nontechnical terms:

(i) The amount of the unpaid tax.

(ii) Notification of the right to request a CDP hearing.

(iii) A statement that the IRS has levied upon the taxpayer's state tax refund or has made a jeopardy levy on property or rights to property of the taxpayer, as appropriate.

(iv) The taxpayer's rights with respect to the levy action, including a brief statement that sets forth—

(A) The statutory provisions relating to the levy and sale of property;

(B) The procedures applicable to the levy and sale of property;

(C) The administrative appeals available to the taxpayer with respect to the levy and sale and the procedures relating to those appeals;

(D) The alternatives available to taxpayers that could prevent any further levies on the taxpayer's property (including installment agreements); and

(E) The statutory provisions and the procedures relating to the redemption of property and the release of liens on property.

*Q-A8*. How will this pre-levy or post-levy notification under section 6330 be accomplished?

*A-A8*. The IRS will notify the taxpayer by means of a pre-levy CDP Notice or a post-levy CDP Notice, as appropriate. The additional information the IRS is required to provide, together with Form 12153, Request for a Collection Due Process Hearing, will be included with the CDP Notice.

(i) The IRS may effect delivery of a pre-levy CDP Notice (and accompanying materials) in one of three ways:

(A) By delivering the notice personally to the taxpayer.

(B) By leaving the notice at the taxpayer's dwelling or usual place of business.

(C) By mailing the notice to the taxpayer at the taxpayer's last known address by certified or registered mail, return receipt requested.

(ii) The IRS may effect delivery of a post-levy CDP Notice (and accompanying materials) in one of three ways:

(A) By delivering the notice personally to the taxpayer.

(B) By leaving the notice at the taxpayer's dwelling or usual place of business.

(C) By mailing the notice to the taxpayer at the taxpayer's last known address by certified or registered mail.

*Q-A9*. What are the consequences if the taxpayer does not receive or accept the notification which was properly left at the taxpayer's dwelling or usual place of business, or properly sent by certified or registered mail, return receipt requested, to the taxpayer's last known address?

*A-A9*. Notification properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business is sufficient to start the 30-day period within which the taxpayer may request a CDP hearing. See paragraph (c) of this section for when a request for a CDP hearing must be

filed. Actual receipt is not a prerequisite to the validity of the CDP Notice.

*Q-A10.* What if the taxpayer does not receive the CDP Notice because the IRS did not send that notice by certified or registered mail to the taxpayer's last known address, or failed to leave it at the dwelling or usual place of business of the taxpayer, and the taxpayer fails to request a CDP hearing with Appeals within the 30-day period commencing the day after the date of the CDP Notice?

*A-A10.* When the IRS determines that it failed properly to provide a taxpayer with a CDP Notice, it will promptly provide the taxpayer with a substitute CDP Notice and provide the taxpayer with an opportunity to request a CDP hearing. Substitute CDP Notices are discussed in Q&A-B3 of paragraph (b)(2) and Q&A-C8 of paragraph (c)(2) of this section.

(4) *Examples.* The following examples illustrate the principles of this paragraph (a):

*Example 1.* Prior to January 19, 1999, the IRS issues a continuous levy on a taxpayer's wages and a levy on that taxpayer's fixed right to future payments. The IRS is not required to release either levy on or after January 19, 1999, until the requirements of section 6343(a)(1) are met. The taxpayer is not entitled to a CDP Notice or a CDP hearing under section 6330 with respect to either levy because both levy actions were initiated prior to January 19, 1999.

*Example 2.* The same facts as in *Example 1,* except the IRS intends to levy upon a taxpayer's bank account on or after January 19, 1999. The taxpayer is entitled to a pre-levy CDP Notice with respect to this proposed new levy.

(b) *Entitlement to a CDP hearing*—(1) *In general.* A taxpayer is entitled to one CDP hearing with respect to the unpaid tax and tax periods covered by the pre-levy or post-levy CDP Notice provided to the taxpayer. The taxpayer must request the CDP hearing within the 30-day period commencing on the day after the date of the CDP Notice.

(2) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (b) as follows:

*Q-B1.* Is the taxpayer entitled to a CDP hearing where a levy for state tax refunds is issued on or after January 19, 1999, even though the IRS had previously issued other levies prior to January 19, 1999, seeking to collect the taxes owed for the same period?

*A-B1.* Yes. The taxpayer is entitled to a CDP hearing under section 6330 for the type of tax and tax periods set forth in the state tax refund levy issued on or after January 19, 1999.

*Q-B2.* Is the taxpayer entitled to a CDP hearing when the IRS, more than 30 days after issuance of a CDP Notice under section 6330 with respect to the unpaid tax and periods, provides subsequent notice to that taxpayer that the IRS intends to levy on property or rights to property of the taxpayer for the same tax and tax periods shown on the CDP Notice?

*A-B2.* No. Under section 6330, only the first pre-levy or post-levy CDP Notice with respect to the unpaid tax and tax periods entitles the taxpayer to request a CDP hearing. If the taxpayer does not timely request a CDP hearing with Appeals following that first notification, the taxpayer foregoes the right to a CDP hearing with Appeals and judicial review of Appeals' determination with respect to levies relating to that tax and tax period. The IRS generally provides additional notices or reminders (reminder notifications) to the taxpayer of its intent to levy when no collection action has occurred within 180 days of a proposed levy. Under such circumstances, a taxpayer may request an equivalent hearing as described in paragraph (i) of this section.

*Q-B3.* When the IRS provides a taxpayer with a substitute CDP Notice and the taxpayer timely requests a CDP hearing, is the taxpayer entitled to a CDP Hearing before Appeals?

*A-B3.* Yes. Unless the taxpayer provides the IRS a written withdrawal of the request that Appeals conduct a CDP hearing, the taxpayer is entitled to a CDP hearing before Appeals. Following the hearing, Appeals will issue a Notice of Determination, and the taxpayer is entitled to seek judicial review of that Notice of Determination.

*Q-B4.* If the IRS sends a second CDP Notice under section 6330 (other than a substitute CDP Notice) for a tax period and with respect to an unpaid tax for which a CDP Notice under section 6330

was previously sent, is the taxpayer entitled to a section 6330 CDP hearing based on the second CDP Notice?

*A-B4*. No. The taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax period. The taxpayer must request the CDP hearing within 30 days of the date of the first CDP Notice provided for that tax and tax period.

*Q-B5*. Will the IRS give pre-levy or post-levy CDP Notices to known nominees of, persons holding property of, or persons holding property subject to a lien with respect to the taxpayer?

*A-B5*. No. Such person is not the person described in section 6331(a) and is, therefore, not entitled to a CDP hearing or an equivalent hearing (as discussed in paragraph (i) of this section). Such person, however, may seek reconsideration by the IRS office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before Appeals under its Collection Appeals Program. However, any such administrative hearing would not be a CDP hearing under section 6330 and any determination or decision resulting from the hearing would not be subject to judicial review.

(3) *Example*. The following example illustrates the principles of this paragraph (b):

*Example*. Federal income tax liability for 1997 is assessed against individual D. D buys an asset and puts it in individual E's name. The IRS gives D a CDP Notice of intent to levy with respect to the 1997 tax liability. The IRS will not notify E of its intent to levy. The IRS is not required to notify E of its intent to levy although E holds property of individual D. E is not the taxpayer.

(c) *Requesting a CDP hearing*—(1) *In general*. When a taxpayer is entitled to a CDP hearing under section 6330, the CDP hearing must be requested during the 30-day period that commences the day after the date of the CDP Notice.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (c) as follows:

*Q-C1*. What must a taxpayer do to obtain a CDP hearing?

*A-C1*. (i) The taxpayer must make a request in writing for a CDP hearing. The request for a CDP hearing shall include the information and signature specified in A–C1(ii) of this paragraph (c)(2). See A–D7 and A–D8 of paragraph (d)(2).

(ii) The written request for a CDP hearing must be dated and must include the following:

(A) The taxpayer's name, address, daytime telephone number (if any), and taxpayer identification number (e.g., SSN, ITIN or EIN).

(B) The type of tax involved.

(C) The tax period at issue.

(D) A statement that the taxpayer requests a hearing with Appeals concerning the proposed levy.

(E) The reason or reasons why the taxpayer disagrees with the proposed levy.

(F) The signature of the taxpayer or the taxpayer's authorized representative.

(iii) If the IRS receives a timely written request for CDP hearing that does not satisfy the requirements set forth in A–C1(ii) of this paragraph (c)(2), the IRS will make a reasonable attempt to contact the taxpayer and request that the taxpayer comply with the unsatisfied requirements. The taxpayer must perfect any timely written request for a CDP hearing that does not satisfy the requirements set forth in A–C1(ii) of this paragraph (c)(2) within a reasonable period of time after a request from the IRS.

(iv) Taxpayers are encouraged to use Form 12153, ''Request for a Collection Due Process Hearing,'' in requesting a CDP hearing so that the request can be readily identified and forwarded to Appeals. Taxpayers may obtain a copy of Form 12153 by contacting the IRS office that issued the CDP Notice, by downloading a copy from the IRS Internet site, *http://www.irs.gov/pub/irs-pdf/f12153.pdf*, or by calling, toll-free, 1–800–829–3676.

(v) The taxpayer must affirm any timely written request for a CDP hearing which is signed or alleged to have been signed on the taxpayer's behalf by the taxpayer's spouse or other unauthorized representative by filing, within a reasonable period of time after a request from the IRS, a signed, written affirmation that the request was originally submitted on the taxpayer's behalf. If the affirmation is filed within a reasonable period of time after a request, the timely CDP hearing request

will be considered timely with respect to the non-signing taxpayer. If the affirmation is not filed within a reasonable period of time after a request, the CDP hearing request will be denied with respect to the non-signing taxpayer.

*Q-C2.* Must the request for the CDP hearing be in writing?

*A-C2.* Yes. There are several reasons why the request for a CDP hearing must be in writing. The filing of a timely request for a CDP hearing is the first step in what may result in a court proceeding. A written request will provide proof that the CDP hearing was requested and thus permit the court to verify that it has jurisdiction over any subsequent appeal of the Notice of Determination issued by Appeals. In addition, the receipt of the written request will establish the date on which the periods of limitation under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) are suspended as a result of the CDP hearing and any judicial appeal. Moreover, because the IRS anticipates that taxpayers will contact the IRS office that issued the CDP Notice for further information or assistance in filling out Form 12153, or to attempt to resolve their liabilities prior to going through the CDP hearing process, the requirement of a written request should help prevent any misunderstanding as to whether a CDP hearing has been requested. If the information requested on Form 12153 is furnished by the taxpayer, the written request also will help to establish the issues for which the taxpayer seeks a determination by Appeals.

*Q-C3.* When must a taxpayer request a CDP hearing with respect to a CDP Notice issued under section 6330?

*A-C3.* A taxpayer must submit a written request for a CDP hearing within the 30-day period commencing the day after the date of the CDP Notice issued under section 6330. This period is slightly different from the period for submitting a written request for a CDP hearing with respect to a CDP Notice issued under section 6320. For a CDP Notice issued under section 6320, a taxpayer must submit a written request for a CDP hearing within the 30-day period commencing the day after the end of the five business day period following the filing of the notice of federal tax lien (NFTL).

*Q-C4.* How will the timeliness of a taxpayer's written request for a CDP hearing be determined?

*A-C4.* The rules and regulations under section 7502 and section 7503 will apply to determine the timeliness of the taxpayer's request for a CDP hearing, if properly transmitted and addressed as provided in A-C6 of this paragraph (c)(2).

*Q-C5.* Is the 30-day period within which a taxpayer must make a request for a CDP hearing extended because the taxpayer resides outside the United States?

*A-C5.* No. Section 6330 does not make provision for such a circumstance. Accordingly, all taxpayers who want a CDP hearing under section 6330 must request such a hearing within the 30-day period commencing the day after the date of the CDP Notice.

*Q-C6.* Where must the written request for a CDP hearing be sent?

*A-C6.* The written request for a CDP hearing must be sent, or hand delivered (if permitted), to the IRS office and address as directed on the CDP Notice. If the address of that office does not appear on the CDP Notice, the taxpayer should obtain the address of the office to which the written request should be sent or hand delivered by calling, toll-free, 1–800–829–1040 and providing the taxpayer's identification number (e.g., SSN, ITIN or EIN).

*Q-C7.* What will happen if the taxpayer does not request a CDP hearing in writing within the 30-day period commencing on the day after the date of the CDP Notice issued under section 6330?

*A-C7.* If the taxpayer does not request a CDP hearing in writing within the 30-day period that commences on the day after the date of the CDP Notice, the taxpayer foregoes the right to a CDP hearing under section 6330 with respect to the unpaid tax and tax periods shown on the CDP Notice. A written request submitted within the 30-day period that does not satisfy the requirements set forth in A–C1(ii)(A), (B), (C), (D) or (F) of this paragraph (c)(2) is

considered timely if the request is perfected within a reasonable period of time pursuant to A–C1(iii) of this paragraph (c)(2). If the request for CDP hearing is untimely, either because the request was not submitted within the 30-day period or not perfected within the reasonable period provided, the taxpayer will be notified of the untimeliness of the request and offered an equivalent hearing. In such cases, the taxpayer may obtain an equivalent hearing without submitting an additional request. See paragraph (i) of this section.

*Q-C8*. When must a taxpayer request a CDP hearing with respect to a substitute CDP Notice?

*A-C8*. A CDP hearing with respect to a substitute CDP Notice must be requested in writing by the taxpayer prior to the end of the 30-day period commencing the day after the date of the substitute CDP Notice.

*Q-C9*. Can taxpayers attempt to resolve the matter of the proposed levy with an officer or employee of the IRS office collecting the tax liability stated on the CDP Notice either before or after requesting a CDP hearing?

*A-C9*. Yes. Taxpayers are encouraged to discuss their concerns with the IRS office collecting the tax, either before or after they request a CDP hearing. If such a discussion occurs before a request is made for a CDP hearing, the matter may be resolved without the need for Appeals consideration. However, these discussions do not suspend the running of the 30-day period within which the taxpayer is required to request a CDP hearing, nor do they extend that 30-day period. If discussions occur after the request for a CDP hearing is filed and the taxpayer resolves the matter with the IRS office collecting the tax, the taxpayer may withdraw in writing the request that a CDP hearing be conducted by Appeals. The taxpayer can also waive in writing some or all of the requirements regarding the contents of the Notice of Determination.

(3) *Examples*. The following examples illustrate the principles of this paragraph (c):

*Example 1*. The IRS mails a CDP Notice of intent to levy to individual A's last known address on June 24, 1999. Individual A has until July 26, 1999, a Monday, to request a CDP hearing. The 30-day period within which individual A may request a CDP hearing begins on June 25, 1999. Because the 30-day period expires on July 24, 1999, a Saturday, individual A's written request for a CDP hearing will be considered timely if it is properly transmitted and addressed to the IRS in accordance with section 7502 and the regulations thereunder no later than July 26, 1999.

*Example 2*. Same facts as in *Example 1*, except that individual A is on vacation, outside the United States, or otherwise does not receive or read the CDP Notice until July 19, 1999. As in *Example 1*, individual A has until July 26, 1999, to request a CDP hearing. If individual A does not request a CDP hearing, individual A may request an equivalent hearing as to the levy at a later time. The taxpayer should make a request for an equivalent hearing at the earliest possible time.

*Example 3*. Same facts as in *Example 2*, except that individual A does not receive or read the CDP Notice until after July 26, 1999, and does not request a hearing by July 26, 1999. Individual A is not entitled to a CDP hearing. Individual A may request an equivalent hearing as to the levy at a later time. The taxpayer should make a request for an equivalent hearing at the earliest possible time.

*Example 4*. Same facts as in *Example 1*, except the IRS determines that the CDP Notice mailed on June 24, 1999, was not mailed to individual A's last known address. As soon as practicable after making this determination, the IRS will mail a substitute CDP Notice to individual A at individual A's last known address, hand deliver the substitute CDP Notice to individual A, or leave the substitute CDP Notice at individual A's dwelling or usual place of business. Individual A will have 30 days commencing on the day after the date of the substitute CDP Notice within which to request a CDP hearing.

(d) *Conduct of CDP hearing*—(1) *In general*. If a taxpayer requests a CDP hearing under section 6330(a)(3)(B) (and does not withdraw that request), the CDP hearing will be held with Appeals. The taxpayer is entitled to only one CDP hearing under section 6330 with respect to the unpaid tax and tax periods shown on the CDP Notice. To the extent practicable, the CDP hearing requested under section 6330 will be held in conjunction with any CDP hearing the taxpayer requests under section 6320. A CDP hearing will be conducted by an employee or officer of Appeals who, prior to the first CDP hearing under section 6320 or section 6330, has had no involvement with respect to the tax for the tax periods to be covered by

the hearing, unless the taxpayer waives this requirement.

(2) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (d) as follows:

*Q-D1.* Under what circumstances can a taxpayer receive more than one prelevy CDP hearing under section 6330 with respect to a tax period?

*A-D1.* The taxpayer may receive more than one CDP pre-levy hearing under section 6330 with respect to a tax period where the tax involved is a different type of tax (for example, an employment tax liability, where the original CDP hearing for the tax period involved an income tax liability), or where the same type of tax for the same period is involved, but where the amount of the unpaid tax has changed as a result of an additional assessment of tax (not including interest or penalties) for that period or an additional accuracy-related or filing-delinquency penalty has been assessed. The taxpayer is not entitled to another CDP hearing under section 6330 if the additional assessment represents accruals of interest, accruals of penalties, or both.

*Q-D2.* Will a CDP hearing with respect to one tax period be combined with a CDP hearing with respect to another tax period?

*A-D2.* To the extent practicable, a CDP hearing with respect to one tax period shown on a CDP Notice will be combined with any and all other CDP hearings which the taxpayer has requested.

*Q-D3.* Will a CDP hearing under section 6330 be combined with a CDP hearing under section 6320?

*A-D3.* To the extent it is practicable, a CDP hearing under section 6330 will be held in conjunction with a CDP hearing under section 6320.

*Q-D4.* What is considered to be prior involvement by an employee or officer of Appeals with respect to the tax and tax period or periods involved in the hearing?

*A-D4.* Prior involvement by an Appeals officer or employee includes participation or involvement in a matter (other than a CDP hearing held under either section 6320 or section 6330) that the taxpayer may have had with respect to the tax and tax period shown on the CDP Notice. Prior involvement exists only when the taxpayer, the tax and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP matter, and the Appeals officer or employee actually participated in the prior matter.

*Q-D5.* How can a taxpayer waive the requirement that the officer or employee of Appeals have no prior involvement with respect to the tax and tax period or periods involved in the CDP hearing?

*A-D5.* The taxpayer must sign a written waiver.

*Q-D6.* How are CDP hearings conducted?

*A-D6.* The formal hearing procedures required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, do not apply to CDP hearings. CDP hearings are much like Collection Appeal Program (CAP) hearings in that they are informal in nature and do not require the Appeals officer or employee and the taxpayer, or the taxpayer's representative, to hold a face-to-face meeting. A CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications between an Appeals officer or employee and the taxpayer or the taxpayer's representative, or some combination thereof. A transcript or recording of any face-to-face meeting or conversation between an Appeals officer or employee and the taxpayer or the taxpayer's representative is not required. The taxpayer or the taxpayer's representative does not have the right to subpoena and examine witnesses at a CDP hearing.

*Q-D7.* If a taxpayer wants a face-to-face CDP hearing, where will it be held?

*A-D7.* Except as provided in A–D8 of this paragraph (d)(2), a taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the proposed levy will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to taxpayer's residence. A business taxpayer will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to the taxpayer's principal place of business. If that is not

satisfactory to the taxpayer, the taxpayer will be given an opportunity for a hearing by telephone or by correspondence. In all cases, the Appeals officer or employee will review the case file, as described in A–F4 of paragraph (f)(2). If no face-to-face or telephonic conference is held, or other oral communication takes place, review of the documents in the case file, as described in A–F4 of paragraph (f)(2), will constitute the CDP hearing for purposes of section 6330(b).

*Q-D8*. In what circumstances will a face-to-face CDP conference not be granted?

*A-D8*. A taxpayer is not entitled to a face-to-face CDP conference at a location other than as provided in A–D7 of this paragraph (d)(2) and this A–D8. If all Appeals officers or employees at the location provided for in A–D7 of this paragraph (d)(2) have had prior involvement with the taxpayer as provided in A–D4 of this paragraph (d)(2), the taxpayer will not be offered a face-to-face conference at that location, unless the taxpayer elects to waive the requirement of section 6330(b)(3). The taxpayer will be offered a face-to-face conference at another Appeals office if Appeals would have offered the taxpayer a face-to-face conference at the location provided in A–D7 of this paragraph (d)(2), but for the disqualification of all Appeals officers or employees at that location. A face-to-face CDP conference concerning a taxpayer's underlying liability will not be granted if the request for a hearing or other taxpayer communication indicates that the taxpayer wishes only to raise irrelevant or frivolous issues concerning that liability. A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances. For example, because the IRS does not consider offers to compromise from taxpayers who have not filed required returns or have not made certain required deposits of tax, as set forth in Form 656, ''Offer in Compromise,'' no face-to-face conference will be granted to a taxpayer who wishes to make an offer to compromise but has not fulfilled those obligations. Appeals in its discretion, however, may grant a face-to-face conference if Appeals determines that a face-to-face conference is appropriate to explain to the taxpayer the requirements for becoming eligible for a collection alternative. In all cases, a taxpayer will be given an opportunity to demonstrate eligibility for a collection alternative and to become eligible for a collection alternative, in order to obtain a face-to-face conference. For purposes of determining whether a face-to-face conference will be granted, the determination of a taxpayer's eligibility for a collection alternative is made without regard to the taxpayer's ability to pay the unpaid tax. A face-to-face conference need not be granted if the taxpayer does not provide the required information set forth in A–C1(ii)(E) of paragraph (c)(2). See also A–C1(iii) of paragraph (c)(2).

(3) *Examples*. The following examples illustrate the principles of this paragraph (d):

*Example 1*. Individual A timely requests a CDP hearing concerning a proposed levy for the 1998 income tax liability assessed against individual A. Appeals employee B previously conducted a CDP hearing regarding a NFTL filed with respect to individual A's 1998 income tax liability. Because employee B's only prior involvement with individual A's 1998 income tax liability was in connection with a section 6320 CDP hearing, employee B may conduct the CDP hearing under section 6330 involving the proposed levy for the 1998 income tax liability.

*Example 2*. Individual C timely requests a CDP hearing concerning a proposed levy for the 1998 income tax liability assessed against individual C. Appeals employee D previously conducted a Collection Appeals Program (CAP) hearing regarding a NFTL filed with respect to individual C's 1998 income tax liability. Because employee D's prior involvement with individual C's 1998 income tax liability was in connection with a non-CDP hearing, employee D may not conduct the CDP hearing under section 6330 unless individual C waives the requirement that the hearing will be conducted by an Appeals officer or employee who has had no prior involvement with respect to individual C's 1998 income tax liability.

*Example 3*. Same facts as in *Example 2*, except that the prior CAP hearing only involved individual C's 1997 income tax liability and employment tax liabilities for 1998 reported on Form 941, ''Employer's Quarterly Federal Tax Return.'' Employee D would not

be considered to have prior involvement because the prior CAP hearing in which she participated did not involve individual C's 1998 income tax liability.

*Example 4.* Appeals employee F is assigned to a CDP hearing concerning a proposed levy for a trust fund recovery penalty (TFRP) assessed pursuant to section 6672 against individual E. Appeals employee F participated in a prior CAP hearing involving individual E's 1999 income tax liability, and participated in a CAP hearing involving the employment taxes of business entity X, which incurred the employment tax liability to which the TFRP assessed against individual E relates. Appeals employee F would not be considered to have prior involvement because the prior CAP hearings in which he participated did not directly involve the TFRP assessed against individual E.

*Example 5.* Appeals employee G is assigned to a CDP hearing concerning a proposed levy for a TFRP assessed pursuant to section 6672 against individual H. In preparing for the CDP hearing, Appeals employee G reviews the Appeals case file concerning the prior CAP hearing involving the TFRP assessed pursuant to section 6672 against individual H. Appeals employee G is not deemed to have participated in the previous CAP hearing involving the TFRP assessed against individual H by such review.

(e) *Matters considered at CDP hearing*—(1) *In general.* Appeals will determine the timeliness of any request for a CDP hearing that is made by a taxpayer. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure with respect to the proposed levy have been met. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the proposed levy, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the underlying liability, including a liability reported on a self-filed return, for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6320 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

(2) *Spousal defenses.* A taxpayer may raise any appropriate spousal defenses at a CDP hearing unless the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. To claim a spousal defense under section 66 or section 6015, the taxpayer must do so in writing according to rules prescribed by the Commissioner or the Secretary. Spousal defenses raised under sections 66 and 6015 in a CDP hearing are governed in all respects by the provisions of sections 66 and section 6015 and the regulations and procedures thereunder.

(3) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (e) as follows:

*Q-E1.* What factors will Appeals consider in making its determination?

*A-E1.* Appeals will consider the following matters in making its determination:

(i) Whether the IRS met the requirements of any applicable law or administrative procedure.

(ii) Any issues appropriately raised by the taxpayer relating to the unpaid tax.

(iii) Any appropriate spousal defenses raised by the taxpayer.

(iv) Any challenges made by the taxpayer to the appropriateness of the proposed collection action.

(v) Any offers by the taxpayer for collection alternatives.

(vi) Whether the proposed collection action balances the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

*Q-E2.* When is a taxpayer entitled to challenge the existence or amount of

the tax liability specified in the CDP Notice?

*A-E2*. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. An opportunity for a conference with Appeals prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose.

*Q-E3*. Are spousal defenses subject to the limitations imposed under section 6330(c)(2)(B) on a taxpayer's right to challenge the tax liability specified in the CDP Notice at a CDP hearing?

*A-E3*. The limitations imposed under section 6330(c)(2)(B) do not apply to spousal defenses. When a taxpayer asserts a spousal defense, the taxpayer is not disputing the amount or existence of the liability itself, but asserting a defense to the liability which may or may not be disputed. A spousal defense raised under section 66 or section 6015 is governed by section 66 or section 6015 and the regulations and procedures thereunder. Any limitation under those sections, regulations, and procedures therefore will apply.

*Q-E4*. May a taxpayer raise at a CDP hearing a spousal defense under section 66 or section 6015 if that defense was raised and considered administratively and the Commissioner has issued a statutory notice of deficiency or final determination letter addressing the spousal defense?

*A-E4*. No. A taxpayer is precluded from raising a spousal defense at a CDP hearing when the Commissioner has made a final determination (under section 66 or section 6015) as to spousal defenses in a final determination letter or statutory notice of deficiency. However, a taxpayer may raise spousal defenses in a CDP hearing when the taxpayer has previously raised spousal defenses, but the Commissioner has not yet made a final determination regarding this issue.

*Q-E5*. May a taxpayer raise at a CDP hearing a spousal defense under section 66 or section 6015 if that defense was raised and considered in a prior judicial proceeding that has become final?

*A-E5*. No. A taxpayer is precluded by the doctrine of res judicata and by the specific limitations under section 66 or section 6015 from raising a spousal defense in a CDP hearing under these circumstances.

*Q-E6*. What collection alternatives are available to the taxpayer?

*A-E6*. Collection alternatives include, for example, a proposal to withhold the proposed levy or future collection action in circumstances that will facilitate the collection of the tax liability, an installment agreement, an offer to compromise, the posting of a bond, or the substitution of other assets. A collection alternative is not available unless the alternative would be available to other taxpayers in similar circumstances. See A–D8 of paragraph (d)(2).

*Q-E7*. What issues may a taxpayer raise in a CDP hearing under section 6330 if the taxpayer previously received a notice under section 6320 with respect to the same tax and tax period and did not request a CDP hearing with respect to that notice?

*A-E7*. The taxpayer may raise appropriate spousal defenses, challenges to the appropriateness of the proposed collection action, and offers of collection alternatives. The existence or amount of the underlying liability for any tax period specified in the CDP Notice may be challenged only if the taxpayer did not have a prior opportunity to dispute the tax liability. If the taxpayer previously received a CDP Notice under section 6320 with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice, the taxpayer had a prior opportunity to dispute the existence or amount of the underlying tax liability.

*Q-E8*. How will Appeals issue its determination?

*A-E8*. (i) Taxpayers will be sent a dated Notice of Determination by certified or registered mail. The Notice of Determination will set forth Appeals' findings and decisions. It will state whether the IRS met the requirements of any applicable law or administrative procedure; it will resolve any issues appropriately raised by the taxpayer relating to the unpaid tax; it will include a decision on any appropriate spousal defenses raised by the taxpayer; it will include a decision on any challenges made by the taxpayer to the appropriateness of the collection action; it will respond to any offers by the taxpayer for collection alternatives; and it will address whether the proposed collection action represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. The Notice of Determination will also set forth any agreements that Appeals reached with the taxpayer, any relief given the taxpayer, and any actions the taxpayer or the IRS are required to take. Lastly, the Notice of Determination will advise the taxpayer of the taxpayer's right to seek judicial review within 30 days of the date of the Notice of Determination.

(ii) Because taxpayers are encouraged to discuss their concerns with the IRS office collecting the tax, certain matters that might have been raised at a CDP hearing may be resolved without the need for Appeals consideration. Unless, as a result of these discussions, the taxpayer agrees in writing to withdraw the request that Appeals conduct a CDP hearing, Appeals will still issue a Notice of Determination, but the taxpayer can waive in writing Appeals' consideration of some or all of the matters it would otherwise consider in making its determination.

*Q-E9*. Is there a period of time within which Appeals must conduct a CDP hearing or issue a Notice of Determination?

*A-E9*. No. Appeals will, however, attempt to conduct a CDP hearing and issue a Notice of Determination as expeditiously as possible under the circumstances.

*Q-E10*. Why is the Notice of Determination and its date important?

*A-E10*. The Notice of Determination will set forth Appeals' findings and decisions with respect to the matters set forth in A-E1 of this paragraph (e)(3). The 30-day period within which the taxpayer is permitted to seek judicial review of Appeals' determination commences the day after the date of the Notice of Determination.

*Q-E11*. If an Appeals officer considers the merits of a taxpayer's liability in a CDP hearing when the taxpayer had previously received a statutory notice of deficiency or otherwise had an opportunity to dispute the liability prior to the issuance of a notice of intention to levy, will the Appeals officer's determination regarding those liability issues be considered part of the Notice of Determination?

*A-E11*. No. An Appeals officer may consider the existence and amount of the underlying tax liability as a part of the CDP hearing only if the taxpayer did not receive a statutory notice of deficiency for the tax liability in question or otherwise have a prior opportunity to dispute the tax liability. Similarly, an Appeals officer may not consider any other issue if the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding in which the person seeking to raise the issue meaningfully participated. In the Appeals officer's sole discretion, however, the Appeals officer may consider the existence or amount of the underlying tax liability, or such other precluded issues, at the same time as the CDP hearing. Any determination, however, made by the Appeals officer with respect to such a precluded issue shall not be treated as part of the Notice of Determination issued by the Appeals officer and will not be subject to any judicial review. Because any decisions made by the Appeals officer on such precluded issues are not properly a part of the CDP hearing, such decisions are not required to appear in the Notice of Determination issued following the hearing.

Even if a decision concerning such precluded issues is referred to in the Notice of Determination, it is not reviewable by the Tax Court because the precluded issue is not properly part of the CDP hearing.

(4) *Examples*. The following examples illustrate the principles of this paragraph (e):

*Example 1*. The IRS sends a statutory notice of deficiency to the taxpayer at his last known address asserting a deficiency for the tax year 1995. The taxpayer receives the notice of deficiency in time to petition the Tax Court for a redetermination of the asserted deficiency. The taxpayer does not timely file a petition with the Tax Court. The taxpayer is precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

*Example 2*. Same facts as in *Example 1*, except the taxpayer does not receive the notice of deficiency in time to petition the Tax Court and did not have another prior opportunity to dispute the tax liability. The taxpayer is not precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

*Example 3*. The IRS properly assesses a trust fund recovery penalty against the taxpayer. The IRS offers the taxpayer the opportunity for a conference with Appeals at which the taxpayer would have the opportunity to dispute the assessed liability. The taxpayer declines the opportunity to participate in such a conference. The taxpayer is precluded from challenging the existence or amount of the tax liability in a subsequent CDP hearing.

(f) *Judicial review of Notice of Determination*—(1) *In general*. Unless the taxpayer provides the IRS a written withdrawal of the request that Appeals conduct a CDP hearing, Appeals is required to issue a Notice of Determination in all cases where a taxpayer has timely requested a CDP hearing. The taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination to the Tax Court.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (f) as follows:

*Q-F1*. What must a taxpayer do to obtain judicial review of a Notice of Determination?

*A-F1*. Subject to the jurisdictional limitations described in A–F2 of this paragraph (f)(2), the taxpayer must, within the 30-day period commencing the day after the date of the Notice of Determination, appeal the determination by Appeals to the Tax Court.

*Q-F2*. With respect to the relief available to the taxpayer under section 6015, what is the time frame within which a taxpayer may seek Tax Court review of Appeals' determination following a CDP hearing?

*A-F2*. If the taxpayer seeks Tax Court review not only of Appeals' denial of relief under section 6015, but also of relief with respect to other issues raised in the CDP hearing, the taxpayer should request Tax Court review within the 30-day period commencing the day after the date of the Notice of Determination. If the taxpayer only seeks Tax Court review of Appeals' denial of relief under section 6015, the taxpayer should request review by the Tax Court, as provided by section 6015(e), within 90 days of Appeals' determination. If a request for Tax Court review is filed after the 30-day period for seeking judicial review under section 6330, then only the taxpayer's section 6015 claims may be reviewable by the Tax Court.

*Q-F3*. What issue or issues may the taxpayer raise before the Tax Court if the taxpayer disagrees with the Notice of Determination?

A-*F3*. In seeking Tax Court review of a Notice of Determination, the taxpayer can only ask the court to consider an issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.

*Q-F4*. What is the administrative record for purposes of Tax Court review?

*A-F4*. The case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP

hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the record in the Tax Court review of the Notice of Determination issued by Appeals.

(g) *Effect of request for CDP hearing and judicial review on periods of limitation and collection activity*—(1) *In general.* The periods of limitation under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) are suspended until the date the IRS receives the taxpayer's written withdrawal of the request for a CDP hearing by Appeals or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking judicial review or the exhaustion of any rights to appeals following judicial review. In no event shall any of these periods of limitation expire before the 90th day after the date on which the IRS receives the taxpayer's written withdrawal of the request that Appeals conduct a CDP hearing or the Notice of Determination with respect to such hearing becomes final upon either the expiration of the time for seeking judicial review or upon exhaustion of any rights to appeals following judicial review.

(2) *Questions and answers.* The questions and answers illustrate the provisions of this paragraph (g) as follows:

*Q-G1.* For what period of time will the periods of limitation under section 6502, section 6531, and section 6532 remain suspended if the taxpayer timely requests a CDP hearing concerning a pre-levy or post-levy CDP Notice?

*A-G1.* The suspension period commences on the date the IRS receives the taxpayer's written request for a CDP hearing. The suspension period continues until the IRS receives a written withdrawal by the taxpayer of the request for a CDP hearing or the Notice of Determination resulting from the CDP hearing becomes final upon either the expiration of the time for seeking judicial review or upon exhaustion of any rights to appeals following judicial review. In no event shall any of these periods of limitation expire before the 90th day after the day on which there is a final determination with respect to such hearing. The periods of limitation that are suspended under section 6330 are those which apply to the taxes and the tax period or periods to which the CDP Notice relates.

*Q-G2.* For what period of time will the periods of limitation under section 6502, section 6531, and section 6532 be suspended if the taxpayer does not request a CDP hearing concerning the CDP Notice, or the taxpayer requests a CDP hearing, but his request is not timely?

*A-G2.* Under either of these circumstances, section 6330 does not provide for a suspension of the periods of limitation.

*Q-G3.* What, if any, enforcement actions can the IRS take during the suspension period?

*A-G3.* Section 6330(e) provides for the suspension of the periods of limitation discussed in paragraph (g)(1) of these regulations. Section 6330(e) also provides that levy actions that are the subject of the requested CDP hearing under that section shall be suspended during the same period. The IRS, however, may levy for other taxes and periods not covered by the CDP Notice if the CDP requirements under section 6330 for those taxes and periods have been satisfied. The IRS also may file NFTLs for tax periods and taxes, whether or not covered by the CDP Notice issued under section 6330, and may take other non-levy collection actions such as initiating judicial proceedings to collect the tax shown on the CDP Notice or offsetting overpayments from other periods, or of other taxes, against the tax shown on the CDP Notice. Moreover, the provisions in section 6330 do not apply when the IRS levies for the tax and tax period shown on the CDP Notice to collect a state tax refund due the taxpayer, or determines that collection of the tax is in jeopardy. Finally, section 6330 does not prohibit the IRS from accepting any voluntary payments made for the tax

and tax period stated on the CDP Notice.

(3) *Examples*. The following examples illustrate the principles of this paragraph (g):

*Example 1*. The period of limitation under section 6502 with respect to the taxpayer's tax period listed in the CDP Notice will expire on August 1, 1999. The IRS sent a CDP Notice to the taxpayer on April 30, 1999. The taxpayer timely requested a CDP hearing. The IRS received this request on May 15, 1999. Appeals sends the taxpayer its determination on June 15, 1999. The taxpayer timely seeks judicial review of that determination. The period of limitation under section 6502 would be suspended from May 15, 1999, until the determination resulting from that hearing becomes final by expiration of the time for seeking review or reconsideration before the Tax Court, plus 90 days.

*Example 2*. Same facts as in *Example 1*, except the taxpayer does not seek judicial review of Appeals' determination. Because the taxpayer requested the CDP hearing when fewer than 90 days remained on the period of limitation, the period of limitation will be extended to October 13, 1999 (90 days from July 15, 1999).

(h) *Retained jurisdiction of Appeals*—(1) *In general*. The Appeals office that makes a determination under section 6330 retains jurisdiction over that determination, including any subsequent administrative hearings that may be requested by the taxpayer regarding levies and any collection actions taken or proposed with respect to Appeals' determination. Once a taxpayer has exhausted his other remedies, Appeals' retained jurisdiction permits it to consider whether a change in the taxpayer's circumstances affects its original determination. Where a taxpayer alleges a change in circumstances that affects Appeals' original determination, Appeals may consider whether changed circumstances warrant a change in its earlier determination.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (h) as follows:

*Q-H1*. Are the periods of limitation suspended during the course of any subsequent Appeals consideration of the matters raised by a taxpayer when the taxpayer invokes the retained jurisdiction of Appeals under section 6330(d)(2)(A) or (B)?

*A-H1*. No. Under section 6330(b)(2), a taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax periods specified in the CDP Notice. Any subsequent consideration by Appeals pursuant to its retained jurisdiction is not a continuation of the original CDP hearing and does not suspend the periods of limitation.

*Q-H2*. Is a decision of Appeals resulting from a retained jurisdiction hearing appealable to the Tax Court?

*A-H2*. No. As discussed in A–H1, a taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax period or periods specified in the CDP Notice. Only determinations resulting from CDP hearings are appealable to the Tax Court.

(i) *Equivalent hearing*—(1) *In general*. A taxpayer who fails to make a timely request for a CDP hearing is not entitled to a CDP hearing. Such a taxpayer may nevertheless request an administrative hearing with Appeals, which is referred to herein as an ''equivalent hearing.'' The equivalent hearing will be held by Appeals and generally will follow Appeals procedures for a CDP hearing. Appeals will not, however, issue a Notice of Determination. Under such circumstances, Appeals will issue a Decision Letter.

(2) *Questions and answers*. The questions and answers illustrate the provisions of this paragraph (i) as follows:

*Q-I1*. What must a taxpayer do to obtain an equivalent hearing?

*A-I1*. (i) A request for an equivalent hearing must be made in writing. A written request in any form that requests an equivalent hearing will be acceptable if it includes the information and signature required in A–I1(ii) of this paragraph (i)(2).

(ii) The request must be dated and must include the following:

(A) The taxpayer's name, address, daytime telephone number (if any), and taxpayer identification number (*e.g.*, SSN, ITIN or EIN).

(B) The type of tax involved.

(C) The tax period at issue.

(D) A statement that the taxpayer is requesting an equivalent hearing with Appeals concerning the levy.

(E) The reason or reasons why the taxpayer disagrees with the proposed levy.

(F) The signature of the taxpayer or the taxpayer's authorized representative.

(iii) The taxpayer must perfect any timely written request for an equivalent hearing that does not satisfy the requirements set forth in A–I1(ii) of this paragraph (i)(2) within a reasonable period of time after a request from the IRS. If the requirements are not satisfied within a reasonable period of time, the taxpayer's equivalent hearing request will be denied.

(iv) The taxpayer must affirm any timely written request for an equivalent hearing that is signed or alleged to have been signed on the taxpayer's behalf by the taxpayer's spouse or other unauthorized representative, and that otherwise meets the requirements set forth in A–I1(ii) of this paragraph (i)(2), by filing, within a reasonable period of time after a request from the IRS, a signed written affirmation that the request was originally submitted on the taxpayer's behalf. If the affirmation is filed within a reasonable period of time after a request, the timely equivalent hearing request will be considered timely with respect to the non-signing taxpayer. If the affirmation is not filed within a reasonable period of time, the equivalent hearing request will be denied with respect to the non-signing taxpayer.

*Q-I2*. What issues will Appeals consider at an equivalent hearing?

*A-I2*. In an equivalent hearing, Appeals will consider the same issues that it would have considered at a CDP hearing on the same matter.

*Q-I3*. Are the periods of limitation under sections 6502, 6531, and 6532 suspended if the taxpayer does not timely request a CDP hearing and is subsequently given an equivalent hearing?

*A-I3*. No. The suspension period provided for in section 6330(e) relates only to hearings requested within the 30-day period that commences the day following the date of the pre-levy or post-levy CDP Notice, that is, CDP hearings.

*Q-I4*. Will collection action be suspended if a taxpayer requests and receives an equivalent hearing?

*A-I4*. Collection action is not required to be suspended. Accordingly, the decision to take collection action during the pendency of an equivalent hearing will be determined on a case-by-case basis. Appeals may request the IRS office with responsibility for collecting the taxes to suspend all or some collection action or to take other appropriate action if it determines that such action is appropriate or necessary under the circumstances.

*Q-I5*. What will the Decision Letter state?

*A-I5*. The Decision Letter will generally contain the same information as a Notice of Determination.

*Q-I6*. Will a taxpayer be able to obtain Tax Court review of a decision made by Appeals with respect to an equivalent hearing?

*A-I6*. Section 6330 does not authorize a taxpayer to appeal the decision of Appeals with respect to an equivalent hearing. A taxpayer may under certain circumstances be able to seek Tax Court review of Appeals' denial of relief under section 6015. Such review must be sought within 90 days of the issuance of Appeals' determination on those issues, as provided by section 6015(e).

*Q-I7*. When must a taxpayer request an equivalent hearing with respect to a CDP Notice issued under section 6330?

*A-I7*. A taxpayer must submit a written request for an equivalent hearing within the one-year period commencing the day after the date of the CDP Notice issued under section 6330. This period is slightly different from the period for submitting a written request for an equivalent hearing with respect to a CDP Notice issued under section 6320. For a CDP Notice issued under section 6320, a taxpayer must submit a written request for an equivalent hearing within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL.

*Q-I8*. How will the timeliness of a taxpayer's written request for an equivalent hearing be determined?

*A-I8*. The rules and regulations under section 7502 and section 7503 will apply to determine the timeliness of the taxpayer's request for an equivalent hearing, if properly transmitted and addressed as provided in A–I10 of this paragraph (i)(2).

*Q-I9*. Is the one-year period within which a taxpayer must make a request for an equivalent hearing extended because the taxpayer resides outside the United States?

*A-I9*. *No*. All taxpayers who want an equivalent hearing must request the hearing within the one-year period commencing the day after the date of the CDP Notice issued under section 6330.

*Q-I10*. Where must the written request for an equivalent hearing be sent?

*A-I10*. The written request for an equivalent hearing must be sent, or hand delivered (if permitted), to the IRS office and address as directed on the CDP Notice. If the address of the issuing office does not appear on the CDP Notice, the taxpayer should obtain the address of the office to which the written request should be sent or hand delivered by calling, toll-free, 1–800–829–1040 and providing the taxpayer's identification number (*e.g.*, SSN, ITIN or EIN).

*Q-I11*. What will happen if the taxpayer does not request an equivalent hearing in writing within the one-year period commencing the day after the date of the CDP Notice issued under section 6330?

*A-I11*. If the taxpayer does not request an equivalent hearing with Appeals within the one-year period commencing the day after the date of the CDP Notice issued under section 6330, the taxpayer foregoes the right to an equivalent hearing with respect to the unpaid tax and tax periods shown on the CDP Notice. A written request submitted within the one-year period that does not satisfy the requirements set forth in A–I1(ii) of this paragraph (i)(2) is considered timely if the request is perfected within a reasonable period of time pursuant to A–I1(iii) of this paragraph (i)(2). If a request for equivalent hearing is untimely, either because the request was not submitted within the one-year period or not perfected within the reasonable period provided, the equivalent hearing request will be denied. The taxpayer, however, may seek reconsideration by the IRS office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before Appeals under its Collection Appeals Program or any successor program.

(j) *Effective date*. This section is applicable on or after November 16, 2006 with respect to requests made for CDP hearings or equivalent hearings on or after November 16, 2006.

[T.D. 8980, 67 FR 2551, Jan. 18, 2002 as amended by T.D. 9291, 71 FR 60831, Oct. 17, 2006]

### § 301.6331–1 Levy and distraint.

(a) *Authority to levy*—(1) *In general*. If any person liable to pay any tax neglects or refuses to pay the tax within 10 days after notice and demand, the district director to whom the assessment is charged (or, upon his request, any other district director) may proceed to collect the tax by levy. The district director may levy upon any property, or rights to property, whether real or personal, tangible or intangible, belonging to the taxpayer. The district director may also levy upon property with respect to which there is a lien provided by section 6321 or 6324 for the payment of the tax. For exemption of certain property from levy, see section 6334 and the regulations thereunder. As used in section 6331 and this section, the term ''tax'' includes any interest, additional amount, addition to tax, or assessable penalty, together with costs and expenses. Property subject to a Federal tax lien which has been sold or otherwise transferred by the taxpayer may be seized while in the hands of the transferee or any subsequent transferee. However, see provisions under sections 6323 and 6324 (a)(2) and (b) for protection of certain transferees against a Federal tax lien. Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy, including receivables, bank accounts, evidences of debt, securities, and salaries, wages, commissions, or other compensation. A levy on a bank reaches any interest that accrues on the taxpayer's balance under the terms of the bank's agreement with the depositor during the 21-day holding period provided for in section 6332(c). Except as provided in § 301.6331–1(b)(1) with regard to a levy on salary or wages, a levy extends only to property possessed and obligations which exist

at the time of the levy. Obligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date. For example, if on the first day of the month a delinquent taxpayer sold personal property subject to an agreement that the buyer remit the purchase price on the last day of the month, a levy made on the buyer on the 10th day of the month would reach the amount due on the sale, although the buyer need not satisfy the levy by paying over the amount to the district director until the last day of the month. Similarly, a levy only reaches property in the possession of the person levied upon at the time the levy is made together with interest that accrues during the 21-day holding period provided for in section 6332(c). For example, a levy made on a bank with respect to the account of a delinquent taxpayer is satisfied if the bank surrenders the amount of the taxpayer's balance at the time the levy is made. The levy has no effect upon any subsequent deposit made in the bank by the taxpayer. Subsequent deposits may be reached only by a subsequent levy on the bank.

(2) *Jeopardy cases.* If the district director finds that the collection of any tax is in jeopardy, he or she may make notice and demand for immediate payment of such tax and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in section 6331(a), the 30-day period provided in section 6331(d), or the limitation on levy provided in section 6331(g)(1).

(3) *Bankruptcy or receivership cases.* During a bankruptcy proceeding or a receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending. Taxes cannot be collected by levy upon assets in the custody of a court, whether or not such custody is incident to a bankruptcy or receivership proceeding, except where the proceeding has progressed to such a point that the levy would not interfere with the work of the court or where the court grants permission to levy. Any assets which under applicable provisions of law are not under the control of the court may be levied upon, for example, property exempt from court custody under State law or the bankrupt's earnings and property acquired after the date of bankruptcy. However, levy upon such property is not mandatory and the Government may rely upon payment of taxes in the proceeding.

(4) *Certain types of compensation*—(i) *Federal employees.* Levy may be made upon the salary or wages of any officer or employee (including members of the Armed Forces), or elected or appointed official, of the United States, the District of Columbia, or any agency or instrumentality of either, by serving a notice of levy on the employer of the delinquent taxpayer. As used in this subdivision, the term ''employer'' means (*a*) the officer or employee of the United States, the District of Columbia, or of the agency or instrumentality of the United States or the District of Columbia, who has control of the payment of the wages, or (*b*) any other officer or employee designated by the head of the branch, department, agency, or instrumentality of the United States or of the District of Columbia as the party upon whom service of the notice of levy may be made. If the head of such branch, department, agency or instrumentality designates an officer or employee other than one who has control of the payment of the wages, as the party upon whom service of the notice of levy may be made, such head shall promptly notify the Commissioner of the name and address of each officer or employee so designated and the scope or extent of his authority as such designee.

(ii) *State and municipal employees.* Salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

(iii) *Seamen.* Notwithstanding the provisions of section 12 of the Seamen's Act of 1915 (46 U.S.C. 601), wages of seamen, apprentice seamen, or fishermen employed on fishing vessels are subject to levy. See section 6334(c).

(5) *Noncompetent Indians.* Solely for purposes of sections 6321 and 6331, any interest in restricted land held in trust by the United States for an individual noncompetent Indian (and not for a tribe) shall not be deemed to be property, or a right to property, belonging to such Indian.

(b) *Continuing levies and successive seizures*—(1) *Continuing effect of levy on salary and wages.* A levy on salary or wages has continuous effect from the time the levy originally is made until the levy is released pursuant to section 6343. For this purpose, the term *salary or wages* includes compensation for services paid in the form of fees, commissions, bonuses, and similar items. The levy attaches to both salary or wages earned but not yet paid at the time of the levy, advances on salary or wages made subsequent to the date of the levy, and salary or wages earned and becoming payable subsequent to the date of the levy, until the levy is released pursuant to section 6343. In general, salaries or wages that are the subject of a continuing levy and are not exempt from levy under section 6334(a)(8) or (9), are to be paid to the district director, the service center director, or the compliance center director (director) on the same date the payor would otherwise pay over the money to the taxpayer. For example, if an individual normally is paid on the Wednesday following the close of each work week, a levy made upon his or her employer on any Monday would apply to both wages due for the prior work week and wages for succeeding work weeks as such wages become payable. In such a case, the levy would be satisfied if, on the first Wednesday after the levy and on each Wednesday thereafter until the employer receives a notice of release from levy described in section 6343, the employer pays over to the director wages that would otherwise be paid to the employee on such Wednesday (less any exempt amount pursuant to section 6334).

(2) *Successive seizures.* Whenever any property or rights to property upon which a levy has been made are not sufficient to satisfy the claim of the United States for which the levy is made, the district director may thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property or rights to property subject to levy of the person against whom such claim exists or on which there is a lien imposed by section 6321 or 6324 (or the corresponding provision of prior law) for the payment of such claim until the amount due from such person, together with all costs and expenses, is fully paid.

(c) *Service of notice of levy by mail.* A notice of levy may be served by mailing the notice to the person upon whom the service of a notice of levy is authorized under paragraph (a)(1) of this section. In such a case the date and time the notice is delivered to the person to be served is the date and time the levy is made. If the notice is sent by certificated mail, return receipt requested, the date of delivery on the receipt is treated as the date the levy is made. If, after receipt of a notice of levy, an officer or other person authorized to act on behalf of the person served signs and notes the date and time of receipt on the notice of levy, the date and time so the contrary, the date and time of delivery.

Any person may, upon written notice to the district director having audit jurisdiction over such person, have all notices of levy by mail sent to one designated office. After such a notice is received by the district director, notices of levy by mail will be sent to the designated office until a written notice withdrawing the request or a written notice designating a different office is received by the district director.

(d) *Effective date.* These regulations are effective December 10, 1992.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7139, 36 FR 15041, Aug. 12, 1971; T.D. 7620, 44 FR 27987, May 14, 1979; T.D. 7874, 48 FR 10061, Mar. 10, 1983; T.D. 8558, 59 FR 38903, Aug. 1, 1994]

### § 301.6331–2 Procedures and restrictions on levies.

(a) *Notice of intent to levy*—(1) *In general.* Levy may be made upon the salary, wages, or other property of a taxpayer for any unpaid tax no less than 30 days after the district director, the service center director, or the compliance center director (director) has notified the taxpayer in writing of the intent to levy. The notice must be given

in person, be left at the dwelling or usual place of business of the taxpayer, or be sent by registered or certified mail to the taxpayer's last known address. For further guidance regarding the definition of last known address, see § 301.6212–2. The notice of intent to levy is separate from, but may be given at the same time as, the notice and demand described in § 301.6331–1.

(2) *Content of Notice.* The notice of intent to levy is to contain a brief statement in nontechnical terms including the following information—

(i) The Internal Revenue Code provisions and the procedures relating to levy and sale of property;

(ii) The administrative appeals available with respect to the levy and sale of property and the procedures relating to such appeals;

(iii) The alternatives available that could prevent levy on the property (including the use of an installment agreement under section 6159); and

(iv) The Internal Revenue Code provisions and the procedures relating to redemption of property and release of liens on property.

(b) *Uneconomical levy*—(1) *In general.* No levy may be made on property if the director estimates that the anticipated expenses with respect to the levy and sale will exceed the fair market value of the property. The estimate is to be made on an aggregate basis for all of the items that are anticipated to be seized pursuant to the levy. Generally, no levy should be made on individual items of insignificant monetary value. For the definition of fair market value, see § 301.6325–1(b)(1)(i). See § 301.6341–1 concerning the expenses of levy and sale.

(2) *Time of estimate.* The estimate, which may be formal or informal, is to be made at the time of the seizure or within a reasonable period of time prior to a seizure. The estimate may be based on earlier estimates of fair market value and anticipated expenses of the same or similar property.

(3) *Examples.* The following examples illustrate the application of this paragraph (b):

*Example 1.* A director anticipates that the taxpayer has only one item of property that can be seized and sold. This item is estimated to have a fair market value of $250.00. The director also estimates that the costs of seizure and sale will total $300.00 if this item is seized. The director is prohibited from levying on this one item of the taxpayer's property because the costs of seizure and sale are estimated to exceed the property's fair market value.

*Example 2.* The facts are the same as in *Example 1* except that the director anticipates that the taxpayer has 10 items of property that can be seized and sold. Each of those items is estimated to have a fair market value of $250.00. The director also estimates that the costs of seizure and sale will total $300.00 regardless of how many of those items are seized. The director is prohibited from levying on only one item of the taxpayer's property because the costs of seizure and sale are estimated to exceed the fair market value of the single item of property. The director, however, would not be prohibited from levying on two or more items of the taxpayer's property because the aggregate fair market value of the seized property would exceed the estimated costs of seizure and sale.

*Example 3.* The taxpayer has three items of property, A, B, and C. The director anticipates that the value of items A, B, and C depends on their being sold as a unit. The director estimates that due to high anticipated costs of storing or maintaining item B prior to the sale, the aggregate fair market value of items A, B, and C will not exceed the anticipated expenses of seizure and sale if all three items are seized. Accordingly, the director is prohibited from levying on items A, B, and C.

*Example 4.* The facts are the same as in *Example 3* except that the director does not anticipate that the value of items A, B, and C depends on those items being sold as a unit. If the director estimates that the aggregate fair market value of items A and C exceeds the aggregate anticipated costs of the seizure and sale of those two items, items A and C can be seized and sold. The director is prohibited from levying on item B because the high cost of storing or maintaining item B is estimated to exceed the fair market value of item B.

(c) *Restriction on levy on date of appearance.* Except for continuing levies on salaries or wages described in § 301.6331–1(b)(1), no levy may be made on any property of a person on the day that person, or an officer or employee of that person, is required to appear in response to a summons served for the purpose of collecting any underpayment of tax from that person. For purposes of this paragraph (c), the date on which an appearance is required is

the date fixed by an officer or employee of the Internal Revenue Service pursuant to section 7605 or the date (if any) fixed as the result of a judicial proceeding instituted under sections 7604 and 7402(b) seeking the enforcement of the summons.

(d) *Jeopardy*. Paragraphs (a) and (c) of this section do not apply to a levy if the director finds, for purposes of § 301.6331–1(a)(2), that the collection of tax is in jeopardy.

(e) *Effective date*. These regulations are effective December 10, 1992.

[T.D. 8558, 59 FR 38903, Aug. 1, 1994, as amended by T.D. 8939, 66 FR 2821, Jan. 12, 2001]

### § 301.6331–3 Restrictions on levy while offers to compromise are pending.

*Cross-reference*. For provisions relating to the making of levies while an offer to compromise is pending, *see* § 301.7122–1.

[T.D. 9027, 67 FR 77417, Dec. 18, 2002]

### § 301.6331–4 Restrictions on levy while installment agreements are pending or in effect.

(a) *Prohibition on levy*—(1) *In general*. No levy may be made to collect a tax liability that is the subject of an installment agreement during the period that a proposed installment agreement is pending with the Internal Revenue Service (IRS), for 30 days immediately following the rejection of a proposed installment agreement, during the period that an installment agreement is in effect, and for 30 days immediately following the termination of an installment agreement. If, within the 30 days following the rejection or termination of an installment agreement, the taxpayer files an appeal with the IRS Office of Appeals, no levy may be made while the rejection or termination is being considered by Appeals. This section will not prohibit levy to collect the liability of any person other than the person or persons named in the installment agreement.

(2) *When a proposed installment agreement becomes pending*. A proposed installment agreement becomes pending when it is accepted for processing. The IRS may not accept a proposed installment agreement for processing following reference of a case involving the liability that is the subject of the proposed installment agreement to the Department of Justice for prosecution or defense. The proposed installment agreement remains pending until the IRS accepts the proposal, the IRS notifies the taxpayer that the proposal has been rejected, or the proposal is withdrawn by the taxpayer. If a proposed installment agreement that has been accepted for processing does not contain sufficient information to permit the IRS to evaluate whether the proposal should be accepted, the IRS will request the taxpayer to provide the needed additional information. If the taxpayer does not submit the additional information that the IRS has requested within a reasonable time period after such a request, the IRS may reject the proposed installment agreement.

(3) *Revised proposals of installment agreements submitted following rejection*. If, following the rejection of a proposed installment agreement, the taxpayer makes a good faith revision of the proposal and submits the revision within 30 days of the date of rejection, the provisions of this section shall apply to that revised proposal.

(4) *Exceptions*. Paragraph (a)(1) of this section shall not prohibit levy if the taxpayer files a written notice with the IRS that waives the restriction on levy imposed by this section, the IRS determines that the proposed installment agreement was submitted solely to delay collection, or the IRS determines that collection of the tax to which the installment agreement or proposed installment agreement relates is in jeopardy.

(b) *Other actions by the IRS while levy is prohibited*—(1) *In general*. The IRS may take actions other than levy to protect the interests of the Government with regard to the liability identified in an installment agreement or proposed installment agreement. Those actions include, for example—

(i) Crediting an overpayment against the liability pursuant to section 6402;

(ii) Filing or refiling notices of Federal tax lien; and

(iii) Taking action to collect from any person who is not named in the installment agreement or proposed installment agreement but who is liable

for the tax to which the installment agreement relates.

(2) *Proceedings in court*. Except as otherwise provided in this paragraph (b)(2), the IRS will not refer a case to the Department of Justice for the commencement of a proceeding in court, against a person named in an installment agreement or proposed installment agreement, if levy to collect the liability is prohibited by paragraph (a)(1) of this section. Without regard to whether a person is named in an installment agreement or proposed installment agreement, however, the IRS may authorize the Department of Justice to file a counterclaim or third-party complaint in a refund action or to join that person in any other proceeding in which liability for the tax that is the subject of the installment agreement or proposed installment agreement may be established or disputed, including a suit against the United States under 28 U.S.C. 2410. In addition, the United States may file a claim in any bankruptcy proceeding or insolvency action brought by or against such person. If a person named in an installment agreement is joined in a proceeding, the United States obtains a judgment against that person, and the case is referred back to the IRS for collection, collection will continue to occur pursuant to the terms of the installment agreement.

(c) *Statute of limitations*—(1) *Suspension of the statute of limitations on collection*. The statute of limitations under section 6502 for collection of any liability shall be suspended during the period that a proposed installment agreement relating to that liability is pending with the IRS, for 30 days immediately following the rejection of a proposed installment agreement, and for 30 days immediately following the termination of an installment agreement. If, within the 30 days following the rejection or termination of an installment agreement, the taxpayer files an appeal with the IRS Office of Appeals, the statute of limitations for collection shall be suspended while the rejection or termination is being considered by Appeals. The statute of limitations for collection shall continue to run if an exception under paragraph (a)(4) of this section applies and levy is not prohibited with respect to the taxpayer.

(2) *Waivers of the statute of limitations on collection*. The IRS may continue to request, to the extent permissible under section 6502 and § 301.6159–1, that the taxpayer agree to a reasonable extension of the statute of limitations for collection.

(d) *Effective date*. This section is applicable on December 18, 2002.

[T.D. 9027, 67 FR 77417, Dec. 18, 2002]

### § 301.6332–1 Surrender of property subject to levy.

(a) *Requirement*—(1) *In general*. Except as otherwise provided in § 301.6332–2, relating to levy in the case of life insurance and endowment contracts, and in § 301.6332–3, relating to property held by banks, any person in possession of (or obligated with respect to) property or rights to property subject to levy and upon which a levy has been made shall, upon demand of the district director, surrender the property or rights (or discharge the obligation) to the district director, except that part of the property or rights (or obligation) which, at the time of the demand, is actually or constructively under the jurisdiction of a court because of an attachment or execution under any judicial process.

(2) *Levy on bank deposits held in offices outside the United States*. Notwithstanding subparagraph (1) of this paragraph (a), if a levy has been made upon property or rights to property subject to levy which a bank engaged in the banking business in the United States or a possession of the United States is in possession of (or obligated with respect to), the Commissioner shall not enforce the levy with respect to any deposits held in an office of the bank outside the United States or a possession of the United States, unless the notice of levy specifies that the district director intends to reach such deposits. The notice of levy shall not specify that the district director intends to reach such deposits unless the district director believes—

(i) That the taxpayer is within the jurisdiction of a U.S. court at the time the levy is made and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an

office of the bank outside the United States or a possession of the United States; or

(ii) That the taxpayer is not within the jurisdiction of a U.S. court at the time the levy is made, that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office outside the United States or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code. For purposes of this subparagraph, the term ''possession of the United States'' includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

(b) *Enforcement of levy*—(1) *Extent of personal liability*. Any person who, upon demand of the district director, fails or refuses to surrender any property or right to property subject to levy is liable in his own person and estate in a sum equal to the value of the property or rights not so surrendered, together with costs and interest. The liability, however, may not exceed the amount of the taxes for the collection of which the levy was made. Interest is to be computed at the annual rate referred to in regulations under section 6621 from the date of the levy, or, in the case of a continuing levy on salary or wages (see section 6331(d)(3)), from the date the person would otherwise have been obligated to pay over the wages or salary to the taxpayer. Any amount recovered, other than cost, will be credited against the tax liability for the collection of which the levy was made.

(2) *Penalty for violation*. In addition to the personal liability described in subparagraph (1) of this paragraph (b), any person who is required to surrender property or rights to property and who fails or refuses to surrender them without reasonable cause is liable for a penalty equal to 50 percent of the amount recoverable under section 6332(d)(1). No part of the penalty described in this subparagraph shall be credited against the tax liability for the collection of which the levy was made. The penalty described in this subparagraph is not applicable in cases where bona fide dispute exists concerning the amount of the property to be surrendered pursuant to a levy or concerning the legal effectiveness of the levy. However, if a court in a later enforcement suit sustains the levy, then reasonable cause would usually not exist to refuse to honor a later levy made under similar circumstances.

(c) *Effect of honoring levy*—(1) *In general*. Any person in possession of, or obligated with respect to, property or rights to property subject to levy and upon which a levy has been made who, upon demand by the district director, surrenders the property or rights to property, or discharges the obligation, to the district director, or who pays a liability described in paragraph (b)(1) of this section, is discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to the property or rights to property arising from the surrender or payment.

(2) *Exception for certain incorrectly surrendered property*. Any person who surrenders to the Internal Revenue Service property or rights to property not properly subject to levy in which the delinquent taxpayer has no apparent interest is not relieved of liability to a third party who has an interest in the property. However, if the delinquent taxpayer has an apparent interest in property or rights to property, a person who makes a good faith determination that such property or rights to property in his or her possession has been levied upon by the Internal Revenue Service and who surrenders the property to the United States in response to the levy is relived of liability to a third party who has an interest in the property or rights to property, even if it is subsequently determined that the property was not properly subject to levy.

(3) *Remedy*. In situations described in paragraphs (c)(1) and (c)(2) of this section, taxpayers and third parties who have an interest in property surrendered in response to a levy may secure from the Internal Revenue Service the administrative relief provided for in section 6343(b) or may bring suit to recover the property under section 7426.

(4) *Examples.* The provisions of this paragraph (c) may be illustrated by the following examples:

*Example 1.* M Bank is served with a notice of levy for an unpaid tax liability due from A in the amount of $2,000. M Bank holds $2,000 in a checking account in the names of A or B or C. Although all of the deposits into the account were made by B and C, A has an unrestricted right to withdraw the funds from the account. M Bank surrenders the entire account to the district director at the end of the holding period provided in section 6332(c). Under paragraph (c)(1) of this section, M Bank is not liable to B or C for any amount, even if B or C prove that the funds in the account did not belong to A, because A's unrestricted right to withdraw the funds is an interest which in subject to levy. B or C may, however, seek the return of the funds from the United States as provided in sections 6343(b) and 7426 of the Internal Revenue Code.

*Example 2.* A is indebted to B for $400. Unbeknownst to A, B has assigned his right to receive payment to C. A is served with a notice of levy for an unpaid tax liability due from B for $400. A, acting with no knowledge of the assignment to C, surrenders $400 to the district director. A is discharged from his obligation to pay B, the taxpayer. Under paragraph (c)(2) of this section, because B had an apparent interest in the funds that A owed to B, and because A determined in good faith that those funds had been levied upon, A is also discharged from any liability to C, even though the money is not properly subject to levy. C may, however, seek return of the payment from the United States as provided in sections 6343(b) and 7426 of the Internal Revenue Code.

*Example 3.* M Bank is served with a notice of levy for an unpaid tax liability due from ''John H. Smith, Sr.'' in the amount of $5,000. M Bank fails to read the notice of levy carefully. When searching its records, M Bank finds the name of ''John H. Smith, Jr.'' and looks no further. M Bank surrenders $5,000 from John H. Smith, Jr.'s checking account to the district director. M Bank is not discharged from liability under section 6332(e) of the Internal Revenue Code because the delinquent taxpayer (John H. Smith, Sr.) had no apparent interest in the account of John H. Smith, Jr. (Generally, John H. Smith Jr. may seek return of the payment from the United States as provided in sections 6343 and 7426 of the Internal Revenue Code.)

*Example 4.* M Bank is served with a notice of levy for an unpaid tax liability due from ''Robert A. Jones'' in the amount of $5,000. M Bank searches its records and identifies four separate accounts of $1,000 each in the name of ''Robert A. Jones.'' All four accounts list different addresses and social security identification numbers. M Bank surrenders all four accounts totalling $4,000 in response to the levy. M Bank could not in good faith have determined that all four accounts were levied upon. Therefore, M Bank is not discharged from liability to any person other than the taxpayer whose account was levied upon.

(5) *Effective date.* Paragraph (c) of this section is effective January 11, 1993. However, persons surrendering property to the Internal Revenue Service may rely on the regulations with respect to levies issued after November 10, 1988.

(d) *Person defined.* The term ''person,'' as used in section 6332(a) and this section, includes an officer or employee of a corporation or a member or employee of a partnership, who is under a duty to surrender the property or rights to property or to discharge the obligation. In the case of a levy upon the salary or wages of an officer, employee, or elected or appointed official of the United States, the District of Columbia, or any agency or instrumentality of either, the term ''person'' includes the officer or employee of the United States, of the District of Columbia, or of such agency or instrumentality who is under a duty to discharge the obligation. As to the officer or employee who is under such duty, see paragraph (a)(4)(i) of § 301.6331–1.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7317, Apr. 13, 1972; T.D. 7620, 44 FR 27988, May 14, 1979; T. D. 8466, 58 FR 17, Jan. 4, 1993; T. D.8467, 58 FR 3829, Jan. 12, 1993]

### § 301.6332–2 Surrender of property subject to levy in the case of life insurance and endowment contracts.

(a) *In general.* This section provides special rules relating to the surrender of property subject to levy in the case of life insurance and endowment contracts. The provisions of § 301.6332–1 which relate generally to the surrender of property subject to levy apply, to the extent not inconsistent with the special rules set forth in this section, to a levy in the case of life insurance and endowment contracts.

(b) *Effect of service of notice of levy*—(1) *In general.*—(i) A notice of levy served by a district director on an insuring organization with respect to a life insurance or endowment contract issued by the organization shall constitute—

(A) A demand by the district director for the payment of the cash loan value of the contract adjusted in accordance with paragraph (c) of this section, and

(B) The exercise of the right of the person against whom the tax is assessed to the advance of such cash loan value.

(ii) It is unnecessary for the district director to surrender the contract document to the insuring organization upon which the levy is made. However, the notice of levy will include a certification by the district director that a copy of the notice of levy has been mailed to the person against whom the tax is assessed at his last known address. For further guidance regarding the definition of last known address, see § 301.6212–2. At the time of service of the notice of levy, the levy is effective with respect to the cash loan value of the insurance contract, subject to the condition that if the levy is not satisfied or released before the 90th day after the date of service, the levy can be satisfied only by payment of the amount described in paragraph (c) of this section. Other than satisfaction or release of the levy, no event during the 90-day period subsequent to the date of service of the notice of levy shall release the cash loan value from the effect of the levy. For example, the termination of the policy by the taxpayer or by the death of the insured during such 90-day period shall not release the levy. For the rules relating to the time when the insuring organization is to pay over the required amount, see paragraph (c) of this section.

(2) *Notification of amount subject to levy*—(i) *Full payment before the 90th day*. In the event that the unpaid liability to which the levy relates is satisfied at any time during the 90-day period subsequent to the date of service of the notice of levy, the district director will promptly give the insuring organization written notification that the levy is released.

(ii) *Notification after the 90th day*. In the event that notification is not given under subdivision (i) of this subparagraph, the district director will, promptly following the 90th day after service of the notice of levy, give the insuring organization written notification of the current status of all accounts listed on the notice of levy, and of the total payments received since service of the notice of levy. This notification will be given to the insuring organization whether or not there has been any change in the status of the accounts.

(c) *Satisfaction of levy*—(1) *In general*. The levy described in paragraph (b) of this section with respect to a life insurance or endowment contract shall be deemed to be satisfied if the insuring organization pays over to the district director the amount which the person against whom the tax is assessed could have had advanced to him by the organization on the 90th day after service of the notice of levy on the organization. However, this amount is increased by the amount of any advance (including contractual interest thereon), generally called a policy loan, made to the person on or after the date the organization has actual notice or knowledge, within the meaning of section 6323(i)(1), of the existence of the tax lien with respect to which the levy is made. The insuring organization may, nevertheless, make an advance (including contractual interest thereon), generally called an automatic premium loan, made automatically to maintain the contract in force under an agreement entered into before the organization has such actual notice or knowledge. In any event, the amount paid to the district director by the insuring organization is not to exceed the amount of the unpaid liability shown on the notification described in paragraph (b)(2) of this section. The amount, determined in accordance with the provisions of this section, subject to the levy shall be paid to the district director by the insuring organization promptly after receipt of the notification described in paragraph (b)(2) of this section. The satisfaction of a levy with respect to a life insurance or endowment contract will not discharge the contract from the tax lien. However, see section 6323(b)(9)(C) and the regulations thereunder concerning the liability of an insurance company after satisfaction of a levy with respect to a life insurance or endowment contract. If the person against whom the tax is assessed so directs, the insuring organization, on a date before the 90th day

after service of the notice of levy, may satisfy the levy by paying over an amount computed in accordance with the provisions of this subparagraph substituting such date for the 90th day. In the event of termination of the policy by the taxpayer or by the death of the insured on a date before the 90th day after service of the notice of levy, the amount to be paid over to the district director by the insuring organization in satisfaction of the levy shall be an amount computed in accordance with the provisions of this subparagraph substituting the date of termination of the policy or the date of death for the 90th day.

(2) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* On March 5, 1968, a notice of levy for an unpaid income tax assessment due from A in the amount of $3,000 is served on the X Insurance Company with respect to A's life insurance policy. On March 5, 1968, the cash loan value of the policy is $1,500. On April 9, 1968, A does not pay a premium due on the policy in the amount of $200. Under an automatic premium advance provision contained in the policy originally issued in 1960, X advances the premium out of the cash value of the policy. As of June 3, 1968 (the 90th day after service of the notice of levy), pursuant to the provisions of the policy, the amount of accrued charges upon the automatic premium advance in the amount of $200 for the period April 9, 1968, through June 3, 1968, is $2. On June 5, 1968, the district director gives written notification to X indicating that A's unpaid tax assessment is $2,500. Under this section, X is required to pay to the district director, promptly after receipt of the June 5, 1968, notification, the sum of $1,298 ($1,500 less $200 less $2), which is the amount A could have had advanced to him by X on June 3, 1968.

*Example 2.* Assume the same facts as in example 1 except that on May 10, 1968, A requests and X grants an advance in the amount of $1,000. X has actual notice of the existence of the lien by reason of the service of the notice of levy on March 5, 1968. This advance is not required to be made automatically under the policy and reduces the amount of the cash value of the policy. For the use of the $1,000 advance during the period May 10, 1968, through June 3, 1968, X charges A the sum of $3. Under this section, X is required to pay to the district director, promptly after receipt of the June 5, 1968, notification, the sum of $1,298. This $1,298 amount is composed of the $295 amount ($1,500 less $200 less $2 less $1,000 less $3) A could have had advanced to him by X on June 3, 1968, plus the $1,000 advance plus the charges in the amount of $3 with respect thereto.

*Example 3.* Assume the same facts as in example 1 except that the insurance contract does not contain an automatic premium advance provision. The contract does provide that, upon default in the payment of premiums, the policy shall automatically be converted to paid-up term insurance with no cash or loan value. A fails to make the premium payment of $200 due on April 9, 1968. After expiration of a grace period to make the premium payment, the X Insurance Company applies the cash loan value of $1,500 to effect the conversion. Since the service of the notice of levy constitutes the exercise of A's right to receive the cash loan value and the amount applied to effect the conversion is not an automatic advance to A to maintain the policy in force, the conversion of the policy is not an event which will release the cash loan value from the effect of the levy. Therefore, X Insurance Company is required to pay to the district director, promptly after receipt of the June 5, 1968 notification, the sum of $1,500.

(d) *Other enforcement proceedings.* The satisfaction of the levy described in paragraph (b) of this section by an insuring organization shall be without prejudice to any civil action for the enforcement of any Federal tax lien with respect to a life insurance or endowment contract. Thus, this levy procedure is not the exclusive means of subjecting the life insurance and endowment contracts of the person against whom a tax is assessed to the collection of his unpaid assessment. The United States may choose to foreclose the tax lien in any case where it is appropriate, as, for example, to reach the cash surrender value (as distinguished from cash loan value) of a life insurance or endowment contract.

(e) *Cross references.* (1) For provisions relating to priority of certain advances with respect to a life insurance or endowment contract after satisfaction of a levy pursuant to section 6332(b), see section 6323(b)(9) and the regulations thereunder.

(2) For provisions relating to the issuance of a certificate of discharge of a life insurance or endowment contract subject to a tax lien, see section 6325(b) and the regulations thereunder.

[T.D. 7180, 37 FR 7317, Apr. 13, 1972, as amended by T.D. 8939, 66 FR 2821, Jan. 12, 2001]

**§ 301.6332–3 The 21-day holding period applicable to property held by banks.**

(a) *In general*. This section provides special rules relating to the surrender, after 21 days, of deposits subject to levy which are held by banks. The provisions of § 301.6332–1 which relate generally to the surrender of property subject to levy apply, to the extent not inconsistent with the special rules set forth in this section, to a levy on property held by banks.

(b) *Definition of bank*. For purposes of this section, the term ''bank'' means—

(1) A bank or trust company or domestic building and loan association incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or of any State, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by State or Federal authority having supervision over banking institutions;

(2) Any credit union the member accounts of which are insured in accordance with the provisions of title II of the Federal Credit Union Act, 12 U.S.C. 1781 *et seq.*; and

(3) A corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

(c) *21-day holding period*—(1) *In general*. When a levy is made on deposits held by a bank, the bank shall surrender such deposits (not otherwise subject to an attachment or execution under judicial process) only after 21 calendar days after the date the levy is made. The district director may request an extension of the 21-day holding period pursuant to paragraph (d)(2) of this section. During the prescribed holding period, or any extension thereof, the levy shall be released only upon notification to the bank by the district director of a decision by the Internal Revenue Service to release the levy. If the bank does not receive such notification from the district director within the prescribed holding period, or any extension thereof, the bank must surrender the deposits, including any interest thereon as determined in accordance with paragraph (c)(2) of this section (up to the amount of the levy), on the first business day after the holding period, or any extension thereof, expires. See § 301.6331–1(c) to determine when a levy served by mail is made.

(2) *Payment of interest on deposits*. When a bank surrenders levied deposits at the end of the 21-day holding period (or at the end of any longer period that has been requested by the district director), the bank must include any interest that has accrued on the deposits prior to and during the holding period, and any extension thereof, under the terms of the bank's agreement with its depositor, but the bank must not surrender an amount greater than the amount of the levy. If the deposits are held in a noninterest bearing account at the time the levy is made, the bank need not include any interest on the deposits at the end of the holding period, or any extension thereof, under this paragraph. Interest that accrues on deposits and is surrendered to the district director at the end of the holding period, or any extension thereof, is treated as a payment to the bank's customer.

(3) *Transactions affecting accounts*. A levy on deposits held by a bank applies to those funds on deposit at the time the levy is made, up to the amount of the levy, and is effective as of the time the levy is made. No withdrawals may be made on levied upon deposits during the 21-day holding period, or any extension thereof.

(4) *Waiver of 21-day holding period*. A depositor may waive the 21-day holding period by notifying the bank of the depositor's intention to do so. Where more than one depositor is listed as the owner of a levied account, all depositors listed as owners of the account must agree to a waiver of the 21-day holding period. If the 21-day holding period is waived, the bank must include with the surrendered deposits a notification to the district director of the waiver.

(5) *Examples*. The provisions of this paragraph (c) may be illustrated by the following examples:

*Example 1*. On April 2, 1992, a notice of levy for an unpaid income tax assessment due from A in the amount of $10,000 is served on X Bank with respect to A's savings account. At the time the notice of levy is served, X Bank holds $5,000 in A's interest-bearing savings account. On April 24, 1992, (the first business day after the 21-day holding period) X Bank must surrender $5,000 plus any interest that accrued on the account under the terms of A's contract with X Bank up through April 23, 1992, (the last day of the holding period).

*Example 2*. The facts are the same as in *Example 1* except that on April 3, 1992, A deposits an additional $5,000 into the account. On April 24, 1992, X Bank must still surrender only $5,000 plus the interest which accrued thereon until the end of the holding period, because the notice of levy served on April 2, 1992, attached only to those funds on deposit at the time the notice was served and not to any subsequent deposits.

*Example 3*. The facts are the same as in *Example 1* except that at the time the notice of levy is served on X Bank, A's savings account contains $50,000. On April 24, 1992, X Bank must surrender $10,000, which is the amount of the levy. The levy will not apply to any interest that accrues on the deposit during the 21-day holding period, because the entire amount of the levy is satisfied by the deposits existing at the time the levy is served.

*Example 4*. The facts are the same as in *Example 1* except that the amount of the levy is $5,002. Under the terms of A's contract with the bank, the account will earn more than $2 of interest during the 21-day holding period. On April 24, 1992, X Bank must surrender $5,002 to the district director. The remaining interest which accrued during the 21-day holding period is not subject to the levy.

*Example 5*. On September 3, 1992, A opens a $5,000 six-month certificate of deposit account with X Bank. Under the terms of the account, the depositor must forfeit up to 30 days of interest on the account in the event of early withdrawal. On January 4, 1993, a notice of levy for an unpaid income tax assessment due from A in the amount of $10,000 is served with respect to A's certificate of deposit account. On January 26, 1993, the bank must surrender $5,000 plus the interest which accrued on the account through January 25, 1993, minus the penalty of 30 days of interest as provided in the deposit agreement.

*Example 6*. Same facts as in *Example 5* except that the notice of levy is served on X Bank on February 15, 1993. The certificate matures on March 2, 1993. On March 8, X Bank must surrender $5,000 plus the interest that accrued on the certificate without any reduction for penalties.

(d) *Notification to the district director of errors with respect to levied upon bank accounts*—(1) *In general*. If a depositor believes that there is an error with respect to the levied upon account which the depositor wishes to have corrected, the depositor shall notify the district director to whom the assessment is charged by telephone to the telephone number listed on the face of the notice of levy in order to enable the district director to conduct an expeditious review of the alleged error. The district director may require any supporting documentation necessary to the review of the alleged error. The notification by telephone provided for in this section does not constitute or substitute for the filing by a third party of a written request under § 301.6343–1(b)(2) for the return of property wrongfully levied upon.

(2) *Disputes regarding the merits of the underlying assessment*. This section does not constitute an additional procedure for an appeal regarding the merits of an underlying assessment. However, if in the judgment of the district director a genuine dispute regarding the merits of an underlying assessment appears to exist, the district director may request an extension of the 21-day holding period.

(3) *Notification of errors from sources other than the depositor*. The district director may take action to release the levy on the bank account based on information obtained from a source other than the depositor, including the bank in which the account is maintained.

(e) *Effective date*. These provisions are effective with respect to levies issued on or after January 4, 1993.

[T. D. 8466, 58 FR 18, Jan. 4, 1993]

## § 301.6333–1 Production of books.

If a levy has been made or is about to be made on any property or rights to property, any person, having custody or control of any books or records containing evidence or statements relating to the property or rights to property subject to levy, shall, upon demand of the internal revenue officer who has made or is about to make the

levy, exhibit such books or records to such officer.

**§ 301.6334–1 Property exempt from levy.**

(a) *Enumeration.* In addition to exemptions allowed as a matter of Internal Revenue Service policy, there shall be exempt from levy—

(1) *Wearing apparel and school books.* Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family. Expensive items of wearing apparel, such as furs, which are luxuries and are not necessary for the taxpayer or for members of his family, are not exempt from levy.

(2) *Fuel, provisions, furniture, and personal effects.* So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, that does not exceed $6,250 in value.

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

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

(5) *Undelivered mail.* Mail, addressed to any person, which has not been delivered to the addressee.

(6) *Certain annuity and pension payments.* Annuity or pension payments under the Railroad Retirement Act (45 U.S.C. chapter 9), benefits under the Railroad Unemployment Insurance Act (45 U.S.C. chapter 11), special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) *Workmen's compensation.* Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) *Judgments for support of minor children.* If the taxpayer is required under any type of order or decree (including an interlocutory decree or a decree of support pendente lite) of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of that taxpayer's minor children, so much of that taxpayer's salary, wages, or other income as is necessary to comply with such order or decree. The taxpayer must establish the amount necessary to comply with the order or decree. The Service is not required to release a levy until such time as it is established that the amount to be released from levy actually will be applied in satisfaction of the support obligation. The Service may make arrangements with a delinquent taxpayer to establish a specific amount of such taxpayer's salary, wage, or other income for each pay period that shall be exempt from levy, for purposes of complying with a support obligation. If the taxpayer has more than one source of income sufficient to satisfy the support obligation imposed by the order or decree, the amount exempt from levy, at the discretion of the Service, may be allocated entirely to one salary, wage or source of other income or be apportioned between the several salaries, wages, or other sources of income.

(9) *Minimum exemption for wages, salary, and other income.* Amounts payable to or received by the taxpayer as wages or salary for personal services, or as other income, to the extent provided in § 301.6334–2 through § 301.6334–4.

(10) *Certain service-connected disability payments.* Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code (U.S.C.)) disability benefit under—

(i) Subchapters II (wartime disability compensation), III (wartime death compensation), IV (peacetime disability compensation), V (peacetime death compensation), or VI (general compensation provisions) of chapter 11 of title 38, U.S.C.; or

(ii) Chapters 13 (dependency and indemnity compensation for service commenced deaths), 21 (specially adapted housing for disabled veterans), 23 (burial benefits), 31 (vocational rehabilitation), 32 (post-Vietnam era veterans' educational assistance), 34 (veterans' educational assistance), 35 (survivors' and dependents' educational assistance), 37 (home, condominium, and mobile home loans), or 39 (automobiles and adaptive equipment for certain disabled veterans and members of the armed forces) of title 38, U.S.C.

(11) *Certain public assistance payments.* Any amount payable to an individual as a recipient of public assistance under—

(i) Title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act (42 U.S.C. 301 *et seq.*); or

(ii) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

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

(13) *Residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy*—(i) Residences in small deficiency cases. If the amount of the levy does not exceed $5,000, any real property used as a residence of the taxpayer or any real property of the taxpayer (other than real property which is rented) used by any other individual as a residence.

(ii) *Principal residences and certain business assets.* Except to the extent provided in section 6334(e), the principal residence (within the meaning of section 121) of the taxpayer and tangible personal property or real property (other than real property which is rented) used in the trade or business of an individual taxpayer.

(b) *Appraisal.* The internal revenue officer seizing property of the type described in section 6334(a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, such officer shall summon three disinterested individuals who shall make the valuation.

(c) *Other property.* No other property or rights to property are exempt from levy except the property specifically exempted by section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

(d) *Levy allowed on principal residence.* The Service will seek approval, in writing, by a judge or magistrate of a district court of the United States prior to levy of property that is owned by the taxpayer and used as the principal residence of the taxpayer, the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child.

(1) *Nature of judicial proceeding.* The Government will initiate a proceeding for judicial approval of levy on a principal residence by filing a petition with the appropriate United States District Court demonstrating that the underlying liability has not been satisfied, the requirements of any applicable law or administrative procedure relevant to the levy have been met, and no reasonable alternative for collection of the taxpayer's debt exists. The petition will ask the court to issue to the taxpayer an order to show cause why the principal residence property should not be levied and will also ask the court to issue a notice of hearing.

(2) The taxpayer will be granted a hearing to rebut the Government's prima facie case if the taxpayer files an objection within the time period required by the court raising a genuine issue of material fact demonstrating that the underlying tax liability has been satisfied, that the taxpayer has other assets from which the liability can be satisfied, or that the Service did not follow the applicable laws or procedures pertaining to the levy. The taxpayer is not permitted to challenge the merits underlying the tax liability in the proceeding. Unless the taxpayer files a timely and appropriate objection, the court would be expected to

enter an order approving the levy of the principal residence property.

(3) *Notice letter to be issued to certain family members.* If the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the Government will send a letter to each such person providing notice of the commencement of the proceeding. The letter will be addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children. If it is unclear who is living in the principal residence property and/or what such person's relationship is to the taxpayer, a letter will be addressed to ''Occupant''. The purpose of the letter is to provide notice to the family members that the property may be levied. The family members may not be joined as parties to the judicial proceeding because the levy attaches only to the taxpayer's legal interest in the subject property and the family members have no legal standing to contest the proposed levy.

(e) *Levy allowed on certain business assets.* The property described in section 6334(a)(13)(B)(ii) shall not be exempt from levy if—

(1) An Area Director of the Service personally approves (in writing) the levy of such property; or

(2) The Secretary finds that the collection of tax is in jeopardy. An Area Director may not approve a levy under paragraph (e)(1) unless the Area Director determines that the taxpayer's other assets subject to collection are insufficient to pay the amount due, together with expenses of the proceeding. When other assets of an individual taxpayer include permits issued by a State and required under State law for the harvest of fish or wildlife in the taxpayer's trade or business, the taxpayer's other assets also include future income that may be derived by such taxpayer from the commercial sale of fish or wildlife under such permit.

(f) *Levy allowed on certain specified payments.* Any payment described in section 6331(h)(2)(B) or (C) shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h).

(g) *Inflation adjustment.* For any calendar year beginning after 1999, each dollar amount referred to in paragraphs (a)(2) and (3) of this section will be increased by an amount equal to the dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year (using the language ''calendar year 1998'' instead of ''calendar year 1992'' in section 1(f)(3)(B)). If any dollar amount as adjusted is not a multiple of $10, the dollar amount will be rounded to the nearest multiple of $10 (rounding up if the amount is a multiple of $5).

(h) *Effective date.* This section is generally effective with respect to levies made on or after July 1, 1989. However, any reasonable attempt by a taxpayer to comply with the statutory amendments addressed by the regulations in this section prior to February 21, 1995, will be considered as meeting the requirements of the regulations in this section. In addition, paragraph (a)(11)(i) of this section is applicable with respect to levies issued after December 31, 1996. Paragraphs (a)(2), (a)(3), (a)(8), (a)(13), (d), (e), (f), (g) and (h) of this section apply as of March 7, 2005.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7319, Apr. 13, 1972; T.D. 7182, 37 FR 7887, Apr. 21, 1972; T.D. 7620, 44 FR 27988, May 14, 1979; T.D. 8568, 59 FR 53088, Oct. 21, 1994; T.D. 8725, 62 FR 39117, July 22, 1997; T.D. 9189, 70 FR 10885, Mar. 7, 2005]

## § 301.6334–2 Wages, salary, and other income.

(a) *In general.* Under section 6334 (a)(9) and (d) certain amounts payable to or received by a taxpayer as wages, salary, or other income are exempt from levy. This section describes the income of a taxpayer that is eligible for the exemption from levy (paragraph (b) of this section) and how exempt amounts are to be paid to the taxpayer (paragraph (c) of this section). Section 301.6334–3 describes that sum that will be exempt from levy for each of the taxpayer's pay periods. Pay periods are described in § 301.6334–3. For the amounts exempt from levy, see § 301.6334–3.

(b) *Eligible taxpayer income.* Only wages, salary, or other income payable to the taxpayer after the levy is made

on the payor may be exempt from levy under section 6334(a)(9). No amount of wages, salary, or other income that is paid to the taxpayer before levy is made on the payor will be so exempt from levy under section 6334(a)(9). The provisions of this paragraph (b) may be illustrated by the following example:

*Example.* Delinquent taxpayer A, an individual, is employed by the M Corporation and is paid wages on Friday of each week. Accordingly, A is paid wages on Friday, February 16, 1990. On Saturday, February 17, A deposits these wages into his personal checking account at Bank N. On Tuesday, February 20, a notice of levy is served on the M Corporation and also on Bank N. Amounts payable to A as wages on Friday, February 23, 1990, and any payday thereafter may be exempt from levy under section 6334(a)(9). No amount of wages A deposited in his account at Bank N on February 17, 1990, is exempt from levy under section 6334(a)(9).

(c) *Payment of exempt amounts to taxpayer*—(1) *From wages, salary, or income from other sources where levy on all sources not made.* In the case of a taxpayer who has more than one source of wages, salary, or other income, the district director may elect to levy on only one or more sources while leaving other sources of income free from levy. If the wages, salary, or other income that the district director leaves free from levy equal or exceed the amount to which the taxpayer is entitled as an exemption from levy under section 6334(a)(9), computed in accordance with § 301.6334–3 (and are not otherwise exempt), the district director may treat no amount of the taxpayer's wages, salary, or other income on which the district director elects to levy as exempt from levy. In such a case, the district director must notify the employer or other person upon whom the levy is served that no amount of the taxpayer's wages, salary, or other income is exempt from levy. The employer or other person upon whom the levy is served may rely on such notification in paying over amounts pursuant to the levy. In the absence of such notification from the district director, however, the employer or other person upon whom the levy is served must determine the amount exempt from levy pursuant to § 301.6334–3 as if that employer or other person upon whom the levy is served is the only source of wages, salary, or other income. Amounts not exempt from levy are to be paid to the district director in accordance with the terms of the levy. The provisions of this paragraph (c)(1) may be illustrated by the following example:

*Example.* Delinquent taxpayer C is an employee of O Corporation and is paid wages totalling $450 on Friday of each week. C also performs services for P Corporation and is paid a salary of $250 on Friday of each week. On Tuesday, February 20, 1990, a levy is served on O Corporation with respect to the wages payable to C. A levy is not served on P Corporation. C's filing status is single and C is entitled to 1 personal exemption. Under § 301.6334–3, C is entitled to an exemption from levy under 6334(a)(9) totalling $101.92 for each weekly pay period. However, because levy has not been made on C's salary paid by the P Corporation ($250 per week) and that salary exceeds the weekly amount ($101.92) to which C is entitled as exempt from levy, the district director may treat no amount of C's wages paid by the O Corporation as exempt from levy. If the district director requires such treatment, the district director must notify O Corporation that no amount of C's wages is exempt from levy and O Corporation may rely on such notification; in the absence of such notification O Corporation must treat $101.92 as exempt from levy.

(2) *Where sources not levied upon are less than exempt amount.* If the taxpayer's income upon which the district director does not levy is less than the amount to which the taxpayer is entitled as exempt from levy, then an additional amount, determined to be exempt from levy pursuant to § 301.6334–3, may be paid to the taxpayer from the sources of wages, salary, or other income upon which levy has been made. In such a case, the district director must designate those wages, salary, or other income from which the exempt amount is to be paid to the taxpayer, and must notify the employer or other person upon whom the levy is served of the amount of the taxpayer's wages, salary, or other income that is exempt from levy. The employer or other person may rely on such notification in paying over amounts pursuant to the levy. In the absence of such notification from the district director, the employer or other person upon whom the levy is served must determine the amount exempt from levy pursuant to § 301.6334–3 as if that employer or other

person upon whom the levy is served is the only source of wages, salary, or other income. Amounts not exempt from levy are to be paid to the district director in accordance with the terms of the levy. The provisions of this paragraph (c)(2) may be illustrated by the following example:

*Example.* Delinquent taxpayer C is an employee of O Corporation and is paid wages totalling $50 on Friday of each week. C also performs services for P Corporation and is paid a salary of $75 on Friday of each week. On Tuesday, February 20, 1990, a levy is served on P Corporation with respect to the wages and salary of C. C's filing status is single and C is entitled to 1 personal exemption. Under § 301.6334–3, C is entitled to an exemption from levy under section 6334(a)(9) totalling $101.92 for each weekly pay period. The district director may notify P Corporation that only $51.92 of C's wages is exempt from levy and P Corporation may rely on such notification; in the absence of such notification, P Corporation must treat the entire $75 salary as exempt from levy.

(d) *Effective date.* These provisions are effective with respect to levies made on or after July 1, 1989. However, any reasonable attempt by a taxpayer to comply with the statutory amendments addressed by these regulations prior to February 21, 1995 will be considered as meeting the requirements of these regulations.

[T.D. 8568, 59 FR 53088, Oct. 21, 1994]

### § 301.6334–3 Determination of exempt amount.

(a) *Individuals paid on weekly basis.* In the case of any individual who is paid or receives all of his or her wages, salary, and other income on a weekly basis, the amount of wages, salary, and other income payable to or received by him or her during any week that is exempt from levy under section 6334(a)(9) is the exempt amount.

(b) *Term defined.* The term *exempt amount* means an amount equal to—

(1) The sum of—

(i) The standard deduction (including additional standard deductions on account of age or blindness); and

(ii) The aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 in the taxable year in which such levy occurs;

(2) Divided by 52.

(c) *Written and properly verified statement.* Unless the taxpayer submits to the employer for forwarding to the district director a written and properly verified statement (as described in § 301.6334–4) specifying the facts necessary to determine the proper amount under paragraphs (b)(1) (i) and (ii) of this section, paragraphs (b)(1) (i) and (ii) of this section must be applied as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(d) *Individuals paid on basis other than weekly*—(1) *In general.* In the case of an individual who is paid or receives wages, salary, and other income other than on a weekly basis, the amount payable to that individual during any applicable pay period that is exempt from levy under section 6334(a)(9) is the amount that as nearly as possible will result in the same total exemption from levy for such individual over that period of time other than weekly as that to which the individual would have been entitled under paragraph (b) of this section if, during such period of time, the individual were paid or received such wages, salary, and other income on a regular weekly basis.

(2) *Specific pay periods other than weekly.* In the case of wages, salary, or other income paid to an individual on the basis of an established calendar period regularly used by the employer or other person levied upon for payroll or payment purposes, the exempt amount of wages, salary, and other income payable to or received by an individual during an applicable pay period other than weekly equals—

(i) The sum of—

(A) The standard deduction (including additional standard deductions on account of age or blindness); and

(B) The aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 in the taxable year in which such levy occurs;

(ii) Divided by—

(A) 260 in the case of a daily pay period;

(B) 26 in the case of a bi-weekly pay period;

(C) 24 in the case of a semi-monthly pay period; and

(D) 12 in the case of a monthly pay period.

(3) *Nonspecific pay periods*. In the case of wages, salary, or other income paid to an individual on a one-time or a recurrent but irregular basis and which is not paid on the basis of an established calendar period regularly used by the employer or other person levied upon for payroll or payment purposes, the exempt amount of wages, salary, and other income payable to or received by an individual equals the exempt amount defined in paragraph (b) of this section multiplied by the number (but not more than 52) of full weeks (consisting of seven calendar days) to which such payment is attributable. The provisions of this paragraph (d)(3) may be illustrated by the following example:

*Example*. Taxpayer A's exempt amount per week (as determined under paragraph (b) of this section) is $100. Taxpayer A is hired by Corporation X to perform a specific task for Corporation X at a flat fee of $1,500 which is to be paid at the completion of the task. Taxpayer A completes the task in 10 weeks. The total exempt amount is $1,000 and $500 is subject to levy.

(e) *Levies continuing into following years*. The exempt amount is computed on the basis of the standard deduction (including additional standard deductions on account of age or blindness) for the taxpayer's filing status and the amount of the deduction for a personal exemption in effect in the taxable year in which the original notice of levy is served. Unless the taxpayer submits a new verified statement in accordance with § 301.6334–4, the exempt amount remains the same for pay periods following the pay period in which the notice of levy is served even if there is a change in the taxpayer's factual situation or a change by operation of law (such as by indexing or otherwise) to the standard deduction or personal exemption amounts.

(f) *Effective date*. These provisions are effective with respect to levies made on or after July 1, 1989. However, any reasonable attempt by a taxpayer to comply with the statutory amendments addressed by these regulations prior to February 21, 1995 will be considered as meeting the requirements of these regulations.

[T.D. 8568, 59 FR 53089, Oct. 21, 1994]

**§ 301.6334–4 Verified statements.**

(a) *In general*. For purposes of §§ 301.6334–2 and 301.6334–3, the amount of wages, salary, or other income that is exempt from levy must be determined on the basis of a written and properly verified statement submitted by the taxpayer to his or her employer for submission to the district director specifying the facts necessary to determine the standard deduction and the aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 in the taxable year in which the levy is served. In the absence of submission of such statement, the amount that is exempt from levy must be determined as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(b) *Content of statement*. The statement in paragraph (a) of this section must be a written statement signed under penalty of perjury, and dated, containing the following information—

(1) The filing status of the taxpayer as either:

(i) Single;

(ii) Married filing a joint return;

(iii) Married filing a separate return;

(iv) Head of household; or

(v) Qualifying widow or widower with dependent child;

(2) The name, relationship, and Social Security Number of each individual whom the taxpayer can claim as a personal exemption on the taxpayer's income tax return; and

(3) Any additional standard deductions that the taxpayer can claim on account of age (65 or older) or blindness on the taxpayer's income tax return.

(c) *Submission of verified statement*—(1) *Obligation of employer*. An employer upon whom a notice of levy for wages, salary, or other income of a taxpayer is served must promptly notify the taxpayer of the fact that a notice of levy has been served. Unless otherwise indicated on the face of the notice of levy, the employer must request the taxpayer to provide the employer with a written statement signed under penalty of perjury, and dated, containing

the information set forth in paragraph (b) of this section, and this statement must be submitted by the employer to the district director. The employer must submit this statement to the district director at the time the employer first responds to the notice of levy.

(2) *Submission by taxpayer*. The taxpayer must provide the employer upon whom the notice of levy has been served with a verified statement complying with paragraph (b) of this section. Unless the taxpayer provides a verified statement, the amount that is exempt from levy must be determined as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(3) *Additional statements*. A taxpayer may submit a verified statement to his or her employer at any time. Except as otherwise provided in paragraph (d) of this section, such verified statement will be effective for any payment of wages, salary, or other income made after the date of submission and will replace any previously submitted verified statement. The employer must provide the district director with the statement on the next occasion on which the employer responds to the notice of levy.

(d) *Effect of verified statement*—(1) A verified statement submitted by an employee is effective upon receipt by the employer, and the employer is required to compute the exempt amount on the basis of the information contained in the verified statement unless notified to the contrary by the Internal Revenue Service.

(2) The Internal Revenue Service may find that a verified statement submitted by an employee contains a materially incorrect statement, or it may determine, after written request to the employee for verification of information contained in the verified statement, that it lacks sufficient information to determine whether the verified statement is correct. If the Internal Revenue Service so finds or determines, and notifies the employer in writing that the verified statement is defective, upon receipt of such notice the employer shall consider the verified statement to be defective for purposes of computing the exempt amount.

(3) If the Internal Revenue Service notifies the employer that the verified statement is defective, the Internal Revenue Service will, based upon its finding, advise the employer that the employer is to compute the exempt amount as if no verified statement had been submitted by the employee or will describe upon what basis the exempt amount is to be computed. The Internal Revenue Service will also specify which Internal Revenue Service office to contact for further information.

(4) In addition to any notice furnished to the employer for the employer's use, the Internal Revenue Service will provide the employer with a copy for the employee of each notice it furnishes the employer.

(5) The employer must promptly furnish the employee with a copy of any Internal Revenue Service notice with respect to a verified statement submitted by the employee.

(6) Once paragraph (d)(3) of this section applies, the employer must continue to compute the exempt amount on the basis of the written notice from the Internal Revenue Service until the Internal Revenue Service by written notice advises the employer to compute the exempt amount on the basis of a new verified statement (as described in paragraph (d)(7) of this section) and revokes its earlier written notice.

(7) Once paragraph (d)(3) of this section applies, the employee may submit a new verified statement together with a written explanation of any circumstances of the employee which have changed since the Internal Revenue Service's earlier written notice, or any other circumstances or reasons as justification or support for the claims made by the employee on the new verified statement. The employee may submit the new verified statement and written explanation either—

(i) To the Internal Revenue Service office specified in the notice furnished to the employer under paragraph (d)(3) of this section; or

(ii) To the employer, who must forward the new verified statement and written explanation to the Internal Revenue Service office specified in the notice earlier furnished to the employer on the next occasion on which

the employer responds to the notice of levy.

(e) *Effective date*. These provisions are effective with respect to levies made on or after July 1, 1989. However, any reasonable attempt by a taxpayer to comply with the statutory amendments addressed by these regulations prior to February 21, 1995 will be considered as meeting the requirements of these regulations.

[T.D. 8568, 59 FR 53090, Oct. 21, 1994]

**§ 301.6335–1 Sale of seized property.**

(a) *Notice of seizure*. As soon as practicable after seizure of property, the internal revenue officer seizing the property shall give notice in writing to the owner of the property (or, in the case of personal property, to the possessor thereof). The written notice shall be delivered to the owner (or to the possessor, in the case of personal property) or left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, a list sufficient to identify the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) *Notice of sale*. (1) As soon as practicable after seizure of the property, the district director shall give notice of sale in writing to the owner. Such notice shall be delivered to the owner or left at his usual place of abode or business if located within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. For further guidance regarding the definition of last known address, see § 301.6212–2. The notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof, and shall expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is to be offered for sale. The notice shall also be published in some newspaper published in the county wherein the seizure is made or in a newspaper generally circulated in that county. For example, if a newspaper of general circulation in a county but not published in that county will reach more potential bidders for the property to be sold than a newspaper published within the county, or if there is a newspaper of general circulation within the county but no newspaper published within the county, the district director may cause public notice of the sale to be given in the newspaper of general circulation within the county. If there is no newspaper published or generally circulated in the county, the notice shall be posted at the post office nearest the place where the seizure is made, and in not less than two other public places.

(2) The district director may use other methods of giving notice of sale and of advertising seized property in addition to those referred to in subparagraph (1) of this paragraph (b), when he believes that the nature of the property to be sold is such that a wider or more specialized advertising coverage will enhance the possibility of obtaining a higher price for the property.

(3) Whenever levy is made without regard to the 10-day period provided in section 6331(a) (relating to cases in which collection is in jeopardy), a public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to perishable goods) is applicable.

(c) *Time, place, manner, and conditions of sale*. The time, place, manner, and conditions of the sale of property seized by levy shall be as follows:

(1) *Time and place of sale*. The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under section 6335(b) (see paragraph (b) of this section). The place of sale shall be within the county in which the property is seized, except that if it appears to the district director under whose supervision the seizure was made that substantially higher bids may be obtained for the property if the sale is held at a place outside such county, he may order that the sale be held in such other place. The

sale shall be held at the time and place stated in the notice of sale.

(2) *Adjournment of sale.* When it appears to the district director that an adjournment of the sale will best serve the interest of the United States or that of the taxpayer, the district director may adjourn, or cause the internal revenue officer conducting the sale to adjourn, the sale from time to time, but the date of the sale shall not be later than one month after the date fixed in the original notice of sale.

(3) *Determinations relating to minimum price*—(i) *Minimum price.* Before the sale of property seized by levy, the district director shall determine a minimum price, taking into account the expenses of levy and sale, for which the property shall be sold. The internal revenue officer conducting the sale may either announce the minimum price before the sale begins, or defer announcement of the minimum price until after the receipt of the highest bid, in which case, if the highest bid is greater than the minimum price, no announcement of the minimum price shall be made.

(ii) *Purchase by the United States.* Before the sale of property seized by levy, the district director shall determine whether the purchase of property by the United States at the minimum price would be in the best interest of the United States. In determining whether the purchase of property would be in the best interest of the United States, the district director may consider all relevant facts and circumstances including for example—

(*a*) Marketability of the property;

(*b*) Cost of maintaining the property;

(*c*) Cost of repairing or restoring the property;

(*d*) Cost of transporting the property;

(*e*) Cost of safeguarding the property;

(*f*) Cost of potential toxic waste cleanup; and

(*g*) Other factors pertinent to the type of property.

(iii) *Effective date.* This paragraph (c)(3) applies to determinations relating to minimum price made on or after December 17, 1996.

(4) *Disposition of property at sale*—(i) *Sale to highest bidder at or above minimum price.* If one or more persons offer to buy the property for at least the amount of the minimum price, the property shall be sold to the highest bidder.

(ii) *Property deemed sold to United States at minimum price.* If no one offers at least the amount of the minimum price for the property and the Secretary has determined that it would be in the best interest of the United States to purchase the property for the minimum price, the property shall be declared to be sold to the United States for the minimum price.

(iii) *Release to owner.* If the property is not declared to be sold under paragraph (c)(4)(i) or (ii) of this section, the property shall be released to the owner of the property and the expense of the levy and sale shall be added to the amount of tax for the collection of which the United States made the levy. Any property released under this paragraph (c)(4)(iii) shall remain subject to any lien imposed by subchapter C of chapter 64 of subtitle F of the Internal Revenue Code.

(iv) *Effective date.* This paragraph (c)(4) applies to dispositions of property at sale made on or after December 17, 1996.

(5) *Offering of property*—(i) *Sale of indivisible property.* If any property levied upon is not divisible, so as to enable the district director by sale of a part thereof to raise the whole amount of the tax and expenses of levy and sale, the whole of such property shall be sold. For application of surplus proceeds of sale, see section 6342(b).

(ii) *Separately, in groups, or in the aggregate.* The seized property may be offered for sale—

(*a*) As separate items, or

(*b*) As groups of items, or

(*c*) In the aggregate, or

(*d*) Both as separate items (or in groups) and in the aggregate. In such cases, the property shall be sold under the method which produces the highest aggregate amount.

The district director shall select whichever of the foregoing methods of offering the property for sale as, in his opinion, is most feasible under all the facts and circumstances of the case, except that if the property to be sold includes both real and personal property, only the personal property may be grouped for the purpose of offering such property for sale. However, real

and personal property may be offered for sale in the aggregate, provided the real property, as separate items, and the personal property as a group, or as groups, or as separate items, are first offered separately.

(iii) *Condition of title and of property.* Only the right, title, and interest of the delinquent taxpayer in and to the property seized shall be offered for sale, and such interest shall be offered subject to any prior outstanding mortgages, encumbrances, or other liens in favor of third parties which are valid as against the delinquent taxpayer and are superior to the lien of the United States. All seized property shall be offered for sale ''as is'' and ''where is'' and without recourse against the United States. No guaranty or warranty, express or implied, shall be made by the internal revenue officer offering the property for sale, as to the validity of the title, quality, quantity, weight, size, or condition of any of the property, or its fitness for any use or purpose. No claim shall be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to conform with any representation, express or implied.

(iv) *Terms of payment.* The property shall be offered for sale upon whichever of the following terms is fixed by the district director in the public notice of sale:

(*a*) Payment in full upon acceptance of the highest bid, without regard to the amount of such bid, or

(*b*) If the aggregate price of all property purchased by a successful bidder at the sale is more than $200, an initial payment of $200 or 20 percent of the purchase price, whichever is the greater, and payment of the balance (including all costs incurred for the protection or preservation of the property subsequent to the sale and prior to final payment) within a specified period, not to exceed 1 month from the date of the sale.

(6) *Method of sale.* The district director shall sell the property either—

(i) At public auction, at which open competitive bids shall be received, or

(ii) At public sale under sealed bids. The following rules, in addition to the other rules provided in this paragraph, shall be applicable to public sale under sealed bids:

(*a*) *Invitation to bidders.* Bids shall be solicited through a public notice of sale.

(*b*) *Form for use by bidders.* A bid shall be submitted on a form which will be furnished by the district director upon request. The form shall be completed in accordance with the instructions thereon.

(*c*) *Remittance with bid.* If the total bid is $200 or less, the full amount of the bid shall be submitted therewith. If the total bid is more than $200, 20 percent of such bid or $200, whichever is greater, shall be submitted therewith. (In the case of alternative bids submitted by the same bidder for items of property offered separately, or in groups, or in the aggregate, the bidder shall remit the full amount of the highest alternative bid submitted, if that bid is $200 or less. If the highest alternative bid submitted is more than $200, the bidder shall remit 20 percent of the highest alternative bid or $200, whichever is greater.) Such remittance shall be by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order.

(*d*) *Time for receiving and opening bids.* Each bid shall be submitted in a securely sealed envelope. The bidder shall indicate in the upper left hand corner of the envelope his name and address and the time and place of sale as announced in the public notice of sale. A bid will not be considered unless it is received by the internal revenue officer conducting the sale prior to the opening of the bids. The bids will be opened at the time and place stated in the notice of sale, or at the time fixed in the announcement of the adjournment of the sale.

(*e*) *Consideration of bids.* The public notice of sale shall specify whether the property is to be sold separately, by groups, or in the aggregate or by a combination of these methods, as provided in subparagraph (4)(ii) of this paragraph. If the notice specifies an alternative method, bidders may submit

bids under one or more of the alternatives. In case of error in the extension of prices in any bid, the unit price will govern. The internal revenue officer conducting the sale shall have the right to waive any technical defects in a bid. In the event two or more highest bids are equal in amount, the internal revenue officer conducting the sale shall determine the successful bidder by drawing lots. After the opening, examination, and consideration of all bids, the internal revenue officer conducting the sale shall announce the amount of the highest bid or bids and the name of the successful bidder or bidders. Any remittance submitted in connection with an unsuccessful bid shall be returned at the conclusion of the sale.

(*f*) *Withdrawal of bids.* A bid may be withdrawn on written or telegraphic request received from the bidder prior to the time fixed for opening the bids. A technical defect in a bid confers no right on the bidder for the withdrawal of his bid after it has been opened.

(7) *Payment of bid price.* All payments for property sold under this section shall be made by cash or by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order. If payment in full is required upon acceptance of the highest bid, the payment shall be made at such time. If deferred payment is permitted, the initial payment shall be made upon acceptance of the bid, and the balance shall be paid on or before the date fixed for payment thereof. Any remittance submitted with a successful sealed bid shall be applied toward the purchase price.

(8) *Delivery and removal of personal property.* Responsibility of the United States for the protection or preservation of seized personal property shall cease immediately upon acceptance of the highest bid. The risk of loss is on the purchaser of personal property upon acceptance of his bid. Possession of any personal property shall not be delivered to the purchaser until the purchase price has been paid in full. If payment of part of the purchase price for personal property is deferred, the United States will retain possession of such property as security for the payment of the balance of the purchase price and, as agent for the purchaser, will cause the property to be cared for until the purchase price has been paid in full or the sale is declared null and void for failure to make full payment of the purchase price. In such case, all charges and expenses incurred in caring for the property after the acceptance of the bid shall be borne by the purchaser.

(9) *Default in payment.* If payment in full is required upon acceptance of the bid and is not then and there paid, the internal revenue officer conducting the sale shall forthwith proceed again to sell the property in the manner provided in section 6335(e) and this section. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the district director, the sale may be declared by the district director to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b), (c), and (e) of section 6335 and this section. In the event of such readvertisement and sale, any new purchaser shall receive such property or rights to property free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited to the United States.

(10) *Stay of sale of seized property pending Tax Court decision.* For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3) and § 301.6863–2.

(d) *Right to request the sale of seized property*—(1) *In general.* The owner of any property seized by levy may request that the district director sell such property within 60 days after such request, or within any longer period

specified by the owner. The district director must comply with such a request unless the district director determines that compliance with the request is not in the best interests of the Internal Revenue Service and notifies the owner of such determination within the 60 day period, or any longer period specified by the owner.

(2) *Procedures to request the sale of seized property*—(i) *Manner*. A request for the sale of seized property shall be made in writing to the group manager of the revenue officer whose signature is on Levy Form 668–B. If the owner does not know the group manager's name or address, the owner may send the request to the revenue officer, marked for the attention of his or her group manager.

(ii) *Form*. The request for sale of seized property within 60 days, or such longer period specified by the owner, shall include:

(A) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the owner making the request;

(B) A description of the seized property that is the subject of the request;

(C) A copy of the notice of seizure, if available;

(D) The period within which the owner is requesting that the property be sold; and

(E) The signature of the owner or duly authorized representative. For purposes of these regulations, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the owner before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has written power of attorney executed by the owner.

(3) *Notification to owner*. The group manager shall respond in writing to a request for sale of seized property as soon as practicable after receipt of such request and in no event later than 60 days after receipt of the request, or, if later, the date specified by the owner for the sale.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7319, Apr. 13, 1972; T.D. 8398, 57 FR 7546, Mar. 3, 1992; T.D. 8691, 61 FR 66217, Dec. 17, 1996; T.D. 8939, 66 FR 2821, Jan. 12, 2001]

### § 301.6336–1 Sale of perishable goods.

(a) *Appraisal of certain seized property*. If the district director determines that any property seized by levy is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, he shall appraise the value of such property and return it to the owner if the owner complies with the conditions prescribed in paragraph (b) of this section or, if the owner does not comply with such conditions, dispose of the property in accordance with paragraph (c) of this section.

(b) *Return to owner*. If the owner of the property can be readily found, the district director shall give him written notice of his determination of the appraised value of the property. However, if the district director determines that the circumstances require immediate action, he may give the owner an oral notice of his determination of the appraised value of the property, which notice shall be confirmed in writing prior to sale. The property shall be returned to the owner if, within the time specified in the notice, the owner—

(1) Pays to the district director an amount equal to the appraised value, or

(2) Gives an acceptable bond as prescribed by section 7101 and § 301.7101–1. Such bond shall be in an amount not less than the appraised value of the property and shall be conditioned upon the payment of such amount at such time as the district director determines to be appropriate in the circumstances.

(c) *Immediate sale*. If the owner does not pay the amount of the appraised value of the seized property within the time specified in the notice, or furnish bond as provided in paragraph (b) of this section within such time, the district director shall as soon as practicable make public sale of the property in accordance with the following terms and conditions—

(1) *Notice of sale*. If the owner can readily be found, a notice shall be given to him. A notice of sale also shall be posted in two public places in the county in which the property is to be sold. The notice shall specify the time and place of sale, the property to be sold, and the manner and conditions of sale. The district director may give such other notice and in such other manner as he deems advisable under the circumstances.

(2) *Sale*. The property shall be sold at public auction to the highest bidder.

(3) *Terms*. The purchase price shall be paid in full upon acceptance of the highest bid. The payment shall be made in cash, or by a certified, cashier's or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order.

### § 301.6337–1 Redemption of property.

(a) *Before sale*. Any person whose property has been levied upon shall have the right to pay the amount due, together with costs and expenses of the proceeding, if any, to the district director at any time prior to the sale of the property. Upon such payment the district director shall restore such property to the owner and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) *Redemption of real estate after sale*—(1) *Period*. The owner of any real estate sold as provided in section 6335, his heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

(2) *Price*. Such property or tract of property may be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the district director for the internal revenue district in which the property is situated, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum. In case real and personal property (or several tracts of real property) are purchased in the aggregate, the redemption price of the real property (or of each of the several tracts) shall be determined on the basis of the ratio, as of the time of sale, of the value of the real property (or tract) to the value of the total property purchased. For this purpose the minimum price or the highest bid price, whichever is higher, offered for the property separately or in groups shall be treated as the value.

(c) *Record*. When any real property is redeemed, the district director shall cause entry of the fact to be made upon the record of sale kept in accordance with section 6340, and such entry shall be evidence of such redemption. The party who redeems the property shall notify the district director of the internal revenue district in which the property is situated of the date of such redemption and of the transfer of the certificate of sale, the amount of the redemption price, and the name of the party to whom such redemption price was paid.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7319, Apr. 13, 1972]

### § 301.6338–1 Certificate of sale; deed of real property.

(a) *Certificate of sale*. In the case of property sold as provided in section 6335 (relating to sale of seized property), the district director shall give to the purchaser a certificate of sale upon payment in full of the purchase price. A certificate of sale of real property shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) *Deed to real property*. In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time prescribed in section 6337, the district director shall execute (in accordance with the laws of the State in which the real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at the sale or his assigns, upon surrender of the certificate of sale, a deed of the

real property so purchased, reciting the facts set forth in the certificate.

(c) *Deed to real property purchased by the United States.* If real property is declared purchased by the United States at a sale pursuant to section 6335, the district director shall at the proper time execute a deed therefor and shall, without delay, cause the deed to be duly recorded in the proper registry of deeds.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7319, Apr. 13, 1972]

### § 301.6339–1 Legal effect of certificate of sale of personal property and deed of real property.

(a) *Certificate of sale of property other than real property.* In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale—

(1) *As evidence.* Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) *As conveyance.* Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) *As authority for transfer of corporate stock.* If such property consists of corporate stocks, shall be notice, when received, to any corporation, company, or association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the stock certificate, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) *As receipts.* If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the certificate of sale as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) *As authority for transfer of title to motor vehicle.* If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificate of title to such motor vehicle were transferred or assigned by the party holding the certificate of title, in lieu of any original or prior certificate, which shall be null and void, whether canceled or not.

(b) *Deed to real property.* In the case of the sale of real property pursuant to section 6335—

(1) *Deed as evidence.* The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) *Deed as conveyance of title.* If the proceedings of the district director as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) *Effect of junior encumbrances.* A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 discharges the property from all liens, encumbrances, and titles over which the lien of the United States, with respect to which the levy was made, has priority. For example, a mortgage on real property executed after a notice of a Federal tax lien has been filed is extinguished when the district director executes a deed to the real property to a purchaser thereof at a sale pursuant to section 6335 following the seizure of the property by the United States. The proceeds of such a sale are distributed in accordance with priority of the liens, encumbrances, or titles. See section 6342(b) and the regulations thereunder for provisions relating to the distribution of surplus proceeds. See section 7426(a)(2) and the regulations thereunder for judicial procedures with respect to surplus proceeds.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7320, Apr. 13, 1972]

### § 301.6340–1 Records of sale.

(a) *Requirement.* Each district director shall keep a record of all sales under section 6335 of real property situated within his district and of redemptions of such property. The records

shall set forth (1) the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making such sale, the amount of expenses, the names of the purchasers, the date of the deed, and, in the case of redemption of the property, (2) the date of such redemption and of the transfer of the certificate of sale, the amount of the redemption price, and the name of the party to whom such redemption price was paid.

(b) *Copy as evidence.* A copy of such record, or any part thereof, certified by the district director shall be evidence in any court of the truth of the facts therein stated.

### § 301.6341–1 Expense of levy and sale.

The district director shall determine the expenses to be allowed in all cases of levy and sale. Such expenses shall include the expenses of protection and preservation of the property during the period subsequent to the levy, as well as the actual expenses incurred in connection with the sale thereof. In case real and personal property (or several tracts of real property) are sold in the aggregate, the district director shall properly apportion the expenses to the real property (or to each tract).

### § 301.6342–1 Application of proceeds of levy.

(a) *Collection of liability.* Any money realized by proceedings under subchapter D, chapter 64, of the Code or by sale of property redeemed by the United States (if the interest of the United States in the property was a lien arising under the provisions of the Internal Revenue Code), is applied in the manner specified in subparagraphs (1), (2), and (3) of this paragraph (a). Money realized by proceedings under subchapter D, chapter 64, of the Code includes money realized by seizure, by sale of seized property, or by surrender under section 6332 (except money realized by the imposition of a 50 percent penalty pursuant to section 6332(c)(2)).

(1) *Expense of levy and sale.* First, against the expenses of the proceedings or sale, including expenses allowable under section 6341 and amounts paid by the United States to redeem property.

(2) *Specific tax liability on seized property.* If the property seized and sold is subject to a tax imposed by any internal revenue law which has not been paid, the amount remaining after applying subparagraph (1) of this paragraph (a), shall then be applied against such tax liability (and, if such tax was not previously assessed, it shall then be assessed);

(3) *Liability of delinquent taxpayer.* The amount, if any, remaining after applying subparagraphs (1) and (2) of this paragraph (a), shall then be applied against the liability in respect of which the levy was made or the sale of redeemed property was conducted.

(b) *Surplus proceeds.* Any surplus proceeds remaining after the application of paragraph (a) of this section shall, upon application and satisfactory proof in support thereof, be credited or refunded by the district director to the person or persons legally entitled thereto. The delinquent taxpayer is the person entitled to the surplus proceeds unless another person establishes a superior claim thereto.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7180, 37 FR 7320, Apr. 13, 1972]

### § 301.6343–1 Requirement to release levy and notice of release.

(a) *In general.* A district director, service center director, or compliance center director (*director*) must promptly release a levy upon all, or part of, property or rights to property levied upon and must promptly notify the person upon whom the levy was made of such a release, if the director determines that any of the conditions in paragraph (b) of this section (conditions requiring release) exist. The director must make a determination whether any of the conditions requiring release exist if a taxpayer submits a request for release of levy in accordance with paragraph (c) or (d) of this section; however, the director may make this determination based upon information received from a source other than the taxpayer. The director may require any supporting documentation as is reasonably necessary to determine whether a condition requiring release exists.

(b) *Conditions requiring release.* The director must release the levy upon all or

a part of the property or rights to property levied upon if he or she determines that one of the following conditions exists—

(1) *Liability satisfied or unenforceable*—(i) *General rule*. The liability for which the levy was made is satisfied or the period of limitations provided in section 6502 (and any period during which the period of limitations is suspended as provided by law) has lapsed. A levy is considered made on the date on which the notice of seizure provided in section 6335(a) is given. A levy that is made within the period of limitations provided in section 6502 does not become unenforceable simply because the person who receives the levy does not surrender the subject property within the period of limitations. In this case, the liability remains enforceable to the extent of the value of the levied upon property. However, a levy made outside the period of limitations (normally ten years without suspensions) must be released unless—

(A) The taxpayer agreed in writing to extend the period of limitations as provided in section 6502(a)(2) and § 301.6502–1; or

(B) A proceeding in court to collect the liability has begun within the period of limitations.

(ii) *Special situations*. A continuing levy on salary or wages made under section 6331(e) must be released at the end of the period of limitations in section 6502. However, a levy on a fixed and determinable right to payment which right includes payments to be made after the period of limitations expires does not become unenforceable upon the expiration of the period of limitations and will not be released under this condition unless the liability is satisfied.

(2) *Release will facilitate collection*. The release of the levy will facilitate collection of the liability. A director has the discretion to release the levy in all situations, including those where the proceeds from the sale will not fully satisfy the tax liabilities of the taxpayer, under terms and conditions as he or she determines are warranted.

(i) *Example*. The following example illustrates the provisions of this paragraph (b)(2):

*Example*. A and B each own machines which, when used together, produce widgets. A owes delinquent federal taxes. A notice of federal tax lien is properly filed against all property or rights to property belonging to A. A's machine is seized to satisfy A's delinquent tax liability. The fair market value of A's property is greater than the expenses of seizure and sale, but less than the amount of A's tax liability. A and B find a buyer who wants to buy both machines together. The buyer will only buy the machines together. A's property has a greater value as part of the package than it does by itself. The larger value, as shown in the sale contract, is enough to pay A's tax liability in full. In this situation a release of the levy will facilitate collection because the sale of both machines can be completed and A's liability will be paid in full at the settlement.

(ii) *Compliance with other conditions*. The director may find that collection will be facilitated by the taxpayer's compliance with conditions other than immediate payment, such as:

(A) The delinquent taxpayer delivers a satisfactory arrangement, which is accepted by the director, for placing property in escrow to secure the payment of the liability (including the expenses of the levy) which is the basis of the levy.

(B) The delinquent taxpayer delivers an acceptable bond to the director conditioned upon the payment of the liability (including the expenses of levy) which is the basis of the levy. This bond shall be in the form provided in section 7101 and § 301.7101–1.

(C) There is paid to the director an amount determined by the director to be equal to the interest of the United States in the seized property or the part of the seized property to be released.

(D) The delinquent taxpayer executes an agreement to extend the statute of limitations in accordance with section 6502(a)(2) and § 301.6502–1.

(iii) *Expenses of sale exceed the government's interest*. If the director determines that the value of the United States' interest in the seized property does not exceed the expenses of sale of the property, a release of the levy will be deemed to facilitate collection of the liability even though the fair market value of property which has been seized exceeds the expenses of seizure and sale.

(3) *Installment agreement.* The taxpayer has entered into an agreement under section 6159 to satisfy the liability by means of installment payments, unless the agreement provides otherwise. However, the director is not required to release the levy under this condition if a release of the levy will jeopardize the secured creditor status of the United States, e.g., where there is an intervening judgment lien creditor and a notice of tax lien has not been filed.

(4) *Economic hardship*—(i) *General rule.* The levy is creating an economic hardship due to the financial condition of an individual taxpayer. This condition applies if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses. The determination of a reasonable amount for basic living expenses will be made by the director and will vary according to the unique circumstances of the individual taxpayer. Unique circumstances, however, do not include the maintenance of an affluent or luxurious standard of living.

(ii) *Information from taxpayer.* In determining a reasonable amount for basic living expenses the director will consider any information provided by the taxpayer including—

(A) The taxpayer's age, employment status and history, ability to earn, number of dependents, and status as a dependent of someone else;

(B) The amount reasonably necessary for food, clothing, housing (including utilities, home-owner insurance, home-owner dues, and the like), medical expenses (including health insurance), transportation, current tax payments (including federal, state, and local), alimony, child support, or other court-ordered payments, and expenses necessary to the taxpayer's production of income (such as dues for a trade union or professional organization, or child care payments which allow the taxpayer to be gainfully employed);

(C) The cost of living in the geographic area in which the taxpayer resides;

(D) The amount of property exempt from levy which is available to pay the taxpayer's expenses;

(E) Any extraordinary circumstances such as special education expenses, a medical catastrophe, or natural disaster; and

(F) Any other factor that the taxpayer claims bears on economic hardship and brings to the attention of the director.

(iii) *Good faith requirement.* In addition, in order to obtain a release of a levy under this subparagraph, the taxpayer must act in good faith. Examples of failure to act in good faith include, but are not limited to, falsifying financial information, inflating actual expenses or costs, or failing to make full disclosure of assets.

(5) *Fair market value exceeds liability.* The fair market value of the property exceeds the liability for which the levy was made and release of the levy on a part of the property can be made without hindering the collection of the liability. The following example illustrates the provisions of this paragraph (b)(5):

*Example.* The Internal Revenue Service levies upon ten widgets which belong to the taxpayer to satisfy the taxpayer's outstanding tax liabilities. Subsequent to the levy, the taxpayer establishes that market conditions have increased the aggregate fair market value of widgets so that the value of seven widgets equals the aggregate anticipated expenses of sale and seizure and the tax liabilities for which the levy was made. The director must release three widgets from the levy and return them to the taxpayer.

(c) *Request for release of levy*—(1) *Information to be submitted by taxpayer.* A taxpayer who wishes to obtain a release of a levy must submit a request for release in writing or by telephone to the district director for the Internal Revenue district in which the levy was made. The taxpayer making the request must provide the following information—

(i) The name, address, and taxpayer identification number of the taxpayer;

(ii) A description of the property levied upon;

(iii) The type of tax and the period for which the tax is due;

(iv) The date of the levy and the originating Internal Revenue district, if known; and

(v) A statement of the grounds upon which the request for release of the levy is based.

(2) *Time for submission*. Except in extraordinary circumstances, a request for release of a levy must be made more than five days prior to a scheduled sale of the property to which the levy relates.

(3) *Determination by director*—(i) *When required*. The director must promptly make a determination concerning release prior to sale in all cases where a request for release of a levy is made except those where the request for release is made five or fewer days prior to a scheduled sale of the property to which the levy relates.

(ii) *Time for making required determination*. The determination will be made, generally, within 30 days of a request for release made 30 or more days prior to a scheduled sale of the property to which the levy relates. If a request for release is made less than 30 days prior to the scheduled sale but more than 5 days before the scheduled sale, a determination must be made prior to the scheduled sale. If necessary the director may postpone the scheduled sale in order to make this determination.

(iii) *Discretionary determination*. The director has the discretion, but is not required, to make a determination concerning release prior to sale in cases where a request for release of a levy is made five or fewer days prior to a scheduled sale of the property to which the levy relates.

(4) *Notification to taxpayer of determination*. The director must promptly notify the taxpayer if the levy is released. If the director determines that none of the conditions requiring release of the levy exist, the director must promptly notify the taxpayer of the decision not to release the levy and the reason why the levy is not being released.

(d) *Expedited determination with respect to certain business property*—(1) *General procedure*—(i) *Submission by taxpayer*. If a levy is made on essential business property as is described in paragraph (d)(2) of this section, the taxpayer may obtain an expedited determination of whether any of the conditions requiring release of the levy exist. In order to obtain an expedited determination, the taxpayer must submit, within the time frame specified in paragraph (c)(2) of this section, the information required in paragraph (c)(1) of this section and include with the information an explanation of why the property levied upon qualifies for an expedited determination of whether a condition requiring release of the levy exists.

(ii) *Time for making required determination*. The director must make such a determination by the later of 10 business days from the time the director receives the request for release, or 10 business days from the time the director receives any necessary supporting documentation, if 10 or more business days remain before a scheduled sale of the property to which the levy relates. An expedited determination concerning release must be made prior to sale in all cases where a request for release of a levy is made within the time frame specified in paragraph (c)(2) of this section. If necessary the director may postpone the scheduled sale in order to make this determination.

(iii) *Discretionary determination*. The director has the discretion, but is not required, to make an expedited determination concerning release in cases where the taxpayer does not submit, within the time frame specified in paragraph (c)(2) of this section, the information required in paragraph (c)(1) of this section and include with the information an explanation of why the property levied upon qualifies for an expedited determination of whether a condition requiring release of the levy exists.

(2) *Essential business property defined*. For purposes of this section, *essential business property* means tangible personal property used in carrying on the trade or business of the taxpayer which when levied upon prevents the taxpayer from continuing to carry on the trade or business.

(3) *Seizure of perishable goods*. The provisions of this paragraph do not apply in the case of a seizure of perishable goods. Those seizures are governed by the provisions of section 6336 and § 301.6336–1.

(e) *Effect of a release of levy*. If property has not yet been surrendered to the director in response to a levy, a release of the levy under section 6343(a)

will relieve the possessor of any obligation to surrender the property. Otherwise, a release of a levy under section 6343(a) will cause the property to be returned to the custody of the person or persons legally entitled thereto. The release of a levy on any property under this section does not prevent any subsequent levy on the property. Section 301.6343–2, dealing with return of wrongfully levied upon property, is subject to section 6402 which prohibits the Internal Revenue Service from refunding a payment of money that has been deposited in the Treasury and credited to the taxpayer's liability unless there is an overpayment.

(f) *Effective date*. This section is effective as of December 30, 1994.

[T.D. 8587, 59 FR 35, Jan. 3, 1995]

### § 301.6343–2 Return of wrongfully levied upon property.

(a) *Return of property*—(1) *General rule*. If the district director, service center director, or compliance center director (the *director*) determines that property has been wrongfully levied upon, the director may return—

(i) The specific property levied upon;

(ii) An amount of money equal to the amount of money levied upon; or

(iii) An amount of money equal to the amount of money received by the United States from a sale of the property.

(2) *Time of return*. If the United States is in possession of specific property, the property may be returned at any time. An amount equal to the amount of money levied upon or received from a sale of the property may be returned at any time before the expiration of 9 months from the date of the levy. When a request described in paragraph (b) of this section is filed for the return of property before the expiration of 9 months from the date of levy, an amount of money may be returned after a reasonable period of time subsequent to the expiration of the 9-month period if necessary for the investigation and processing of such request.

(3) *Specific property*. In general the specific property levied upon will be returned whenever possible. For this purpose, money that is specifically identifiable, as in the case of a coin collection which may be worth substantially more than its face value, is treated as specific property.

(4) *Purchase by United States*. For purposes of paragraph (a)(1)(iii) of this section, if property is declared purchased by the United States at a sale pursuant to section 6335(e), the United States is treated as having received an amount of money equal to the minimum price determined by the director before the sale or, if larger, the amount received by the United States from the resale of the property.

(b) *Request for return of property*. A written request for the return of property wrongfully levied upon must be addressed to the district director (marked for the attention of the Chief, Special Procedures Staff) for the Internal Revenue district in which the levy was made. The written request must contain the following information—

(1) The name and address of the person submitting the request;

(2) A detailed description of the property levied upon;

(3) A description of the claimant's basis for claiming an interest in the property levied upon; and

(4) The name and address of the taxpayer, the originating Internal Revenue district, and the date of the levy as shown on the notice of levy form, or levy form, or, in lieu thereof, a statement of the reasons why such information cannot be furnished.

(c) *Inadequate request*. A request for the return of property wrongfully levied upon will not be considered adequate unless it is a written request containing the information required by paragraph (b) of this section. However, unless a notification is mailed by the director to the claimant within 30 days of receipt of the request to inform the claimant of the inadequacies, any written request will be considered adequate. If the director timely notifies the claimant of the inadequacies of his request, the claimant has 30 days from the receipt of the notification of inadequacy to supply in writing any omitted information. Where the omitted information is so supplied within the 30-day period, the request will be considered to be adequate from the time the original request was made for purposes of determining the applicable period of

limitation upon suit under section 6532(c).

(d) *Payment of interest.* Interest is paid at the overpayment rate established under section 6621—

(1) In the case of money returned under paragraph (a)(1)(ii) of this section, from the date the director received the money to a date (to be determined by the director) preceding the date of return by not more than 30 days; or

(2) In the case of money returned under paragraph (a)(1)(iii) of this section, from the date of the sale of the property to a date (to be determined by the director) preceding the date of return by not more than 30 days.

(e) *Effective date.* This section is effective as of December 30, 1994.

[T.D. 8587, 59 FR 37, Jan. 3, 1995]

### § 301.6343–3 Return of property in certain cases.

(a) *In general.* If money has been levied upon and applied toward the taxpayer's liability, or property has been levied upon and sold, and the receipts have been applied toward the taxpayer's liability, or property has been levied upon and purchased by the United States and the United States still possesses the property, and the Commissioner determines that any of the conditions in paragraph (c) of this section exist, the Commissioner may return—

(1) An amount of money equal to the amount of money levied upon;

(2) An amount of money equal to the amount of money received by the United States from a sale of the property; or

(3) The specific property levied upon and purchased by the United States.

(b) *Return of levied upon property in possession of the Internal Revenue Service (IRS) pending sale under section 6335.* Other than as provided in § 301.6343–1(b) or in paragraph (d) of this section, the Commissioner, in his or her discretion, may return levied upon property that is in the possession of the United States pending sale under section 6335.

(c) *Conditions authorizing the return of property.* The Commissioner may return property upon determining that one of the following conditions exist:

(1) *Premature or not in accordance with administrative procedures.* The levy was premature or otherwise not in accordance with the administrative procedures of the Secretary.

(2) *Installment agreement.* Subsequent to the levy, the taxpayer enters into an agreement under section 6159 to satisfy the liability for which the levy was made by means of installment payments. If, however, the agreement specifically provides that already levied upon property will not be returned under section 6343(d), the Commissioner may not grant a request for return of property under this paragraph (c)(2).

(3) *Facilitate collection.* The return of property will facilitate the collection of the tax liability for which the levy was made.

(4) *Best interests of the United States and the taxpayer*—(i) *In general.* The taxpayer or the National Taxpayer Advocate (or his or her delegate) has consented to the return of property, and the return of property would be in the best interest of the taxpayer, as determined by the National Taxpayer Advocate (or his or her delegate), and in the best interest of the United States, as determined by the Commissioner.

(ii) *Best interest of the taxpayer.* The National Taxpayer Advocate (or his or her delegate) generally will determine whether the return of property is in the best interest of the taxpayer. If, however, a taxpayer requests the Commissioner to return property and has not specifically requested the National Taxpayer Advocate (or his or her delegate) to determine the taxpayer's best interest, a finding by the Commissioner that the return of property is in the best interest of the taxpayer will be sufficient to support the return of property. Only the National Taxpayer Advocate (or his or her delegate) may determine that a return of property is not in the best interest of the taxpayer.

(5) *Examples.* The following examples illustrate the provisions of this paragraph (c):

*Example 1.* A owes $1,000 in Federal income taxes. The IRS levies on a broker with respect to a money market account belonging to the taxpayer and receives payment from the broker which it applies to the taxpayer's

outstanding liability. However, the IRS failed to follow procedure provided by the Internal Revenue Manual (but not required by statute) with regard to managerial approval prior to the making of the levy. The Commissioner may return an amount of money equal to the amount of money the IRS levied upon and applied toward the taxpayer's tax liability.

*Example 2.* B owes $1,000 in Federal income taxes. The IRS levies on a bank with respect to a savings account belonging to the taxpayer and receives funds from the bank, which it applies to the taxpayer's liability. Subsequent to the levy, B enters into an installment agreement, under which B will pay timely installments to satisfy the entire liability. The installment agreement does not by its terms preclude the return of levied upon property. The revenue officer verifies that B is financially capable of paying the entire liability, including accruals, in the agreed-upon installment payments. The Commissioner may return an amount of money equal to the amount of money levied upon and applied toward the taxpayer's liability.

*Example 3.* C owns a house that is deteriorating and in unsalable condition. C is in the process of renovating the house for sale when the IRS levies upon C's bank account for the payment of a $20,000 outstanding Federal tax liability and receives funds in the amount of $3,000, which it applies toward C's liability. A notice of federal tax lien is the only lien encumbrancing the house. C requests that an amount of money equal to the amount seized from the bank account be returned so that C can complete the renovations on the house. Without the funds, C will be unable to complete the renovations and sell the house. Upon examination, the Commissioner determines that the IRS will be able to collect the entire tax liability if C's house is restored to salable condition. If the National Taxpayer Advocate, or the Commissioner in lieu of the National Taxpayer Advocate, determines that the return of the seized money is in the taxpayer's best interest, the Commissioner may return an amount of money equal to the amount seized from the bank account, in the best interest of the taxpayer and the United States.

(d) *Best Interests of the United States and the taxpayer to release levy and return of property where levy made in violation of law*—(1) *In general.* If the IRS makes a levy in violation of the law, it is in the best interests of the United States and the taxpayer to release the levy and the IRS will return to the taxpayer any property obtained pursuant to the levy. For example, the IRS will release the levy and return the taxpayer's property if the levy was made—

(i) Without giving the requisite thirty-day notice of the right to a hearing under section 6330;

(ii) During the pendency of a proceeding for refund of divisible tax in violation of section 6331(i);

(iii) Before investigation of the status of levied upon property in violation of section 6331(j);

(iv) During the pendency of an offer-in-compromise in violation of section 6331(k)(1); or

(v) During the period an offer to enter into an installment agreement is pending (or for 30 days following the rejection of an offer, or, if the rejection is timely appealed, during the period that the appeal is pending) or during the period an installment agreement is in effect (or during the 30 days following a termination or, if a timely appeal of termination is filed, during the period the appeal is pending) in violation of section 6331(k)(2).

(2) *Property may not be credited to outstanding liability without the taxpayer's permission.* When the release of a levy and the return of property are required under this paragraph (d), the property or the proceeds from the sale of the property received by the IRS pursuant to the levy must be returned to the taxpayer unless the taxpayer requests otherwise. The property or proceeds of sale may not be credited to any outstanding tax liability of the taxpayer, including the one with respect to which the IRS made the levy, without the written permission of the taxpayer.

(e) *Time of return.* Levied upon property in possession of the IRS (other than money) may be returned under paragraphs (c) and (d) of this section at any time. An amount of money equal to the amount of money levied upon or received from a sale of property may be returned at any time before the expiration of 9 months from the date of the levy. When a request for the return of money filed in accordance with paragraph (h) of this section is filed before the expiration of the 9-month period, or a determination to return an amount of money is made before the expiration of the 9-month period, the money may be returned within a reasonable period of time after the expiration of the 9-month period if additional

time is necessary for investigation or processing.

(f) *Purchase by the United States.* For purposes of paragraph (a)(2) of this section, if property is declared purchased by the United States at a sale pursuant to section 6335(e)(1)(C), the United States will be treated as having received an amount of money equal to the minimum price determined by the Commissioner before the sale.

(g) *Determinations by the Commissioner.* The Commissioner must determine whether any of the conditions authorizing the return of property exists if a taxpayer submits a request for the return of property in accordance with paragraph (h) of this section. The Commissioner also may make this determination independently. If the Commissioner determines that conditions authorizing the return of property are not present, the Commissioner may not authorize the return of property. If the Commissioner determines that conditions authorizing the return of property are present, the Commissioner may (but is not required to, unless the reason for the return of property is that the levy was made in violation of law and is governed by paragraph (d) of this section) authorize the return of property. If the Commissioner decides independently to return property under paragraph (c)(4) of this section based on the best interests of the taxpayer and the United States, the taxpayer or the National Taxpayer Advocate (or his or her delegate) must consent to the return of property.

(h) *Procedures for request for the return of property*—(1) *Manner.* A request for the return of property must be made in writing to the address on the levy form.

(2) *Form.* The written request must include the following information—

(i) The name, current address, and taxpayer identification number of the person requesting the return of money (or property purchased by the United States);

(ii) A description of the property levied upon;

(iii) The date of the levy; and

(iv) A statement of the grounds upon which the return of money is being requested (or property purchased by the United States).

(i) *No interest.* No interest will be paid on any money returned under this section.

(j) *Administrative collection upon default.* If the Commissioner returns property under this section, and the taxpayer fails to pay the previously assessed liability for which the levy was made on the returned property, the Commissioner may administratively collect the liability. Collection may include levying again on the returned property as long as statutory and administrative requirements are followed.

(k) *Effective date.* This section is applicable on July 14, 2005.

[T.D. 9213, 70 FR 40670, July 14, 2005]

### § 301.6361–1 Collection and administration of qualified taxes.

(a) *In general.* In the case of any State which has in effect a State agreement (as defined in paragraph (a) of § 301.6361–4), the Commissioner of Internal Revenue shall collect and administer each qualified tax (as defined in paragraph (b) of § 301.6361–4) of such State. No fee or other charge shall be imposed upon any State for the collection or administration of any qualified tax of such State or any other State. In any such case of collection and administration of qualified taxes, the provisions of subtitle F (relating to procedure and administration), subtitle G (relating to the Joint Committee on Taxation), and chapter 24 (relating to the collection of income tax at source on wages), and the provisions of regulations thereunder, insofar as such provisions relate to the collection and administration of the taxes imposed on the income of individuals by chapter 1 (and the civil and criminal sanctions provided by subtitle F, or by title 18 of the United States Code (relating to crimes and criminal procedure), with respect to such collection and administration) shall apply to the collection and administration of qualified taxes as if such taxes were imposed by chapter 1, except to the extent that the application of such provisions (and sanctions) are modified by regulations issued under subchapter E (as defined in paragraph (d) of § 301.6361–4). Any extension of time which is granted for

the making of a payment, or for the filing of any return, which relates to any Federal tax imposed by subtitle A (or by subtitle C with respect to filing a return) shall constitute automatically an extension of the same amount of time for the making of the corresponding payment or for the filing of the corresponding return relating to any qualified tax.

(b) *Returns of qualified taxes.* Every individual, estate, or trust which has liability for one or more qualified taxes for a taxable year—

(1) Shall file a Federal income tax return at the time prescribed pursuant to section 6072(a) (whether or not such return is required by section 6012), and shall file therewith on the prescribed form a return under penalties of perjury for each tax which is—

(i) A qualified resident tax imposed by a State of which the taxpayer was a resident, as defined in § 301.6362–6, for any part of the taxable year;

(ii) A qualified nonresident tax imposed by a State within which was located the source or sources from which the taxpayer derived, while not a resident of such State and while not exempt from liability for the tax by reason of a reciprocal agreement between such State and the State of which he is a resident, 25 percent or more of his aggregate wage and other business income, as defined in paragraph (c) of § 301.6362–5, for the taxable year; or

(iii) A qualified resident or nonresident tax with respect to which any amount was currently collected from the taxpayer's income (including collection by withholding on wages or by payment of estimated income tax), as provided in paragraph (f) of § 301.6362–6, for any part of the taxable year; and

(2) Shall declare (in addition to the declaration required with respect to the return of the Federal income tax and in the place and manner prescribed by form or instructions thereto) under penalties of perjury that, to the best of the knowledge and belief of the taxpayer (or, in the case of an estate or trust, of the fiduciary who executes the Federal income tax return), he has no liability for any qualified tax for the taxable year other than any such liabilities returned with the Federal income tax return (pursuant to subparagraph (1) of this paragraph (b)). Such declaration shall constitute a return indicating no liability with respect to each qualified tax other than any such tax for which liability is so returned. A Federal income tax return form which is filed but which does not contain such declaration shall constitute a Federal income tax return only if the taxpayer in fact has no liability for any qualified State tax for the taxable year.

(c) *Credits*—(1) *Credit for tax of another State or political subdivision*—(i) *In general.* A credit allowable under a qualified tax law against the tax imposed by such law for a taxpayer's tax liability to another State or a political subdivision of another State shall be allowed if the requirements of subdivision (ii) of this subparagraph are met, and if the credit meets the requirements of paragraph (c) of § 301.6362–4. Such credit shall be allowed without regard to whether the tax imposed by the other State or subdivision thereof is a qualified tax, and without regard to whether such tax has been paid.

(ii) *Substantiation of tax liability for which a credit is allowed.* If the liability which gives rise to a credit of the type described in subdivision (i) of this subparagraph is with respect to a qualified tax, then the fact of such liability shall be substantiated by filing the return on which such liability is reported. If such liability is not with respect to a qualified tax, then the Commissioner may require a taxpayer who claims entitlement to such a credit to complete a form to be submitted with his return of the qualified tax against which the credit is claimed. On such form the taxpayer shall identify each of the other States (the liabilities to which were not substantiated as provided in the first sentence of this subdivision) or political subdivisions to which the taxpayer reported a liability for a tax giving rise to the credit, furnish the name or description of each such tax, state the amount of the liability so reported with respect to each such tax and the beginning and ending dates of the taxable period for which such liability was reported, and provide such other information as is requested in the form or in the instructions thereto. In addition, the taxpayer shall agree on such form to notify the Commissioner

in the event that the amount of any tax liability (or portion thereof) which is claimed as giving rise to a credit of the type described in subdivision (i) of this subparagraph is changed or adjusted, whether as a result of an amended return filed by the taxpayer, a determination by the jurisdiction imposing the tax, or in any other manner.

(2) *Credit or withheld qualified tax.* An individual from whose wages an amount is withheld on account of a qualified tax shall receive a credit for such amount against his aggregate liability for all such qualified taxes and the Federal income tax for the taxable year, whether or not such tax has been paid over to the Federal Government by the employer. The credit shall operate in the manner provided by section 31(a) of the Code and the regulations thereunder with respect to Federal income tax withholding.

(d) *Collection of qualified taxes at source on wages*—(1) *In general.* Except as otherwise provided in subparagraph (2) of this paragraph, every employer making payment of wages to an employee described in such subparagraph shall deduct and withhold upon such wages the amount prescribed with respect to the qualified tax designated in such subparagraph. The amounts prescribed for withholding with respect to each such qualified tax shall be published in Circular E (Employer's Tax Guide) or other appropriate Internal Revenue Service publications. See paragraph (f)(1) of § 301.6362–7 with respect to civil and criminal penalties to which an employer shall be subject with respect to his responsibilities relating to qualified taxes.

(2) *Specific withholding requirements.* An employer shall deduct and withhold upon an employee's wages the amount prescribed with respect to a qualified tax with respect to which such employee is subject to the current collection provisions pursuant to paragraph (f) of § 301.6362–6, unless:

(i) In the case of a qualified resident tax, the employee's services giving rise to the wages are performed in another State, and such other State or a political subdivision thereof imposes a nonresident tax on such employee with respect to which the withholding amount exceeds the prescribed withholding amount with respect to such qualified resident tax, and the State imposing such qualified resident tax grants a credit against it for such nonresident tax.

(ii) In the case of a qualified nonresident tax, either:

(A) Residents of the State in which the employee resides are exempt from liability for the qualified nonresident tax imposed by the State from sources within which his wage income is derived, by reason of an interstate compact or agreement to which the two States are parties, or

(B) The State in which the employee resides imposes a qualified resident tax on such employee with respect to which the prescribed withholding amounts exceed the prescribed withholding amounts with respect to the qualified nonresident tax imposed by the State from sources within which his wage income is derived, and the State in which he resides grants a credit against its qualifed resident tax for such qualified nonresident tax.

If the nonresident tax described in subdivision (i) of this subparagraph is a qualified nonresident tax imposed by a State, then the reference in such subdivision to the State in which the services are performed shall be construed as a reference to the State from sources within which the wage income is derived, within the meaning of paragraph (d)(1) of § 301.6362–5.

(3) *Forms, procedures, and returns relating to withholding with respect to qualified taxes*—(i) *Forms W–4 and W–4P.* Forms W–4 (Employee's Withholding Allowance Certificate) and W–4P (Annuitant's Request for Income Tax Withholding), shall include information as to the State in which the employee resides, and shall be used for purposes of withholding with respect to both Federal and qualified taxes. An employee shall show on his Form W–4 the State in which he resides for purposes of this paragraph, and shall file a new Form W–4 within 10 days after he changes his State of residence. An employee who fails to meet either of the requirements set forth in the preceding sentence, with the intent to evade the withholding tax imposed with respect to a qualifed tax, shall be subject to the penalty provided in section 7205 of

the Code. An employer shall be responsible for determining the State within which are located the sources from which the employee's wage income is derived for purposes of this paragraph; and, if the employee does not file a Form W–4, the employer shall assume for such purposes that the employee resides in that State. When an employer and an employee enter into a voluntary withholding agreement pursuant to § 31.3402(p)–1, the employer shall withhold the amount prescribed with respect to the qualified resident tax imposed by the State in which the employee resides, as indicated on Form W–4. Similarly, if an annuitant requests withholding with respect to his annuity payments pursuant to section 3402 (o)(1)(B) of the Code, the payer shall withhold the whole dollar amount specified by the annuitant with respect to a qualified resident tax, provided that the combined withholding with respect to Federal and qualified taxes on each annuity payment shall be a whole dollar amount not less than $5, and that the net amount of any annuity payment received by the payee shall not be reduced to less than $10.

(ii) *Forms W-2 and W-2P*. Forms W-2 (Wage and Tax Statement) and W-2P (the corresponding form for annuities) shall show:

(A) The total amount withheld with respect to the Federal income tax;

(B) The total amount withheld with respect to qualified taxes;

(C) The name of each State imposing a qualified tax in which the employee (or annuitant) resided during the taxable year, as shown on Form W–4 (or W–4P);

(D) The name of each State imposing a qualified nonresident tax within which were located sources from which the employee's wage income was derived during a period of the taxable year in which he was not shown as a resident of such State on Form W–4, and the amount of the employee's wage income so derived; and

(E) The name of each State or locality that imposes an income tax which is not a qualified tax and with respect to which the employer withheld on the employee's wage income for the taxable year, and the amount of wage income with respect to which the employer so withheld.

(iii) *Requirements relating to deposit and payment of withheld tax*. Rules relating to the deposit and remittance of withheld Federal income and FICA taxes, including those prescribed in section 6302 of the Code and the regulations thereunder, shall apply also to amounts withheld with respect to qualified taxes. Thus, an employer's liability with respect to the deposit and payment of withheld taxes shall be for the combined amount of withholding with respect to Federal and qualified taxes. The Federal Tax Deposit form shall separately indicate:

(A) The combined total amount of Federal income, FICA, and qualified taxes withheld;

(B) The combined total amount of qualified taxes withheld; and

(C) The total amount of qualified taxes withheld with respect to each electing State.

Data indicating the total amount of tax deposits processed by the Internal Revenue Service with respect to the qualified taxes of an electing State will be available to that State upon request on as frequent as a weekly basis. These data will be available no later than 10 working days after the end of the calendar week in which the deposits were processed by the Service.

(iv) *Employment tax returns*. Forms 941 (Employer's Quarterly Federal Tax Return), 941–E (Quarterly Return of Withheld Income Tax), 941–M (Employer's Monthly Federal Tax Return), 942 (Employer's Quarterly Tax Return for Household Employees), and 943 (Employer's Annual Tax Return for Agricultural Employees), shall indicate the total amount withheld with respect to each qualified tax, as directed by such forms or their instructions.

(e) *Criminal penalties*. A criminal offense committed with respect to a qualified tax shall be treated as a separate offense from a similar offense committed with respect to the Federal tax. Thus, for example, if a taxpayer willfully attempts to evade both the Federal tax and a qualified tax by failing to report a portion of his income,

he shall be considered as having committed two criminal offenses, each subject to a separate penalty under section 7201. See also § 301.6362–7(f) with respect to criminal penalties.

(f) *Allocation of amounts collected with respect to tax and criminal fines*—(1) *In general*. The aggregate amount that has been collected from a taxpayer (including amounts collected by withholding) in respect of liability for both one or more qualified taxes and the Federal income tax for a taxable year shall be allocated among the Federal Government and the States imposing qualified taxes for which the taxpayer is liable in the proportion which the taxpayer's liability for each such tax bears to his aggregate liability for such year to all of such taxing jurisdictions with respect to such taxes. A reallocation shall be made either when an amount is collected from the taxpayer or his employer or is credited or refunded to the taxpayer, subsequent to the making of the initial allocation, or when a determination is made by the Commissioner that an error was made with respect to a previous allocation. However, any such allocation or reallocation shall not affect the amount of a taxpayer's or employer's liability to either jurisdiction, or the amount of the assessment and collection which may be made with respect to a taxpayer or employer. Accordingly, such allocations and reallocations shall not be taken into consideration for purposes of the application of statutes of limitation or provisions relating to interest, additions to tax, penalties, and criminal sanctions. See example 4 in subparagraph (4) of this paragraph (e). In addition, any such allocation or reallocation shall not affect the amount of the deduction to which a taxpayer is entitled under section 164 for a year in which he made payment (including payments made by withholding) of an amount which was designated as being in respect of his liability for a qualified tax. However, to the extent that an amount which was paid by a taxpayer and designated as being in respect of his liability for a qualified tax is allocated or reallocated in such a manner as to apply it toward the taxpayer's liability for the Federal income tax, such allocation or reallocation shall be treated as a refund to the taxpayer of an amount paid in respect of a State income tax, and shall be included in the gross income of the taxpayer to the extent appropriate under section 111 and the regulations thereunder in the year in which the allocation or reallocation is made. See section 451 and the regulations thereunder. Similarly, to the extent that an amount which was paid by a taxpayer and designated as being in respect of his Federal income tax liability is allocated or reallocated in such a manner as to apply it toward his liability for a qualified tax, such allocation or reallocation shall be treated as a payment made by the taxpayer in respect of a State income tax, and shall be deductible under section 164 in the year in which the allocation or reallocation is made. The Internal Revenue Service shall notify the taxpayer in writing of any allocation or reallocation of tax liabilities in a proportion other than that of the respective tax liabilities shown on the taxpayer's returns.

(2) *Amounts of collections and liabilities*. For purposes of this paragraph the aggregate amount that has been collected from a taxpayer or his employer in respect of tax liability shall include the amounts of interest provided in chapter 67, and additions to tax and assessable penalties provided in chapter 68, which are collected with respect to such tax; but shall not include criminal fines provided in chapter 75, or in title 18 of the United States Code, which are collected with respect to offenses relating to such tax. (See subparagraph (3) of this paragraph (e) with respect to the treatment of such criminal fines.) However, for purposes of this paragraph, the amount of the taxpayer's liability for each tax shall exclude his liability for such interest additions to tax, and assessable penalties with respect to such tax, and his liability for criminal fines imposed with respect to offenses relating to such tax. For purposes of this paragraph, the amount of the taxpayer's liability for each tax shall be computed by taking credits into account, except that there shall be no reduction for any amounts paid on account of such liability, whether by means of withholding, estimated tax payment, or otherwise.

(3) *Special rules relating to criminal fines.* (i) Except as otherwise provided in subdivision (ii) of this subparagraph, when a criminal charge is brought against a taxpayer with respect to a taxable year pursuant to chapter 75, or to title 18 of the United States Code, or to a corresponding provision of a qualified tax law, alleging that an offense was committed against the United States with respect to the Federal income tax or against a State with respect to a qualified tax, and an amount of money is collected by the Federal Government as a fine as a result of such charge, then the Federal Government shall remit an amount to each State, if any, which is an affected jurisdiction. The amount remitted to each such State shall bear the same proportion to the total amount collected as a fine as the taxpayer's liability with respect to the qualified taxes of that State bears to the aggregate of the taxpayer's income tax liabilities to all affected jurisdictions for the taxable year, as determined under subparagraphs (1) and (2) of this paragraph (e). For purposes of this subparagraph, an affected jurisdiction is (A) a jurisdiction with respect to the tax of which a criminal charge described in the preceding sentence was brought for the taxable year, or (B) a jurisdiction with respect to the Federal income tax or the qualified tax of which the acts or omissions alleged in such a criminal charge would constitute the basis for the bringing of a criminal charge for the same taxable year. However, in no case shall the amount received by an affected State, or the amount of the excess of the amount received by the Federal Government over the amount of its remissions to States, with respect to a fine exceed the maximum fine prescribed by statute for the offense against that jurisdiction with respect to which a criminal charge was brought, or with respect to which the bringing of a criminal charge could have been supported on the basis of the acts or omissions alleged in a criminal charge brought. For purposes of this subparagraph, the amount collected as a fine as a result of a criminal charge shall include amounts paid in settlement of an actual or potential liability for a fine, amounts paid pursuant to a conviction and amounts paid pursuant to a plea of guilty or *nolo contendere.*

(ii) If a criminal charge described in the first sentence of subdivision (i) of this subparagraph is actually brought with respect to the income tax of every affected jurisdiction with respect to the taxable year, and if a Court adjudicates on the merits the taxpayer's liability for a fine to each such jurisdiction, and includes in its decree a direction of the amount, if any, to be paid as a fine to each such jurisdiction, then that decree shall govern the allocation of the amount of money collected by the Federal Government as a fine with respect to the taxable year.

(4) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* The total combined amount of State X qualified tax and Federal income tax collected from A, a resident of State X, for the taxable year is $5,100. The amounts of A's liabilities for such taxes for that year are $800 to State X and $4,000 to the Federal Government. Since A's tax liability to State X is one-sixth of the combined tax liability ($4,800), one-sixth ($50) of the amount to be refunded to A ($300) is chargeable against State X's account, and five-sixths ($250) is chargeable against the Federal Government's account.

*Example 2.* Assume the same facts as in example 1 except that the total amount collected from A is $4,500. Since A's liabilities for the State X tax and the Federal tax are one-sixth and five-sixths, respectively, of the combined tax liability, the Federal Government shall pay over to State X one-sixth ($750) of the amount actually collected from A, and the Federal Government shall retain five-sixths ($3,750).

*Example 3.* The total amount of State X qualified tax, State Y qualified tax, and Federal income tax collected from B, a resident of State X who is employed in State Y, for the taxable year is $5,500. The amounts of B's liabilities for such taxes for that year are: $250 for the State X tax (after allowance of a credit for State Y's qualified tax), $750 for the State Y tax, and $4,000 for the Federal tax. Since B's liability for the State X tax ($250) is 5 percent of the combined tax liability ($5,000), his liability for the State Y tax ($750) is 15 percent of such combined liability, and his liability for the Federal tax ($4,000) is 80 percent of such combined liability, the total amount to be refunded to B ($500) shall be chargeable in the following manner: 5 percent ($25) against State X's account, 15 percent ($75) against State Y's account, and 80 percent ($400) against the Federal Government's account.

*Example 4.* C is liable for $2,000 in Federal income tax and $500 in State X qualified tax (a resident tax) for the taxable year. However, on his Federal income tax return for such year, C erroneously described himself as a resident of State Y (which does not have a qualified tax), and he filed with such return his declaration to the effect that he had no qualified tax liability for the year. Accordingly, C paid only $2,000 for his Federal tax liability, and such amount was retained in the account of the Federal Government. Subsequently, C's error is discovered. The amount collected by the Federal Government from C for such year must be allocated between the Federal Government and State X in proportion to C's tax liability to both. Accordingly, the Federal Government must pay over to State X the amount of $400 (which is ⅕ ($500/$2,500) of the $2,000 collected). If the Federal Government collects from C the additional $500 owed, it will retain $400 of such amount and pay the remaining $100 to State X. Similarly, if the Federal Government collects from C any interest, or any additions to tax or assessable penalties under chapter 68, ⅘ of the amount of such collections shall be retained by the Federal Government and ⅕ of such amount shall be paid over to State X. However, notwithstanding the allocation of the funds between the taxing jurisdictions, C's liability for the $500 retains its character as a liability for State X tax. Therefore, any interest, additions to tax, or assessable penalities imposed with respect to the State X tax shall be imposed with respect to C's full $500 liability for such tax, notwithstanding the fact that amounts collected with respect to such items shall be allocated ⅘ to the Federal Government.

*Example 5.* A criminal charge is brought against D pursuant to chapter 75, alleging that he willfully evaded the payment of Federal income tax by failing to report interest income derived from obligations of the United States. D enters a plea of *non contendere* to the charge and pays $2,500 as a fine to the Federal Government. The act alleged in the criminal charge would not support the bringing of a criminal charge under a State law corresponding to chapter 75, or to title 18 of the United States Code, with respect to the qualified tax of any State; accordingly, the United States is the only affected jurisdiction, and no remittances shall be made to any State with respect to the amount collected by the Federal Government as a fine.

*Example 6.* A criminal charge is brought against E pursuant to chapter 75, alleging that he willfully attempted to evade the assessment of liability for both Federal income tax and the qualified tax of State X by filing false and fraudulent income tax returns. E's case is settled upon the condition that he pay a fine in the amount of $5,000. As determined pursuant to subparagraph (2) of this paragraph, E's liabilities for the taxable year are in the amounts of $7,200 to the Federal Government and $800 to State X. Accordingly, after the Federal Government collects the fine, $500 ($5,000+$800×$8,000) is remitted to State X.

*Example 7.* Assume the same facts as in example 6, except that E is tried and convicted on both charges, and pursuant to court decree he pays to the United States a fine of $6,000 with respect to each charge, or a total of $12,000. Because a criminal charge was brought with respect to each affected jurisdiction, and the allocation of the total amount paid as a fine was specifically imposed by a court decree, the direction of the Court shall govern the allocation. Accordingly, after the Federal Government collects the fines it pays over $6,000 to the account of State X.

[T.D. 7577, 43 FR 59361, Dec. 20, 1978]

### § 301.6361–2 Judicial and administrative proceedings; Federal representation of State interests.

(a) *Civil proceedings*—(1) *General rule.* Any person shall have the same right to bring or contest a civil action, and to obtain a review thereof, with respect to a qualified tax (including the current collection thereof) in the same court or courts which would be available to him, and pursuant to the same requirements and procedures to which he would be subject, under chapter 76 (relating to judicial proceedings), and under title 28 of the United States Code (relating to the judiciary and judicial procedure), if the tax were imposed by section 1 or chapter 24 of the Internal Revenue Code. For purposes of this section, the term ''person'' includes the Federal Government. Except as provided in subparagraph (2) of this paragraph (a), to the extent that the preceding sentence provides judicial procedures (including review procedures) with respect to any matter, such procedures shall replace civil judicial procedures under State law.

(2) *Exception.* The right or power of the courts of any State to pass on matters involving the constitution of such State is unaffected by any provision of this paragraph; however, the jurisdiction of a State court in such matters shall not extend beyond the issue of constitutionality. Thus, if in a case involving the validity of a qualified tax statute under the State constitution,

the State court holds such statute constitutional, such court shall not proceed to decide the amount of the tax liability.

(b) *Criminal proceedings.* Only the Federal Government shall have the right to bring a criminal action with respect to a qualified tax (including the current collection thereof). Such an action shall be brought in the same court or courts which would be available to the Federal Government, and pursuant to the same requirements and procedures to which the Federal Government would be subject, if the tax were imposed by section 1 or chapter 24 of the Internal Revenue Code.

(c) *Administrative proceedings.* Any person shall have the same rights in administrative proceedings of the Internal Revenue Service with respect to a qualified tax (including the current collection thereof) which would be available to him, and shall be subject to the same administrative requirements and procedures to which he would be subject, if the tax were imposed by section 1 or chapter 24 of the Internal Revenue Code.

(d) *United States representation of State interests*—(1) *General rule.* Except as provided in subparagraphs (2) and (3) of this paragraph (d), the Federal Government shall appear on behalf of any State the qualified tax of which it collects (or did collect for the year in issue), and shall represent such State's interests in any administrative or judicial proceeding, either civil or criminal in nature, which relates to the administration and collection of such qualified tax, in the same manner as it represents the interests of the United States in corresponding proceedings involving Federal income tax matters.

(2) *Exceptions.* The Federal Government shall not so represent a State's interests either—

(i) In proceedings in a State court involving the constitution of such State, to the extent of such constitutional issue, or

(ii) In proceedings in any court involving the relationship between the United States and the State, to the extent of the issue pertaining to such relationship, if either:

(A) The proceeding is one which is initiated by the United States against the State, or by the State against the United States, and no individual (except in his official capacity as a governmental official) is an original party to the proceeding, or

(B) The proceeding is not one described in (A), but the State elects to represent its own interests to the extent permissible under this subdivision.

(3) *Finality of Federal administrative determinations.* State and local government officials and employees may not review Federal administrative determinations concerning tax liabilities of, refunds owed to, or criminal prosecutions of, individuals with respect to qualified taxes. See, however, § 301.6363–3 relating to State administration of a qualified tax with respect to transition years. If requested by an electing State, the Commissioner or his delegate may, under terms and conditions set forth in an agreement with such State, permit such State to carry on operations supplementary to the Federal administration of the State's qualified tax (including supplemental audits or examinations of tax returns by State audit personnel), but all administrative determinations shall be made by the Federal Government without review by the State. An agreement which permits supplemental audits or examinations of tax returns by State audit personnel shall provide that the audits and examinations shall be conducted under the supervision and control of the Commissioner or his delegate, who shall have the authority to determine which returns shall be audited and when the audits shall occur. Also, such agreements shall provide that the results of any such supplemental audit shall be referred to the Commissioner or his delegate for final administrative determination. The Commissioner or his delegate shall, to the extent permitted by law, allow an electing State reasonable access to tax returns and other appropriate records and information relating to its qualified tax for the purpose of conducting any such supplemental operations. In addition, the Secretary or his delegate shall permit an electing State to inspect the workpapers which are compiled in the course of verification by the Treasury Department of the correctness of the accounting by which

the amounts of the actual net collections attributable to the electing State's qualified taxes are determined.

[T.D. 7577, 43 FR 59364, Dec. 20, 1978]

### § 301.6361–3 Transfers to States.

(a) *Periodic transfers.* In general, amounts collected by the Federal Government which are allocable to qualified taxes (including criminal fines which are required to be paid to a State, as determined under paragraph (f)(3) of § 301.6361–1) shall be promptly transferred to each State imposing such a tax. Transfers of such amounts, based on percentages of estimated Federal collections, shall be made not less frequently than every third business day unless the State agrees to accept transfers at less frequent intervals.

(b) *Determination of amounts of transfers.* The amounts allocable to the qualified taxes of each State for purposes of periodic transfer shall be determined as a percentage of the estimated aggregate net individual income tax collections made by the Federal Government. For purposes of this paragraph, the ''aggregate net individual income tax collections'' shall include amounts collected on account of the Federal individual income tax and all qualified taxes by all means (including withholding, tax returns, and declarations of estimated tax), and shall be reduced to the extent of any liability to taxpayers for credits or refunds by reason of overpayments of such taxes. The percentage of the estimated amount of such collections which is allocated to each State shall be based on an estimate which is to be made by the Office of Tax Analysis prior to the beginning of each calendar year as to what portion of the estimated aggregate net individual income tax collections for the forthcoming year will be attributable to the qualified taxes of that State. Each State will be notified prior to the beginning of each calendar year of the amount which it is estimated that the State will receive by application of that percentage for the year. However, the Office of Tax Analysis shall, from time to time throughout the calendar year, revise the percentage estimates when such a revision is, in the opinion of that office necessary to conform such estimates to the actual receipts. When such a revision is made, the payments to the State will be adjusted accordingly.

(c) *Adjustment of difference between actual collections and periodic transfers.* At least once annually the Secretary or his delegate shall determine the difference between the aggregate amount of the actual net collections made (taking into account credits, refunds, and amounts received by withholding with respect to which a tax return is not filed) which is attributable to each State's qualified taxes during the preceding year and the aggregate amount actually transferred to such State based on estimates during such year. The amount of such difference, as so determined, shall be a charge against, or an addition to, the amounts otherwise determined to be payable to the State.

(d) *Recipient of transferred funds.* All funds transferred pursuant to section 6361(c) and paragraph (a) of this section shall be transferred by the Federal Government to the State official designated by the Governor to receive such funds in the State agreement pursuant to paragraph (d)(5) of § 301.6363–1, unless the Governor notifies the Secretary or his delegate in writing of the designation of a different State official to receive the funds.

[T.D. 7577, 43 FR 59365, Dec. 20, 1978]

### § 301.6361–4 Definitions.

For purposes of the regulations in this part under subchapter E of chapter 64 of the Internal Revenue Code of 1954, relating to collection and administration of State individual income taxes—

(a) *State agreement.* The term ''State agreement'' means an agreement between a State and the Federal Government which was entered into pursuant to section 6363 and the regulations thereunder, and which provides for the Federal collection and administration of the qualified tax or taxes of that State.

(b) *Qualified tax.* The term ''qualified tax'' means a tax which is a ''qualified State individual income tax'', as defined in section 6362 (including subsection (f)(1) thereof, which requires that a State agreement be in effect) and the regulations thereunder.

(c) *Chapters and subtitles.* References in regulations in this part under subchapter E to chapters and subtitles are to chapters and subtitles of the Internal Revenue Code of 1954, unless otherwise indicated.

(d) *Subchapter E.* The term ''subchapter E'' means subchapter E of chapter 64 of the Internal Revenue Code of 1954, relating to collection and administration of State individual income taxes, as amended from time to time.

[T.D. 7577, 43 FR 59365, Dec. 20, 1978]

### § 301.6361–5 Effective date of section 6361.

Section 6361 shall take effect on the first January 1 which is more than 1 year after the first date on which at least one State has filed a notice of election with the Secretary or his delegate to enter into a State agreement. For purposes of this section, a notice of election shall be deemed to have been filed by a State only if there is no defect in either the State's notice of election or the State's tax law of which the Secretary notified the Governor pursuant to paragraph (c) of § 301.6363–1, and which has not been retroactively cured under the provisions of such paragraph.

[T.D. 7577, 43 FR 59365, Dec. 20, 1978]

### § 301.6362–1 Types of qualified tax.

(a) *In general.* A qualified tax may be either a ''qualified resident tax'' within the meaning of paragraph (b) of this section, or a ''qualified nonresident tax'' within the meaning of paragraph (c) of this section.

(b) *Qualified resident tax.* A tax imposed by a State on the income of individuals, estates, and trusts which are residents of such State within the meaning of section 6362(e) and § 301.6362–6 shall be a ''qualified resident tax'' if it is either:

(1) A tax based on Federal taxable income which meets the requirements of section 6362 (b), (e), and (f), and of §§ 301.6362–2, 301.6362–6, and 301.6362–7; or

(2) A tax which is a percentage of the Federal tax and which meets the requirements of section 6362 (c), (e), and (f), and of §§ 301.6362–3, 301.6362–6, and 301.6362–7.

(c) *Qualified nonresident tax.* A tax imposed by a State on the wage and other business income of individuals who are not residents of such State within the meaning of section 6362(e)(1) and paragraph (b) of § 301.6362–6 shall be a ''qualified nonresident tax'' if it meets the requirements of section 6362 (d), (e), and (f), and of §§ 301.6362–5, 301.6362–6, and 301.6362–7.

[T.D. 7577, 43 FR 59366, Dec. 20, 1978]

### § 301.6362–2 Qualified resident tax based on taxable income.

(a) *In general.* A tax meets the requirements of section 6362(b) and this section only if it is imposed on the amount of the taxable income, as defined in section 63, of the individual, estate, or trust, adjusted—

(1) By subtracting an amount equal to the amount of the taxpayer's interest on obligations of the United States which was included in his gross income for the taxable year;

(2) By adding an amount equal to the amount of the taxpayer's net State income tax deduction, as defined in paragraph (a) of § 301.6362–4, for the taxable year;

(3) By adding an amount equal to the amount of the taxpayer's net tax-exempt income, as defined in paragraph (b) of § 301.6362–4, for the taxable year; and

(4) If a credit is allowed against the tax in accordance with paragraph (b)(3) of this section for sales tax imposed by the State or a political subdivision thereof, by adding an amount equal to the amount of the taxpayer's deduction under section 164(a)(4) for such sales tax.

The tax may provide for either a single rate or multiple rates which vary with the amount of taxable income, as adjusted.

(b) *Permitted adjustments.* A tax which otherwise meets the requirements of paragraph (a) of this section shall not be deemed to fail to meet such requirements solely because it provides for one or more of the following adjustments:

(1) A credit meeting the requirements of paragraph (c) of § 301.6362–4 is allowed against the tax for the taxpayer's income tax liability to another State or a political subdivision thereof.

(2) A tax is imposed on the amount taxed under section 56 (relating to the minimum tax for tax preferences).

(3) A credit is allowed against the tax for all or a portion of any general sales tax imposed by the State or a political subdivision thereof with respect to sales either to the taxpayer or to one or more of his dependents.

(c) *Method of making mandatory adjustments.* The mandatory adjustments provided in paragraph (a) of this section shall be made directly to taxable income. Except as provided in paragraph (c)(2) of § 301.6362–4, no account shall be taken of any reduction or increase in the Federal adjusted gross income which would result from the exclusion from, or inclusion in, gross income of the items which are the subject of the adjustments. Thus, for example, when for purposes of the calculation the taxpayer's Federal taxable income is adjusted to reflect the exclusion from gross income of interest on obligations of the United States, no change shall be made in the amount of the taxpayer's deduction for medical expenses, or in the amount of his charitable contribution base, even though such amounts would ordinarily depend upon the amount of adjusted gross income.

[T.D. 7577, 43 FR 59366, Dec. 20, 1978]

### § 301.6362–3 Qualified resident tax which is a percentage of Federal tax.

(a) *In general.* A tax meets the requirements of section 6362(c) and this section only if:

(1) The tax is imposed as a single specified percentage of the excess of the taxes imposed by chapter 1 over the sum of the credits allowable under part IV of subchapter A of chapter 1 (other than the credits allowable under sections 31 and 39), and

(2) The amount of the tax is decreased by the amount of the decrease in such liability which would result from excluding from the taxpayer's gross income an amount equal to the amount of interest on obligations of the United States which was included in his gross income for the taxable year.

(b) *Permitted adjustments.* A tax which otherwise meets the requirements of paragraph (a) of this section shall not be deemed to fail to meet such requirements solely because it provides for one or more of the following three adjustments:

(1) The amount of a taxpayer's liability for tax is increased by the amount of the increase in such liability which would result from including in such taxpayer's gross income all of the following:

(i) An amount equal to the amount of his net State income tax deduction, as defined in paragraph (a) of § 301.6362–4, for the taxable year,

(ii) An amount equal to the amount of his net tax-exempt income, as defined in paragraph (b) of § 301.6362–4, for the taxable year, and

(iii) If a credit is allowed against the tax under paragraph (b)(3) of this section for sales tax imposed by the State or a political subdivision thereof, an amount equal to the amount of his deduction under section 164(a)(4) for such sales tax.

(2) A credit meeting the requirements of paragraph (c) of § 301.6362–4 is allowed against the tax for the income tax of another State or a political subdivision thereof.

(3) A credit is allowed against the tax for all or a portion of any general sales tax imposed by the State or a political subdivision thereof with respect to sales either to the taxpayer or to one or more of his dependents.

(c) *Method of making adjustments.* Except as specifically provided in paragraphs (a)(2) and (b)(1) of this section and in paragraph (c)(2) of § 301.6362–4, no account shall be taken of any reduction or increase in the Federal adjusted gross income which would result from the exclusion from, or inclusion in, gross income of the items which are the subject of the adjustments provided in those paragraphs. Thus, for example, when for purposes of the calculation the taxpayer's Federal income tax liability is adjusted to reflect the exclusion from gross income of interest on obligations of the United States, no change shall be made in the amount of the taxpayer's deduction for medical expenses, or in the amount of his charitable contribution base, even though such amounts would ordinarily depend

upon the amount of adjusted gross income. Also, when calculating the adjusted Federal tax liability to which the rate of the State tax is to be applied, no adjustment shall be made in the amount of any credit against Federal tax to which a taxpayer is entitled.

[T.D. 7577, 43 FR 59366, Dec. 20, 1978]

### § 301.6362–4 Rules for adjustments relating to qualified resident taxes.

(a) *Net State income tax deduction.* For purposes of section 6362 (b)(1)(B) and (c)(3)(B), and §§ 301.6362–2 and 301.6362–3, the ''net State income tax deduction'' shall be the excess (if any) of (1) the amount deducted from income under section 164(a)(3) as taxes paid to a State or to a political subdivision thereof, over (2) the amounts included in income as recoveries of prior income taxes which were paid to a State or to a political subdivision thereof and which had been deducted under section 164(a)(3).

(b) *Net tax-exempt income.* For purposes of section 6362 (b)(1)(C) and (c)(3)(A) and §§ 301.6362–2 and 301.6362–3, the ''net tax-exempt income'' shall be the excess (if any) of:

(1) The sum of (i) the interest on obligations described in section 103 (a)(1) other than obligations of the State imposing the tax and the political subdivisions thereof, and (ii) the interest on obligations described in such section of such State and the political subdivisions thereof which under the law of the State is subject to the tax; over

(2) The sum of (i) the amount of deductions allocable to the interest described in subparagraph (1) (i) or (ii) of this paragraph (b), which is disallowed pursuant to section 265 and the regulations thereunder, and (ii) the amount of the adjustment to basis allocable to such obligations which is required to be made for the taxable year under section 1016(a) (5) or (6).

For purposes of subparagraph (1)(ii) of this paragraph (b), a State may, at its option, subject to the tax the interest from all, none, or some of its section 103(a)(1) obligations and those of its political subdivisions. For example, a State may subject to tax all of such obligations other than those which it or its political subdivisions issued prior to a specified date, which may be the date that subchapter E became applicable to the State.

(c) *Credits for taxes of other jurisdictions*—(1) *In general.* A State tax law that provides for a credit, pursuant to section 6362(b)(2) (B) or (C) or section 6362(c)(4), and paragraph (b)(1) of § 301.6362–2 or paragraph (b)(2) of § 301.6362–3, for income tax of another State or a political subdivision thereof shall provide that, in the case of each taxpayer, the amount of the credit shall equal the amount of his liability with respect to such other jurisdiction's tax for the taxable year which runs concurrently with, or which ends in, the taxable year used by the taxpayer for purposes of the State tax which provides for the credit. Such a credit may be allowed with respect to every income tax (whether or not qualified) imposed on the taxpayer by another State or a political subdivision thereof, or only with respect to certain of such taxes. However, for purposes of this paragraph, the amount which is treated as being the amount of the taxpayer's liability with respect to any such tax imposed by another jurisdiction shall not exceed the amount of liability for such tax which is both—

(A) Reported to the taxing authorities responsible for collecting such other jurisdiction's tax, and

(B) Substantiated pursuant to the requirements of paragraph (c)(1)(ii) of § 301.6361–1.

(2) *Limitation.* The amount of any credit allowed for the taxable year pursuant to this paragraph shall not exceed the product of the amount of the resident tax against which the credit is allowed, as computed without subtracting any such credit, multiplied by a fraction the numerator of which is the amount of income subject to tax by both the State imposing the resident tax against which the credit is allowed and the other jurisdiction whose tax is being credited, and the denominator of which is the amount of income subject to tax by the State imposing the resident tax against which the credit is allowed. For purposes of the preceding sentence, ''income subject to tax'' means the amount of the taxpayer's adjusted gross income which is taken

into account for purposes of computing tax liability; in the case of a qualified resident tax, an appropriate modification shall be made to take into account any adjustments which are made pursuant to paragraph (a)(1) and (3) of § 301.6362–2, or pursuant to paragraph (a)(2) or (b)(1)(ii) of § 301.6362–3.

(3) *Examples*. The application of this paragraph may be illustrated by the following examples:

*Example 1*. (i) A, a calendar-year, cash-basis taxpayer, is a resident of State X throughout the taxable year. For such year, his adjusted gross income for Federal income tax purposes consists of $24,000, consisting of $3,000 derived from employment in State X, $5,000 derived from employment in State Y. $15,000 derived from employment in State Z, and $1,000 in interest income from United States savings bonds. In addition, he received net tax-exempt income in the amount of $2,000. For the taxable year, he incurs liabilities of $200 for the State Y nonresident income tax, and $1,400 for the State Z nonresident income tax. State X, which has in effect a State agreement for the taxable year, imposes a resident tax against which credits are allowed for the nonresident taxes imposed by States Y and Z. Without taking any such credits into account, however, the amount of A's liability for such resident tax would be $1,500. A properly reports his nonresident income tax liabilities to States Y and Z at the same time that he files his return with respect to the State X tax, and he substantiates on such return his liabilities to States Y and Z.

(ii) The amount of A's income subject to tax in State X is $25,000 (his adjusted gross income of $24,000, minus the United States savings bond income of $1,000, plus the net tax-exempt income of $2,000). The amount of the credit allowable against the State X resident tax for the amount of A's liability with respect to the State Y nonresident tax is calculated as follows: The maximum amount of credit is the actual amount of his liability to Y, or $200. Under subparagraph (2) of this paragraph, the amount of the credit is limited to $300 ($1,500 × $5,000/$25,000). Thus, such limit has no effect, and the full $200 is allowable as a credit against A's liability for the resident tax of State X. The amount of the credit allowable against the State X resident tax for the amount of A's liability with respect to the State Z nonresident tax is calculated as follows: The maximum amount of the credit is the actual amount of his liability to Z, or $1,400. Under subparagraph (2) of this paragraph, the amount of the credit is limited to $900 (1,500 × $15,000/$25,000). Thus, such limit has the effect of reducing to $900 the amount of the credit allowable for tax of State Z against A's liability for the resident tax of State X.

*Example 2*. (i) B, a calendar-year, cash-basis taxpayer, is a resident of State X employed in State Y through March 14, 1977. On March 15, 1977, B becomes a resident of State Z and remains a resident of such State through the remainder of 1977. For 1977, the amount of B's adjusted gross income for Federal income tax purposes is $20,000, consisting of $6,000 derived from employment in State Y which B held during the period of his residence in State X, $12,000 derived from employment in State Z which B held during the period of his residence in State Z, and $2,000 in interest income from various bank accounts. During 1977, B has no interest income from United States obligations, and no tax-exempt income. For 1977, B incurs a liability of $200 to State Y on account of its nonresident income tax imposed with respect to his $6,000 of income derived from sources within that State. State Z, which has in effect a State agreement for 1977, imposes a resident income tax on B which, if B had been a resident of State Z for all 1977, would amount to $1,200 prior to the allowance of any credits under this paragraph. However, by reason of paragraph (e)(1) of § 301.6362–6, B's liability for the resident tax of State Z, before taking into account credits allowed under this paragraph, is reduced to $960 ($1,200 × 292/365, or 4/5). Furthermore, State Z allows a credit for the nonresident tax imposed by State Y.

(ii) The amount of the credit allowable against the State Z resident tax for the amount of B's liability with respect to the State Y nonresident tax is calculated as follows: The maximum amount of the credit is the amount of his actual liability to State Y, or $200. Under subparagraph (2) of this paragraph, the amount of the credit is limited to $288 ($960 × $6,000/$20,000). Thus, such limit has no effect, and the full $200 is allowable as a credit for tax of State Y against B's liability for the resident tax of State Z.

[T.D. 7577, 43 FR 59367, Dec. 20, 1978]

## § 301.6362–5 Qualified nonresident tax.

(a) *In general*. A tax meets the requirements of section 6362(d) and this section only if:

(1) The tax is imposed by a State which simultaneously imposes a resident tax meeting the requirements of section 6362(b) and § 301.6362–2 or of section 6362(c) and § 301.6362–3;

(2) The tax is required to be computed in accordance with either the method prescribed in paragraph (b) of this section or another method of which the Secretary or his delegate approves upon submission by the State of the laws pertaining to the tax;

(3) The tax is imposed only on the wage and other business income derived from sources within such State (as defined in paragraph (d) of this section), of all individuals each of whom derives 25 percent or more of his aggregate wage and other business income for the taxable year from sources within such State while he is neither (i) a resident of such State within the meaning of section 6362(e) and § 301.6362–6, nor (ii) exempt from liability for the tax by reason of a reciprocal agreement between such State and the State of which he is a resident within the meaning of those provisions;

(4) The amount of the tax imposed with respect to any individual does not exceed the amount of tax for which such individual would be liable under the qualified resident tax imposed by such State if he were a resident of the State for the period during which he earned wage or other business income from sources within the State, and if his taxable income for such period were an amount equal to the sum of the zero bracket amount (within the meaning of section 63(d) and determined as if he had been a resident of the State for such period) and the excess of:

(i) The amount of his wage and other business income derived from sources within the State, over

(ii) That portion of the sum of the zero bracket amount and the nonbusiness deductions (*i.e.*, all deductions from adjusted gross income allowable in computing taxable income) taken into account for purposes of the State's qualified resident tax which bears the same ratio to such sum as the amount described in subdivision (i) of this subparagraph bears to his total adjusted gross income for the year; and

(5) For purposes of the tax, wage or other business income is considered as being the income of the individual whose income it is for purposes of section 61.

(b) *Approved method of computing liability for qualified nonresident tax.* A tax satisfies the requirement of paragraph (a)(2) of this section if the amount of the tax is computed either as a percentage of the excess of the amount described in paragraph (a)(4)(i) of this section over the amount described in paragraph (a)(4)(ii) of this section, or by application of progressive rates to such excess.

(c) *Definition of wage and other business income.* For purposes of section 6362(d) and this section, the term ''wage and other business income'' means the following types of income:

(1) Wages, as defined in section 3401(a) and the regulations thereunder, but for these purposes:

(i) The amount of wages shall exclude amounts which are treated as wages under section 3402 (o) or (p) (relating to supplemental unemployment compensation benefits, annuity payments, and voluntary withholding agreements), and amounts which are treated as disability payments to the extent that they are excluded from gross income for Federal income tax purposes, pursuant to section 105(d), and

(ii) The amount of wages shall be reduced by those expenses which are directly related to the earning of such wages and with respect to which deductions are properly claimed from gross income in computing adjusted gross income;

(2) Net earnings from self-employment, as defined in section 1402(a); and

(3) The distributive share of income of any trade or business carried on by a trust, estate, or electing small business corporation (as defined in section 1371(a) and the regulations thereunder), to the extent that such share:

(i) Is includible in the gross income of the taxpayer for the taxable year, and

(ii) Would constitute net earnings from self-employment if the trade or business were carried on by a partnership.

For purposes of this subparagraph, ''distributive share'' includes the income of a trust or estate which is taxable to the taxpayer as a beneficiary under applicable Federal income tax rules, and the undistributed taxable income of an electing small business corporation which is taxable to the taxpayer as a shareholder under section 1373.

(d) *Income derived from sources within a State*—(1) *Income attributable primarily to services.* Except as otherwise provided by Federal statute (see paragraphs (h), (i), and (j) of § 301.6362–7),

wage income and other business income (net earnings from self-employment or distributive shares) which is attributable more to services performed by the taxpayer than to a capital investment of the taxpayer shall be considered to have been derived from sources within a State only if the services of the taxpayer which give rise to the income are performed in such State. If for a taxable year only a portion of the taxpayer's services giving rise to the income from one employment, trade, or business is performed within a State, then it shall be presumed that the amount of income from such employment, trade, or business which is derived from sources within that State equals that portion of the total income derived from such employment, trade, or business for the year which the amount of time spent by the taxpayer for such year performing services with respect to that employment, trade, or business in that State bears to the aggregate amount of time spent by the taxpayer for such year performing all of such services. However, the presumption stated in the preceding sentence may be rebutted in the event that the taxpayer proves, by use of detailed records, that the correct allocation of his income is otherwise.

(2) *Income attributable primarily to investment.* Except as otherwise provided by Federal statute (see paragraph (j) of § 301.6362–7), business income (net earnings from self-employment or distributive shares) which is attributable more to a capital investment of the taxpayer than to services performed by the taxpayer shall be considered to have been derived from sources within the State, if any, in which the significant activities of the trade or business are conducted. If for the taxable year only a portion of the significant activities conducted with respect to one trade or business is conducted within a certain State, then the portion of the taxpayer's total income for the year from such trade or business which is considered to be derived from sources within that State shall be computed as follows:

(i) *Allocation by records.* The portion of the taxpayer's total income from the trade or business which is considered to be derived from sources within the State shall be the portion which is allocable to such sources according to the records of the taxpayer or of the partnership, trust, estate, or electing small business corporation from which his income is derived, provided that the taxpayer establishes to the satisfaction of the district director, when requested to do so, that those records fairly and equitably reflect the income which is allocable to sources within the State. An allocation made pursuant to this subdivision shall be based on the location of the significant activities of the trade or business, and not on the location at which the taxpayer's personal services are performed.

(ii) *Allocation by formula.* If the taxpayer (or the trade or business) does not keep records meeting the requirements of subdivision (i) of this subparagraph, or if the taxpayer fails to meet the burden of proof set forth therein, then the amount of the taxpayer's income from the trade or business which is considered to be derived from sources within the State shall be determined by multiplying the total of his income (as defined in paragraphs (c) (2) and (3) of this section) from the trade or business for the taxable year by the percentage which is the average of these three percentages:

(A) *Property percentage.* The percentage computed by dividing the average of the value, at the beginning and end of the taxable year, of real and tangible personal property connected with the taxpayer's trade or business and located within the State, by the average of the value, at the beginning and end of the taxable year, of all such property located both within and without the State. For this purpose, real property shall include real property rented to the taxpayer in connection with the trade or business, or rented to the trade or business.

(B) *Payroll percentage.* The percentage computed by dividing the total wages, salaries, and other compensation for personal services which is paid or incurred during the taxable year to employees in connection with the taxpayer's trade or business, and which would be treated as derived by such employees from sources within the State pursuant to subparagraph (1) of this paragraph (d), by the total of all

such wages, salaries, and other compensation for personal services which is so paid or incurred without regard to whether such payments would be treated as derived by the employees from sources within the State. For purposes of this subdivision (ii), no amount paid as deferred compensation pursuant to a retirement plan to a former employee shall be taken into consideration.

(C) *Gross income percentage.* The percentage computed by dividing the gross sales or charges for services performed by or through an agency located within the State by the total of all gross sales or charges for services performed both within and without the State. The sales or charges to be allocated to the State shall include all sales which are negotiated, and charges which are for services performed, by an employee, agent, agency, or independent contractor chiefly situated at, or working principally out of an office located within, the State.

(3) *Income attributable to real estate investment.* Notwithstanding subparagraph (2) of this paragraph (d), income and deductions from the rental of real property, and gain and loss from the sale, exchange, or other disposition of real property, shall not be subject to allocation under subparagraph (2), but shall be considered as entirely derived from sources located within the State in which such property is located.

(4) *Treatment of losses.* A loss attributable to the taxpayer's employment, or to his conduct of, participation in, or investment in a trade or business, shall be allocated in the same manner as the income attributable to such employment or trade or business would be allocated pursuant to this paragraph.

(5) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* A, an employee who earns $10,000 in wage income attributable to services, and who has no other wage or other business income, spends 60 percent of his working time performing services for his employer in State X, 30 percent in State Y, and 10 percent in State Z. In the absence of the requisite proof to the contrary, A's wage income is considered to have been derived 60 percent from sources located within State X, 30 percent within State Y, and 10 percent within State Z. Assuming that A is a nonresident with respect to all three States, and that they all impose qualified nonresident taxes, then the qualified nonresident tax of State X is imposed on $6,000, the qualified nonresident tax of State Y is imposed on $3,000, and the qualified nonresident tax of State Z is not imposed on any of the income because A did not derive at least 25 percent of his wage and other business income from sources located within State Z.

*Example 2.* B, who earns no wage income but who has a total of $10,000 of other business income for the taxable year, all of which is net income from self-employment attributable primarily to services, spends 45 percent of his working time performing services in State X, 30 percent in State Y, and 25 percent in State Z. However, the rates that B is able to charge for his services and the business expenses which he incurs vary in the different States, and he is able to prove by detailed records that his net income from self-employment was in fact derived 50 percent from sources located within State X, 35 percent from sources located within State Y, and 15 percent from sources located within State Z. Assuming that B is a nonresident with respect to all three States, and that they all impose qualified nonresident taxes, then the qualified nonresident tax of State X is imposed on $5,000, the qualified nonresident tax of State Y is imposed on $3,500, and the qualified nonresident tax of State Z is not imposed on any of the income because B did not derive at least 25 percent of his wage and other business income from sources located within State Z.

*Example 3.* C is a partner in a profitable business concern, in which he has a substantial capital investment. His net earnings from self-employment attributable to his partnership interest are $75,000 for the taxable year. The fair market value of the services which C performs for the partnership during the taxable year is $30,000. C's income is therefore attributable primarily to his capital investment. The partnership business is carried on partially within and partially without State X. Neither C nor the partnership maintains records from which the portion of C's $75,000 income which is considered to be derived from sources within State X can be satisfactorily proven. As determined under subparagraph (2) of this paragraph, the partnership's ''property percentage'' in State X is 70, its ''payroll percentage'' therein is 60, and its ''gross income percentage'' therein is 56. The amount of C's partnership income considered to be derived from sources within State X is $46,500 ($75,000×62 percent). This result would obtain even if C's services for the partnership are performed entirely within State X.

*Example 4.* Assume the same facts as in (3), except that the records of the partnership of which C is a member indicate that the net profits of the partnership are derived 40 percent from business activities conducted in

State X, and 60 percent from business activities conducted in State Y. C is requested to prove that those records fairly and equitably reflect the income which is allocable to sources within State X. The documentary evidence which he adduces in support of the allocation made by the records shows how such allocation results from a careful step-by-step tracing of the profitability of each phase and aspect of the partnership's operations, and shows the State in which each such phase and aspect of the operations is conducted. C's proof is satisfactory to show that the percentage allocation, and the amount of his partnership income considered to be derived from sources within State X is $30,000, or $75,000 multiplied by 40 percent. This result would obtain even if B's services for the partnership are performed entirely within State X.

[T.D. 7577, 43 FR 59367, Dec. 20, 1978]

### § 301.6362–6 Requirements relating to residence.

(a) *In general*. A tax imposed by a State meets the requirements of section 6362(e) and this section if in effect it provides that:

(1) The State of residence of an individual, estate, or trust is determined according to paragraph (1), (2), or (3) respectively, of section 6362(e), and according to paragraph (b), (c), or (d), respectively, of this section.

(2) The liability for a resident tax imposed by such State upon an individual or trust which changes residence to another State in the taxable year is determined according to section 6362(e)(4) and paragraph (e) of this section.

(3) The rules relating to current collection of tax apply as provided in section 6362(e)(5) and paragraph (f) of this section.

(b) *Residence of an individual*—(1) *In general*. Except as otherwise provided in subparagraph (5) of this paragraph (b), an individual is treated as a resident of a State with respect to a taxable year only if:

(i) His principal place of residence (as defined in subparagraph (2) of this paragraph (b)) is within such State for a period of at least 135 consecutive days, at least 30 days of which are in such taxable year; or

(ii) In the case of a citizen or resident of the United States who is not a resident of any State (determined as provided in subdivision (i) of this subparagraph) with respect to such taxable year, his domicile (as defined in subparagraph (3) of this paragraph (b)) is in such State for at least 30 days during such taxable year.

With respect to an individual who is a resident (determined as provided in subdivision (i) of this subparagraph) of more than one State during a taxable year, see paragraph (e) of this section.

(2) *Principal place of residence*—(i) *Definition*. For purposes of subparagraph (1)(i) of this paragraph (b), and paragraph (d)(4) of this section, the term ''principal place of residence'' shall mean the place which is an individual's primary home. An individual's temporary absence from his primary home shall not effect a change with respect thereto. On the other hand, if an individual moves to another State, other than as a mere transient or sojourner, he shall be treated as having changed the location of his primary home.

(ii) *Examples*. The application of this subparagraph may be illustrated by the following examples:

*Example 1*. A has a city home and a country home. He resides in the city home for 7 months of the year and uses the address of that home as his legal residence for purposes of driver's license, automobile registration, and voter registration. He resides in the country home 5 months of the year. His city home is considered his principal place of residence.

*Example 2*. During the taxable year, B, a construction worker, is employed at several different locations in different States. The duration of each job on which he is employed ranges from a few weeks to several months, and he knows when he accepts a job what its approximate duration will be. He owns a house in State X which he uses as his legal residence for purposes of driver's license, automobile registration, and voter registration. In addition, his family lives there during the entire year, and B lives there during periods between jobs. However, the duration of the jobs and the distance between the job-sites and his house require him to live in the localities of the respective job-sites during the period of his employment, although occasionally he returns to his house in State X on weekends. B's house in State X is his principal place of residence during all of the taxable year.

*Example 3*. C, a dependent of his parents who are residents of State X, is a full-time student in a 4-year degree program at a college in State Y. During the 9-month academic year, C lives on the college campus, but he returns to his parents' home in State X for the summer recess. C gives the State Y

as his residence for purposes of his driver's license and voter registration, but lists the address of his parents' home in State X as his ''permanent address'' on the records of the college which he attends. Although C's domicile remains at his parents' home in State X, his presence in State Y cannot be regarded as that of a mere transient or sojourner; accordingly, C's principal place of residence is in State Y for that portion of the taxable year during which he attends college.

*Example 4.* D loses his job in State X, where he lived and worked for many years. After a series of unsuccessful attempts to find other employment in State X, he accepts a job in State Y. D gives up his apartment in State X and moves to State Y upon commencing his new job; however, he intends to continue to explore available employment opportunities in State X so that he may return there as soon as an opportunity to do so arises. D changes his principal place of residence when he moves to State Y.

(3) *Domicile defined.* For purposes of subparagraph (1)(ii) of this paragraph (b), and paragraph (d)(4) of this section, the term ''domicile'' shall mean an individual's fixed or permanent home. An individual acquires a domicile in a place by living there; even for a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to change domicile, nor will intention to change domicile effect such a change until accompanied by actual removal. A domicile, once acquired, is maintained until a new domicile is acquired.

(4) *Period of residence*—(i) *General rule.* An individual who becomes a resident of a State pursuant to subparagraph (1) of this paragraph (b), or who is at the beginning of a taxable year a resident of a State pursuant to such provision, shall be treated as continuing to be a resident of such State through the end of the taxable year, unless, prior thereto, such individual becomes a resident, under the principles of subparagraph (1), of another State or a possession or foreign country. In the event that the individual becomes a resident of such another jurisdiction prior to the end of the taxable year, his residence in such State shall be treated as ending on the day prior to the day on which he becomes a resident of such other jurisdiction pursuant to subparagraph (1).

(ii) *Examples.* The application of this subparagraph may be illustrated by the following examples:

*Example 1.* A, a calendar-year taxpayer, has his principal place of residence in State X from the beginning of 1976 through August 1, 1976, when he gives up pemanently such principal place of residence. He spends the remainder of 1976 traveling outside of the United States, but does not become a resident of any other country. A is considered to be a resident of State X for the entire year 1976.

*Example 2.* Assume the same facts as in example 1, except that A ceases his traveling and establishes his principal place of residence in State Y on November 15, 1976. Assume, also, that A maintains that principal place of residence for more than 135 consecutive days. Under these circumstances, for his taxable year 1976, A is considered to be a resident of State X from January 1 through November 14, and a resident of State Y from November 15 through December 31.

(5) *Special rules.* (i) No provision of subchapter E or the regulations thereunder shall be construed to require or authorize the treatment of a Senator, Representative, Delegate, or Resident Commissioner as a resident of a State other than the State which he represents in Congress.

(ii) For special rules relating to members of the Armed Forces, see paragraph (h) of § 301.6362–7.

(6) *Examples.* The application of this paragraph may be illustrated by the following examples:

*Example 1.* A, a calendar-year taxpayer, maintains his principal place of residence in State X from December 1, 1976, through April 15, 1977. Assuming that A was not a resident of any other jurisdiction at any time during 1976, A is treated as a resident of State X for the entire year 1976. Such result would obtain even if A was absent from State X on vacation for some portion of December 1976. Moreover, such result would obtain even if it is assumed that A was a domiciliary of State Y from January 1, 1976, through April 15, 1977, because an individual's domicile does not determine his residence so long as residence in one State for the taxable year can be determined from the general rule stated in the first sentence of paragraph (b)(1) of this section.

*Example 2.* Assume the same facts as in example 1 (including the fact of A's domicile in State Y), except that A maintained his principal place of residence in State Z from September 15, 1975, through January 31, 1976, inclusive. With respect to the year 1976, A is

treated as a resident of State Z from January 1 through November 30, and as a resident of State X from December 1 through December 31. A's liability for the qualified taxes of the respective States for 1976 shall be determined pursuant to the provisions in paragraph (e) of this section.

(c) *Residence of an estate.* An estate of an individual is treated as a resident of the last State of which such individual was a resident, as determined under the rules of paragraph (b) of this section, prior to his death. However, the estate of an individual who was not a resident of any State (as determined without regard to the 30-day requirement in paragraph (b)(1) of this section) immediately prior to his death, and who was not a resident of any State at any time during the 3-year period ending on the date of his death, is not treated as a resident of any State. For purposes of determining the decedent's last State of residence, the rules of paragraph (b) shall be applied irrespective of whether subchapter E was in effect at the time the period of 135 consecutive days of residence began, or whether the decedent's last State of residence is a State electing to enter into an agreement pursuant to subchapter E. The determination of the State of residence of an estate pursuant to this paragraph shall not be governed by any determination under State law as to which State is treated as the residence or domicile of the decedent for purposes other than its individual income tax (such as liability for State inheritance tax or jurisdiction of probate proceedings).

(d) *Residence of a trust*—(1) *In general.* (i) The State of residence of a trust shall be determined by reference to the circumstances of the individual who, by either an inter-vivos transfer or a testamentary transfer, is deemed to be the ''principal contributor'' to the trust under the provisions of subdivision (ii) of this subparagraph.

(ii) If only one individual has ever contributed assets to the trust, including the assets which were transferred to the trust at its inception, then such individual is the principal contributor to the trust. However, if on any day subsequent to the initial creation of the trust, such trust receives assets having a value greater than the aggregate value of all assets theretofore contributed to it, then the trust shall be deemed (for the limited purpose of determining the State of residence) to have been ''created'' anew, and the individual who on the day of such creation contributed more (in value) than any other individual contributed on that day shall become the principal contributor to the trust. When a trust is created anew, all references in this paragraph to the creation of the trust shall be construed as referring to the most recent creation. For purposes of this paragraph, the value of any asset shall be its fair market value on the day that it was contributed to the trust; any subsequent appreciation or depreciation in the value of the asset shall be disregarded.

(2) *Testamentary trust.* A trust with respect to which a deceased individual is the principal contributor by reason of property passing on his death is treated as a resident of the last State of which such individual was a resident, as determined under the rules of paragraph (b) of this section, before his death. However, if such deceased individual was not a resident of any State (as determined without regard to the 30-day requirement in paragraph (b)(1) of this section) immediately prior to his death, and was not a resident of any State at any time during the 3-year period ending on the date of his death, then a testamentary trust of which he is the principal contributor by reason of property passing on his death is not treated as a resident of any State. All property passing on the transferor's death is treated for this purpose as a contribution made to the trust on the date of death, regardless of when the property is actually paid over to the trust.

(3) *Nontestamentary trust.* A trust which is not a trust described in subparagraph (2) of this paragraph (d), is treated as a resident of the State in which the principal contributor to the trust, during the 3-year period ending on the date of the creation of the trust, had his principal place of residence for an aggregate number of days longer than the aggregate number of days he had his principal place of residence in any other State. However, if the principal contributor to such a trust was not a resident of any State at any time

during such 3-year period, then the trust is not treated as a resident of any State.

(4) *Special rules*. If the application of the provisions of the foregoing subparagraphs of this paragraph results in a determination of more than one State of residence for a trust, or does not provide a rule by which the residence or nonresidence of the trust can be determined, then the determination of the State of residence of such trust shall be made according to the rules of the applicable subdivision of this subparagraph.

(i) If, at the time of creation of the trust, 50 percent or more in value of the trust corpus consists of real property, then the trust shall be treated as a resident of the State in which more of the real property (in value) which was in the trust at such time was located than any other State.

(ii) If, at the time of creation of the trust, less than 50 percent in value of the trust corpus consists of real property, then the trust shall be treated as a resident of the State in which, at such time, the trustee, if an individual, had his principal place of residence, or, if a corporation, had its principal place of business. If there were two or more trustees, then the foregoing sentence shall be applied by reference to the principal places of residence, or of business, of the majority of trustees who had authority to make investment and other management decisions for the trust.

(iii) If, after application of the provisions of subdivisions (i) and (ii) of this subparagraph, the State of residence of the trust still cannot be ascertained, then the Commissioner of Internal Revenue shall determine the State of residence of such trust for purposes of qualified taxes. Such determination shall be made by reference to the number of significant contacts each State had with the trust at the time of its creation. Significant contacts shall include the principal place of residence of the principal contributor or contributors to the trust, the principal place of residence or business of the trustee (or trustees), the situs of the assets of which the trust corpus was composed, and the location from which management decisions emanated with respect to the business and investment interests of the trusts.

(5) *Examples*. The application of this paragraph may be illustrated by the following examples:

*Example 1*. A created a trust in 1950 by transferring to it certain stock in a corporation. At the time of such transfer, the stock had a fair market value of $1,000. A at all relevant times had his principal place of residence in State X, and accordingly the trust is treated as a resident of such State for qualified tax purposes. As of January 1, 1977, the stock originally contributed by A, which was at all times the only property in the trust, has a fair market value of $3,000. On such date, B, who has had his principal place of residence in State Y for more than 3 years, contributes to the trust property having a fair market value of $1,200. For purposes of determining the identity of the principal contributor to the trust and the State of residence of the trust, the stock contributed by A in 1950 continues to be valued for such purposes at $1,000. Thus, the trust is treated as being created anew on January 1, 1977, with B as the principal contributor, and with State Y as its State of residence.

*Example 2*. C has his principal place of residence in State X continuously for many years, until August 1, 1978, when he establishes his principal place of residence in State Y. The change of residence is intended to be permanent, and C has no further contact with State X after such change. On January 1, 1980, C creates a nontestamentary trust. During the 3–year period ending on such date C had his principal place of residence in State X for 576 days, and in State Y for 519 days. Therefore, the trust is treated as a resident of State X.

(e) *Liability for tax on change of residence during taxable year*—(1) *In general*. If, under the principles contained in paragraph (b) or (d) of this section, an individual or trust becomes a resident, or ceases to be a resident, of a State, and is also a resident of another jurisdiction outside of such State during the same taxable year, the liability of such individual or trust for the resident tax of such State shall be determined by multiplying the amount which would be his or its liability for tax (computed after allowing the nonrefundable credits (i.e., credits not corresponding to the credits referred to in section 6401(b) available against the tax)) if he or it had been a resident of such State for the entire taxable year by a fraction, the numerator of which is the number of days he or it was a

resident of such State during the taxable year, and the denominator of which is the total number of days in the taxable year. The preceding sentence shall not apply by reason of the fact that an individual is born or dies during the taxable year, or by reason of the fact that a trust comes into existence or ceases to exist during the taxable year.

(2) *Residence determined by domicile.* When an individual is treated as a resident of a State by reason of being domiciled in such State, pursuant to paragraph (b)(1)(ii) of this section, then the numerator of the fraction provided in subparagraph (1) of this paragraph (e), shall be the number of days the individual was domiciled in the State during the taxable year.

(3) *Example.* The application of this paragraph may be illustrated by the following example:

*Example.* A, a calendar-year taxpayer, is a resident of State X continuously for many years prior to March 15, 1977. On such date, A retires and establishes a new principal place of residence in State Y. A earns $6,000 in 1977 prior to March 15, but receives no taxable income for the remainder of such year. If A had been a resident of State X for the entire taxable year 1977, his liability with respect to the qualified tax of such State (computed after allowing the nonrefundable credits available against the tax) would be $600. If he had been a resident of State Y for the entire taxable year 1977, his liability with respect to the qualified tax on that State (computed similarly) would be $400. Pursuant to the provisions in paragraph (e) of this section, A's liabilities for State qualified taxes for 1977 are as follows:

Liability for State *X* tax=$600×73/365=$120

Liability for State *Y* Tax=$400×292/365=$320.

(f) *Current collection of tax.* The State tax laws shall contain provisions for methods of current collection with respect to individuals which correspond to the provisions of the Internal Revenue Code of 1954 with respect to such current collection, including chapter 24 (relating to the collection of income tax at source on wages) and sections 6015, 6073, 6153, and other provisions of the Code relating to declarations (and amendments thereto) and payments of estimated income tax. Except as otherwise provided by Federal statute (see paragraphs (h), (i), and (j) of § 301.6362–7), in applying such provisions of the State tax laws:

(1) In the case of a resident tax, an individual shall be subject to the current collection provisions if either—

(i) He is a resident of the State within the meaning of paragraph (b) of this section, or

(ii) He has his principal place of residence (as defined in paragraph (b)(2) of this section) within the State,

And it is reasonable to expect him to have it within the State for 30 days or more during the taxable year.

(2) In the case of a nonresident tax, an individual shall be subject to the current collection provisions if he does not meet either description relating to an individual in subparagraph (1) of this paragraph (f), if he is not exempt from liability for the tax by reason for a reciprocal agreement between the State of which he is a resident and the State imposing the tax, and if it is reasonable to expect him to receive wage or other business income derived from sources within the State imposing the tax (as defined in paragraph (d) of § 301.6362–5) for services performed on 30 days or more of the taxable year.

For additional rules relating to withholding see paragraph (d) of § 301.6361–1.

[T.D. 7577, 43 FR 59369, Dec. 20, 1978]

### § 301.6362–7 Additional requirements.

A State tax meets the additional requirements of section 6362(f) and this section only if:

(a) *State agreement must be in effect for period concerned.* A State agreement, as defined in paragraph (a) of § 301.6361–4, is in effect with respect to such tax for the taxable period in question.

(b) *State laws must contain certain provisions.* Under the laws of such State, the provisions of subchapter E and the regulations thereunder, as in effect from time to time, are applicable for the entire period for which the State agreement is in effect. Any change made by the State in such tax (other than an adjustment in the State law which is made solely in order to comply with a change in the Federal Law or regulations) shall not apply to taxable years beginning in any calendar year for which the State agreement is

in effect unless the change is enacted before November 1 of such year.

(c) *State individual income tax laws can be only of certain kinds.* Such State does not impose any tax on the income of individuals other than (1) a qualified resident tax, and (2) either or both a qualified nonresident tax and a separate tax on income which is not wage and other business income as defined in paragraph (c) of § 301.6362–5 and which is received or accrued by individuals who are domiciled in the State, but who are not residents of the State (as defined in paragraph (b) of § 301.6362–6). For purposes of this paragraph, a tax imposed on the amount taxed under section 56 (as permitted under § 301.6362–2(b)(2)) shall be treated as an adjustment to and a part of the qualified resident tax. Also, tax laws which were in effect prior to the effective date of a State agreement and which are not repealed, but which are made inapplicable for the period during which the State agreement is in effect, shall be disregarded.

(d) *Taxable years must coincide.* The taxable years of all individuals, estates, and trusts under such tax are required to coincide with their taxable years used for purposes of the taxes imposed by chapter 1. Accordingly, when subchapter E begins to apply to a State, a taxpayer whose taxable year for purposes of the Federal income tax is different from his taxable year for purposes of the State income tax which precedes the qualified tax may have one short taxable year for purposes of such State income tax, so that thereafter his taxable years for purposes of the qualified tax will coincide with the Federal taxable year.

(e) *Married individuals.* Individuals who are married within the meaning of section 143 of the Code are prohibited from filing (1) a joint return for purposes of such State tax if they file separate Federal income tax returns, or (2) separate returns for purposes for such State tax if they file a joint Federal income tax return.

(f) *Penalties; no double jeopardy.* Under the laws of such State:

(1) Civil and criminal sanctions identical to those provided by subtitle F, and by title 18 of the United States Code (relating to crimes and criminal procedures), with respect to the taxes imposed on the income of individuals by chapter 1 and on the wages of individuals by chapter 24, apply to individuals and their employers who are subject to such State tax (and the collection and administration thereof, including the corresponding withholding tax imposed to implement the current collection of such State tax) as if such tax were imposed by chapter 1 or chapter 24, in the case of the withholding tax), except to the extent that the application of such sanctions is modified by regulations issued under subchapter E; and

(2) No other sanctions or penalties apply with respect to any act or omission to act in respect of such State tax. See also paragraph (e) of § 301.6361–1 with respect to criminal penalties.

(g) *Partnerships, trusts, subchapter S corporations, and other conduit entities.* Under the laws of such State, the State tax treatment of—

(1) Partnerships and partners,

(2) Trusts and their beneficiaries,

(3) Estate and their beneficiaries,

(4) Electing small business corporations (within the meaning of section 1371(a) and their shareholders, and

(5) Any other entity and the individuals having beneficial interests therein (such as a cooperative corporation and its shareholders), to the extent that such entity is treated as a conduit for purposes of the taxes imposed by chapter 1, corresponds to the tax treatment provided therefor with respect to the taxes imposed by chapter 1. For example, a subchapter S corporation shall not be subject to the State's corporate income tax on amounts which are includible in shareholders incomes which are subject to that State's individual income tax, except to the extent that the subchapter S corporation is subject to tax under Federal law. Similarly, a partnership shall not be subject to the State's unincorporated business income tax on amounts which are includible in partners' incomes which are subject to that State's individual income tax. However, the laws of the State which set forth the provisions of such State individual income tax shall authorize the Commissioner of Internal Revenue to require that the conduit entities described in this paragraph (or

some of them) supply information to the Federal Government with respect to the source of income, the State of residence, or the amount of income of a particular type, of an individual, estate, or trust holding a beneficial interest in such conduit entity.

(h) *Members of armed forces*. The relief provided to any member of the Armed Forces by section 514 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. section 574) is in no way diminished. Accordingly, for purposes of such State tax, an individual shall not be considered to have become a resident of a State solely because of his absence from his original State of residence under military order. Moreover, compensation for military service shall not be considered as income derived from a source within a State of which the individual earning such compensation is not a resident, within the meaning of paragraph (d) of § 301.6362–5. The preceding sentence shall not apply to nonmilitary compensation. Thus, for example, if an individual who is serving in State X as a member of the Armed Forces, and who is regarded as a resident of State Y under the Soldiers' and Sailors' Civil Relief Act, earns nonmilitary income in State X from a part-time job, such nonmilitary income may be subject to a qualified nonresident tax imposed by State X.

(i) *Withholding on compensation of employees of railroads, motor carriers, airlines, and water carriers*. There is no contravention of the provisions of section 26, 226A, or 324 of the Interstate Commerce Act, or of section 1112 of the Federal Aviation Act of 1958, with respect to the withholding of compensation to which such sections apply for purposes of the nonresident tax.

(j) *Income derived from interstate commerce*. There is no contravention of the provisions of the Act of September 14, 1959 (73 Stat. 555), with respect to the taxation of income derived from interstate commerce to which such statute applies.

[T.D. 7577, 43 FR 59372, Dec. 20, 1978]

### § 301.6363–1 State agreements.

(a) *Notice of election*. If a State elects to enter into a State agreement it shall file notice of such election with the Secretary or his delegate. The notice of election shall include the following:

(1) *Statement by the Governor*. A written statement by the Governor of the electing State:

(i) Requesting that the Secretary enter into a State agreement, and

(ii) Binding the Governor and his successors in office to notify the Secretary or his delegate immediately of the enactment, between the time of the filing of the notice of election and the time of the execution of the State agreement, of any law of that State which meets the description given in any of the subdivisions of subparagraph (2) of this paragraph (a), whether or not such law is intended to be administered by the United States pursuant to subchapter E.

(2) *Copy of State laws*. Certified copies of all laws of that State described in any of the following subdivisions of this subparagraph, and a specification of laws described in subdivision (i) of this subparagraph as ''subchapter E laws'', of laws described in subdivision (ii) as ''other tax laws'', of laws described in subdivision (iii) as ''non-tax laws'', and of laws described in subdivision (iv) as ''interstate cooperation laws'':

(i) All of the State individual income tax laws (including laws relating to the collection or administration of such taxes or to the prosecution of alleged civil or criminal violations with respect to such taxes) which the State would expect the United States to administer pursuant to subchapter E if the State agreement is executed as requested. In order to have a valid notice, the State must have a tax which would meet the requirements for qualification specified in section 6362 and the regulations thereunder if a State agreement were in effect with respect thereto, with no conditions attached to the effectiveness of such tax other than the execution of a State agreement. Such tax must be effective no later than the January 1 specified in the State's notice of election as the date as of which subchapter E is desired to become applicable to the electing State, except that such effective date shall be deferred to the date provided in the State agreement for the beginning of applicability of subchapter E to the

State, if the latter date is different from the date specified in the notice of election.

(ii) All of the State income tax laws applicable to individuals (including laws relating to the collection or administration of such taxes or to the prosecution of alleged civil or criminal violations with respect to such taxes) which the State would not expect the United States to administer but which may be in effect simultaneously (for any period of time) with the State agreement.

(iii) All of the State laws other than individual income tax laws which provide for the making of any payments by the State based on one or more criteria which the State may desire to verify by reference to information contained in returns of qualified taxes.

(iv) All of the State laws which may be in effect simultaneously (for any period of time) with the State agreement and which provide for cooperation or reciprocal agreement between the electing State and another State with respect to income taxes applicable to individuals.

(3) *Approval by legislature or authorization by constitutional amendment.* A certified copy of an Act or Resolution of the legislature of the electing State in which the legislature affirmatively expresses its approval of the State's entry into a State agreement, or a certified copy of an amendment to the constitution of such State by which the voters of the State affirmatively authorize such entry.

(4) *Opinion by State Attorney General or judgment of highest court.* A written statement by the State Attorney General to the effect that, in his opinion, no provision of the State's Constitution would be violated by the State law's incorporation by reference of the Federal individual income tax laws and regulations, as amended from time to time, by the Federal prosecution and trial of individuals who are alleged to have committed crimes with respect to the State's qualified tax (when it goes into effect as such), or by any other provision relating to such tax, considered as of the time it is being collected and administered by the Federal Government pursuant to subchapter E. However, if such a statement is not included in the notice of election, a judgment of the highest court of the State to the same effect may be submitted in its place.

(5) *Effective date.* A written specification of the January as of which subchapter E is desired to become applicable to the electing State.

(b) *Rules relating to time for filing notice of election.* An electing State must file its notice of election more than 6 months prior to the January 1 as of which the notice specifies that the provisions of subchapter E are desired to become applicable to such State. Thus, for example, if the date specified in the notice is January 1, 1979, the notice must be filed no later than June 30, 1978. However, because under the provisions of section 204(b) of the Federal-State Tax Collection Act of 1972 (86 Stat. 945), as amended by section 2116(a) of the Tax Reform Act of 1976 (90 Stat. 1910), the provisions of subchapter E will initially take effect on the first January 1 which is more than 1 year after the first date on which at least one State has filed a notice of its election (see § 301.6361–5), the notice of an election which causes subchapter E to initially take effect must be filed with the Secretary or his delegate more than 1 year prior to the January 1 as of which such notice specifies that the provisions of subchapter E are desired to become applicable to such State. Thus, for example, if such an initially electing State desires to elect subchapter E as of January 1, 1979, its notice must be filed no later than December 31, 1977. For purposes of this section, if the notice of election is sent by either registered or certified mail to the Secretary of the Treasury, Washington, D.C. 20220, then it shall be deemed to be filed on the date of mailing; otherwise, the notice of election shall be deemed to be filed when it is received by the Secretary or his delegate.

(c) *Procedures relating to defects in notice or tax laws.* If a State has filed a notice of election, then the Secretary shall, within 90 days after the notice is filed, notify the Governor of such State in writing of any defect in the notice of election which prevents it from being valid, and of any defect in the State's

tax laws which causes the tax submitted to fail to meet the requirements for qualification specified in section 6362 and the regulations thereunder, other than the fact that no State agreement is in effect with respect thereto. Any such defect of which the Secretary does not notify the Governor within such 90-day period is waived. The Secretary or his delegate may, in his discretion, permit any of such defects of which the Governor is timely notified to be cured retroactively to the date of the filing of the notice of election, by amendment of the notice or the State law. Judicial review of the Secretary's determination that the notice of election or the tax laws, or both, contain defects, may be obtained as set forth in section 6363(d) and § 301.6363–4.

(d) *Execution and contents of State agreement.* If the Secretary does not timely notify the Governor of a defect in the notice of election or in the State's tax laws, as provided in paragraph (c) of this section, or if, as provided in such paragraph, all such defects have been cured retroactively, then the Secretary shall enter into a State agreement. The agreement shall include the following elements:

(1) *Effective date.* The agreement shall specify the January 1 as of which subchapter E will commence to be applicable to the State. Such date shall be the same as that specified in the notice of election pursuant to paragraph (a)(5) of this section, unless the parties agree to a different January 1, except that in no event shall a State agreement executed after November 1 specify the next January 1.

(2) *Obligation of Governor to notify the United States of changes in pertinent State laws.* The agreement shall require the Governor of the State, and his successors in office, to notify the Secretary or his delegate within 30 days of the enactment of any law of the State, after the execution of the agreement, of a type described in paragraph (a)(2) of this section.

(3) *Obligation of Governor to furnish to the United States information needed to administer State tax laws.* The agreement shall require the Governor and his successors to furnish to the Secretary or his delegate any information needed by the Federal Government to administer the State tax laws. Such information shall include, for example, a list (which shall be maintained on a current basis) of those obligations of the State or its political subdivisions described in section 103(a)(1) from which the interest is not subject to the qualified taxes of the State.

(4) *Identification of State official to act as liaison with Federal Government.* The agreement shall include a designation by the Governor of the State official or officials with whom the Secretary or his delegate should coordinate in connection with any questions or problems which may arise during the period for which the State agreement is effective, including those which may result from changes or contemplated changes in pertinent State laws.

(5) *Identification of State official to receive transferred funds.* The agreement shall include a designation by the Governor of the State official who shall initially receive the funds on behalf of the State when they are transferred pursuant to section 6361(c) and § 301.6361–3.

(6) *Other obligations.* If the Secretary and the Governor both so agree, the agreement shall provide for additional obligations.

(e) *State agreement superseding certain other agreements.* For the period of its effectiveness, a State agreement shall supersede an otherwise effective agreement entered into by the State and the Secretary for the withholding of State income taxes from the compensation of Federal employees pursuant to 5 U.S.C. 5517 (or pursuant to 5 U.S.C. 5516, in the case of the District of Columbia).

[T.D. 7577, 43 FR 59373, Dec. 20, 1978]

### § 301.6363–2 Withdrawal from State agreements.

(a) *By notification.* If a State which has entered into a State agreement desires to withdraw from the agreement, its Governor shall file a notice of withdrawal with the Secretary or his delegate. A notice of withdrawal shall include the following documents:

(1) *Request by the Governor.* A request by the Governor of the State that the State agreement cease to be effective with respect to taxable years beginning

on or after a specified January 1, except as provided in paragraph (b)(2) of § 301.6365–2 with respect to withholding in the case of fiscal year taxpayers.

(2) *Legislative approval of withdrawal.* A certified copy of an act or Resolution of the legislature of the State in which the legislature affirmatively expresses its approval of the State's withdrawal from the State agreement.

(3) *Identification of State official.* A written identification of the State official or officials with whom the Secretary or his delegate should coordinate in connection with the State's withdrawal from the State agreement.

(b) *By change in State law.* If any law of a State which has entered into a State agreement is enacted pertaining to individual income taxes (including the collection or administration of such taxes, and the prosecution of alleged civil or criminal violations with respect to such taxes), and if the Secretary or his delegate determines that as a result of such law the State no longer has a qualified tax, then such change in the State law shall be treated as a notification of withdrawal from the agreement. The Secretary shall notify the Governor in writing when a change is to be so treated. Such notification shall have the same effect as if, on the effective date of the disqualifying change in the law, the Governor had filed with the Secretary or his delegate a valid and sufficient notice of withdrawal requesting that the State agreement cease to be effective with respect to taxable years beginning on or after the first January 1 which is more than 6 months thereafter, subject to the exception with respect to withholding in the case of fiscal-year taxpayers. However, the cessation of effectiveness may be deferred to a subsequent January 1 if the Governor so requests and if the Secretary or his delegate in his discretion determines that the date of cessation provided in the preceding sentence would subject the State or its taxpayers to undue hardship. In addition, the Governor may request the Secretary or his delegate to permit the State's early withdrawal from the agreement, pursuant to paragraph (c)(2) of this section. Until the date of cessation of effectiveness of the State agreement, the change in State law which was treated as a notification of withdrawal, and any other such subsequent change that would be similarly treated, shall not be given effect for purposes of the Federal collection and administration of the State taxes. Similarly, such changes shall not be given effect for such purposes during the period of litigation if the State seeks judicial review of the action of the Secretary or his delegate pursuant to section 6363(d) or § 301.6363–4, even if such changes are ultimately found by the court not to disqualify the State's qualified tax. However, a change in State law which would be treated as a notice of withdrawal in the absence of this sentence shall not be so treated if, prior to the last November 1 preceding the January 1 on which the cessation of effectiveness of the State agreement is to occur, either such change in State law is retroactively repealed, or the State law is retroactively modified and the Secretary or his delegate determines that with such modification the State has a qualified tax.

(c) *Rules relating to time of withdrawal*—(1) *General rule.* Except as provided in subparagraph (2) of this paragraph (c), a notice of withdrawal shall not be valid unless the January 1 specified therein is not earlier than the first January 1 which is more than 6 months subsequent to the date on which the notice is received by the Secretary or his delegate. Thus, for example, if the notice specifies January 1, 1980, for withdrawal, the notice must be received no later than June 30, 1979.

(2) *Early withdrawal.* The Secretary or his delegate may, in his discretion and upon written request by a Governor of a State who has filed a notice of withdrawal, waive the 6-months requirement of section 6363(b)(1) and subparagraph (1) of this paragraph (c), if the Secretary determines that:

(i) The State will suffer a hardship if required to meet such requirement, and

(ii) The early withdrawal requested by the Governor would be practicable from the standpoint of orderly collection of the qualified tax and administration of the State law by the Federal Government.

[T.D. 7577, 43 FR 59374, Dec. 20, 1978]

**§ 301.6363–3 Transition years.**

The State may by law provide for the transition to or from a qualified tax to the extent necessary to prevent double taxation or other unintended hardships, or to prevent unintended benefits, under State law. Generally, such provisions shall be administered by the State; but, if requested to do so by the Governor of the State, the Secretary or his delegate may in his discretion, agree to administer such provisions either solely or jointly with the State.

[T.D. 7577, 43 FR 59375, Dec. 20, 1978]

**§ 301.6363–4 Judicial review.**

(a) *General rule.* If the Secretary or his delegate determines pursuant to paragraph (c) of § 301.6363–1 that a State did not file a valid notice of election or does not have a tax which would meet the requirements for qualification specified in section 6362 and the regulations thereunder if a State agreement were in effect with respect thereto, or if he determines pursuant to paragraph (b) of § 301.6363–2 that a participating State has enacted a law as a result of which the State no longer has a qualified tax, such State may, within 60 days after its Governor has received notification of such determination, file a petition for the review of such determination with either the United States Court of Appeals for the circuit in which the State is located or the United States Court of Appeals for the District of Columbia. If a State files such a petition, the clerk of the court shall forthwith transmit a copy of the petition to the Secretary or his delegate, who in turn shall thereupon file in the court the record of proceedings on which the determination adverse to the State was based, as provided in section 2112 of title 28, United States Code.

(b) *Court of Appeals' jurisdiction.* The court of Appeals may affirm or set aside, in whole or in part, the action of the Secretary or his delegate; and (subject to the rules delaying the effectiveness of the change in State law provided in paragraph (b) of § 301.6363–2) the court may issue such other orders as may be appropriate with respect to taxable years which include any part of the period of litigation.

(c) *Review of Court of Appeals' judgment.* The judgment of the Court of Appeals shall be subject to review by the Supreme Court of the United States upon certiorari or certification sought by either party as provided in section 1254 of title 28, United States Code.

(d) *Effect of final judgment.* If a final judgment, rendered with respect to litigation involving a State's petition to review a determination of the Secretary or his delegate to the effect that the State's individual income tax laws included in its notice of election would not meet the requirements for qualification specified in section 6362 and the regulations thereunder if a State agreement were in effect with respect thereto, includes a determination that the State's tax would in fact meet such requirements, then the provisions of subchapter E shall apply to the State with respect to taxable years beginning on or after the first January 1 which is more than 6 months after the date of such final judgment. If a final judgment, rendered with respect to litigation involving a State's petition to review a determination of the Secretary or his delegate to the effect that the State's previously-qualified tax ceases to qualify because of a change in the State's law, includes a determination that the State's tax does in fact cease to qualify, then the provisions of subchapter E (other than section 6363) shall cease to apply to the State with respect to taxable years beginning on or after the first January 1 which is more than 6 months after the date of such final judgment. See paragraph (b) of § 301.6365–2 for special rules with respect to withholding in the case of fiscal-year taxpayers.

(e) *Expeditious treatment of judicial proceedings.* Under section 6363(d)(4), any judicial proceedings to which a State and the United States are parties, and which are brought pursuant to section 6363, are entitled to receive a preference, and to be heard and determined as expeditiously as possible, upon request of the Secretary or the State.

[T.D. 7577, 43 FR 59375, Dec. 20, 1978]

**§ 301.6365–1 Definitions.**

(a) *State.* For purposes of subchapter E and the regulations thereunder, the

term ''State'' shall include the District of Columbia, but shall not include the Commonwealth of Puerto Rico or any possession of the United States.

(b) *Governor*. For purposes of subchapter E and the regulations thereunder, the term ''Governor'' shall include the Mayor of the District of Columbia.

[T.D. 7577, 43 FR 59375, Dec. 20, 1978]

### § 301.6365–2 Commencement and cessation of applicability of subchapter E to individual taxpayers.

(a) *General rule*. Except for purposes of chapter 24 (relating to the collection of income tax at source on wages), whenever subchapter E begins or ceases to apply to any State (i.e., a State agreement begins or ceases to be effective) as of any January 1, such commencement or cessation of applicability shall apply to taxable years of individuals beginning on or after such date. For example, if subchapter E begins to apply to a particular State on January 1, 1980, it would become applicable for calendar year 1980 for calendar-year taxpayers in that State; but if a taxpayer in the State is using a fiscal year running from July 1 to June 30, the subchapter would begin to apply (except for purposes of chapter 24) to that taxpayer on July 1, 1980, for his taxable year ending June 30, 1981. Similarly, if the subchapter ceases to apply to such State on January 1, 1982, it would cease to apply to calendar-year taxpayers after the end of calendar year 1981; but it would cease to apply (except for purposes of chapter 24) to fiscal-year taxpayers at the end of their fiscal years which are in progress on January 1, 1982. The cessation of applicability of subchapter E to a State does not affect rights, duties, and liabilities with respect to any taxable year for which subchapter E does apply with respect to any taxpayer (or his employer).

(b) *Special rules pertaining to withholding*—(1) *Subchapter E beginning to apply*. The Federal withholding system provided in chapter 24 shall go into effect for State individual income tax purposes with respect to wages paid on or after the January 1 as of which subchapter E begins to apply to a State. If an employee is subject to a qualified tax imposed by the State, such withholding system shall apply to his wages paid on or after that January 1, without regard to whether he is a calendar-year or fiscal-year taxpayer. See § 301.6363–3 with respect to transition-year rules.

(2) *Subchapter E ceasing to apply*. The Federal withholding system provided in chapter 24 shall cease to be effective for State tax purposes with respect to wages paid on or after the January 1 as of which subchapter E ceases to apply to the State, although fiscal-year taxpayers of that State continue to be subject to the other provisions of subchapter E for the remainder of their fiscal years then in progress. See § 301.6363–3 with respect to transition-year rules.

[T.D. 7577, 43 FR 59375, Dec. 20, 1978]

## Abatements, Credits, and Refunds

PROCEDURE IN GENERAL

### § 301.6401–1 Amounts treated as overpayments.

(a) The term ''overpayment'' includes:

(1) Any payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation applicable thereto.

(2) Any amount allowable for a taxable year as credits under sections 31 (relating to tax withheld on wages), 39 (relating to certain uses of gasoline, special fuels, and, lubricating oil), 43 (relating to earned income credit), and 667(b) (relating to taxes paid by certain trusts) which exceeds the tax imposed by subtitle A of the Code (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1 of the Code, other than the credits allowable under sections 31, 39, and 43) for such year.

(b) An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

[T.D. 7204, 37 FR 17158, Aug. 25, 1972, as amended by T.D. 7537, 43 FR 13878, Apr. 3, 1978]

### § 301.6402–1 Authority to make credits or refunds.

The Commissioner, within the applicable period of limitations, may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the person making the overpayment and the balance, if any, shall be refunded, subject to sections 6402 (c) and (d) and the regulations thereunder, to that person by the Commissioner.

[T.D. 8053, 50 FR 39662, Sept. 30, 1985]

### § 301.6402–2 Claims for credit or refund.

(a) *Requirement that claim be filed.* (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

(2) In the case of a claim filed prior to April 15, 1968, the claim together with appropriate supporting evidence shall be filed in the office of the internal revenue officer to whom the tax was paid or with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim, together with appropriate supporting evidence, shall be filed (i) with the Director of International Operations if the tax was paid to him or (ii) with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim with appropriate supporting evidence must be filed with the service center serving the internal revenue district in which the tax was paid. As to interest in the case of credits or refunds, see section 6611. See section 7502 for provisions treating timely mailing as timely filing and section 7503 for time for filing claim when the last day falls on Saturday, Sunday, or legal holiday.

(b) *Grounds set forth in claim.* (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

(2) Neither the district director nor the director of the regional service center has authority to refund on equitable grounds penalties or other amounts legally collected.

(c) *Form for filing claim.* Except for claims filed after June 30, 1976 for the refunding of overpayment of income taxes, all claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843. For special rules applicable to income tax, see § 301.6402–3. For other provisions relating to credits and refunds of taxes other than income tax, see the regulations relating to the particular tax.

(d) *Separate claims for separate taxable periods.* In the case of income, gift, and Federal unemployment taxes, a separate claim shall be made for each type of tax for each taxable year or period.

(e) *Proof of representative capacity.* If a return is filed by an individual and, after his death, a refund claim is filed by his legal representative, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a

return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim.

(f) *Mailing of refund check.* (1) Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and, except as provided in subparagraph (2) of this paragraph (f), the checks may be sent direct to the claimant or to such person in care of an attorney or agent who has filed a power of attorney specifically authorizing him to receive such checks.

(2) Checks in payment of claims which have either been reduced to judgment or settled in the course or as a result of litigation will be drawn in the name of the person or persons entitled to the money and will be sent to the Assistant Attorney General, Tax Division, Department of Justice, for delivery to the taxpayer or the counsel of record in the court proceeding.

(3) For restrictions on the assignment of claims, see section 3477 of the Revised Statutes (31 U.S.C. 203).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7008, 34 FR 3673, Mar. 1, 1969; T.D. 7188, 37 FR 12794, June 29, 1972; T.D. 7410, 41 FR 11020, Mar. 16, 1976; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976; T.D. 7484, 42 FR 22143, May 2, 1977]

### § 301.6402–3 Special rules applicable to income tax.

(a) In the case of a claim for credit or refund filed after June 30, 1976—

(1) In general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return.

(2) In the case of an overpayment of income taxes for a taxable year of an individual for which a Form 1040 or 1040A has been filed, a claim for refund shall be made on Form 1040X (''Amended U.S. Individual Income Tax Return'').

(3) In the case of an overpayment of income taxes for a taxable year of a corporation for which a Form 1120 has been filed, a claim for refund shall be made on Form 1120X (''Amended U.S. Corporation Income Tax Return'').

(4) In the case of an overpayment of income taxes for a taxable year for which a form other than Form 1040, 1040A, or 1120 was filed (such as Form 1041 (U.S. Fiduciary Income Tax Return) or Form 990T (Exempt Organization Business Income Tax Return)), a claim for credit or refund shall be made on the appropriate amended income tax return.

(5) A properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of § 301.7502–1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed. A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed. If the taxpayer indicates on its return (or amended return) that all or part of the overpayment shown by its return (or amended return) is to be applied to its

estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

(6) Notwithstanding paragraph (a)(5) of this section, the Internal Revenue Service, within the applicable period of limitations, may credit any overpayment of individual, fiduciary, or corporation income tax, including interest thereon, against—

(i) First, any outstanding liability for any tax (or for any interest, additional amount, additions to the tax, or assessable penalty) owed by the taxpayer making the overpayment;

(ii) Second, in the case of an individual taxpayer, amounts of past-due support assigned to a State under section 402(a)(26) or 471(a)(17) of the Social Security Act under procedures set forth in the regulations under section 6402(c);

(iii) Third, past-due and legally enforceable debt under procedures set forth in the regulations under section 6402(d); and

(iv) Fourth, qualifying amounts of past-due support not assigned to a State under procedures set forth in the regulations under section 6402 (c).

Only the balance, if any, of the overpayment remaining after credits described in this paragraph (a)(6) shall be treated in the manner so elected.

(b) In the case of a claim for credit or refund filed before July 1, 1976—

(1) In the case of income tax, claims for refund may not only be made on Form 843 but may also be made on any individual, fiduciary, or corporation income tax return, or on any amended income tax return.

(2) In the case of an overpayment for a taxable year of an individual for which a Form 1040 or Form 1040A has been filed, claim for refund may be made on Form 1040X (''Amended U.S. Individual Income Tax Return''). In cases to which this subparagraph applies, the taxpayer is encouraged to use Form 1040X.

(3) In the case of an overpayment for a taxable year of a corporation for which a corporation tax return has been filed, claim for refund may be made on Form 1120X (''Amended U.S. Corporation Income Tax Return''). In cases to which this subparagraph applies, the taxpayer is encouraged to use Form 1120X.

(4) A properly executed individual, fiduciary, or corporation income tax return shall, at the election of the taxpayer, constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return. For purposes of section 6511, such claim shall be considered as filed on the date on which such return is considered as filed, except that if the requirements of § 301.7502–1, relating to timely mailing treated as timely filing, are met the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return was mailed.

(5) An election to treat the return as a claim for refund or credit shall be evidenced by a statement on the return setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return is filed. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated income tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

(6) Notwithstanding elections made under paragraph (b)(5) of this section for taxable years ending after December 20, 1972, the Commissioner, within the applicable period of limitations, may credit any overpayment of individual, fiduciary, or corporation income tax, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the taxpayer making the overpayment, and only the balance, if any, shall be treated in the manner so elected.

(c) The filing of a properly executed income tax return shall, in any case in which the taxpayer is not required to show his tax on such form (see section 6014 and the regulations thereunder), be treated as a claim for refund (or for claims filed before July 1, 1976, constitute an election by the taxpayer to have the return treated as a claim for refund), and such return shall constitute a claim for refund within the meaning of section 6402 and section 6511 for the amount of the overpayment shown by the computation of the tax made by the district director or the director of the regional service center on the basis of the return. For purposes of section 6511, such claim shall be considered as filed on the date on which such return is considered as filed, except that if the requirements of § 301.7502–1, relating to timely mailing treated as timely filing, are met the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return was mailed.

(d) In any case in which a taxpayer elects to have an overpayment refunded to him he may not thereafter change his election to have the overpayment applied as a payment on account of his estimated income tax.

(e) In the case of a nonresident alien individual or foreign corporation, the appropriate income tax return on which the claim for refund or credit is made must contain the tax identification number of the taxpayer required pursuant to section 6109 and the entire amount of income of the taxpayer subject to tax, even if the tax liability for that income was fully satisfied at source through withholding under chapter 3 of the Internal Revenue Code (Code). Also, if the overpayment of tax resulted from the withholding of tax at source under chapter 3 of the Code, a copy of the Form 1042–S required to be provided to the beneficial owner pursuant to § 1.1461–1(c)(1)(i) of this chapter must be attached to the return. For purposes of claiming a refund, the Form 1042–S must include the taxpayer identifying number of the beneficial owner even if not otherwise required. No claim of refund or credit under chapter 65 of the Code may be made by the taxpayer for any amount that the payor has repaid to the taxpayer pursuant to § 1.1461–2(a)(2) of this chapter, that was subject to a set-off pursuant to § 1.1461–2(a)(3) of this chapter, or in accordance with the provisions of an agreement that a qualified intermediary described in § 1.1441–1(e)(5)(ii) has in effect with the Internal Revenue Service. Upon request, a taxpayer must also submit such documentation as the Commissioner (or delegate), the District Director, or the Assistant Commissioner (International), may require establishing that the taxpayer is the beneficial owner of the income for which a claim of refund or credit is being made.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7102, 36 FR 5498, Mar. 24, 1971; T.D. 7234, 37 FR 28163, Dec. 21, 1972; T.D. 7293, 38 FR 32804, Nov. 28, 1973; T.D. 7298, 38 FR 35234, Dec. 26, 1973; T.D. 7410, 41 FR 11020, Mar. 16, 1976; T.D. 7808, 47 FR 5714, Feb. 8, 1982; T.D. 8053, 50 FR 39662, Sept. 30, 1985; T.D. 8734, 62 FR 53495, Oct. 14, 1997]

### § 301.6402–4 Payments in excess of amounts shown on return.

In certain cases, the taxpayer's payments in respect of his tax liability, made before the filing of his return, may exceed the amount of tax shown on the return. For example, such payments may arise in the case of the income tax when the estimated tax or the credit for income tax withheld at the source on wages exceeds the amount of tax shown on the return, or where a corporation obtains an extension of time for filing its return and makes installment payments based on its estimate of its tax liability which exceed the tax liability shown on the return subsequently filed. In any case in which the district director or the director of the regional service center determines that the payments by the taxpayer (made within the period prescribed for payment and before the filing of the return) are in excess of the amount of tax shown on the return, he may make credit or refund of such overpayment without awaiting examination of the completed return and without awaiting filing of a claim for refund. However, the provisions of §§ 301.6402–2 and 301.6402–3 are applicable to such overpayment, and taxpayers should submit claims for refund (if the income tax return is not itself a claim for refund, as provided in

§ 301.6402–3) to protect themselves in the event the district director or the director of the regional service center fails to make such determination and credit or refund. The provisions of section 6405 (relating to reports of refunds of more than $100,000 to the Joint Committee on Internal Revenue Taxation) are not applicable to the overpayments described in this section caused by timely payments of tax which exceed the amount of tax shown on a timely return.

**§ 301.6402–5 Offset of past-due support against overpayment.**

(a) *Introduction*—(1) *Scope*. Section 6402(c) requires the Secretary of the Treasury or his delegate to reduce the amount of any overpayment to be refunded to a person making an overpayment by the amount of past-due support owed by that person of which the Secretary has been notified in accordance with section 464 of the Social Security Act. Past-due support shall be collected by offset under section 6402(c) and this section in the same manner as if it were a liability for tax imposed by the Internal Revenue Code of 1954 (except that a liability for tax shall be given priority with respect to offset arising under section 6402(a)). Collection by offset under section 6402(c) of this section is a collection procedure separate from the collection procedures provided by section 6305 and § 301.6305–1, relating to assessment and collection of certain child and spousal support liabilities. The sole collection procedure provided by section 6402(c) and this section is that of offset against overpayment. Section 6305 and § 301.6305–1, by contrast, provide for other collection procedures in addition to collection by offset against overpayment. Sections 6305 and 6402(c) have differing procedural requirements and may be used separately or in conjunction with each other.

(2) *General rule*. An amount of past-due support qualifies for offset under this section if it satisfies the requirements of paragraph (b) of this section. A State shall submit to the Department of Health and Human Services a notification of liability for qualifying past-due support containing the information described in paragraph (c) of this section. A qualifying amount of past-due support owed by a taxpayer who has made an overpayment shall be collected in accordance with the procedures set forth in paragraph (d) of this section. Under paragraph (d), the balance of any overpayment remaining after crediting of the overpayment under section 6402(a) to any liability for an internal revenue tax on the part of the taxpayer shall be offset by the amount of past-due support of which the Internal Revenue Service has been notified. The amount of the overpayment not subject to offset for any liability for an internal revenue tax or for past-due support shall be promptly refunded to the taxpayer. Paragraph (e) of this section requires that the Internal Revenue Service notify the taxpayer of the amount of the offset and of the State to which it has been paid. Under procedures set forth in paragraph (f) of this section, amounts collected by offset shall be transferred to a special account maintained by the Bureau of Government Financial Operations for distribution to the States. The Internal Revenue Service shall make monthly collection reports to the Secretary of Health and Human Services or his delegate. The States shall reimburse the Secretary of the Treasury for the full cost of the refund offset under paragraph (g) of this section.

(b) *Past-due support*—(1) *Definition*. For purposes of this section, the term ''past-due support'' means the amount of a delinquent obligation, which amount was determined under a court order, or an order pursuant to an administrative process established under State law, for support and maintenance of a child or of a child and the parent with whom the child is living.

(2) *Past-due support qualifying for offset*. Past-due support qualifies for offset under section 6402(c) and this section if—

(i) There has been as assignment of the support obligation to a State pursuant to section 402(a)(26) of the Social Security Act (relating to aid and service to needy families with children) and that State has made reasonable efforts to collect the amount of the obligation;

(ii) The amount of past-due support is not less than $150.00;

(iii) The past-due support has been delinquent for three months or longer; and

(iv) A notification of liability for past-due support has been received by the Secretary of the Treasury as prescribed by paragraph (c) of this section.

(c) *Notification of liability for past-due support*—(1) *Form.* A State shall, by October 1 of each year, submit a notification (or notifications) of liability for past-due support on magnetic tape to the Special Collection Activities Unit. Office of Child Support Enforcement, Department of Health and Human Services, 6110 Executive Boulevard, Suite 900, Rockville, Maryland 20852, Attention: Tax Refund Offset—Tape Processing.

(2) *Content.* The notification of liability for past-due support shall contain with respect to each taxpayer—

(i) The name of the taxpayer who owes the past-due support;

(ii) The social security number of that taxpayer;

(iii) The amount of past-due support owed; and

(iv) The alphabetical designation of the State submitting the notification of liability for past-due support.

The Secretary of Health and Human Services may also require such other information from the State submitting the notification as is necessary for his orderly consolidation of data for transmittal to the Internal Revenue Service.

(3) *Transmittal of notification to Internal Revenue Service.* The Secretary of Health and Human Services shall, by December 1 of each year, consolidate and transmit to the Internal Revenue Service on magnetic tape the data contained in the notifications of liability for past-due support submitted by the participating States.

(4) *Correction of notification.* If, after submitting a notification of liability for past-due support, a State determines that an error has been made with respect to the information contained in the notification, or if a State receives a payment or credits a payment to the account of a taxpayer named in this notification, the State shall promptly notify the Office of Child Support Enforcement of the Department of Health and Human Services of these corrections in accordance with any time limitations specified by the Office of Child Support Enforcement. That Office shall promptly transmit these corrections to the Internal Revenue Service and the Internal Revenue Service shall make the appropriate correction of the notification of liability for past-due support. However, in no case shall a State notify the Internal Revenue Service under this paragraph (c)(4) of an increased amount of past-due support owed by a taxpayer named in its notification of liability for past-due support. The correction notification described in this paragraph (c)(4) is to be submitted only for the purpose of completing or correcting the information contained in the notification of liability for past-due support.

(d) *Collection*—(1) *Priority of offset for outstanding tax liability.* Under section 6402(a) and § 301.6402–1, the Commissioner may credit any overpayment of tax against any outstanding liability for any tax owed by the person making the overpayment. Only the balance remaining after such crediting is available for offset under section 6402(c) of this section. Thus, if a taxpayer making an overpayment has both an outstanding tax liability and a liability for past-due support subject to this section, then the entire amount of the overpayment shall be credited first against the outstanding tax liability under section 6402(a) and § 301.6402–1 and only the remainder, if any, of the overpayment will be offset by the amount of past-due support. However, an overpayment shall be offset by an amount of past-due support under section 6402(c) before any crediting of the overpayment to any future liability for an internal revenue tax. Thus, for example, if no outstanding tax liability is owed and the amount of an overpayment is equal to or less than the amount of past-due support, the Internal Revenue Service shall offset the overpayment by the amount of past-due support before crediting the overpayment against the taxpayer's estimated income tax for the succeeding taxable year under section 6402(b).

(2) *Amounts subject to offset.* The balance of any overpayment remaining after a crediting of the overpayment

under section 6402(a) to any outstanding liability for tax on the part of the taxpayer shall be offset by the amount of past-due support of which the Internal Revenue Service has been notified under this section.

(3) *Amounts not subject to offset.* The amount of an overpayment not subject to offset for any liability for tax or for past-due support shall be promptly refunded to the taxpayer.

(e) *Notice of offset.* The Internal Revenue Service shall notify the taxpayer in writing of the amount and date of the offset for past-due support and of the State to which this amount of past-due support has been paid.

(f) *Disposition of amounts collected.* Amounts collected under this section shall be transferred to a special account maintained by the Bureau of Government Financial Operations. The Internal Revenue Service shall advise the Secretary of Health and Human Services or his delegate on a monthly basis of the names and social security numbers of the taxpayers from whom the amounts of past-due support were collected, of the amounts collected from each taxpayer, and of the State on whose behalf each collection was made. After authorization by the Division of Finance of the Social Security Administration, the Bureau of Government Financial Operations of the Department of the Treasury shall pay to the participating States amounts equal to the amounts collected under this section.

(g) *Fee.* A refund offset fee in the amount of $17.00 per offset for taxable year 1981, or such greater or smaller amount as the Secretary of the Treasury and the Secretary of Health and Human Services have agreed to be sufficient to reimburse the Internal Revenue Service for the full cost of the offset procedure, shall be billed and collected from the participating States by the Secretary of Health and Human Services or his delegate and deposited in the United States Treasury and credited to the appropriation accounts of the Internal Revenue Service which bore all or part of the costs involved in making the collection.

(h) Effective dates. This section applies to refunds payable on or before January 1, 1999. For the rules applicable after January 1, 1999, see 31 CFR part 285.

[T.D. 7895, 48 FR 22709, May 20, 1983, as amended by T.D. 8837, 64 FR 48548, Sept. 7, 1999]

### § 301.6402–6 Offset of past-due, legally enforceable debt against overpayment.

(a) *General rule.* (1) A Federal agency (as defined in section 6402(f)) that has entered into an agreement with the Internal Revenue Service with regard to its participation in the tax refund offset program and that is owed a past-due, legally enforceable debt may refer the past-due, legally enforceable debt to the Internal Revenue Service to be collected by Federal tax refund offset. The Service shall, after making appropriate credits as provided by § 301.6402–3(a)(6) (i) and (ii), reduce the amount of any overpayment payable to a taxpayer by the amount of any past-due, legally enforceable debt owed to the agency and properly referred to the Service. This section does not apply to any debt subject to section 464 of the Social Security Act (past-due support).

(2)(i) This section applies to OASDI overpayments provided the requirements of 31 U.S.C. 3720A(f)(1) and (2) are met with respect to such overpayments.

(ii) For purposes of this section, ''OASDI overpayment'' means any overpayment of benefits made to an individual under title II of the Social Security Act.

(b) *Eligible Federal agencies.* (1) A Federal agency is eligible to participate in the tax refund offset program if the agency—

(i) Has promulgated temporary of final regulations under 31 U.S.C. 3720A, governing the operation of the Federal tax refund offset program in the agency;

(ii) Has promulgated temporary or final regulations under 31 U.S.C. 3716, governing the operation of the administrative offset program in the agency; and

(iii) Has promulgated temporary or final regulations under 5 U.S.C. 5514(a), governing the operation of the salary offset program in the agency (unless the agency has certified that, relying

on the most current information reasonably available, it will not refer to the Service any names of present or former Federal employees or other persons whose debts are subject to offset under the provisions of 5 U.S.C. 5514(a)(1)).

(2) An agency prohibited by Federal law from meeting any of the requirements of paragraph (b)(1) or (c) of this section shall notify the Service in writing of the specific legal impediment to meeting these requirements. This notification shall be made prior to entering into an agreement with the Service to participate in the tax refund offset program. The Service will determine in writing whether the agency is prohibited by Federal law from meeting any of the requirements of paragraph (b)(1) or (c) of this section. The Service will waive in writing any requirement that it determines the agency is prohibited by Federal law from meeting.

(c) *Past-due, legally enforceable debt eligible for refund offset.* For purposes of this section, a Federal agency may refer a past-due, legally enforceable debt to the Service for offset if—

(1) Except in the case of a judgment debt or any debts specifically exempt from this requirement (for example, debts referred by the Department of Education that were pending on or after April 9, 1991, and referred to the Service for offset before November 15, 1992), the debt is referred for offset within ten years after the agency's right of action accrues;

(2) The debt cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) The debt is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2), or cannot be currently collected by administrative offset under 31 U.S.C. 3716(a) by the referring agency against amounts payable to the taxpayer by the referring agency;

(4) The agency has notified, or has made a reasonable attempt to notify, the taxpayer that the debt is past-due, and unless repaid within 60 days thereafter, will be referred to the Service for offset against an overpayment of tax;

(5) The agency has given the taxpayer at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, has considered any evidence presented by the taxpayer, and has determined that the debt is past-due and legally enforceable;

(6) The debt has been disclosed by the agency to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100;

(7) The debt is at least $25; and

(8) In the case of an OASDI overpayment—

(i) The individual is not currently entitled to monthly insurance benefits under title II of the Social Security Act;

(ii) The notice describes conditions under which the Department of Health and Human Services is required to waive recovery of the overpayment, as provided under section 204(b) of the Social Security Act; and

(iii) If the taxpayer files for a waiver under section 204(b) of the Social Security Act within the 60-day notice period, the agency has considered the taxpayer's request.

(d) *Pre-offset notice and consideration of evidence.* (1) For purposes of paragraph (c)(4) of this section, an agency has made a reasonable attempt to notify the taxpayer if the agency uses the most recent address information obtained from the Service pursuant to section 6103(m) (2), (4), or (5) of the Code, unless the agency receives clear and concise notification from the taxpayer that notices from the agency are to be sent to an address different from the address obtained from the Service. Clear and concise notification means that the taxpayer has provided the agency with written notification including the taxpayer's name and identifying number (as defined in section 6109), the taxpayer's new address, and the taxpayer's intent to have agency notices sent to the new address.

(2) For purposes of paragraph (c)(5) of this section, if the evidence presented by the taxpayer is considered by an agent of the agency, or other entities or persons acting on the agency's behalf, the taxpayer must be accorded at

least 30 days from the date the agent or other entity or person determines that all or part of the debt is past-due and legally enforceable to request review by an officer or employee of the agency of any unresolved dispute. The agency must then notify the taxpayer of its decision.

(e) *Referral of past-due, legally enforceable debt.* A Federal agency must refer a past-due, legally enforceable debt to the Service in the time and manner prescribed by the Service. The referral must contain—

(1) The name and identifying number (as defined in section 6109) of the taxpayer who is responsible for the debt;

(2) The amount of such past-due and legally enforceable debt;

(3) The date on which the debt became past-due;

(4) The designation of the Federal agency or subagency referring the debt; and

(5) In the case of an OASDI overpayment, a certification by the Secretary of Health and Human Services designating whether the amount payable to the agency is to be deposited in either the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, but not both.

(f) *Correction of referral.* If, after referring a past-due, legally enforceable debt to the Service as provided by paragraph (e) of this section, an agency determines that an error has been made with respect to the information transmitted to the Service, or if an agency receives a payment or credits a payment to the account of a taxpayer referred to the Service for offset, the agency shall promptly notify the Service. The Service shall make the appropriate correction of its records. However, this paragraph (f) does not permit an agency to increase the amount of a past-due, legally enforceable debt or refer additional debtors to the Service for offset after an agency makes its original referral of debts for tax refund offset. The agency may refer additional debts to the Service for refund offset in subsequent tax refund offset years.

(g) *Priorities for offset.* (1) An overpayment shall be reduced first by the amount of an outstanding liability for any tax under section 6402(a); second, by the amount of any past-due support assigned to a State under section 402(a)(26) or section 471(a)(17) of the Social Security Act which is to be offset under section 6402(c) and the regulations thereunder; third, by the amount of any past-due, legally enforceable debt owed to a Federal agency under section 6402(d) and this section; and fourth, by the amount of any qualifying past-due support not assigned to a State which is to be offset under section 6402(c) and the regulations thereunder.

(2) If a taxpayer owes more than one past-due, legally enforceable debt to a Federal agency or agencies, the overpayment shall be credited against the debts in the order in which the debts accrued. A debt shall be considered to have accrued at the time at which the agency determines that the debt became past due.

(3) Reduction of the overpayment pursuant to section 6402 (a), (c), and (d) shall occur prior to crediting the overpayment to any future liability for an internal revenue tax. Any amount remaining after offset under section 6402 (a), (c), and (d) shall be refunded to the taxpayer, or applied to estimated tax, if elected by the taxpayer.

(h) *Post-offset notice to the taxpayer and the agency.* (1) The Service shall notify the taxpayer in writing of the amount and date of the offset for a past-due, legally enforceable debt and of the Federal agency to which this amount has been paid or credited. For joint returns, see paragraph (i) of this section.

(2) The Service shall advise each agency of the names, mailing addresses, and identifying numbers of the taxpayers from whom amounts of past-due, legally enforceable debt were collected and of the amounts collected from each taxpayer. If the refund from which an amount of past-due, legally enforceable debt is to be withheld is based upon a joint return, the Service shall notify the agency and furnish the names and addresses of each taxpayer filing the joint return.

(i) *Offset made with regard to refund based upon joint return.* (1) In the case of an offset from a refund based on a joint return, the Service shall issue a notice in writing to any person who

may have filed a joint return with the taxpayer, including the amount and date of any offset and the steps which the non-debtor spouse may take in order to secure his or her proper share of the refund (unless the non-debtor spouse has already taken these steps prior to offset).

(2) If the person filing the joint return with the taxpayer owing the past-due, legally enforceable debt takes appropriate action to secure his or her proper share of a refund from which an offset was made, the Service shall pay the person his or her share of the refund and shall deduct that amount from amounts payable to the agency.

(j) *Disposition of amounts collected.* Amounts collected under this section shall be transferred to a special account maintained by the Financial Management Service (FMS) for each Federal agency. If an erroneous payment is made to any agency, the Service shall deduct the amount of such payment from amounts payable to the agency.

(k) *Fees.* The agency shall enter into a separate agreement with the Service and FMS to reimburse the Service and FMS for the full cost of administering the tax refund offset program. The fees shall be deducted from amounts collected prior to disposition. The fees shall be deposited in the United States Treasury and credited to the appropriation accounts which bore all or part of the costs involved in administering the refund offset procedures.

(l) *Review of offset of refunds.* Any reduction of a taxpayer's refund made pursuant to section 6402(c) or (d) shall not be subject to review by any court of the United States or by the Service in an administrative proceeding. No action brought against the United States to recover the amount of this reduction shall be considered to be a suit for refund of tax. Any legal, equitable, or administrative action by any person seeking to recover the amount of the reduction of the overpayment must be taken against the Federal agency to which the amount of the reduction was paid. Any action which is otherwise available with respect to recoveries of overpayments of benefits under section 204 of the Social Security Act must be taken against the Secretary of Health and Human Services.

(m) *Access to and use of confidential tax information.* Access to and use of confidential tax information in connection with the tax refund offset program are restricted by section 6103 of the Code. However, section 6103(l)(10) permits Federal officers and employees of agencies participating in the tax refund offset program to have access to and use of confidential tax information. Agencies receiving such information are subject to the safeguard, recordkeeping, and reporting requirements of section 6103(p)(4) and the regulations thereunder. The agency shall inform its officers and employees who access or use confidential tax information of the restrictions and penalties under the Internal Revenue Code for misuse of confidential tax information.

(n) *Effective dates.* This section applies to refunds payable under section 6402 after April 15, 1992, and on or before January 1, 1998. For the rules applicable after January 1, 1998, see 31 CFR part 285.

[T.D. 8413, 57 FR 13038, Apr. 15, 1992; 57 FR 36691, Aug. 14, 1992, as amended by T.D. 8837, 64 FR 48548, Sept. 7, 1999]

### § 301.6402–7 Claims for refund and applications for tentative carryback adjustments involving consolidated groups that include insolvent financial institutions.

(a) *In general*—(1) *Overview.* Section 6402(i) authorizes the Secretary to issue regulations providing for the payment of a refund directly to the statutory or court-appointed fiduciary of an insolvent corporation that was a subsidiary in a consolidated group, to the extent the Secretary determines that the refund is attributable to losses or credits of the insolvent corporation. This section provides rules for the payment of refunds and tentative carryback adjustments to the fiduciary of an insolvent financial institution that was a subsidiary in a consolidated group.

(2) *Notice.* This section provides notice to the common parent of a consolidated group of which an insolvent financial institution is or was a member that—

(i) The fiduciary for the institution may, in addition to the common parent, act as agent for the group in certain matters relating to the tax liability of the group in the year in which a loss arose and for the year to which a claim for refund or application for tentative carryback adjustment relates; and

(ii) The Internal Revenue Service may deal directly with the common parent or the fiduciary (or both) as agent for the group to the extent provided in this section.

(b) *Definitions.* For purposes of this section, the following terms have the meanings set forth below:

(1) *Carryback year group.* A carryback year group is a consolidated group of which a corporation that is or becomes an insolvent financial institution is a member during a consolidated carryback year.

(2) *Consolidated carryback year.* A consolidated carryback year is a consolidated return year to which a loss arising in a loss year is carried back.

(3) *Fiduciary.* A fiduciary is—

(i) The Federal Deposit Insurance Corporation;

(ii) The Resolution Trust Corporation; or

(iii) Any other entity established by federal law, or a federal agency, that is identified by the Commissioner in a revenue ruling or revenue procedure as a fiduciary for purposes of this section;

in its capacity as an authorized receiver or conservator of an insolvent financial institution.

(4) *Insolvent financial institution.* An insolvent financial institution (an institution) is a bank or domestic building and loan association for which the fiduciary is authorized to act as a receiver or conservator—

(i) On the ground that the institution is insolvent within the meaning of 12 U.S.C. 191, 12 U.S.C. 1821(c)(5)(A), 12 U.S.C. 1464(d)(2)(A)(i), or 12 U.S.C. 1464(d)(2)(C)(i) or any applicable state law (or any successor statute which adopts a substantially similar standard); or

(ii) On grounds other than insolvency, provided that the institution is insolvent within the meaning of paragraph (b)(4)(i) of this section at any time after commencement of the conservatorship or receivership.

A reference to an institution under these regulations includes, as the context requires, a reference to predecessors and successors of the institution.

(5) *Loss year.* A loss year is a taxable year for which any member or former member of the carryback year group claims a loss that may be carried back.

(6) *Loss year group.* A loss year group is a consolidated group of which a corporation that is or becomes an insolvent financial institution is a member during a loss year.

(7) *Procedure effective date.* The procedure effective date is the day on which the Internal Revenue Service has processed the notice described in paragraph (d)(1) of this section to the extent necessary for all Internal Revenue Service Centers to have access to information indicating that—

(i) Appropriate notice to the Internal Revenue Service has been filed; and

(ii) Payments with respect to losses of an institution are to be paid in accordance with the procedures set forth in this section.

(8) *Definitions in § 1.1502–1.* Unless otherwise provided, the definitions contained in § 1.1502–1 of this chapter apply in this section.

(c) *Deemed agency status of fiduciary*—(1) *In general.* Notwithstanding the general treatment of a common parent as the agent of a group under §§ 1.1502–77 and 1.1502–78 of this chapter, if the fiduciary satisfies the notice requirements of paragraph (d)(1) of this section, the fiduciary may also be deemed to be an agent under §§ 1.1502–77 and 1.1502–78 of this chapter—

(i) Of the loss year group (if any) for purposes of filing a consolidated return for the loss year;

(ii) Of the carryback year group for purposes of filing a claim for refund or an application for a tentative carryback adjustment for the consolidated carryback year under paragraph (e) of this section and receiving payments of any refund or tentative carryback adjustment under paragraph (g) of this section; and

(iii) Of the carryback year group, the loss year group or any other group of which the institution is a member for

any matter pertaining to the determination of the refund or tentative carryback adjustment, but only to the extent provided in paragraph (c)(2) of this section.

(2) *Limitation.* The fiduciary may act as an agent for matters described in paragraph (c)(1)(iii) of this section only to the extent—

(i) Authorized by the district director, in his/her sole discretion, after receiving a written request from the fiduciary; or

(ii) Requested by the Internal Revenue Service under paragraph (f)(3) of this section.

(d) *Notice requirements*—(1) *Notice to the Internal Revenue Service.* To satisfy the notice requirement of this paragraph (d)(1), the fiduciary must file Form 56–F, Notice Concerning Fiduciary Relationship of Financial Institution, with the Internal Revenue Service Center indicated on the form. However, in its sole discretion, the Internal Revenue Service may treat notice to it in any other manner as satisfying the notice requirement under this paragraph (d)(1).

(2) *Notice to the common parent*—(i) *Form 56-F.* The fiduciary must send a copy of the form 56–F filed with the Internal Revenue Service Center or any other notice provided to the Service under paragraph (d)(1) of this section to the common parent of the loss year group (if any) and the common parent of all carryback year groups (if different from the loss year group).

(ii) *Claim for refund and loss year return.* If a claim for refund is filed by the fiduciary in accordance with paragraph (e)(1) of this section, the fiduciary must provide a copy of the claim for refund to the common parent of the carryback year group. If a loss year return is filed by the fiduciary in accordance with paragraph (e)(3) of this section, the fiduciary must provide a copy of the loss year return to the common parent of the loss year group (if any).

(iii) *Additional information.* The fiduciary must provide to the affected common parent a copy of the request for agency status referred to in paragraphs (c)(2) (i) and (ii) of this section, and a copy of any additional information submitted to the Internal Revenue Service as agent under paragraph (c)(1)(iii) of this section.

(e) *Filing requirements of the fiduciary*—(1) *Claim for refund by the fiduciary.* If the fiduciary accepts a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing a copy of the common parent's claim for refund. If no claim for refund is filed by the common parent for the consolidated carryback year or the fiduciary does not accept a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing its own claim for refund under section 6402, based on all information pertaining to the institution and all information pertaining to other members of the carryback year group and the loss year group to which the fiduciary has reasonable access. Any claim for refund filed by the fiduciary under this paragraph (e)(1) must contain the title ''Claim for refund under section 6402(i) of the Code'' at the top of the first page of the claim, and the following must be attached to the claim:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount of the refund claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section;

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section; and

(vi) A statement executed by an authorized representative of the fiduciary and any paid preparer utilized by the fiduciary that provides ''Under penalties of perjury, I declare that I have examined the items listed in § 301.6402–7T(e)(1)(i) through (v), including accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than fiduciary) is based on all information of which the preparer has any knowledge.''

(2) *Application for tentative carryback adjustment pursuant to section 6411.* Notwithstanding section 6411 and § 1.1502–78 of this chapter, an application for a tentative carryback adjustment must be signed by both the common parent of the carryback year group and the fiduciary if the payment with respect to the tentative carryback adjustment is not made before the procedure effective date (whether or not the application was filed before the procedure effective date). Any application for a tentative carryback adjustment filed under this paragraph (e)(2) must contain the title ''Application for tentative carryback adjustment under section 6402(i) of the Code'' at the top of the first page of the application. In addition, the following must be attached to the application:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraph (d)(2)(i) of this section.

(3) *Loss year return by the fiduciary.* If the institution is a member of a loss year group, and either the common parent does not file a loss year return or the fiduciary does not accept the loss year return filed by the common parent, the fiduciary may file a loss year return with respect to the loss year group. A loss year return can only be filed by the fiduciary in conjunction with the filing of a claim for refund under paragraph (e)(1).The return must be based on all information pertaining to the institution and all information pertaining to other members to which the fiduciary has reasonable access. Any return filed by the fiduciary under this paragraph (e)(3) must contain the title ''Loss year return under section 6402(i) of the Code'' at the top of the first page of the return, and the following must be attached to the return:

(i) The name and employer identification number of the institution that is a member of the loss year group;

(ii) The name of the fiduciary;

(iii) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(iv) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section.

(4) *Additional information.* If the fiduciary files additional information under paragraph (c)(1)(iii) of this section, the fiduciary must attach a representation that it has satisfied the requirements set forth in paragraph (d)(2)(iii) of this section.

(5) *Election to waiver carryback.* Any election filed after December 30, 1991, by the common parent of a loss year group under section 172(b)(3) to relinquish the entire carryback period with respect to a consolidated net operating loss arising in a loss year is not effective with respect to the portion of the consolidated net operating loss attributable to a subsidiary that is an institution. Instead, the fiduciary may make the election under section 172(b)(3) with respect to the portion attributable to the institution after the notice described in paragraph (d)(1) of this section is filed. For purposes of this paragraph (e)(5), the portion attributable to an institution is determined under the principles of paragraph (g)(2)(ii) of this section.

(f) *Processing and reconciliation of information by the Internal Revenue Service*—(1) *Loss year return if the insolvent financial institution is a member of a loss year group.* The Internal Revenue Service may, in its sole discretion, adjust a loss year return filed by the common parent of a loss year group to take into account information filed by the fiduciary in accordance with paragraph (e) of this section, or accept or adjust a loss year return for the loss year group filed by the fiduciary. Nothing in this section relieves the common parent of a loss year group of its duty to file a consolidated return taking into account an institution's items of income, gain, loss, deduction, and credit for any taxable year, or obligates the Internal Revenue Service to accept a return

filed by the fiduciary as the return of the loss year group.

(2) *Claim for refund with respect to consolidated carryback year.* The Internal Revenue Service may, in its sole discretion, adjust a claim for refund filed by the common parent of a carryback year group to take into account information filed by the fiduciary in accordance with paragraph (e) of this section, or accept or adjust a claim for refund for the carryback year group filed by the fiduciary. Nothing in this section obligates the Internal Revenue Service to pay a claim for refund, or to accept a claim for refund, filed by the fiduciary as a claim for refund for the carryback year group.

(3) *Additional information.* In determining the amount of any refund that may be paid to the fiduciary under paragraph (g) of this section, the Internal Revenue Service may, in its sole discretion, take into account any information that the Internal Revenue Service deems relevant and may require the fiduciary to file any additional information the Internal Revenue Service deems appropriate.

(g) *Payment of a refund or a tentative carryback adjustment to fiduciary*—(1) *In general.* If a claim for refund or an application for a tentative carryback adjustment is filed for the consolidated carryback year in accordance with paragraph (e) of this section, the Internal Revenue Service may, in its sole discretion, pay to the fiduciary all or any portion of the refund or tentative carryback adjustment that the Internal Revenue Service determines under this section to be attributable to the net operating losses of the institution. Nothing in this section obligates the Internal Revenue Service to pay to the fiduciary all or any portion of a claim for refund or application for tentative carryback adjustment.

(2) *Portion of refund or tentative carryback adjustment attributable to the net operating loss of an insolvent financial institution*—(i) *In general.* The portion of a refund or tentative carryback adjustment attributable to a net operating loss of an institution that is carried to a consolidated carryback year is determined based on the absorption, as described in paragraph (g)(2)(iii) of this section, of the institution's net operating loss carried to the consolidated carryback year.

(ii) *Member's net operating loss.* If the loss year is a consolidated return year, references in this section to the net operating loss of a member of the loss year group is a reference to the portion of the loss year group's consolidated net operating loss attributable to the member. The consolidated net operating loss for a taxable year that is attributable to a member is determined by a fraction, the numerator of which is the separate net operating loss of the member for the year of the loss and the denominator of which is the sum of the separate net operating losses for that year of all members having such losses. For this purpose, the separate net operating loss of a member is determined by computing the consolidated net operating loss by taking into account only the member's items of income, gain, deduction, and loss, including the member's losses and deductions actually absorbed by the group in the taxable year (whether or not absorbed by the member).

(iii) *Absorption of net operating losses.* The absorption of net operating losses generally is determined under applicable principles of the Code and regulations, including the principles of section 172 and §§ 1.1502–21(b) or 1.1502–21A(b) (as appropriate) of this chapter. Notwithstanding any contrary rule or principle of the Code or regulations, if an institution and another member of the carryback year group have net operating losses that arise in taxable years ending on the same date and are carried to the same consolidated carryback year, the carryback year group's consolidated taxable income for that year is treated as offset first by the loss attributable to the institution to the extent thereof.

(3) *Examples.* For purposes of the examples in this section, all groups file consolidated returns, all corporations have calendar taxable years, the facts set forth the only corporate activity, the fiduciary has met the notice and filing requirements of this section, and the common parent has filed a return for the loss year and a claim for refund. The principles of this paragraph (g) are illustrated by the following examples.

*Example 1. Absorption of net operating losses.* (a) P owns all the stock of S1, an insolvent financial institution, and S2, a corporation that is not a financial institution. For Year 1, P, S1, and S2 each have $50 of income, and the P group's consolidated taxable income is $150. On May 31 of Year 2, S1 becomes insolvent and is placed in receivership under the supervision of a fiduciary. For Year 2, the P group has a consolidated net operating loss of $200, of which $100 is attributable to S1 and $100 is attributable to S2.

(b) Under paragraph (g)(2)(iii) of this section, the $150 of consolidated taxable income for Year 1 is offset first by the $100 portion of the consolidated net operating loss for Year 2 attributable to S1. The remaining $50 is treated as offset by $50 of the $100 of consolidated net operating loss attributable to S2. Thus, the refund attributable to $100 of the loss may be payable to the fiduciary and the refund attributable to $50 of the loss may be payable to P. The remaining $50 consolidated net operating loss, available to be carried forward, is entirely attributable to S2.

*Example 2. Separate return net operating loss.* The facts are the same as in *Example 1*, except that S1 left the P group at the end of Year 1 and its $100 of loss in Year 2 is incurred in a separate return limitation year. Under paragraph (g)(2)(iii) of this section, the generally applicable absorption principles of section 172 and §1.1502–21 of this chapter apply. Although S1 and S2 are carrying back losses to Year 1 from taxable years ending on the same date (Year 2), S1's loss is subject to a $50 limitation under §1.1502–21(c) of this chapter and only $50 of S1's loss is absorbed before S2's net operating loss. Therefore, the refund attributable to $50 of the net operating loss of S1 may be payable to the fiduciary, and the refund attributable to $100 of the net operating loss of S2 may be payable to P. The remaining $50 net operating loss of S1 is available to be carried forward.

(4) *Refund or tentative carryback adjustment allocation agreement.* The determination of the portion of any refund or tentative carryback adjustment payable to the fiduciary under this paragraph (g) shall be made without regard to—

(i) Any agreement among the members of the consolidated group; or

(ii) Whether the fiduciary is otherwise entitled to any portion of the refund or tentative carryback adjustment under applicable law.

(h) *Credits, net capital losses, and subgroups*—(1) *Credits and net capital losses*—(i) *In general.* The principles of this section also apply to credits and net capital losses, with appropriate adjustments to reflect differences between the rules applicable to net operating losses and those applicable to credits and net capital losses.

(ii) *Example.* The principles of this paragraph (h)(1) are illustrated by the following example.

*Example.* Net capital loss. (a) P owns all the stock of S1, an insolvent financial institution, and S2, a corporation that is not a financial institution. For Year 1, P, S1, and S2 each have $50 of capital gain, and the P group's consolidated capital gain net income is $150. On May 31 of Year 2, S1 becomes insolvent and is placed in receivership under the supervision of a fiduciary. For Year 2, the P group has a consolidated net operating loss of $100 that is attributable to S1, and a consolidated net capital loss of $100 that is attributable to S2.

(b) Under paragraphs (g)(2)(iii) and (h)(1) of this section, the generally applicable absorption principles of sections 172 and 1212 and §§1.1502–21(b) and 1.1502–22(b) of this chapter apply. Consequently, S2's capital loss is absorbed before S1's net operating loss. Therefore, the $150 of consolidated capital gain net income is offset first by S2's $100 capital loss and the remaining $50 by S1's net operating loss. The refund attributable to $50 of the net operating loss may be payable to the fiduciary, and the refund attributable to the $100 of capital loss may be payable to P. The remaining $50 consolidated net operating loss available to be carried forward is entirely attributable to S1.

(2) *Insolvent financial institution subgroup*—(i) *In general.* The principles of this section apply to all members included in an insolvent financial institution subgroup with appropriate adjustments to reflect differences resulting from the application to more than one corporation in a group. Unless otherwise determined by the Internal Revenue Service in its sole discretion, an insolvent financial institution subgroup is composed of an insolvent financial institution and those other members of a loss year group that, at any time during the conservatorship or receivership of the institution, bear the same relationship to the institution that the members of a group bear to their common parent under section 1504(a)(1).

(ii) *Examples.* The principles of this paragraph (h)(2) are illustrated by the following examples.

*Example 1.* Loss of other subgroup members. (a) S1 is a financial institution, and P,

S2, and S3 are not financial institutions. P owns all the stock of S1, S1 owns all the stock of S2, and the stock of S3 is owned 20 percent by S2 and 80 percent by P. For Year 1, P, S1, and S2 each have $100 of income, S3 has no income or loss, and the P group's consolidated taxable income is $300. On May 31 of Year 2, S1 becomes insolvent and is placed in receivership under the supervision of a fiduciary. For Year 2, the P group has a consolidated net operating loss of $300, of which $200 is attributable to S1 and $100 is attributable to S2.

(b) S1 and S2 compose a subgroup because S2 bears the same relationship to S1 that the member of a group bears to its common parent under section 1504(a). S3 is not included in the subgroup because it is not connected to S1 through 80 percent stock ownership as described in section 1504(a).

(c) Because S1 and S2 are members of a subgroup, a claim for refund under paragraph (e) of this section must be based on the aggregate consolidated net operating loss of both S1 and S2. Under paragraph (e)(5) of this section, P may not elect under section 172(b)(3) to relinquish the entire carryback period with respect to the $300 of consolidated net operating loss arising in Year 2 that is attributable to S1 and S2. Any refund payable under paragraph (g)(1) of this section with respect to the $300 loss of S1 and S2 may be paid by the Internal Revenue Service directly to the fiduciary.

*Example 2. Income of other subgroup members.* (a) The facts are the same as in *Example 1*, except that S2 has $100 of income in Year 2 rather than $100 of loss. Any refund payable under paragraph (g) of this section with respect to the loss of S1 in Year 2 must take into account the income of S2, and therefore the refund will be based on a $100 loss of the subgroup.

(b) Although P and S3 are not members included in the subgroup, the loss year return and the claim for refund filed by the fiduciary under paragraph (e) of this section must be completed based on all information to which the fiduciary has reasonable access. Under paragraph (e)(3) of this section, if P does not file a loss year return that is accepted by S1, and S1 has reasonable access to information indicating that P and S3 have income in Year 2, S1 must take that income into account in filing the P group's return for Year 2 and reduce the amount of S1's loss that may be carried to Year 1 accordingly. However, if P or S3 has a loss in Year 2, any refund attributable to that loss will not be paid to the fiduciary.

(i) [Reserved]

(j) *Determination of ownership.* This section determines the party to whom a refund or tentative carryback adjustment will be paid but is not determinative of ownership of any such amount among current or former members of a consolidated group (including the institution).

(k) *Liability of the Government.* Any refund or tentative carryback adjustment paid to the fiduciary discharges any liability of the Government to the same extent as payment to the common parent under § 1.1502–77 or § 1.1502–78 of this chapter. Furthermore, any refund or tentative carryback adjustment paid to the fiduciary is considered a payment to all members of the carryback year group. Any determination made by the Internal Revenue Service under this section to pay a refund or tentative carryback adjustment to a fiduciary or the common parent may not be challenged by the common parent, any member of the group, or the fiduciary.

(l) *Effective dates.* This section applies to refunds and tentative carryback adjustments paid after December 30, 1991.

[T.D. 8387, 56 FR 67487, Dec. 31, 1991; 57 FR 6073, Feb. 20, 1992. Redesignated and amended by T.D. 8446, 57 FR 53034, Nov. 6, 1992; T.D. 8677, 61 FR 33325, June 27, 1996; T.D. 8823, 64 FR 36101, July 2, 1999]

## § 301.6403–1 Overpayment of installment.

If any installment of tax is overpaid, the overpayment shall first be applied against any outstanding installments of such tax. If the overpayment exceeds the correct amount of tax due, the overpayment shall be credited or refunded as provided in section 6402 and §§ 301.6402–1 to 301.6402–4, inclusive.

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[T.D. 8299, 55 FR 14245, Apr. 17, 1990]

### § 301.6404–1 Abatements.

(a) The district director or the director of the regional service center may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the period of limitations applicable thereto, or if the assessment has been erroneously or illegally made.

(b) No claim for abatement may be filed with respect to income, estate, or gift tax.

(c) Except in case of income, estate, or gift tax, if more than the correct amount of tax, interest, additional amount, addition to the tax, or assessable penalty is assessed but not paid to the district director, the person against whom the assessment is made may file a claim for abatement of such overassessment. Each claim for abatement under this section shall be made on Form 843. In the case of a claim filed prior to April 15, 1968, the claim shall be filed in the office of the internal revenue officer by whom the tax was assessed or with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim shall be filed (1) with the Director of International Operations if the tax was assessed by him, or (2) with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim shall be filed with the service center serving the internal revenue district in which the tax was assessed. Form 843 shall be made in accordance with the instructions relating to such form.

(d) The Commissioner may issue uniform instructions to district directors authorizing them, to the extent permitted in such instructions, to abate amounts the collection of which is not warranted because of the administration and collection costs.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7008, 34 FR 3673, Mar. 1, 1969; T.D. 7188, 37 FR 12794, June 29, 1972; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976]

### § 301.6404–2 Abatement of interest.

(a) *In general.* (1) Section 6404(e)(1) provides that the Commissioner may (in the Commissioner's discretion) abate the assessment of all or any part of interest on any—

(i) Deficiency (as defined in section 6211(a), relating to income, estate, gift, generation-skipping, and certain excise taxes) attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (IRS) (acting in an official capacity) in performing a ministerial or managerial act; or

(ii) Payment of any tax described in section 6212(a) (relating to income, estate, gift, generation-skipping, and certain excise taxes) to the extent that any unreasonable error or delay in payment is attributable to an officer or employee of the IRS (acting in an official capacity) being erroneous or dilatory in performing a ministerial or managerial act.

(2) An error or delay in performing a ministerial or managerial act will be taken into account only if no significant aspect of the error or delay is attributable to the taxpayer involved or to a person related to the taxpayer within the meaning of section 267(b) or section 707(b)(1). Moreover, an error or delay in performing a ministerial or managerial act will be taken into account only if it occurs after the IRS has contacted the taxpayer in writing

with respect to the deficiency or payment. For purposes of this paragraph (a)(2), no significant aspect of the error or delay is attributable to the taxpayer merely because the taxpayer consents to extend the period of limitations.

(b) *Definitions*—(1) *Managerial act* means an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated under paragraph (a) of this section.

(2) *Ministerial act* means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

(c) *Examples*. The following examples illustrate the provisions of paragraphs (b) (1) and (2) of this section. Unless otherwise stated, for purposes of the examples, no significant aspect of any error or delay is attributable to the taxpayer, and the IRS has contacted the taxpayer in writing with respect to the deficiency or payment. The examples are as follows:

*Example 1*. A taxpayer moves from one state to another before the IRS selects the taxpayer's income tax return for examination. A letter explaining that the return has been selected for examination is sent to the taxpayer's old address and then forwarded to the new address. The taxpayer timely responds, asking that the audit be transferred to the IRS's district office that is nearest the new address. The group manager timely approves the request. After the request for transfer has been approved, the transfer of the case is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in transferring the case.

*Example 2*. An examination of a taxpayer's income tax return reveals a deficiency with respect to which a notice of deficiency will be issued. The taxpayer and the IRS identify all agreed and unagreed issues, the notice is prepared and reviewed (including review by District Counsel, if necessary), and any other relevant prerequisites are completed. The issuance of the notice of deficiency is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in issuing the notice.

*Example 3*. A revenue agent is sent to a training course for an extended period of time, and the agent's supervisor decides not to reassign the agent's cases. During the training course, no work is done on the cases assigned to the agent. The decision to send the revenue agent to the training course and the decision not to reassign the agent's cases are not ministerial acts; however, both decisions are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

*Example 4*. A taxpayer appears for an office audit and submits all necessary documentation and information. The auditor tells the taxpayer that the taxpayer will receive a copy of the audit report. However, before the report is prepared, the auditor is permanently reassigned to another group. An extended period of time passes before the auditor's cases are reassigned. The decision to reassign the auditor and the decision not to reassign the auditor's cases are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

*Example 5*. A taxpayer is notified that the IRS intends to audit the taxpayer's income tax return. The agent assigned to the case is granted sick leave for an extended period of time, and the taxpayer's case is not reassigned. The decision to grant sick leave and the decision not to reassign the taxpayer's case to another agent are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

*Example 6*. A revenue agent has completed an examination of the income tax return of a taxpayer. There are issues that are not agreed upon between the taxpayer and the IRS. Before the notice of deficiency is prepared and reviewed, a clerical employee misplaces the taxpayer's case file. The act of misplacing the case file is a managerial act.

The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from the file being misplaced.

*Example 7.* A taxpayer invests in a tax shelter and reports a loss from the tax shelter on the taxpayer's income tax return. IRS personnel conduct an extensive examination of the tax shelter, and the processing of the taxpayer's case is delayed because of that examination. The decision to delay the processing of the taxpayer's case until the completion of the examination of the tax shelter is a decision on how to organize the processing of tax returns. This is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

*Example 8.* A taxpayer claims a loss on the taxpayer's income tax return and is notified that the IRS intends to examine the return. However, a decision is made not to commence the examination of the taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. The decision on how to prioritize the processing of returns based on the expiration of the statute of limitations is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

*Example 9.* During the examination of an income tax return, there is disagreement between the taxpayer and the revenue agent regarding certain itemized deductions claimed by the taxpayer on the return. To resolve the issue, advice is requested in a timely manner from the Office of Chief Counsel on a substantive issue of federal tax law. The decision to request advice is a decision concerning the proper application of federal tax law; it is neither a ministerial nor a managerial act. Consequently, interest attributable to a delay resulting from the decision to request advice cannot be abated under paragraph (a) of this section.

*Example 10.* The facts are the same as in *Example 9* except the attorney who is assigned to respond to the request for advice is granted leave for an extended period of time. The case is not reassigned during the attorney's absence. The decision to grant leave and the decision not to reassign the taxpayer's case to another attorney are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

*Example 11.* A taxpayer contacts an IRS employee and requests information with respect to the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. Because the employee fails to access the most recent data, the employee gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Accessing the most recent data is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability.

*Example 12.* A taxpayer contacts an IRS employee and requests information with respect to the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. To determine the current amount due, the employee must interpret complex provisions of federal tax law involving net operating loss carrybacks and foreign tax credits. Because the employee incorrectly interprets these provisions, the employee gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Interpreting complex provisions of federal tax law is neither a ministerial nor a managerial act. Consequently, interest attributable to an error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability in this situation cannot be abated under paragraph (a) of this section.

*Example 13.* A taxpayer moves from one state to another after the IRS has undertaken an examination of the taxpayer's income tax return. The taxpayer asks that the audit be transferred to the IRS's district office that is nearest the new address. The group manager approves the request, and the case is transferred. Thereafter, the taxpayer moves to yet another state, and once again asks that the audit be transferred to the IRS's district office that is nearest that new address. The group manager approves the request, and the case is again transferred. The agent then assigned to the case is granted sick leave for an extended period of time, and the taxpayer's case is not reassigned. The taxpayer's repeated moves result in a delay in the completion of the examination. Under paragraph (a)(2) of this section, interest attributable to this delay cannot be abated because a significant aspect of this delay is attributable to the taxpayer. However, as in *Example 5*, the Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by the managerial decisions to grant sick leave and not to reassign the taxpayer's case to another agent.

(d) *Effective dates*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, the provisions of this section apply to interest accruing with respect to deficiencies or payments of any tax described in section 6212(a) for

taxable years beginning after July 30, 1996.

(2) *Special rules*—(i) *Estate tax*. The provisions of this section apply to interest accruing with respect to deficiencies or payments of—

(A) Estate tax imposed under section 2001 on estates of decedents dying after July 30, 1996;

(B) The additional estate tax imposed under sections 2032A(c) and 2056A(b)(1)(B) in the case of taxable events occurring after July 30, 1996; and

(C) The additional estate tax imposed under section 2056A(b)(1)(A) in the case of taxable events occurring after December 31, 1996.

(ii) *Gift tax*. The provisions of this section apply to interest accruing with respect to deficiencies or payments of gift tax imposed under chapter 12 on gifts made after December 31, 1996.

(iii) *Generation-skipping transfer tax*. The provisions of this section apply to interest accruing with respect to deficiencies or payments of generation-skipping transfer tax imposed under chapter 13—

(A) On direct skips occurring at death, if the transferor dies after July 30, 1996; and

(B) On inter vivos direct skips, and all taxable terminations and taxable distributions occurring after December 31, 1996.

[T.D. 8789, 63 FR 70013, Dec. 18, 1998]

## § 301.6404–3 Abatement of penalty or addition to tax attributable to erroneous written advice of the Internal Revenue Service.

(a) *General rule*. Any portion of any penalty or addition to tax that is attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the Internal Revenue Service (Service), acting in his or her official capacity, shall be abated, provided the requirements of paragraph (b) of this section are met.

(b) *Requirements*—(1) *In general*. Paragraph (a) of this section shall apply only if—

(i) The written advice was reasonably relied upon by the taxpayer;

(ii) The advice was issued in response to a specific written request for advice by the taxpayer; and

(iii) The taxpayer requesting advice provided adequate and accurate information.

(2) *Advice was reasonably relied upon*—(i) *In general*. The written advice from the Service must have been reasonably relied upon by the taxpayer in order for any penalty to be abated under paragraph (a) of this section.

(ii) *Advice relating to a tax return*. In the case of written advice from the Service that relates to an item included on a federal tax return of a taxpayer, if such advice is received by the taxpayer subsequent to the date on which the taxpayer filed such return, the taxpayer shall not be considered to have reasonably relied upon such written advice for purposes of this section, except as provided in paragraph (b)(2)(iii) of this section.

(iii) *Amended returns*. If a taxpayer files an amended federal tax return that conforms with written advice received by the taxpayer from the Service, the taxpayer will be considered to have reasonably relied upon the advice for purposes of the position set forth in the amended return.

(iv) *Advice not related to a tax return*. In the case of written advice that does not relate to an item included on a federal tax return (for example, the payment of estimated taxes), if such written advice is received by the taxpayer subsequent to the act or omission of the taxpayer that is the basis for the penalty or addition of tax, then the taxpayer shall not be considered to have reasonably relied upon such written advice for purposes of this section.

(v) *Period of reliance*. If the written advice received by the taxpayer relates to a continuing action or series of actions, the taxpayer may rely on that advice until the taxpayer is put on notice that the advice is no longer consistent with Service position and, thus, no longer valid. For purposes of this section, the taxpayer will be put on notice that written advice is no longer valid if the taxpayer receives correspondence from the Service stating that the advice no longer represents Service position. Further, any of the following events, occurring subsequent to the issuance of the advice, that set forth a position that is inconsistent with the written advice received from

the Service shall be deemed to put the taxpayer on notice that the advice is no longer valid—

(A) Enactment of legislation or ratification of a tax treaty;

(B) A decision of the United States Supreme Court;

(C) The issuance of temporary or final regulations; or

(D) The issuance of a revenue ruling, a revenue procedure, or other statement published in the Internal Revenue Bulletin.

(3) *Advice was in response to written request.* No abatement under paragraph (a) of this section shall be allowed unless the penalty or addition to tax is attributable to advice issued in response to a specific written request for advice by the taxpayer. For purposes of the preceding sentence, a written request from a representative of the taxpayer shall be considered a written request by the taxpayer only if—

(i) The taxpayer's representative is an attorney, a certified public accountant, an enrolled agent, an enrolled actuary, or any other person permitted to represent the taxpayer before the Service and who is not disbarred or suspended from practice before the Service; and

(ii) The written request for advice either is accompanied by a power of attorney that is signed by the taxpayer and that authorizes the representative to represent the taxpayer for purposes of the request, or such a power of attorney is currently on file with the Service.

(4) *Taxpayer's information must be adequate and accurate.* No abatement under paragraph (a) of this section shall be allowed with respect to any portion of any penalty or addition to tax that resulted because the taxpayer requesting the advice did not provide the Service with adequate and accurate information. The Service has no obligation to verify or correct the taxpayer's submitted information.

(c) *Definitions*—(1) *Advice.* For purposes of section 6404(f) and the regulations thereunder, a written response issued to a taxpayer by an officer or employee of the Service shall constitute ''advice'' if, and only if, the response applies the tax laws to the specific facts submitted in writing by the taxpayer and provides a conclusion regarding the tax treatment to be accorded the taxpayer upon the application of the tax law to those facts.

(2) *Penalty and addition to tax.* For purposes of section 6404(f) and the regulations thereunder, the terms ''penalty'' and ''addition to tax'' refer to any liability of a particular taxpayer imposed under subtitle F, chapter 68, subchapter A and subchapter B of the Internal Revenue Code, and the liabilities imposed by sections 6038(b), 6038(c), 6038A(d), 6038B(b), 6039E(c), and 6332(d)(2). In addition, the terms ''penalty'' and ''addition to tax'' shall include any liability resulting from the application of other provisions of the Code where the Commissioner of Internal Revenue has designated by regulation, revenue ruling, or other guidance published in the Internal Revenue Bulletin that such provision shall be considered a penalty or addition to tax for purposes of section 6404(f). The terms ''penalty'' and ''addition to tax'' shall also include interest imposed with respect to any penalty or addition to tax.

(d) *Procedures for abatement.* Taxpayers entitled to an abatement of a penalty or addition to tax pursuant to section 6404(f) and this section should complete and file Form 843. If the erroneous advice received relates to an item on a federal tax return, taxpayers should submit Form 843 to the Internal Revenue Service Center where the return was filed. If the advice does not relate to an item on a federal tax return, the taxpayer should submit Form 843 to the Service Center where the taxpayer's return was filed for the taxable year in which the taxpayer relied on the erroneous advice. At the top of Form 843 taxpayers should write, ''Abatement of penalty or addition to tax pursuant to section 6404(f).'' Further, taxpayers must state on Form 843 whether the penalty or addition to tax has been paid. Taxpayers must submit, with Form 843, copies of the following—

(1) The taxpayer's written request for advice;

(2) The erroneous written advice furnished by the Service to the taxpayer and relied on by the taxpayer; and

(3) The report (if any) of tax adjustments that identifies the penalty or addition to tax and the item relating to the erroneous written advice.

(e) *Period for requesting abatement.* An abatement of any penalty or addition to tax pursuant to section 6404(f) and this section shall be allowed only if the request for abatement described in paragraph (d) of this section is submitted within the period allowed for collection of such penalty or addition to tax, or, if the penalty or addition to tax has been paid, the period allowed for claiming a credit or refund of such penalty or addition to tax.

(f) *Examples.* The following examples illustrate the application of section 6404(f) of the Code and the regulations thereunder:

*Example 1.* In February 1989, an individual submitted a written request for advice to an Internal Revenue Service Center and included adequate and accurate information to consider the request. The question posed by the taxpayer concerned whether a certain amount was includible in income on the taxpayer's 1989 federal income tax return. An employee of the Service Center issued the taxpayer a written response that concluded that based on the specific facts submitted by the taxpayer, the amount was not includible in income on the taxpayer's 1989 return. Since the response provided a conclusion regarding the tax treatment accorded the taxpayer on the basis of the facts submitted, the response constitutes ''advice'' for purposes of section 6404(f). The taxpayer filed his 1989 return and, relying on the Service's advice, did not include the item in income. Upon examination, it was determined that the item should have been included in income on the taxpayer's 1989 return. Because the taxpayer reasonably relied upon erroneous written advice from the Service, any penalty or addition to tax attributable to the erroneous advice will be abated by the Service. However, the erroneous advice will not affect the amount of any taxes and interest owed by the taxpayer (except to the extent interest relates to a penalty or addition to tax attributable to the erroneous advice) due to the fact that the item was not included in income.

*Example 2.* In March 1989, an individual submitted a written request to the National Office of the Internal Revenue Service regarding whether a certain activity constitutes a passive activity within the meaning of section 469 of the Code. The request did not meet the procedural requirements set forth by the National Office for consideration of the submission as a private letter ruling request and, thus, was not treated as such by the Service. The Service furnished the taxpayer with a written response that transmitted various published provisions of section 469 and the regulations thereunder relevant to the determination of whether an activity is passive within the meaning of those provisions. The Service also included a Publication regarding the tax treatment of passive activities. However, the Service's response contained no opinion or determination regarding whether the taxpayer's described activity was or was not passive under section 469. The Service's response is not advice within the meaning of section 6404(f), and cannot be relied upon for purposes of an abatement of a portion of a penalty or addition to tax under that section.

*Example 3.* On April 1, 1989, an individual submitted a written request for advice to an Internal Revenue Service Center. The advice related to an item included on a federal tax return. The individual filed a federal income tax return with the appropriate Service Center on April 15, 1989. Subsequently, on May 1, 1989, the individual received advice from the Service Center concerning the written request made on April 1. Because the individual filed his tax return prior to the date on which written advice from the Service was received, the individual did not rely on the Service's written advice for purposes of section 6404(f). If, however, the individual amends his tax return to conform with the written advice received from the Service, the individual will be considered to have reasonably relied upon the Service's advice.

*Example 4.* Individual A, on May 1, 1989, received advice from the Service that concluded that interest paid by the taxpayer with respect to a specific loan was interest paid or accrued in connection with a trade or business, within the meaning of section 163(h)(2)(A) of the Code. The advice relates to a continuing action. Therefore, provided the facts submitted by the taxpayer to obtain the advice remain adequate and accurate (that is, the circumstances relating to the indebtedness do not change), Individual A may rely on the Service's advice for subsequent taxable years until the individual is put on notice that the advice no longer represents Service position and, thus, is no longer valid.

*Example 5.* An individual, on June 1, 1989, received advice from the Service that concluded that no gain or loss would be recognized with respect to a transfer of property to his spouse under section 1041. The advice does not relate to a continuing action. Therefore, the taxpayer may not rely on the advice of the Service for transfers other than the transfer discussed in the taxpayer's written request for advice.

(g) *Effective date*. Section 6404(f) shall apply with respect to advice requested on or after January 1, 1989.

[T.D. 8254, 54 FR 21057, May 16, 1989. Redesignated at 55 FR 14245, Apr. 17, 1990]

### § 301.6405–1 Reports of refunds and credits.

Section 6405 requires that a report be made to the Joint Committee on Taxation of proposed refunds or credits in excess of $100,000 of any income tax (including any qualified State individual income tax collected by the Federal Government), war profits tax, excess profits tax, estate tax, or gift tax. An exception is provided under which refunds and credits made after July 1, 1972, and attributable to an election under section 165(h) to deduct a disaster loss for the taxable year in which the disaster occurred, may be made prior to the submission of such report to the Joint Committee on Taxation.

[T.D. 7577, 43 FR 59376, Dec. 20, 1978]

### § 301.6407–1 Date of allowance of refund or credit.

The date on which the district director or the director of the regional service center, or an authorized certifying officer designated by either of them, first certifies the allowance of an overassessment in respect of any internal revenue tax shall be considered as the date of allowance of refund or credit in respect of such tax.

RULES OF SPECIAL APPLICATION

### § 301.6411–1 Tentative carryback adjustments.

For regulations under section 6411, see §§ 1.6411–1 to 1.6411–4, inclusive, of this chapter (Income Tax Regulations).

### § 301.6413–1 Special rules applicable to certain employment taxes.

For regulations under section 6413, see §§ 31.6413(a)–1 to 31.6413(c)–1, inclusive, of this chapter (Employment Tax Regulations).

### § 301.6414–1 Income tax withheld.

(a) For rules relating to the refund or credit of income tax withheld under chapter 3 of the Code on nonresident aliens and foreign corporations and tax-free covenant bonds, see § 1.6414–1 of this chapter (Income Tax Regulations).

(b) For rules relating to the refund or credit of income tax withheld under chapter 24 of the Code from wages, see § 31.6414–1 of this chapter (Employment Tax Regulations).

### § 301.6425–1 Adjustment of overpayment of estimated income tax by corporation.

For regulations under section 6425, see §§ 1.6425–1 to 1.6425–3, inclusive, of this chapter (Income Tax Regulations).

[T.D. 7059, 35 FR 14548, Sept. 17, 1970]

## Limitations

LIMITATIONS ON ASSESSMENT AND COLLECTION

### § 301.6501(a)–1 Period of limitations upon assessment and collection.

(a) The amount of any tax imposed by the Code (other than a tax collected by means of stamps) shall be assessed within 3 years after the return was filed. For rules applicable in cases where the return is filed prior to the due date thereof, see section 6501(b). In the case of taxes payable by stamp, assessment shall be made at any time after the tax became due and before the expiration of 3 years after the date on which any part of the tax was paid. For exceptions and additional rules, see subsections (b) to (g) of section 6501, and for cross references to other provisions relating to limitations on assessment and collection, see sections 6501(h) and 6504.

(b) No proceeding in court without assessment for the collection of any tax shall be begun after the expiration of the applicable period for the assessment of such tax.

### § 301.6501(b)–1 Time return deemed filed for purposes of determining limitations.

(a) *Early return*. Any return, other than a return of tax referred to in paragraph (b) of this section, filed before the last day prescribed by law or regulations for the filing thereof (determined without regard to any extension of time for filing) shall be considered as filed on such last day.

(b) *Returns of social security tax and of income tax withholding.* If a return on or after November 13, 1966, of tax imposed by chapter 3 of the Code (relating to withholding of tax on nonresident aliens and foreign corporations and tax-free covenant bonds), or if a return of tax imposed by chapter 21 of the Code (relating to the Federal Insurance Contributions Act) or by chapter 24 of the Code (relating to collection of income tax at source on wages), for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be deemed filed on April 15 of such succeeding calendar year. For example, if quarterly returns of the tax imposed by chapter 24 of the Code are filed for the four quarters of 1955 on April 30, July 31, and October 31, 1955, and on January 31, 1956, the period of limitation for assessment with respect to the tax required to be reported on such return is measured from April 15, 1956. However, if any of such returns is filed after April 15, 1956, the period of limitation for assessment of the tax required to be reported on that return is measured from the date it is in fact filed.

(c) *Returns executed by district directors or other internal revenue officers.* The execution of a return by a district director or other authorized internal revenue officer or employee under the authority of section 6020(b) shall not start the running of the statutory period of limitations on assessment and collection.

**§ 301.6501(c)–1 Exceptions to general period of limitations on assessment and collection.**

(a) *False return.* In the case of a false or fraudulent return with intent to evade any tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time after such false or fraudulent return is filed.

(b) *Willful attempt to evade tax.* In the case of a willful attempt in any manner to defeat or evade any tax imposed by the Code (other than a tax imposed by subtitle A or B, relating to income, estate, or gift taxes), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(c) *No return.* In the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time after the date prescribed for filing the return. For special rules relating to filing a return for chapter 42 and similar taxes, see §§ 301.6501(n)–1, 301.6501(n)–2, and 301.6501(n)–3.

(d) *Extension by agreement.* The time prescribed by section 6501 for the assessment of any tax (other than the estate tax imposed by chapter 11 of the Code) may, prior to the expiration of such time, be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner. The extension shall become effective when the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(e) *Gifts subject to chapter 14 of the Internal Revenue Code not adequately disclosed on the return.* If any transfer of property subject to the special valuation rules of section 2701 or section 2702, or if the occurrence of any taxable event described in section § 25.2701–4 of this chapter, is not adequately shown on a return of tax imposed by chapter 12 of subtitle B of the Internal Revenue Code (without regard to section 2503(b)), any tax imposed by chapter 12 of subtitle B of the Code on the transfer or resulting from the taxable event may be assessed, or a proceeding in court for the collection of the appropriate tax may be begun without assessment, at any time.

(2) *Adequately shown.* A transfer of property valued under the rules of section 2701 or section 2702 or any taxable event described in § 25.2701–4 of this chapter will be considered adequately shown on a return of tax imposed by chapter 12 of subtitle B of the Internal Revenue Code only if, with respect to the entire transaction or series of

transactions (including any transaction that affected the transferred interest) of which the transfer (or taxable event) was a part, the return provides:

(i) A description of the transactions, including a description of transferred and retained interests and the method (or methods) used to value each;

(ii) The identity of, and relationship between, the transferor, transferee, all other persons participating in the transactions, and all parties related to the transferor holding an equity interest in any entity involved in the transaction; and

(iii) A detailed description (including all actuarial factors and discount rates used) of the method used to determine the amount of the gift arising from the transfer (or taxable event), including, in the case of an equity interest that is not actively traded, the financial and other data used in determining value. Financial data should generally include balance sheets and statements of net earnings, operating results, and dividends paid for each of the 5 years immediately before the valuation date.

(3) *Effective date*. The provisions of this paragraph (e) are effective as of January 28, 1992. In determining whether a transfer or taxable event is adequately shown on a gift tax return filed prior to that date, taxpayers may rely on any reasonable interpretation of the statutory provisions. For these purposes, the provisions of the proposed regulations and the final regulations are considered a reasonable interpretation of the statutory provisions.

(f) *Gifts made after December 31, 1996, not adequately disclosed on the return*—(1) *In general*. If a transfer of property, other than a transfer described in paragraph (e) of this section, is not adequately disclosed on a gift tax return (Form 709, ''United States Gift (and Generation-Skipping Transfer) Tax Return''), or in a statement attached to the return, filed for the calendar period in which the transfer occurs, then any gift tax imposed by chapter 12 of subtitle B of the Internal Revenue Code on the transfer may be assessed, or a proceeding in court for the collection of the appropriate tax may be begun without assessment, at any time.

(2) *Adequate disclosure of transfers of property reported as gifts*. A transfer will be adequately disclosed on the return only if it is reported in a manner adequate to apprise the Internal Revenue Service of the nature of the gift and the basis for the value so reported. Transfers reported on the gift tax return as transfers of property by gift will be considered adequately disclosed under this paragraph (f)(2) if the return (or a statement attached to the return) provides the following information—

(i) A description of the transferred property and any consideration received by the transferor;

(ii) The identity of, and relationship between, the transferor and each transferee;

(iii) If the property is transferred in trust, the trust's tax identification number and a brief description of the terms of the trust, or in lieu of a brief description of the trust terms, a copy of the trust instrument;

(iv) Except as provided in § 301.6501–1(f)(3), a detailed description of the method used to determine the fair market value of property transferred, including any financial data (for example, balance sheets, etc. with explanations of any adjustments) that were utilized in determining the value of the interest, any restrictions on the transferred property that were considered in determining the fair market value of the property, and a description of any discounts, such as discounts for blockage, minority or fractional interests, and lack of marketability, claimed in valuing the property. In the case of a transfer of an interest that is actively traded on an established exchange, such as the New York Stock Exchange, the American Stock Exchange, the NASDAQ National Market, or a regional exchange in which quotations are published on a daily basis, including recognized foreign exchanges, recitation of the exchange where the interest is listed, the CUSIP number of the security, and the mean between the highest and lowest quoted selling prices on the applicable valuation date will satisfy all of the requirements of this paragraph (f)(2)(iv). In the case of the transfer of an interest in an entity

(for example, a corporation or partnership) that is not actively traded, a description must be provided of any discount claimed in valuing the interests in the entity or any assets owned by such entity. In addition, if the value of the entity or of the interests in the entity is properly determined based on the net value of the assets held by the entity, a statement must be provided regarding the fair market value of 100 percent of the entity (determined without regard to any discounts in valuing the entity or any assets owned by the entity), the pro rata portion of the entity subject to the transfer, and the fair market value of the transferred interest as reported on the return. If 100 percent of the value of the entity is not disclosed, the taxpayer bears the burden of demonstrating that the fair market value of the entity is properly determined by a method other than a method based on the net value of the assets held by the entity. If the entity that is the subject of the transfer owns an interest in another non-actively traded entity (either directly or through ownership of an entity), the information required in this paragraph (f)(2)(iv) must be provided for each entity if the information is relevant and material in determining the value of the interest; and

(v) A statement describing any position taken that is contrary to any proposed, temporary or final Treasury regulations or revenue rulings published at the time of the transfer (see § 601.601(d)(2) of this chapter).

(3) *Submission of appraisals in lieu of the information required under paragraph (f)(2)(iv) of this section.* The requirements of paragraph (f)(2)(iv) of this section will be satisfied if the donor submits an appraisal of the transferred property that meets the following requirements—

(i) The appraisal is prepared by an appraiser who satisfies all of the following requirements:

(A) The appraiser is an individual who holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis.

(B) Because of the appraiser's qualifications, as described in the appraisal that details the appraiser's background, experience, education, and membership, if any, in professional appraisal associations, the appraiser is qualified to make appraisals of the type of property being valued.

(C) The appraiser is not the donor or the donee of the property or a member of the family of the donor or donee, as defined in section 2032A(e)(2), or any person employed by the donor, the donee, or a member of the family of either; and

(ii) The appraisal contains all of the following:

(A) The date of the transfer, the date on which the transferred property was appraised, and the purpose of the appraisal.

(B) A description of the property.

(C) A description of the appraisal process employed.

(D) A description of the assumptions, hypothetical conditions, and any limiting conditions and restrictions on the transferred property that affect the analyses, opinions, and conclusions.

(E) The information considered in determining the appraised value, including in the case of an ownership interest in a business, all financial data that was used in determining the value of the interest that is sufficiently detailed so that another person can replicate the process and arrive at the appraised value.

(F) The appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions.

(G) The valuation method utilized, the rationale for the valuation method, and the procedure used in determining the fair market value of the asset transferred.

(H) The specific basis for the valuation, such as specific comparable sales or transactions, sales of similar interests, asset-based approaches, merger-acquisition transactions, etc.

(4) *Adequate disclosure of non-gift completed transfers or transactions.* Completed transfers to members of the transferor's family, as defined in section 2032A(e)(2), that are made in the ordinary course of operating a business are deemed to be adequately disclosed under paragraph (f)(2) of this section, even if the transfer is not reported on a gift tax return, provided the transfer is properly reported by all parties for

income tax purposes. For example, in the case of salary paid to a family member employed in a family owned business, the transfer will be treated as adequately disclosed for gift tax purposes if the item is properly reported by the business and the family member on their income tax returns. For purposes of this paragraph (f)(4), any other completed transfer that is reported, in its entirety, as not constituting a transfer by gift will be considered adequately disclosed under paragraph (f)(2) of this section only if the following information is provided on, or attached to, the return—

(i) The information required for adequate disclosure under paragraphs (f)(2)(i), (ii), (iii) and (v) of this section; and

(ii) An explanation as to why the transfer is not a transfer by gift under chapter 12 of the Internal Revenue Code.

(5) *Adequate disclosure of incomplete transfers.* Adequate disclosure of a transfer that is reported as a completed gift on the gift tax return will commence the running of the period of limitations for assessment of gift tax on the transfer, even if the transfer is ultimately determined to be an incomplete gift for purposes of § 25.2511–2 of this chapter. For example, if an incomplete gift is reported as a completed gift on the gift tax return and is adequately disclosed, the period for assessment of the gift tax will begin to run when the return is filed, as determined under section 6501(b). Further, once the period of assessment for gift tax expires, the transfer will be subject to inclusion in the donor's gross estate for estate tax purposes only to the extent that a completed gift would be so included. On the other hand, if the transfer is reported as an incomplete gift whether or not adequately disclosed, the period for assessing a gift tax with respect to the transfer will not commence to run even if the transfer is ultimately determined to be a completed gift. In that situation, the gift tax with respect to the transfer may be assessed at any time, up until three years after the donor files a return reporting the transfer as a completed gift with adequate disclosure.

(6) *Treatment of split gifts.* If a husband and wife elect under section 2513 to treat a gift made to a third party as made one-half by each spouse, the requirements of this paragraph (f) will be satisfied with respect to the gift deemed made by the consenting spouse if the return filed by the donor spouse (the spouse that transferred the property) satisfies the requirements of this paragraph (f) with respect to that gift.

(7) *Examples.* The following examples illustrate the rules of this paragraph (f):

*Example 1.* (i) *Facts.* In 2001, A transfers 100 shares of common stock of XYZ Corporation to A's child. The common stock of XYZ Corporation is actively traded on a major stock exchange. For gift tax purposes, the fair market value of one share of XYZ common stock on the date of the transfer, determined in accordance with § 25.2512–2(b) of this chapter (based on the mean between the highest and lowest quoted selling prices), is $150.00. On A's Federal gift tax return, Form 709, for the 2001 calendar year, A reports the gift to A's child of 100 shares of common stock of XYZ Corporation with a value for gift tax purposes of $15,000. A specifies the date of the transfer, recites that the stock is publicly traded, identifies the stock exchange on which the stock is traded, lists the stock's CUSIP number, and lists the mean between the highest and lowest quoted selling prices for the date of transfer.

(ii) *Application of the adequate disclosure standard.* A has adequately disclosed the transfer. Therefore, the period of assessment for the transfer under section 6501 will run from the time the return is filed (as determined under section 6501(b)).

*Example 2.* (i) *Facts.* On December 30, 2001, A transfers closely-held stock to B, A's child. A determined that the value of the transferred stock, on December 30, 2001, was $9,000. A made no other transfers to B, or any other donee, during 2001. On A's Federal gift tax return, Form 709, for the 2001 calendar year, A provides the information required under paragraph (f)(2) of this section such that the transfer is adequately disclosed. A claims an annual exclusion under section 2503(b) for the transfer.

(ii) *Application of the adequate disclosure standard.* Because the transfer is adequately disclosed under paragraph (f)(2) of this section, the period of assessment for the transfer will expire as prescribed by section 6501(b), notwithstanding that if A's valuation of the closely-held stock was correct, A was not required to file a gift tax return reporting the transfer under section 6019. After the period of assessment has expired on the

transfer, the Internal Revenue Service is precluded from redetermining the amount of the gift for purposes of assessing gift tax or for purposes of determining the estate tax liability. Therefore, the amount of the gift as reported on A's 2001 Federal gift tax return may not be redetermined for purposes of determining A's prior taxable gifts (for gift tax purposes) or A's adjusted taxable gifts (for estate tax purposes).

*Example 3.* (i) *Facts.* A owns 100 percent of the common stock of X, a closely-held corporation. X does not hold an interest in any other entity that is not actively traded. In 2001, A transfers 20 percent of the X stock to B and C, A's children, in a transfer that is not subject to the special valuation rules of section 2701. The transfer is made outright with no restrictions on ownership rights, including voting rights and the right to transfer the stock. Based on generally applicable valuation principles, the value of X would be determined based on the net value of the assets owned by X. The reported value of the transferred stock incorporates the use of minority discounts and lack of marketability discounts. No other discounts were used in arriving at the fair market value of the transferred stock or any assets owned by X. On A's Federal gift tax return, Form 709, for the 2001 calendar year, A provides the information required under paragraph (f)(2) of this section including a statement reporting the fair market value of 100 percent of X (before taking into account any discounts), the pro rata portion of X subject to the transfer, and the reported value of the transfer. A also attaches a statement regarding the determination of value that includes a discussion of the discounts claimed and how the discounts were determined.

(ii) *Application of the adequate disclosure standard.* A has provided sufficient information such that the transfer will be considered adequately disclosed and the period of assessment for the transfer under section 6501 will run from the time the return is filed (as determined under section 6501(b)).

*Example 4.* (i) *Facts.* A owns a 70 percent limited partnership interest in PS. PS owns 40 percent of the stock in X, a closely-held corporation. The assets of X include a 50 percent general partnership interest in PB. PB owns an interest in commercial real property. None of the entities (PS, X, or PB) is actively traded and, based on generally applicable valuation principles, the value of each entity would be determined based on the net value of the assets owned by each entity. In 2001, A transfers a 25 percent limited partnership interest in PS to B, A's child. On the Federal gift tax return, Form 709, for the 2001 calendar year, A reports the transfer of the 25 percent limited partnership interest in PS and that the fair market value of 100 percent of PS is $y and that the value of 25 percent of PS is $z, reflecting marketability and minority discounts with respect to the 25 percent interest. However, A does not disclose that PS owns 40 percent of X, and that X owns 50 percent of PB and that, in arriving at the $y fair market value of 100 percent of PS, discounts were claimed in valuing PS's interest in X, X's interest in PB, and PB's interest in the commercial real property.

(ii) *Application of the adequate disclosure standard.* The information on the lower tiered entities is relevant and material in determining the value of the transferred interest in PS. Accordingly, because A has failed to comply with requirements of paragraph (f)(2)(iv) of this section regarding PS's interest in X, X's interest in PB, and PB's interest in the commercial real property, the transfer will not be considered adequately disclosed and the period of assessment for the transfer under section 6501 will remain open indefinitely.

*Example 5.* The facts are the same as in *Example 4* except that A submits, with the Federal tax return, an appraisal of the 25 percent limited partnership interest in PS that satisfies the requirements of paragraph (f)(3) of this section in lieu of the information required in paragraph (f)(2)(iv) of this section. Assuming the other requirements of paragraph (f)(2) of this section are satisfied, the transfer is considered adequately disclosed and the period for assessment for the transfer under section 6501 will run from the time the return is filed (as determined under section 6501(b) of this chapter).

*Example 6.* A owns 100 percent of the stock of X Corporation, a company actively engaged in a manufacturing business. B, A's child, is an employee of X and receives an annual salary paid in the ordinary course of operating X Corporation. B reports the annual salary as income on B's income tax returns. In 2001, A transfers property to family members and files a Federal gift tax return reporting the transfers. However, A does not disclose the 2001 salary payments made to B. Because the salary payments were reported as income on B's income tax return, the salary payments are deemed to be adequately disclosed. The transfer of property to family members, other than the salary payments to B, reported on the gift tax return must satisfy the adequate disclosure requirements under paragraph (f)(2) of this section in order for the period of assessment under section 6501 to commence to run with respect to those transfers.

(8) *Effective date.* This paragraph (f) is applicable to gifts made after December 31, 1996, for which the gift tax return for such calendar year is filed after December 3, 1999.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7838, 47 FR 44250, Oct. 7, 1982; T.D. 8395, 57 FR 4277, Feb. 4, 1992; T.D. 8845, 64 FR 67771, Dec. 3, 1999; 65 FR 1059, Jan. 7, 2000]

### § 301.6501(d)–1 Request for prompt assessment.

(a) Except as otherwise provided in section 6501 (c), (e), or (f), any tax for which a return is required and for which:

(1) A decedent or an estate of a decedent may be liable, other than the estate tax imposed by chapter 11 of the Code, or

(2) A corporation which is contemplating dissolution, is in the process of dissolution, or has been dissolved, may be liable, shall be assessed, or a proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after the receipt of a written request for prompt assessment thereof.

(b) The executor, administrator, or other fiduciary representing the estate of the decedent, or the corporation, or the fiduciary representing the dissolved corporation, as the case may be, shall, after the return in question has been filed, file the request for prompt assessment in writing with the district director for the internal revenue district in which such return was filed. The request, in order to be effective, must be transmitted separately from any other document, must set forth the classes of tax and the taxable periods for which the prompt assessment is requested, and must clearly indicate that it is a request for prompt assessment under the provisions of section 6501(d). The effect of such a request is to limit the time in which an assessment of tax may be made, or a proceeding in court without assessment for collection of tax may be begun, to a period of 18 months from the date the request is filed with the proper district director. The request does not extend the time within which an assessment may be made, or a proceeding in court without assessment years from the date the return was filed. This special period of limitations will not apply to any return filed after a request for prompt assessment has been made unless an additional request is filed in the manner provided herein.

(c) In the case of a corporation the 18-month period shall not apply unless:

(1) The written request notifies the district director that the corporation contemplates dissolution at or before the expiration of such 18-month period; the dissolution is in good faith begun before the expiration of such 18-month period; and the dissolution so begun is completed either before or after the expiration of such 18-month period; or

(2) The written request notifies the district director that a dissolution has in good faith been begun, and the dissolution is completed either before or after the expiration of such 18-month period; or

(3) A dissolution has been completed at the time the written request is made.

### § 301.6501(e)–1 Omission from return.

(a) *Income taxes*—(1) *General rule.* (i) If the taxpayer omits from the gross income stated in the return of a tax imposed by subtitle A of the Code an amount properly includible therein which is in excess of 25 percent of the gross income so stated, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(ii) For purposes of this subparagraph, the term ''gross income'', as it relates to a trade or business, means the total of the amounts received or accrued from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of such sales or services. An item shall not be considered as omitted from gross income if information, sufficient to apprise the district director of the nature and amount of such item, is disclosed in the return or in any schedule or statement attached to the return.

(2) *Constructive dividends.* If a taxpayer omits from gross income an amount properly includible therein under section 551(b) as his distributive

share of the undistributed foreign personal holding company income, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(b) *Estate and gift taxes.* (1) If the taxpayer omits from the gross estate as stated in the estate tax return, or from the total amount of the gifts made during the period for which the gift tax return was filed (see § 25.6019–1 of this chapter) as stated in such return, an item or items properly includible therein the amount of which is in excess of 25 percent of the gross estate as stated in the return, or 25 percent of the total amount of the gifts as stated in the return, the tax may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return was filed.

(2) For purposes of this paragraph, an item disclosed in the return or in any schedule or statement attached to the return in a manner sufficient to apprise the district director of the nature and amount thereof shall not be taken into account in determining items omitted from the gross estate or total gifts, as the case may be. Further, there shall not be taken into account in computing the 25 percent omission from the gross estate stated in the estate tax return or from the total gifts stated in the gift tax return, any increases in the valuation of assets disclosed on the return.

(c) *Excise taxes*—(1) *In general.* If the taxpayer omits from a return of a tax imposed under a provision of subtitle D an amount properly includable thereon, which amount is in excess of 25 percent of the amount of tax reported thereon, the tax may be assessed or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return was filed. For special rules relating to chapter 41, 42, 43, and 44 taxes, see subparagraphs (2), (3), (4), and (5) of this paragraph.

(2) *Chapter 41 excise taxes.* If an organization discloses an expenditure in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the district director or director of a service center of the existing and nature of such expenditure, the three year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax under chapter 41 arising from such expenditure. If a taxpayer fails to so disclose an expenditure in its return (or in a schedule or statement attached thereto), the tax arising from the expenditure not so disclosed may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(3) *Chapter 42 excise taxes.* (i) If a private foundation omits from its annual return with respect to the tax imposed by section 4940 an amount of tax properly includible therein which is in excess of 25 percent of the amount of tax imposed by section 4940 which is reported on the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. If a private foundation discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising from such income shall be counted as reported on the return in computing whether the foundation has omitted more than 25 percent of the tax reported on its return.

(ii) If a private foundation trust, or other organization (as the case may be) discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the district director or director of a service center of the existence and nature of such item, the three year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax imposed under sections 4941(a), 4942(a), 4943(a), 4944(a), 4945(a), 4951(a), 4952(a), 4953, and 4958 arising from any transaction disclosed by such item. If a private foundation trust, or other organization (as the case may be) fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed or a proceeding in court for the collection of

such tax may be begun without assessment, at any time within 6 years after the return was filed.

(4) *Chapter 43 excise taxes.* If a taxpayer discloses an item in its return (or in a schedule or statement attached thereto) in a manner sufficient to apprise the district director or director of a service center of the existence and nature of such item, the three year limitation on assessment and collection described in section 6501(a) shall apply with respect to any tax imposed under sections 4971(a), 4972, 4973, 4974, and 4975(a) arising from any transaction disclosed by such item. If a taxpayer fails to so disclose an item in its return (or in a schedule or statement attached thereto), the tax arising from any transaction not so disclosed may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. The applicable return for the tax under sections 4971, 4972, 4973 and 4974 is the return designated by the Commissioner for reporting the respective tax. The applicable return for the tax under section 4975 is the return filed by the plan used to report the act giving rise to the tax.

(5) *Chapter 44 excise taxes.* If a real estate investment trust omits from its annual return with respect to the tax imposed by section 4981 an amount of tax properly includible therein which is in excess of 25 percent of the amount of tax imposed by section 4981 which is reported on the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. If a real estate investment trust discloses in its return (or in a schedule or statement attached thereto) the nature, source, and amount of any income giving rise to any omitted tax, the tax arising from such income shall be counted as reported on the return in computing whether the trust has omitted more than 25 percent of the tax reported on its return.

(d) *Exception.* The provisions of this section do not limit the application of section 6501(c).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7238, 37 FR 28741, Dec. 29, 1972; T.D. 7838, 47 FR 44250, Oct. 7, 1982; T.D. 8920, 66 FR 2171, Jan. 10, 2001]

### § 301.6501(f)–1 Personal holding company tax.

If a corporation which is a personal holding company for any taxable year fails to file with its income tax return for such year a schedule setting forth the items of gross income described in section 543(a) received by the corporation during such year, and the names and addresses of the individuals who owned, within the meaning of section 544, at any time during the last half of such taxable year, more than 50 percent in value of the outstanding capital stock of the corporation, the personal holding company tax for such year may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return for such year was filed.

### § 301.6501(g)–1 Certain income tax returns of corporations.

(a) *Trusts or partnerships.* If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A of the Code, and if the taxpayer is later held to be a corporation for the taxable year for which the return was filed, such return shall be deemed to be the return of the corporation for the purpose of section 6501.

(b) *Exempt organizations.* If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if the taxpayer is later held to be a taxable organization for the taxable year for which the return was filed, such return shall be deemed to be the return of the organization for the purpose of section 6501.

(c) *DISC.* If a corporation determines in good faith that it is a DISC (as defined in section 992(a)(1)) for a taxable year and files a return as such pursuant to section 6011(c)(2), and if the corporation is thereafter held to be a corporation which is not a DISC for the

taxable year for which the return was filed, then—

(1) Such return shall be deemed to be the return of the corporation for the purpose of section 6501.

(2) Such return if filed within the time required by section 6072(b) for filing a DISC return shall be deemed to be filed within the time required by section 6072(b) for filing of a return by a corporation which is not a DISC, and

(3) Interest on underpayment and overpayments allowed by chapter 67 of the Code and additions to the tax, additional amounts and assessable penalties allowed by chapter 68 of the Code, when determined by reference to the time for filing of a return, shall be determined by reference to the time required by section 6072(b) for filing of a return by a DISC.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7533, 43 FR 6604, Feb. 15, 1978]

### § 301.6501(h)–1 Net operating loss or capital loss carrybacks.

In the case of a deficiency attributable to the application to the taxpayer of a net operating loss or capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(2)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed. In the case of a deficiency attributable to the application of a net operating loss carryback, such deficiency may be assessed within 18 months after the date on which the taxpayer files in accordance with section 172(b)(3) a copy of the certification (with respect to such taxable year) issued under section 317 of the Trade Expansion Act of 1962, if later than the date prescribed by the preceding sentence.

[T.D. 7301, 39 FR 974, Jan. 4, 1974]

### § 301.6501(i)–1 Foreign tax carrybacks; taxable years beginning after December 31, 1957.

With respect to taxable years beginning after December 31, 1957, a deficiency attributable to the application to the taxpayer of a carryback under section 904(d) (relating to carryback and carryover of excess foreign taxes), may be assessed at any time before the expiration of 1 year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(d) which result in such carryback.

### § 301.6501(j)–1 Investment credit carryback; taxable years ending after December 31, 1961.

With respect to taxable years ending after December 31, 1961, a deficiency attributable to the application to the taxpayer of an investment credit carryback may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused investment credit which results in such carryback may be assessed, or, with respect to any portion of an investment credit carryback from a taxable year attributable to a net operating loss or capital loss carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed. For purposes of this section a deficiency shall include a deficiency which may be assessed pursuant to the provisions of section 6213(b)(2), but only those arising with respect to applications for tentative carryback adjustments filed after November 2, 1966.

[T.D. 7301, 39 FR 975, Jan. 4, 1974]

### § 301.6501(m)–1 Tentative carryback adjustment assessment period.

(a) *Period of limitation after tentative carryback adjustment.* (1) Under section 6501(m), in a case where an amount has been applied, credited, or refunded under section 6411, by reason of a net operating loss carryback, a capital loss carryback, an investment credit carryback, or a work incentive program credit carryback to a prior taxable year, the period described in section 6501(a) of the Code for assessing a deficiency for such prior taxable year is extended to include the period described in section 6501 (h), (j), or (o), whichever is applicable; except that the amount which may be assessed solely by reason of section 6501(m) may

not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be assessed solely by reason of section 6501 (h), (j), or (o), as the case may be.

(2) The application of this paragraph may be illustrated by the following example:

*Example*. Assume that M Corporation, which claims an unused investment credit of $50,000 for the calendar year 1968, files an application under section 6411 of the Code for an adjustment of its tax for 1965, and receives a refund of $50,000 in 1969. In 1971, it is determined that the amount of the unused investment credit for 1968 is $30,000 rather than $50,000. Moreover, it is determined that M Corporation would have owed $40,000 of additional tax for 1965 if it had properly reported certain income which it failed to include in its 1965 return. Assuming that M Corporation filed its 1968 return on March 15, 1969, and that the 3-year period described in section 6501(a) has not been extended, the period prescribed in section 6501(j) for assessing the excessive amount refunded, $20,000 (*i.e.*, $50,000, original amount refunded less $30,000, correct amount of unused investment credit), does not expire until March 15, 1972, and $20,000 may be assessed on or before such date under section 6501(j). Under section 6501(m), M Corporation may be assessed on or before March 15, 1972, an amount not in excess of $30,000 ($50,000, the amount refunded under section 6411, minus $20,000, the amount which may be assessed solely by reason of section 6501 (j)).

(b) *Effective date*. The provisions of paragraph (a) of this section apply only with respect to applications under section 6411 filed after November 2, 1966.

[T.D. 7301, 39 FR 975, Jan. 4, 1974]

### § 301.6501(n)–1 Special rules for chapter 42 and similar taxes.

(a) *Return filed by private foundation, plan, trust, or other organization*. (1) A return filed by a private foundation, plan, trust, or other organization (as the case may be) with respect to any act giving rise to a tax imposed by chapter 42 (other than a tax imposed by section 4940), or by section 4975 shall be considered, for purposes of section 6501, to be the return of all persons required to file a return with respect to any such tax arising from such act, notwithstanding that all such persons have not signed the return. In the case of a private foundation that files a Form 990–PF (or a Form 5227 in the case of a nonexempt foundation described in section 4947(a)(2)), which contains questions with respect to such taxes, the filing of such form by such foundation shall constitute the filing of a return with respect to any such act, even though the foundation incorrectly answered such questions.

(2) For purposes of section 4940, the return referred to in this section is the return filed by the private foundation for the taxable year for which the tax is imposed.

(b) *Failure of private foundation plan, trust, or other organization to file*. The period of limitations on assessment and collection described in section 6501 does not begin with respect to any person liable for tax under chapter 42 (other than section 4940) or section 4975 arising from a given act, where the private foundation, plan, trust, or other organization (as the case may be) has not filed its required return that reports such act for the year in which the act (or failure to act) giving rise to liability for such tax occurred.

(c) *Example*. The provision of this section may be illustrated by the following example:

*Example*. In 1973, D, an individual taxpayer who was a disqualified person under the provisions of section 4946(a)(1), participated in an act of self-dealing with a private foundation and incurred a tax under section 4941(a)(1). On May 15, 1974, the private foundation files a Form 990–PF and answers all the questions thereon with regard to any acts of self-dealing (as defined in section 4941(d)) in which it may have engaged in 1973. Assuming that the foundation's return was not a false or fraudulent return nor made with the willful attempt to defeat tax, the period of limitations on assessment and collection under section 6501(a) shall start with respect to any tax under section 4941(a) or section 4941(b) imposed on D arising out of that transaction with such foundation.

[T.D. 7838, 47 FR 44251, Oct. 7, 1982, as amended by T.D. 8920, 66 FR 2171, Jan. 10, 2001]

### § 301.6501(n)–2 Certain contributions to section 501(c)(3) organizations.

If a private foundation makes a contribution to a section 501(c)(3) organization as provided in section 4942(g)(3), and a deficiency of tax of such foundation occurs due to the failure of the section 501(c)(3) organization to make the distribution prescribed by section

4942(g)(3), then such deficiency may be assessed within one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

[T.D. 7838, 47 FR 44251, Oct. 7, 1982]

### § 301.6501(n)–3 Certain set-asides described in section 4942(g)(2).

Where a deficiency of tax of a private foundation results from the failure of an amount set aside by such foundation for a specific project to be treated as a qualifying distribution under section 4942(g)(2)(B)(ii)(II), such deficiency may be assessed within two years after the expiration of the period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

[T.D. 7838, 47 FR 44251, Oct. 7, 1982]

### § 301.6501(o)–1 Work incentive program credit carrybacks, taxable years beginning after December 31, 1971.

With respect to taxable years beginning after December 31, 1971, a deficiency attributable to the application to the taxpayer of a work incentive program credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(2)) may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused work incentive program credit which results in such carryback may be assessed, or, with respect to any portion of a work incentive program credit carryback from a taxable year attributable to a net operating loss or capital loss carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

[T.D. 7301, 39 FR 975, Jan. 4, 1974]

### § 301.6501(o)–2 Special rules for partnership items of federally registered partnerships.

(a) *In general.* In the case of any tax imposed by subtitle A with respect to any person, the period for assessing a deficiency attributable to any partnership item of a federally registered partnership shall not expire before the later of—

(1) The date which is 4 years after the date on which the return of the federally registered partnership for the partnership taxable year in which the item arose is filed (or, if later, the date prescribed for filing the return), or

(2) If the name or address of the person against whom the assessment is sought does not appear on the return of the federally registered partnership, the date which is 1 year after the date on which a satisfactory identifying statement is furnished in writing to the director of the service center with which the partnership return is filed. A satisfactory identifying statement is a written statement providing the name, address, and taxpayer identification number of both the partner and the partnership. The statement shall note the partnership taxable year for which the statement is furnished.

(b) *''Pass through'' entity as partner.* In the case of a partnership having a ''pass through'' entity (*i.e.*, partnership, electing small business corporation (as defined in section 1371(b)), trust, estate, or nominee) as a partner, the 1 year period described in paragraph (a)(2) of this section shall not begin with respect to the person to be assessed until the chain of ownership linking the taxpayer with the federally registered partnership in which the item originally arose is fully disclosed.

*Example.* Partnership U, a federally registered partnership, has two partners, Partnerships W and X. The partners of W are A and B, who are individuals, and T, a trust whose beneficiaries are individuals C and D. The partners of X are E, an individual, and Partnership Y whose partners are individuals F, G, and H. U and X properly disclose the identity of their partners. W, however, discloses the identity of only A and B, and Y discloses the identity of only F and G. The period of limitation described in paragraph (a) of this section for items attributable to U does not expire with respect to T, C, D, and H until one year after the chain of ownership linking these taxpayers with U is fully disclosed.

(c) *Federally registered partnership*—(1) *In general.* With respect to any partnership taxable year, a federally registered partnership is any partnership—

(i) Interests in which have been offered for sale at any time during the taxable year or a prior taxable year in an offering required to be registered with the Securities and Exchange Commission, or

(ii) Which, at any time during the taxable year or a prior taxable year, was subject to the annual reporting requirements of the Securities and Exchange Commission which relate to the protection of investors in the partnership.

For purposes of the preceding sentence an interest is ''offered for sale'' when it is the subject of an ''offer for sale'' as that term is used in section 2 of the Securities Act of 1933 (15 U.S.C. 77b).

(2) *Certain reporting requirements not taken into account.* A requirement to file reports with the Securities and Exchange Commission for any purpose other than to protect investors does not cause the partnership to be treated as a federally registered partnership. For example, a brokerage firm organized as a partnership is not a federally registered partnership merely because it files reports required by the Commission for regulatory purposes.

(d) *Extension by agreement*—(1) *In general.* Any general partner of a federally registered partnership (or any other person authorized by the partnership) may, prior to the expiration of the limitation period described in paragraph (a) of this section, extend the period for assessing a deficiency attributable to a partnership item for any period of time agreed upon in writing. The extension shall become effective when the agreement has been executed by the district director or the service center director and shall be binding on all persons whose liability for tax imposed by subtitle A is affected in whole or in part by partnership items flowing from the partnership.

(2) *Authorization of other persons.* The partnership may authorize persons other than the general partners to extend the period of limitation for assessing a deficiency attributable to a partnership item. This authorization shall be in writing, shall clearly identify the person being authorized and the action being authorized, and shall be signed by all the general partners. The authorization shall become effective when filed with the district director and shall remain in effect until a written revocation signed as provided in the preceding sentence is filed.

(3) *Removing authority of general partners.* A partnership wishing to deny to some or all of the general partners the authority to execute an agreement extending the period of limitation for assessment may do so by submitting a written statement to that effect. The statement shall either identify the partners exclusively authorized to execute such an agreement or declare that one or more named partners or all partners lack the authority to execute such an agreement. The statement shall be signed by all the general partners. The statement shall become effective when filed with the district director and shall remain in effect until a statement revoking or superseding it and signed as provided in the preceding sentence is filed.

(e) *Special period of limitation with respect to carryback of net operating loss, capital, loss, etc.* The provisions of section 6501(o) must also be taken into account in applying the various special periods of limitation prescribed in sections 6501 (h), (i) and (j). Thus, to the extent that a carryback is attributable to a partnership item of a federally registered partnership, the period for assessing a deficiency attributable to that carryback shall not expire before the date determined under paragraph (a) of this section with respect to the partnership taxable year in which the item arose.

(f) *Otherwise applicable limitation period.* The special provisions of section 6501(o) and this section do not terminate any otherwise applicable period for assessing a deficiency. Thus, the fact that more than 4 years have elapsed since the filing of the partnership return for the year in issue does not prevent assessment against a partner based on partnership items if an otherwise applicable period of limitation for the partner has not yet expired

*Example.* Partnership V files its return for the taxable year ending December 31, 1980, on April 15, 1981. A, a partner in Partnership V, agrees to extend the assessment period for A's taxable year ending December 31, 1980, until September 30, 1985. The partnership does not agree to any extension under section 6501(o)(3) so that the period for assessing

a deficiency attributable to partnership items could expire on April 15, 1985. A deficiency may be assessed against A for 1980 at any time prior to October 1, 1985, even if that deficiency is based on partnership items.

(g) *Effective date.* This section and § 301.6501(o)–3 are effective generally for partnership items arising in partnership taxable years beginning after December 31, 1978 and before September 4, 1982. This section shall not apply, however, to any partnership taxable year with respect to which the amendments made to Code section 6501(o) by section 402 of the Tax Equity and Fiscal Responsibility Act of 1982 are effective. See section 407(a)(3) of that Act.

(Sec. 6501(o) (as it read before the enactment of the Tax Equity and Fiscal Responsibility Act of 1982) and 7805 of the Internal Revenue Code of 1954 (92 Stat. 2818, 26 U.S.C. 6501(o); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7884, 48 FR 16242, Apr. 15, 1983]

### § 301.6501(o)–3 Partnership items.

(a) *Partnership item defined.* For purposes of section 6501(o) (as it read before the enactment of the Tax Equity and Fiscal Responsibility Act of 1982), § 301.6501(o)–2, and § 301.6511(g)–1, the term ''partnership item'' means—

(1) Any item required to be taken into account for the partnership taxable year under any provision of subchapter K of chapter 1 of the Code, to the extent that the item is designated in paragraph (b) of this section as more appropriately determined at the partnership level than at the partner level, and

(2) Any other item to the extent affected by an item described in paragraph (b) of this section.

The items described in paragraph (a)(2) of this section include items related to the partnership (for example, a partner's basis in the partnership interest) as well as more general items whose computation may be affected by changes to items described in paragraph (b) of this section (for example, adjusted gross income, self-employment tax, income averaging, medical deduction, and charitable contribution deduction).

(b) *Items more appropriately determined at the partnership level.* The following items which are required to be taken into account for the taxable year of a partnership under subchapter K of chapter 1 of the Code are more appropriately determined at the partnership level than at the partner level:

(1) The partnership aggregate and each partner's share of each of the following:

(i) Items of income, gain, loss, deduction, or credit of the partnership;

(ii) Expenditures by the partnership not deductible in computing its taxable income (for example, foreign taxes and charitable contributions);

(iii) Items of the partnership which may be tax preference items under section 57(a) for any partner;

(iv) Income of the partnership exempt from tax;

(v) Partnership liabilities (including determinations with respect to the amount of the liabilities, whether the liabilities are nonrecourse, and changes from the preceding taxable year); and

(vi) Other amounts with respect to partnership investments, transactions, and operations necessary to enable partners to compute—

(A) The credit provided by section 38;

(B) Recapture under section 47 of the credit provided by section 38,

(C) Their amounts at risk in any activity to which section 465 applies, and

(D) The depletion allowance under section 613A with respect to oil and gas wells;

(2) Guaranteed payments;

(3) Optional adjustments to the basis of partnership property pursuant to an election under section 754 (including necessary preliminary determinations, such as the determination of a transferee partner's basis in a partnership interest); and

(4) To the extent that the determination can be made from determinations that are necessary at the partnership level with respect to an amount, the character of an amount, or the percentage interest of a partner in the partnership for purposes of the partnership books and records or for purposes of furnishing information to a partner—

(i) Contributions to the partnership;

(ii) Distributions from the partnership;

(iii) Amounts to be taken into account by a partner dealing with the partnership in a transaction to which

section 707(a) applies (including the application of section 707(b));

(iv) The application to the distributee partner of section 751(b); and

(v) The application to the transferor partner of section 751(a).

(c) *Illustrations*. This paragraph (c) illustrates the provisions of paragraph (b)(4) of this section. The factors enumerated are not exhaustive; there may be additional partnership-level determinations with respect to a determination listed in paragraph (b)(4) of this section.

(1) *Contributions*. For purposes of its books and records, or for purposes of furnishing information to a partner, the partnership needs to determine:

(i) The character of an amount received from a partner (for example, whether it is a contribution, a loan, or a repayment of a loan);

(ii) The amount of money contributed by a partner;

(iii) The applicability of the investment company rules of section 721(b) with respect to a contribution; and

(iv) The basis to the partnership of contributed property. To the extent that a determination with respect to a contribution can be made from these and similar partnership-level determinations, therefore, the determination is more appropriately made at the partnership level. To the extent that that determination requires other information, however, that determination is more appropriately made at the partner level. For example, it may be necessary to determine whether the contribution of the property causes recapture from the contributing partner of the credit provided under section 38 in certain circumstances in which that determination is irrelevant to the partnership.

(2) *Distribution*. For purposes of its books and records, or for purposes of furnishing information to a partner, the partnership needs to determine:

(i) The charter of an amount transferred to a partner (for example, whether it is a distribution, a loan, or a repayment of a loan);

(ii) The amount of money distributed to a partner;

(iii) The adjusted basis to the partnership of distributed property; and

(iv) The character of partnership property (for example, whether an item is inventory or a capital asset). To the extent that a determination with respect to a distribution can be made from these and similar partnership-level determinations, therefore, the determination is more appropriately made at the partnership level. To the extent that that determination requires other information, however, that determination is more appropriately made at the partnership level. Such other information would include certain factors used in determining the partner's basis for the partnership interest, such as the amount that the partner paid to acquire the partnership interest from a transferor partner if that transfer was not covered by an election under section 754.

(3) *Transactions to which section 707(a) applies*. For purposes of its books and records, the partnership needs to determine:

(i) The amount transferred from the partnership to a partner or from a partner to the partnership in any transaction to which section 707(a) applies;

(ii) The character of such an amount (for example, whether or not it is a loan; in the case of amounts paid over time for the purchase of an asset, what portion is interest); and

(iii) The percentage of the capital interests and profits interests in the partnership owned by each partner.

To the extent that a determination with respect to a transaction to which section 707(a) applies can be made from these and similar partnership-level determinations, therefore, that determination is more appropriately made at the partnership level. To the extent that the determination requires other information, however, that determination is more appropriately made at the partner level. Examples of such other information are the cost to the partner of goods sold to the partnership and the extent to which the partner may be treated under section 267(c) as the constructive owner of a capital or profits interest actually owned by another.

(4) *Application of section 751*. For purposes of its books and records, or for purposes of furnishing information to a

partner for use in applying section 751, the partnership needs to determine:

(i) The fair market value and adjusted basis of the partnership's—

(A) Unrealized receivables (within the meaning of section 751(c)),

(B) Substantially appreciated inventory (within the meaning of section 751(d)), and

(C) Other property;

(ii) A partner's share of each of the classes of assets described in paragraph (c)(3)(i) of this section; and

(iii) Whether a distribution to a partner is a disproportionate distribution subject to section 751(b).

To the extent that a determination with respect to the application of section 751 can be made from these and similar partnership-level determinations, therefore, that determination is more appropriately made at the partnership level. To the extent that the determination requires other information, however, that determination is more appropriately made at the partner level. An example of such other information is the amount realized by a partner on the sale of a partnership interest.

(Sec. 6501(o) (as it read before the enactment of the Tax Equity and Fiscal Responsibility Act of 1982) and 7805 of the Internal Revenue Code of 1954 (92 Stat. 2818, 26 U.S.C. 6501(o); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7884, 48 FR 16243, Apr. 15, 1983]

### § 301.6502–1 Collection after assessment.

(a) *General rule*. In any case in which a tax has been assessed within the applicable statutory period of limitations on assessment, a proceeding in court to collect the tax may be commenced, or a levy to collect the tax may be made, within 10 years after the date of assessment.

(b) *Agreement to extend the period of limitations on collection*. The Secretary may enter into an agreement with a taxpayer to extend the period of limitations on collection in the following circumstances:

(1) *Extension agreement entered into in connection with an installment agreement*. If the Secretary and the taxpayer enter into an installment agreement for the tax liability prior to the expiration of the period of limitations on collection, the Secretary and the taxpayer, at the time the installment agreement is entered into, may enter into a written agreement to extend the period of limitations on collection to a date certain. A written extension agreement entered into under this paragraph shall extend the period of limitations on collection until the 89th day after the date agreed upon in the written agreement.

(2) *Extension agreement entered into in connection with the release of a levy under section 6343*. If the Secretary has levied on any part of the taxpayer's property prior to the expiration of the period of limitations on collection and the levy is subsequently released pursuant to section 6343 after the expiration of the period of limitations on collection, the Secretary and the taxpayer, prior to the release of the levy, may enter into a written agreement to extend the period of limitations on collection to a date certain. A written extension agreement entered into under this paragraph shall extend the period of limitations on collection until the date agreed upon in the extension agreement.

(c) *Proceeding in court for the collection of the tax*. If a proceeding in court for the collection of a tax is begun within the period provided in paragraph (a) of this section (or within any extended period as provided in paragraph (b) of this section), the period during which the tax may be collected by levy is extended until the liability for the tax or a judgment against the taxpayer arising from the liability is satisfied or becomes unenforceable.

(d) *Effect of statutory suspensions of the period of limitations on collection if executed collection extension agreement is in effect*. (1) Any statutory suspension of the period of limitations on collection tolls the running of the period of limitations on collection, as extended pursuant to an executed extension agreement under paragraph (b) of this section, for the amount of time set forth in the relevant statute.

(2) The following example illustrates the principle set forth in this paragraph (d):

*Example*. In June of 2003, the Internal Revenue Service (IRS) enters into an installment agreement with the taxpayer to provide for periodic payments of the taxpayer's timely assessed tax liabilities. At the time the installment agreement is entered into, the taxpayer and the IRS execute a written agreement to extend the period of limitations on collection. The extension agreement executed in connection with the installment agreement operates to extend the period of limitations on collection to the date agreed upon in the extension agreement, plus 89 days. Subsequently, and prior to the expiration of the extended period of limitations on collection, the taxpayer files a bankruptcy petition under chapter 7 of the Bankruptcy Code and receives a discharge from bankruptcy a few months later. Assuming the tax is not discharged in the bankruptcy, section 6503(h) of the Internal Revenue Code operates to suspend the running of the previously extended period of limitations on collection for the period of time the IRS is prohibited from collecting due to the bankruptcy proceeding, and for 6 months thereafter. The new expiration date for the IRS to collect the tax is the date agreed upon in the previously executed extension agreement, plus 89 days, plus the period during which the IRS is prohibited from collecting due to the bankruptcy proceeding, plus 6 months.

(e) *Date when levy is considered made*. The date on which a levy on property or rights to property is considered made is the date on which the notice of seizure required under section 6335(a) is given.

(f) *Effective date*. This section is applicable on September 6, 2006.

[T.D. 9284, 71 FR 52445, Sept. 6, 2006]

### § 301.6503(a)–1 Suspension of running of period of limitation; issuance of statutory notice of deficiency.

(a) *General rule*. (1) Upon the mailing of a notice of deficiency for income, estate, gift, chapter 41, 42, 43, or 44 tax under the provisions of section 6212, the period of limitation on assessment and collection of any deficiency is suspended for 90 days after the mailing of a notice of such deficiency if the notice of deficiency is addressed to a person within the States of the Union and the District of Columbia, or 150 days if such notice of deficiency is addressed to a person outside the States of the Union and the District of Columbia (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th or 150th day), plus an additional 60 days thereafter in either case. If a proceeding in respect of the deficiency is placed on the docket of the Tax Court, the period of limitation is suspended until the decision of the Tax Court becomes final, and for an additional 60 days thereafter. If a notice of deficiency is mailed to a taxpayer within the period of limitation and the taxpayer does not appeal therefrom to the Tax Court, the notice of deficiency so given does not suspend the running of the period of limitation with respect to any additional deficiency shown to be due in a subsequent deficiency notice.

(2) This paragraph may be illustrated by the following example:

*Example*. A taxpayer filed a return for the calendar year 1973 on April 15, 1974; the notice of deficiency was mailed to him (at an address within the United States) on April 15, 1977; and he filed a petition with the Tax Court on July 14, 1977. The decision of the Tax Court became final on November 6, 1978. The running of the period of limitation for assessment is suspended from April 15, 1977, to January 5, 1979, which date is 60 days after the date (November 6, 1978), on which the decision became final. If in this example the taxpayer had failed to file a petition with the Tax Court, the running of the period of limitation for assessment would then be suspended from April 15, 1977 (the date of notice), to September 12, 1977 (that is, for the 90-day period in which he could file a petition with the Tax Court, and for 60 days thereafter).

(3) For provisions relating to suspension of the running of the period of limitation with respect to collection of ''second tier'' excise taxes (as defined in section 4963) until final resolution of a refund proceeding described in sections 4961 and 7422 for the determination of the taxpayer's liability for the second tier taxes, see § 53.4961–2 (e)(4).

(b) *Corporations joining in consolidated return*. If a notice under section 6212(a) with respect to a deficiency in tax imposed by subtitle A of the Code for any taxable year is mailed to a corporation, the suspension of the running of the period of limitation provided in section 6503(a)(1) shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year. Under § 1.1502–

77(a) of this chapter (Income Tax Regulations), relating to consolidated returns, notices of deficiency are mailed only to the common parent.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7244, 37 FR 28898, Dec. 30, 1972; T.D. 7838, 47 FR 44251, Oct. 7, 1982; T.D. 8084, 51 FR 16305, May 2, 1986]

### § 301.6503(b)–1 Suspension of running of period of limitation; assets of taxpayer in control or custody of court.

Where all or substantially all of the assets of a taxpayer are in the control or custody of the court in any proceeding before any court of the United States, or of any State of the United States, or of the District of Columbia, the period of limitations on collection after assessment prescribed in section 6502 is suspended with respect to the outstanding amount due on the assessment for the period such assets are in the control or custody of the court, and for 6 months thereafter. In the case of an estate of a decedent or an incompetent, the period of limitations on collection is suspended only for periods beginning after November 2, 1966, during which assets are in the control or custody of a court, and for 6 months thereafter.

[T.D. 7121, 36 FR 10782, June 3, 1971]

### § 301.6503(c)–1 Suspension of running of period of limitation; location of property outside the United States or removal of property from the United States; taxpayer outside of United States.

(a) *Property located outside, or removed from, the United States prior to November 3, 1966.* The running of the period of limitations on collection after assessment prescribed in section 6502 is suspended for the period of time, prior to November 3, 1966, that collection is hindered or delayed because property of the taxpayer is situated or held outside the United States or is removed from the United States. The total suspension of time under this provision shall not in the aggregate exceed 6 years. In any case in which the district director determines that collection is so hindered or delayed, he shall make and retain in the files of his office a written report which shall identify the taxpayer and the tax liability, shall show what steps were taken to collect the tax liability, shall state the grounds for his determination that property of the taxpayer is situated or held outside, or is removed from, the United States, and shall show the date on which it was first determined that collection was so hindered or delayed. The term ''property'' includes all property or rights to property, real or personal, tangible or intangible, belonging to the taxpayer. The suspension of the running of the period of limitations on collection shall be considered to begin on the date so determined by the district director. A copy of the report shall be mailed to the taxpayer at his last known address. For further guidance regarding the definition of last known address, see § 301.6212–2.

(b) *Taxpayer outside United States after November 2, 1966.* The running of the period of limitations on collection after assessment prescribed in section 6502 (relating to collection after assessment) is suspended for the period after November 2, 1966, during which the taxpayer is absent from the United States if such period is a continuous period of absence from the United States extending for 6 months or more. In a case where the running of the period of limitations has been suspended under the first sentence of this paragraph and at the time of the taxpayer's return to the United States the period of limitations would expire before the expiration of 6 months from the date of his return, the period of limitations shall not expire until after 6 months from the date of the taxpayer's return. The taxpayer will be deemed to be absent from the United States for purposes of this section if he is generally and substantially absent from the United States, even though he makes casual temporary visits during the period.

[T.D. 7121, 36 FR 10782, June 3, 1971, as amended by T.D. 8939, 66 FR 2821, Jan. 12, 2001]

### § 301.6503(d)–1 Suspension of running of period of limitation; extension of time for payment of estate tax.

Where an estate is granted an extension of time as provided in section 6161 (a)(2) or (b)(2), or under the provisions

of section 6166, for payment of any estate tax, the running of the period of limitations for collection of such tax is suspended for the period of time for which the extension is granted.

### § 301.6503(e)–1 Suspension of running of period of limitation; certain powers of appointment.

Where the estate of a decedent is allowed an estate tax charitable deduction under the provisions of section 2055(b)(2) (with respect to property over which the decedent's surviving spouse was given a power of appointment exercisable in favor of charitable organizations) subject to the later disallowance of the deduction if all conditions set forth in section 2055(b)(2) are not complied with, the running of the period of limitation for assessment or collection of any estate tax imposed on the decedent's estate is suspended until 30 days after the expiration of the period for assessment or collection of the estate tax imposed on the estate of the decedent's surviving spouse.

### § 301.6503(f)–1 Suspension of running of period of limitation; wrongful seizure of property of third party.

The running of the period of limitations on collection after assessment prescribed in section 6502 (relating to collection after assessment) shall be suspended for a period equal to a period beginning on the date property (including money) is wrongfully seized or received by a district director and ending on the date 30 days after the date on which the district director returns the property pursuant to section 6343(b) (relating to authority to return property) or the date 30 days after the date on which a judgment secured pursuant to section 7426 (relating to civil actions by persons other than taxpayers) with respect to such property becomes final. The running of the period of limitations on collection after assessment shall be suspended under this section only with respect to the amount of such assessment which is equal to the amount of money or the value of specific property returned. This section applies in the case of property wrongfully seized or received after November 2, 1966.

*Example.* On June 1, 1968 (at which time 10 months remain before the period of limitations on collection after assessment will expire), the district director wrongfully seizes $1,000 in B's account in Bank X and properly seizes $500 in taxpayer A's account in Bank Y in an attempt to satisfy A's assessed tax liability of $1,500. The district director determines that the $1,000 seized in Bank X was not the property of taxpayer A and, on March 1, 1969, he returns the $1,000 to B. As a result of the wrongful seizure, the running of the period of limitations on collection after assessment of the amount owed by taxpayer A is suspended for the 9-month period (beginning June 1, 1968, when the money was wrongfully seized and ending March 1, 1969, when the money was returned to B), plus 30 days. Therefore, the period of limitations on collection after assessment prescribed in section 6502 will not expire until February 1, 1970, which is 10 months plus 30 days after the money was returned.

[T.D. 7121, 36 FR 10783, June 3, 1971. Redesignated by T.D. 7838, 47 FR 44252, Oct. 7, 1982]

### § 301.6503(g)–1 Suspension pending correction.

The running of the periods of limitations provided in sections 6501 and 6502 on the making of assessments, the collection by levy, or a proceeding in court in respect of any tax imposed by chapter 42 or section 507, 4971, or 4975 shall be suspended for any period described in section 507(g)(2) or during which the Commissioner has extended the time for making correction under section 4963(e)(1)(B).

[T.D. 7838, 47 FR 44252, Oct. 7, 1982, as amended by T.D. 8084, 51 FR 16305, May 2, 1986]

## LIMITATIONS ON CREDIT OR REFUND

### § 301.6511(a)–1 Period of limitation on filing claim.

(a) In the case of any tax (other than a tax payable by stamp):

(1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later.

(2) If no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

(b) In the case of any tax payable by means of a stamp, a claim for credit or

refund of an overpayment of such tax must be filed by the taxpayer within 3 years from the time the tax was paid. For provisions relating to redemption of unsued stamps, see section 6805.

(c) For limitations on allowance of credit or refund, special rules, and exceptions, see subsections (b) through (e) of section 6511. For limitations in the case of a petition to the Tax Court, see section 6512. For rules as to time return is deemed filed and tax considered paid, see section 6513.

### § 301.6511(b)–1 Limitations on allowance of credits and refunds.

(a) *Effect of filing claim.* Unless a claim for credit or refund of an overpayment is filed within the period of limitation prescribed in section 6511(a), no credit or refund shall be allowed or made after the expiration of such period.

(b) *Limit on amount to be credited or refunded.* (1) In the case of any tax (other than a tax payable by stamp):

(i) If a return was filed, and a claim is filed within 3 years from the time the return was filed, the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

(ii) If a return was filed, and a claim is filed after the 3-year period described in subdivision (i) of this subparagraph but within 2 years from the time the tax was paid, the amount of the credit or refund shall not exceed the portion of the tax paid within the 2 years immediately preceding the filing of the claim.

(iii) If no return was filed, but a claim is filed, the amount of the credit or refund shall not exceed the portion of the tax paid within the 2 years immediately preceding the filing of the claim.

(iv) If no claim is filed, the amount of the credit or refund allowed or made by the district director or the director of the regional service center shall not exceed the amount that would have been allowable under the preceding subdivisions of this subparagraph if a claim had been filed on the date the credit or refund is allowed.

(2) In the case of a tax payable by stamp:

(i) If a claim is filed, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(ii) If no claim is filed, the amount of the credit or refund allowed or made by the district director or the director of the regional service center shall not exceed the portion of the tax paid within the 3 years immediately preceding the allowance of the credit or refund.

For provisions relating to redemption of unused stamps, see section 6805.

### § 301.6511(c)–1 Special rules applicable in case of extension of time by agreement.

(a) *Scope.* If, within the period prescribed in section 6511(a) for the filing of a claim for credit or refund, an agreement extending the period for assessment of a tax has been made in accordance with the provisions of section 6501(c)(4), the special rules provided in this section become applicable. This section shall not apply to any claim filed, or credit or refund allowed if no claim is filed, either (1) prior to the execution of an agreement extending the period in which assessment may be made, or (2) more than 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof.

(b) *Period in which claim may be filed.* Claim for credit or refund of an overpayment may be filed, or credit or refund may be allowed if no claim is filed, at any time within which an assessment may be made pursuant to an agreement, or any extension thereof, under section 6501(c)(4), and for 6 months thereafter.

(c) *Limit on amount to be credited or refunded.* (1) If a claim is filed within the time prescribed in paragraph (b) of this section, the amount of the credit or refund allowed or made shall not exceed the portion of the tax paid after the execution of the agreement and before the filing of the claim, plus the amount that could have been properly credited or refunded under the provisions of section 6511(b)(2) if a claim had been filed

on the date of the execution of the agreement.

(2) If no claim is filed, the amount of credit or refund allowed or made within the time prescribed in paragraph (b) of this section shall not exceed the portion of the tax paid after the execution of the agreement and before the making of the credit or refund, plus the amount that could have been properly credited or refunded under the provisions of section 6511(b)(2) if a claim had been filed on the date of the execution of the agreement.

(d) *Effective date of agreement.* The agreement referred to in this section shall become effective when signed by the taxpayer and the district director or an assistant regional commissioner.

**§ 301.6511(d)–1 Overpayment of income tax on account of bad debts, worthless securities, etc.**

(a)(1) If the claim for credit or refund relates to an overpayment of income tax on account of—

(i) The deductibility by the taxpayer, under section 166 or section 832(c), of a debt as a debt which became worthless, or, under section 165(g), of a loss from the worthlessness of a security, or

(ii) The effect that the deductibility of a debt or loss described in subdivision (i) of this subparagraph has on the application to the taxpayer of a carryover, then in lieu of the 3-year period from the time the return was filed in which claim may be filed or credit or refund allowed, as prescribed in section 6511 (a) or (b), the period shall be 7 years from the date prescribed by law for filing the return (determined without regard to any extension of time for filing such return) for the taxable year for which the claim is made or the credit or refund allowed or made.

(2) If the claim for credit or refund relates to an overpayment on account of the effect that the deductibility of a debt or loss, described in subparagraph (1) of this paragraph (a), has on the application to the taxpayer of a net operating loss carryback provided in section 172(b), the period in which claim for credit or refund may be filed shall be whichever of the following two periods expires later:

(i) Seven years from the last date prescribed for filing the return (determined without regard to any extension of time for filing such return) for the taxable year of the net operating loss which results in such carryback, or

(ii) The period which ends with the expiration of the period prescribed in section 6511(c) within which a claim for credit or refund may be filed with respect to the taxable year of the net operating loss which resulted in the carryback.

(3) In the case of a claim for credit or refund involving items described in this section, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 6511 (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the deductibility of items described in subparagraph (1) of this paragraph (a). If the claim involves an overpayment based not only on the deductibility of items described in subparagraph (1) of this paragraph (a), but based also on other items, the credit or refund cannot exceed the sum of the following:

(i) The amount of the overpayment which is attributable to the deductibility of items described in subparagraph (1) of this paragraph (a), and

(ii) The balance of such overpayment up to a limit of the portion, if any, of the tax paid within the period provided in section 6511 (b)(2) or (c), or within the period provided in any other applicable provision of law.

(4) If the claim involves an overpayment based not only on the deductibility of items described in subparagraph (1) of this paragraph (a), but based also on other items, and if the claim with respect to any items is barred by the expiration of any applicable period of limitation, the portion of the overpayment attributable to the items not so barred shall be determined by treating the allowance of such items as the first adjustment to be made in computing such overpayment.

(b) If a claim for credit or refund is not filed within the applicable period described in paragraph (a) of this section, then credit or refund may be allowed or made only if claim therefor is filed or if such credit or refund is allowed within any period prescribed in section 6511 (a), (b), or (c), whichever is applicable, subject to the provisions

thereof limiting the amount of credit or refund in the case of a claim filed, or, if no claim was filed, in the case of credit or refund allowed within such applicable period as prescribed in section 6511 (b) or (c).

(c) The provisions of this section and section 6511(d)(1) do not apply to an overpayment resulting from the deductibility of a debt that became partially worthless during the taxable year, but only to an overpayment resulting from the deductibility of a debt which became entirely worthless during such year.

(d) The provisions of paragraph (a) of this section with regard to an overpayment caused by the deductibility of a bad debt under section 166 or section 832(c), or of a loss from the worthlessness of a security under section 165(g), are likewise applicable to an overpayment caused by the effect that the deductibility of such bad debt or loss has on the application to the taxpayer of a carryover or of a carryback.

### § 301.6511(d)–2 Overpayment of income tax on account of net operating loss or capital loss carrybacks.

(a) *Special period of limitation.* (1) If the claim for credit or refund relates to an overpayment of income tax attributable to a net operating loss carryback (provided in section 172(b)), or a capital loss carryback (provided in section 1212(a)), then in lieu of the 3-year period from the time the return was filed in which the claim may be filed or credit or refund allowed, as prescribed in section 6511 (a) or (b), the period shall be whichever of the following two periods expires later:

(i) The period which ends with the expiration of the 15th day of the 40th month (or 39th month, in the case of a corporation) following the end of the taxable year of the net operating loss or net capital loss which resulted in the carryback; or

(ii) The period which ends with the expiration of the period prescribed in section 6511(c) within which a claim for credit or refund may be filed with respect to the taxable year of the net operating loss or net capital loss which resulted in the carryback except that—

(*a*) With respect to an overpayment attributable to a net operating loss carryback to any year on account of a certification issued to the taxpayer under section 317 of the Trade Expansion Act of 1962, the period shall not expire before the expiration of the sixth month following the month in which such certification is issued to the taxpayer, and

(*b*) With respect to an overpayment attributable to the creation of, or an increase in, a net operating loss as a result of the elimination of excessive profits by a renegotiation (as defined in section 1481(a)(1)(A)), the period shall not expire before September 1, 1959, or the expiration of the 12th month following the month in which the agreement or order for the elimination of such excessive profits becomes final, whichever is the later.

(2) In the case of a claim for credit or refund involving a net operating loss or capital loss carryback described in subparagraph (1) of this paragraph (a), the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 6511 (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the carryback. If the claim involves an overpayment based not only on a net operating loss or capital loss carryback described in subparagraph (1) of this paragraph (a), but based also on other items, the credit or refund cannot exceed the sum of the following:

(i) The amount of the overpayment which is attributable to the net operating loss or capital loss carryback, and

(ii) The balance of such overpayment up to a limit of the portion, if any, of the tax paid within the period provided in section 6511 (b)(2) or (c), or within the period provided in any other applicable provision of law.

(3) If the claim involves an overpayment based not only on a net operating loss or capital loss carryback described in subparagraph (1) of this paragraph (a), but based also on other items, and if the claim with respect to any items is barred by the expiration of any applicable period of limitation, the portion of the overpayment attributable to the items not so barred shall be determined by treating the allowance of such items as the first adjustment to

be made in computing such overpayment. If a claim for credit or refund is not filed, and if credit or refund is not allowed, within the period prescribed in this paragraph, then credit or refund may be allowed or made only if claim therefor is filed, or if such credit or refund is allowed, within the period prescribed in section 6511 (a), (b), or (c), whichever is applicable, subject to the provisions thereof limiting the amount of credit or refund in the case of a claim filed, or if no claim was filed, in case of credit or refund allowed, within such applicable period. For the limitations on the allowance of interest for an overpayment where credit or refund is subject to the provisions of this section, see section 6611(f).

(b)(1) *Barred overpayments.* If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback or capital loss carryback is otherwise prevented by the operation of any law or rule of law (other than section 7122, relating to compromises), such credit or refund may be allowed or made under the provisions of section 6511(d)(2)(B) if a claim therefor is filed within the period provided by section 6511(d)(2)(A) and paragraph (a) of this section for filing a claim for credit or refund of an overpayment attributable to a carryback. Similarly, if the allowance of an application, credit, or refund of a decrease in the tax determined under section 6411(b) is otherwise prevented by the operation of any law or rule of law (other than section 7122), such application, credit, or refund may be allowed or made if an application for a tentative carryback adjustment is filed within the period provided in section 6411(a). Thus, for example, even though the tax liability (not including the net operating loss deduction or capital loss carryback (or the effect of such deduction or carryback)) for a given taxable year has previously been litigated before the Tax Court, credit or refund of an overpayment may be allowed or made despite the provisions of section 6512(a), if claim for such credit or refund is filed within the period provided in section 6511(d)(2)(A) and paragraph (a) of this section. In the case of a claim for credit or refund of an overpayment attributable to a carryback, or in the case of an application for a tentative carryback adjustment, the determination of any court, including the Tax Court, in any proceeding in which the decision of the court has become final, shall be conclusive except with respect to the net operating loss deduction, and the effect of such deduction, or with respect to the determination of a short-term capital loss, and the effect of such short-term capital loss, to the extent that such deduction or short-term capital loss is affected by a carryback which was not in issue in such proceeding.

(2) For purposes of the special period of limitation for filing a claim for credit or refund of an overpayment of tax with respect to a computation year (as defined in section 1302(c)(1)) by an individual who has chosen to compute his tax under sections 1301 through 1305 (relating to income averaging), such claim is determined to relate to an overpayment attributable to a net operating loss carryback when such carryback relates to any base period year (as defined in section 1302(c)(3)). Thus, if (i) an individual has a net operating loss for a taxable year subsequent to a taxable year for which he had chosen the benefits of income averaging, and (ii) such net operating loss carryback is wholly utilized in any one or more of his base period years (which would result in an increased amount of averageable income for such computation year), the special period of limitation with respect to such individual's computation year applies and a timely claim for credit or refund with respect to the computation year may be filed.

[T.D. 7196, 37 FR 13691, July 13, 1972, and T.D. 7301, 39 FR 976, Jan. 4, 1974]

### § 301.6511(d)–3 Special rules applicable to credit against income tax for foreign taxes.

(a) *Period in which claim may be filed.* In the case of an overpayment of income tax resulting from a credit, allowed under the provisions of section 901 or under the provisions of any treaty to which the United States is a party, for taxes paid or accrued to a foreign country or possession of the United States, a claim for credit or refund must be filed by the taxpayer

within 10 years from the last date prescribed for filing the return (determined without regard to any extension of time for filing such return) for the taxable year with respect to which the claim is made. Such 10-year period shall be applied in lieu of the 3-year period prescribed in section 6511(a).

(b) *Limit on amount to be credited or refunded.* In the case of a claim described in paragraph (a) of this section, the amount of the credit or refund allowed or made may exceed the portion of the tax paid within the period prescribed in section 6511 (b) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the allowance of a credit against income tax referred to in paragraph (a) of this section.

### § 301.6511(d)–4 Overpayment of income tax on account of investment credit carryback.

(a) *Special period of limitation.* (1) If the claim for credit or refund relates to an overpayment of income tax attributable to an investment credit carryback, provided in section 46(b), then in lieu of the 3-year period from the time the return was filed in which the claim may be filed or credit or refund allowed, as prescribed in section 6511 (a) or (b), the period shall be whichever of the following 2 periods expires later:

(i) The period which ends with the expiration of the 15th day of the 40th month (or 39th month, in the case of a corporation) following the end of the taxable year of the unused investment credit which resulted in the carryback (or, with respect to any portion of an investment credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, the period which ends with the expiration of the 15th day of the 40th month (or 39th month, in the case of a corporation) following the end of such subsequent taxable year); or

(ii) The period which ends with the expiration of the period prescribed in section 6511(c) within which a claim for credit or refund may be filed with respect to the taxable year of the unused investment credit which resulted in the carryback.

(2) In the case of a claim for credit or refund involving an investment credit carryback described in subparagraph (1) of this paragraph, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 6511 (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the carryback. If the claim involves an overpayment based not only on an investment credit carryback described in subparagraph (1) of this paragraph (a), but based also on other items, the credit or refund cannot exceed the sum of the following:

(i) The amount of the overpayment which is attributable to the investment credit carryback, and

(ii) The balance of such overpayment up to a limit of the portion, if any, of the tax paid within the period provided in section 6511 (b)(2) or (c), or within the period provided in any other applicable provision of law.

(3) If the claim involves an overpayment based not only on an investment credit carryback described in subparagraph (1) of this paragraph (a), but based also on other items, and if the claim with respect to any items is barred by the expiration of any applicable period of limitation, the portion of the overpayment attributable to the items not so barred shall be determined by treating the allowance of such items as the first adjustment to be made in computing such overpayment. If a claim for credit or refund is not filed, and if credit or refund is not allowed, within the period prescribed in this paragraph, then credit or refund may be allowed or made only if claim therefor is filed, or if such credit or refund is allowed, within the period prescribed in section 6511 (a), (b), or (c), whichever is applicable, subject to the provisions thereof limiting the amount of credit or refund in the case of a claim filed, or if no claim was filed, in case of credit or refund allowed, within such applicable period. For the limitations on the allowance of interest for an overpayment where credit or refund is subject to the provisions of this section, see section 6611(f).

(b) *Barred overpayments.* If the allowance of a credit or refund of an overpayment of tax attributable to an investment credit carryback is otherwise prevented by the operation of any law or rule of law (other than section 7122, relating to compromises), such credit or refund may be allowed or made under the provisions of section 6511(d)(4)(B) if a claim therefor is filed within the period provided by section 6511(d)(4)(A) and paragraph (a) of this section for filing a claim for credit or refund of an overpayment attributable to a carryback. In the case of a claim for credit or refund of an overpayment attributable to a carryback, the determination of any court, including the Tax Court, in any proceeding in which the decision of the court has become final, shall not be conclusive with respect to the investment credit, and the effect of such credit, to the extent that such credit is affected by a carryback which was not in issue in such proceeding.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7301, 39 FR 977, Jan. 4, 1974]

### § 301.6511(d)–7 Overpayment of income tax on account of work incentive program credit carryback.

(a) *Special period of limitation.* (1) If the claim for credit or refund related to an overpayment of income tax attributable to a work incentive program (WIN) credit carryback, provided in section 50A, then in lieu of the 3-year period from the time the return was filed in which the claim may be filed or credit or refund allowed, as prescribed in section 6511 (a) or (b), the period shall be whichever of the following 2 periods expires later:

(i) The period which ends with the expiration of the fifteenth day of the fortieth month (or thirty–-ninth month, in the case of a corporation) following the end of the taxable year of the unused WIN credit which resulted in the carryback (or, with respect to any portion of a WIN credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, the period which ends with the expiration of the fifteenth day of the fortieth month (or thirty-ninth month in the case of a corporation) following the end of such subsequent taxable year); or

(ii) The period which ends with the expiration of the period prescribed in section 6511(c) within which a claim for credit or refund may be filed with respect to the taxable year of the unused WIN credit which resulted in the carryback.

(2) In the case of a claim for credit or refund involving a WIN credit carryback described in paragraph (a)(1) of this section, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 6511 (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the carryback. If the claim involves an overpayment based not only on a WIN credit carryback described in paragraph (a)(1) of this section but based also on other items, the credit or refund cannot exceed the sum of the following:

(i) The amount of the overpayment which is attributable to the WIN credit carryback, and

(ii) The balance of such overpayment up to a limit of the portion, if any, of the tax paid within the period provided in section 6511 (b)(2) or (c), or within the period provided in any other applicable provision of law.

(3) If the claim involves an overpayment based not only on a WIN credit carryback described in paragraph (a)(1) of this section but based also on other items, and if the claim with respect to any items is barred by the expiration of any applicable period of limitation, the portion of the overpayment attributable to the items not so barred shall be determined by treating the allowance of such items as the first adjustment to be made in computing such overpayment. If a claim for credit or refund is not filed, and if credit or refund is not allowed, within the period prescribed in this paragraph, then credit or refund may be allowed or made only if claim therefor is filed, or if such credit or refund is allowed, within the period prescribed in section 6511 (a), (b), or (c), whichever is applicable, subject to the provisions thereof limiting the amount of credit or refund in the case of a claim filed, or if no claim was

filed, in case of credit or refund allowed, within such applicable period. For the limitations on the allowance of interest for an overpayment where credit or refund is subject to the provisions of this section, see section 6611(f).

(b) *Barred overpayments.* If the allowance of a credit or refund of an overpayment of tax attributable to a WIN credit carryback is otherwise prevented by the operation of any law or rule of law (other than section 7122, relating to compromises), such credit or refund may be allowed or made under the provisions of section 6511(d)(7)(B) if a claim therefor is filed within the period provided by section 6511(d)(7)(A) and paragraph (a) of this section for filing a claim for credit or refund of an overpayment attributable to a carryback. In the case of a claim for credit or refund of an overpayment attributable to a carryback, the determination of any court, including the Tax Court, in any proceeding in which the decision of the courts has become final, shall not be conclusive with respect to the WIN credit, and the effect of such credit, to the extent that such credit is affected by a carryback which was not in issue in such proceeding.

[T.D. 7301, 39 FR 977, Jan. 4, 1974; 39 FR 2758, Jan. 24, 1974]

### § 301.6511(e)–1 Special rules applicable to manufactured sugar.

(a) *Use as livestock feed and for distillation of alcohol.* No payment shall be allowed or made under section 6418 (a) unless within 2 years after the date the right to such payment has accrued a claim therefor is filed by the person entitled thereto. Such right accrues as of the date the manufactured sugar, or article manufactured therefrom, is used for a purpose for which payment is allowable under section 6418(a).

(b) *Exportation.* No payment shall be allowed or made under section 6418 (b) unless within 2 years after the date the right to such payment has accrued a claim therefor is filed by the person entitled thereto. Such right accrues as of the date the articles are exported.

### § 301.6511(f)–1 Special rules for chapter 42 taxes.

(a) *In general.* Claims for credit or refund of an overpayment of any tax imposed by chapter 42 shall be filed by the taxpayer within 3 years from the time a return was filed by the private foundation or trust (as the case may be) with respect to such tax, or within 2 years from the time the tax was paid, whichever of such periods expire the later.

(b) *Examples.* This section may be illustrated by the following examples:

*Example 1.* In 1972, D, an individual taxpayer who was a disqualified person under the provisions of section 4946(a)(1), participated in an act of self-dealing with a private foundation and incurred a tax under section 4941(a)(1). The private foundation files a Form 990–PF on May 15, 1973, and discloses thereon that it has engaged in an act of self-dealing with D. D files a Form 4720 on July 2, 1973, and pays the amount of tax imposed by section 4941(a) with respect to such act of self-dealing. For purposes of this section, the return was filed on May 15, 1973, and any claim for credit or refund by D must be filed by May 17, 1976 (May 15, 1976, was a Saturday).

*Example 2.* Assume the same facts as in example 1 except that D filed a Form 4720 on July 1, 1974, and pays the tax on that date. D must then file any claim for credit or refund by July 1, 1976.

[T.D. 7838, 47 FR 44252, Oct. 7, 1982]

### § 301.6511(g)–1 Special rule for partnership items of federally registered partnerships.

(a) *In general.* In the case of any tax imposed by subtitle A with respect to any person, the period for filing a claim for credit or refund of any overpayment attributable to any partnership item of a federally registered partnership shall not expire before the later of—

(1) The date which is 4 years after the date prescribed by law (including extensions thereof) for filing the partnership return for the partnership taxable year in which the item arose, or

(2) If the taxpayer or a general partner or a person authorized to act on behalf of the partnership, as provided in § 301.6501(o)–2(d), consents to extend the period for assessing a deficiency attributable to the partnership item before the date specified in paragraph (a)(1) of this section, the date 6 months after the expiration of the extension.

(b) *Limits on amount of credit or refund not applicable.* In the case of a claim for credit or refund of any income tax

overpayment attributable to any partnership item of a federally registered partnership, the limitations provided in section 6511(b) (2) and (c) shall not apply if the claim is filed within the period described in paragraph (a) of this section.

(c) *Special periods of limitation with respect to carryback of net operating loss, capital loss, etc.* The provisions of section 6511(g) must also be taken into account in applying the various special periods of limitation prescribed in section 6511(d). Thus, to the extent that a carryback is attributable to a partnership item of a federally registered partnership, the period for filing a claim for credit or refund of an overpayment attributable to that carryback shall not expire before the date determined under paragraph (a) of this section with respect to the partnership taxable year in which the item arose.

(d) *Definitions.* For purposes of this section, the terms ''partnership item'' and ''federally registered partnership'' have the same meaning as such terms have when used in section 6501(o), § 301.6501(o)–2(c), and § 301.6501(o)–3.

(e) *Effective date.* The provisions of this section are effective generally for partnership items arising in partnership taxable years beginning after December 31, 1978 and before September 4, 1982. This section shall not apply, however, to any partnership taxable year with respect to which the amendments made to Code section 6511(g) by section 402 of the Tax Equity and Fiscal Responsibility Act of 1982 are effective. See section 407(a)(3) of that Act.

(Sec. 6501(o) (as it read before the enactment of the Tax Equity and Fiscal Responsibility Act of 1982) and 7805 of the Internal Revenue Code of 1954 (92 Stat. 2818, 26 U.S.C. 6501(o); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7884, 48 FR 16244, Apr. 15, 1983]

### § 301.6512–1 Limitations in case of petition to Tax Court.

(a) *Effect of petition to Tax Court*—(1) *General rule.* If a person having a right to file a petition with the Tax Court with respect to a deficiency in income, estate, gift, or excise tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 of the Code has filed such petition within the time prescribed in section 6213(a), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which a district director or director of a service center (or a regional director of appeals) has determined the deficiency, shall be allowed or made, and no suit in any court for the recovery of any part of such tax shall be instituted by the taxpayer, except as to items set forth in paragraph (a)(2) of this section.

(2) *Exceptions.* The exceptions to the rule stated in subparagraph (1) of this paragraph (a), are as follows:

(i) An overpayment determined by a decision of the Tax Court which has become final;

(ii) Any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(iii) Any amount collected after the expiration of the period of limitation upon levying or beginning a proceeding in court for collection.

(b) *Overpayment determined by Tax Court.* If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which a district director, or director of a service center (or a regional director of appeals) has determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the overpayment determined by the Tax Court shall be credited or refunded to the taxpayer when the decision of the Tax Court has become final. (See section 7481, relating to the date when a Tax Court decision becomes final.) No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

(1) After the mailing of the notice of deficiency, or

(2) Within the period which would be applicable under section 6511(b)(2), (c), (d) or (g) (see §§ 301.6511(b)–1. 301.6511(c)–1, 301.6511(d)–1, 301.6511(d)–2, and 301.6511(d)–3), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment.

(c) *Jeopardy assessments.* In the case of a jeopardy assessment made under section 6861(a), if the amount which should have been assessed as determined by a decision of the Tax Court which has become final is less than the amount already collected, the excess payment shall be credited or refunded subject to a determination being made by the Tax Court with respect to the time of payment as stated in paragraph (b) of this section.

(d) *Disallowance of deficiency by reviewing court.* If the amount of the deficiency determined by the Tax Court (in a case where collection has not been stayed by the filing of a bond) is disallowed in whole or in part by the reviewing court, then the overpayment resulting from such disallowance shall be credited or refunded without the making of claim therefor, subject to a determination being made by the Tax Court with respect to the time of payment as stated in paragraph (b) of this section. (See section 7481, relating to date Tax Court decision becomes final.)

(e) *Collection in excess of amount determined by Tax Court.* Where the amount collected is in excess of the amount computed in accordance with the decision of the Tax Court which has become final, the excess payment shall be credited or refunded within the period of limitation provided in section 6511.

(f) *Collection after expiration of statutory period.* Where an amount is collected after the statutory period of limitation upon the beginning of levy or a proceeding in court for collection has expired (see section 6502, relating to collection after assessment), the taxpayer may file a claim for refund of the amount so collected within the period of limitation provided in section 6511. In any such case, the decision of the Tax Court as to whether the statutory period upon collection of the tax expired before notice of the deficiency was mailed shall, when the decision becomes final, be conclusive.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7838, 47 FR 44252, Oct. 7, 1982]

### § 301.6513–1 Time return deemed filed and tax considered paid.

(a) *Early return or advance payment of tax.* For purposes of section 6511, a return filed before the last day prescribed by law or regulations for the filing thereof shall be considered as filed on such last day. For purposes of section 6511 (b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for payment shall be considered made on such last day. An extension of time for filing a return or for paying any tax, or an election to pay any tax in installments, shall not be given any effect in determining under this section the last day prescribed for filing a return or paying any tax.

(b) *Prepaid income tax.* For purposes of section 6511 (relating to limitations on credit or refund) or section 6512 (relating to limitations in case of petition to Tax Court)—

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 of the Code (relating to collection of income tax at source on wages) shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31 (relating to tax withheld on wages),

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the income tax return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return), and

(3) Any tax withheld at the source on or after November 13, 1966, under chapter 3 of the Code (relating to tax withheld on nonresident aliens and foreign corporations and tax-free covenant bonds) shall, in respect of the recipient of the income, be deemed to have been paid by such recipient on the last day

prescribed for filing his income tax return under section 6012 for the taxable year (determined without regard to any extension of time for filing such return) with respect to which such tax is allowable as a credit under section 1462 (relating to withheld tax as credit to recipient of income).

Subparagraph (3) of this paragraph (b), shall apply even though the recipient of the income has been granted under section 6012 and the regulations thereunder an exemption from the requirement of making an income tax return for the taxable year.

(c) *Return and payment of social security taxes and income tax withholding.* Notwithstanding paragraph (a) of this section, if a return (or payment) on or after November 13, 1966, of tax imposed by chapter 3 of the Code (relating to withholding of tax on nonresident aliens and foreign corporations and tax-free covenant bonds), or if a return (or payment) of tax imposed by chapter 21 of the Code (relating to the Federal Insurance Contributions Act) or by chapter 24 of the Code (relating to the collection of income tax at source on wages), for any period ending with or within a calendar year is filed or paid before April 15 of the succeeding calendar year, for purposes of section 6511 (relating to limitations on credit or refund) the return shall be considered filed, or the tax considered paid, on April 15 of such succeeding calendar year.

(d) *Overpayment of income tax credited to estimated tax.* If a taxpayer elects under the provisions of section 6402(b) to credit an overpayment of income tax for a taxable year against estimated tax for the succeeding taxable year, the amount so credited shall be considered a payment of income tax for such succeeding taxable year (whether or not claimed as a credit on the estimated tax return for such succeeding taxable year). If the treatment of such amount as a payment of income tax for the succeeding taxable year results in an overpayment for such succeeding taxable year, the period of limitations applicable to such overpayment is determined by reference to that taxable year. An election so to credit an overpayment of income tax precludes the allowance of a claim for credit or refund of such overpayment for the taxable year in which the overpayment arises.

### § 301.6514(a)–1 Credits or refunds after period of limitation.

(a) A refund of any portion of any internal revenue tax (or any interest, additional amount, addition to the tax, or assessable penalty) shall be considered erroneous and a credit of any such portion shall be considered void:

(1) If made after the expiration of the period of limitation prescribed by section 6511 for filing claim therefor, unless prior to the expiration of such period claim was filed, or

(2) In the case of a timely claim, if the credit or refund was made after the expiration of the period of limitation prescribed by section 6532(a) for the filing of suit, unless prior to the expiration of such period suit was begun.

(b) For procedure by the United States to recover erroneous refunds, see sections 6532(b) and 7405.

### § 301.6514(b)–1 Credit against barred liability.

Any credit against a liability in respect of any taxable year shall be void if the collection of such liability would be barred by the applicable statute of limitations at the time such credit is made.

## MITIGATION OF EFFECT OF PERIOD OF LIMITATIONS

### § 301.6521–1 Mitigation of effect of limitation in case of related employee social security tax and self-employment tax.

(a) Section 6521 may be applied in the correction of a certain type of error involving both the tax on self-employment income under section 1401 and the employee tax under section 3101 if the correction of the error as to one tax is, on the date the correction is authorized, prevented in whole or in part by the operation of any law or rule of law other than section 7122, relating to compromises. Examples of such law are sections 6212(c), 6401(a), 6501, 6511, 6512(a), 6514, 6532, 6901 (c), (d) and (e), 7121, and 7459(e).

(b) If the liability for either tax with respect to which the error was made has been compromised under section

7122, the provisions of section 6521 limiting the correction with respect to the other tax do not apply.

(c) Section 6521 is not applicable if, on the date of the authorization, correction of the effect of the error is permissible as to both taxes without recourse to such section.

(d) If, because an amount of wages, as defined in section 3121(a), is erroneously treated as self-employment income, as defined in section 1402(b), or an amount of self-employment income is erroneously treated as wages, it is necessary in correcting the error to assess the correct tax and give a credit or refund for the amount of the tax erroneously paid, and if either, but not both, of such adjustments is prevented by any law or rule of law (other than section 7122), the amount of the assessment, or the amount of the credit or refund, authorized shall reflect the adjustment which would be made in respect of the other tax (either the tax on self-employment income under section 1401 or the employee tax under section 3101) but for the operation of such law or rule of law. For example, assume that during 1955 A paid $10 as tax on an amount erroneously treated as ''wages'', when such amount was actually self-employment income, and that credit or refund of the $10 is not barred. A should have paid a self-employment tax of $15 on the amount. If the assessment of the correct tax, that is, $15, is barred by the statute of limitations, no credit or refund of the $10 shall be made without offsetting against such $10 the $15, assessment of which is barred. Thus, no credit or refund in respect of the $10 can be made.

(e) As another example, assume that during 1955 a taxpayer reports wages of $4,200 and net earnings from self-employment of $900. By reason of the limitations of section 1402(b) he shows no self-employment income. Assume further that by reason of a final decision by the Tax Court of the United States, further adjustments to the taxpayer's income tax liability are barred. The question of the amount of his wages, as defined in section 3121, was not in issue in the Tax Court litigation, but it is subsequently determined (within the period of limitations applicable under the Federal Insurance Contributions Act) that $700 of the $4,200 reported as wages was not for employment as defined in section 3121(b). Therefore, the taxpayer is entitled to the allowance of a refund of the $14 tax paid on such remuneration under section 3101. The reduction of his wages from $4,200 to $3,500 would result in the determination of $700 self-employment income, the tax on which is $21 for the year. Under section 6521, the overpayment of $14 would be offset by the barred deficiency of $21, thus eliminating the refund otherwise allowable. If the facts were changed so that the taxpayer erroneously paid tax on self-employment income of $700, having been taxed on only $3,500 as wages, and within the period of limitations applicable under the Federal Insurance Contributions Act, it is determined that his wages were $4,200, the tax of $14 under section 3101, otherwise collectible, would be eliminated by offsetting under section 6521 the barred overpayment of $21. The balance of the barred overpayment, $7, cannot be credited or refunded.

(f) Another illustration of the operation of section 6521 is the case of a taxpayer who, for 1955, is erroneously taxed on $2,500 as wages, the tax on which is $50, and who reports no self-employment income. After the period of limitations has run on the refund of the tax under the Federal Insurance Contributions Act, it is determined that the amount treated as wages should have been reported as net earnings from self-employment. The taxpayer's self-employment income would then be $2,500 and the tax thereon would be $75. Assume that the period of limitations applicable to subtitle A of the Code has not expired, and that a notice of deficiency may properly be issued. Under section 6521, the amount of the deficiency of $75 must be reduced by the barred overpayment of $50.

### § 301.6521–2 Law applicable in determination of error.

The question of whether there was an erroneous treatment of self-employment income or of wages is determined under the provisions of law and regulations applicable with respect to the year or other taxable period as to which the error was made. The fact that the error was in pursuance of an

interpretation, either judicial or administrative, accorded such provisions of law and regulations at the time the action involved was taken is not necessarily determinative of this question. For example, if a later judicial decision authoritatively alters such interpretation so that such action is contrary to the applicable provisions of the law and regulations as later interpreted, the error comes within the scope of section 6521.

PERIODS OF LIMITATION IN JUDICIAL PROCEEDINGS

**§ 301.6532–1 Periods of limitation on suits by taxpayers.**

(a) No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum shall be begun until whichever of the following first occurs:

(1) The expiration of 6 months from the date of the filing of the claim for credit or refund, or

(2) A decision is rendered on such claim prior to the expiration of 6 months after the filing thereof.

Except as provided in paragraph (b) of this section, no suit or proceeding for the recovery of any internal revenue tax, penalty, or other sum may be brought after the expiration of 2 years from the date of mailing by registered mail prior to September 3, 1958, or by either registered or certified mail on or after September 3, 1958, by a district director, a director of an internal revenue service center, or an assistant regional commissioner to a taxpayer of a notice of disallowance of the part of the claim to which the suit or proceeding relates.

(b) The 2-year period described in paragraph (a) of this section may be extended if an agreement to extend the running of the period of limitations is executed. The agreement must be signed by the taxpayer or by an attorney, agent, trustee, or other fiduciary on behalf of the taxpayer. If the agreement is signed by a person other than the taxpayer, it shall be accompanied by an authenticated copy of the power of attorney or other legal evidence of the authority of such person to act on behalf of the taxpayer. If the taxpayer is a corporation, the agreement should be signed with the corporate name followed by the signature of a duly authorized officer of the corporation. The agreement will not be effective until signed by a district director, a director of an internal revenue service center, or an assistant regional commissioner.

(c) The taxpayer may sign a waiver of the requirement that he be mailed a notice of disallowance. Such waiver is irrevocable and will commence the running of the 2-year period described in paragraph (a) of this section on the date the waiver is filed. The waiver shall set forth:

(1) The type of tax and the taxable period covered by the taxpayer's claim for refund;

(2) The amount of the claim;

(3) The amount of the claim disallowed;

(4) A statement that the taxpayer agrees the filing of the waiver will commence the running of the 2-year period provided for in section 6532(a)(1) as if a notice of disallowance had been sent the taxpayer by either registered or certified mail.

The filing of such a waiver prior to the expiration of 6 months from the date the claim was filed does not permit the filing of a suit for refund prior to the time specified in section 6532(a)(1) and paragraph (a) of this section.

(d) Any consideration, reconsideration, or other action with respect to a claim after the mailing by registered mail prior to September 3, 1958, or by either registered or certified mail on or after September 3, 1958, of a notice of disallowance or after the execution of a waiver referred to in paragraph (c) of this section, shall not extend the period for bringing suit or other proceeding under section 7422(a).

**§ 301.6532–2 Periods of limitation on suits by the United States.**

The United States may not recover any erroneous refund by civil action under section 7405 unless such action is begun within 2 years after the making of such refund. However, if any part of the refund was induced by fraud or misrepresentation of a material fact, the action to recover the erroneous refund may be brought at any time within 5 years from the date the refund was made.

**§ 301.6532–3 Periods of limitation on suits by persons other than taxpayers.**

(a) *General rule.* No suit or proceeding, except as otherwise provided in section 6532(c)(2) and paragraph (b) of this section, under section 7426 and § 301.7426–1 relating to civil actions by persons other than taxpayers, shall be begun after the expiration of 9 months from the date of levy or agreement under section 6325(b)(3) giving rise to such action.

(b) *Period when claim is filed.* The 9-month period prescribed in section 6532(c)(1) and paragraph (a) of this section shall be extended to the shorter of,

(1) 12 months from the date of filing by a third party of a written request under § 301.6343–1(b)(2) for the return of property wrongfully levied upon, or

(2) 6 months from the date of mailing by registered or certified mail by the district director to the party claimant of a notice of disallowance of the part of the request to which the action relates. A request which, under § 301.6343–1(b)(3), is not considered adequate does not extend the 9-month period described in paragraph (a) of this section.

(c) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* On June 1, 1970, a tax is assessed against A with respect to his delinquent tax liability. On July 19, 1970, a levy is wrongfully made upon certain tangible personal property of B's which is in A's possession at that time. On July 20, 1970, notice of seizure is given to A. Thus, under section 6502(b), July 20, 1970, is the date on which the levy is considered to be made. Unless a request for the return of property is sooner made to extend the 9-month period, no suit or proceeding under section 7426 may be begun by B after April 20, 1971, which is 9 months from the date of levy.

*Example 2.* Assume the same facts as in the preceding example except that, on August 3, 1970, B properly files a request for the return of his property wrongfully levied upon. Assume further that the district director mails, on March 1, 1971, a notice of disallowance of B's request for the return of the property. No suit or proceeding under section 7426 may be begun by B after August 3, 1971, which is 12 months from the date of filing a request for the return of property wrongfully levied upon.

*Example 3.* Assume the same facts as in the preceding example except that the notice of disallowance of B's request for the return of property wrongfully levied upon is mailed to B on November 12, 1970. Since the 6-month period from the mailing of the notice of disallowance expires before the 12-month period from the date of filing the request for the return of property which ends on August 3, 1971, no suit or proceeding under section 7426 may be begun by B after May 12, 1971, which is 6 months from the date of mailing the notice of disallowance.

[T.D. 7305, 39 FR 9950, Mar. 15, 1974]

## Interest

INTEREST ON UNDERPAYMENTS

**§ 301.6601–1 Interest on underpayments.**

(a) *General rule.* (1) Interest at the annual rate referred to in the regulations under section 6621 shall be paid on any unpaid amount of tax from the last date prescribed for payment of the tax (determined without regard to any extension of time for payment) to the date on which payment is received.

(2) For provisions requiring the payment of interest during the period occurring before July 1, 1975, see section 6601(a) prior to its amendment by section 7 of the Act of Jan. 3, 1975 (Pub. L. 93–625, 88 Stat. 2115).

(b) *Satisfaction by credits made after December 31, 1957*—(1) *In general.* If any portion of a tax is satisfied by the credit of an overpayment after December 31, 1957, interest shall not be imposed under section 6601 on such portion of the tax for any period during which interest on the overpayment would have been allowable if the overpayment had been refunded.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

*Example 1.* An examination of A's income tax returns for the calendar years 1955 and 1956 discloses an underpayment of $800 for 1955 and an overpayment of $500 for 1956. Interest under section 6601(a) ordinarily accrues on the underpayment of $800 from April 15, 1956, to the date of payment. However, the 1956 overpayment of $500 is credited after December 31, 1957, against the underpayment in accordance with the provisions of section 6402(a) and § 301.6402–1. Under such circumstances interest on the $800 underpayment runs from April 15, 1956, the last date prescribed for payment of the 1955 tax, to April 15, 1957, the date the overpayment of $500 was made. Since interest would have

been allowed on the overpayment, if refunded, from April 15, 1957, to a date not more than 30 days prior to the date of the refund check, no interest is imposed after April 15, 1957, on $500, the portion of the underpayment satisfied by credit. Interest continues to run, however, on $300 (the $800 underpayment for 1955 less the $500 overpayment for 1956) to the date of payment.

*Example 2.* An examination of A's income tax returns for the calendar years 1956 and 1957 discloses an overpayment, occurring on April 15, 1957, of $700 for 1956 and an underpayment of $400 for 1957. After April 15, 1958, the last date prescribed for payment of the 1957 tax, the district director credits $400 of the overpayment against the underpayment. In such a case, interest will accrue upon the overpayment of $700 from April 15, 1957, to April 15, 1958, the due date of the amount against which the credit is taken. Interest will also accrue under section 6611 upon $300 ($700 overpayment less $400 underpayment) from April 15, 1958, to a date not more than 30 days prior to the date of the refund check. Since a refund of the portion of the overpayment credited against the underpayment would have resulted in interest running upon such portion from April 15, 1958, to a date not more than 30 days prior to the date of the refund check, no interest is imposed upon the underpayment.

(c) *Last date prescribed for payment.* (1) In determining the last date prescribed for payment, any extension of time granted for payment of tax (including any postponement elected under section 6163(a)) shall be disregarded. The granting of an extension of time for the payment of tax does not relieve the taxpayer from liability for the payment of interest thereon during the period of the extension. Thus, except as provided in paragraph (b) of this section, interest at the annual rate referred to in the regulations under section 6621 is payable on any unpaid portion of the tax for the period during which such portion remains unpaid by reason of an extension of time for the payment thereof.

(2)(i) If a tax or portion thereof is payable in installments in accordance with an election made under section 6152(a) or 6156(a), the last date prescribed for payment of any installment of such tax or portion thereof shall be determined under the provisions of section 6152(b) or 6156(b), as the case may be, and interest shall run on any unpaid installment from such last date to the date on which payment is received. However, in the event installment privileges are terminated for failure to pay an installment when due as provided by section 6152(d) and the time for the payment of any remaining installment is accelerated by the issuance of a notice and demand therefor, interest shall run on such unpaid installment from the date of the notice and demand to the date on which payment is received. But see section 6601(e)(4).

(ii) If the tax shown on a return is payable in installments, interest will run on any tax not shown on the return from the last date prescribed for payment of the first installment. If a deficiency is prorated to any unpaid installments, in accordance with section 6152(c), interest shall run on such prorated amounts from the date prescribed for the payment of the first installment to the date on which payment is received.

(3) If, by reason of jeopardy, a notice and demand for payment of any tax is issued before the last date otherwise prescribed for payment, such last date shall nevertheless be used for the purpose of the interest computation, and no interest shall be imposed for the period commencing with the date of the issuance of the notice and demand and ending on such last date. If the tax is not paid on or before such last date, interest will automatically accrue from such last date to the date on which payment is received.

(4) In the case of taxes payable by stamp and in all other cases where the last date for payment of the tax is not otherwise prescribed, such last date for the purpose of the interest computation shall be deemed to be the date on which the liability for the tax arose. However, such last date shall in no event be later than the date of issuance of a notice and demand for the tax.

(d) *Suspension of interest; waiver of restrictions on assessment.* In the case of a deficiency determined by a district director (or an assistant regional commissioner, appellate) with respect to any income, estate, gift, or chapter 41, 42, 43, or 44 tax, if the taxpayer files with such internal revenue officer an agreement waiving the restrictions on assessment of such deficiency, and if notice and demand for payment of such

deficiency is not made within 30 days after the filing of such waiver, no interest shall be imposed on the deficiency for the period beginning immediately after such 30th day and ending on the date notice and demand is made. In the case of an agreement with respect to a portion of the deficiency, the rules as set forth in this paragraph are applicable only to that portion of the deficiency to which the agreement relates.

(e) *Income tax reduced by carryback.* (1) The carryback of a net operating loss, net capital loss, investment credit, or a work incentive program (WIN) credit shall not affect the computation of interest on any income tax for the period commencing with the last day prescribed for the payment of such tax and ending with the last day of the taxable year in which the loss or credit arises. For example, if the carryback of a net operating loss, a net capital loss, an investment credit, or a WIN credit to a prior taxable period eliminates or reduces a deficiency in income tax for that period, the full amount of the deficiency will nevertheless bear interest at the annual rate referred to in the regulations under section 6621 from the last date prescribed for payment of such tax until the last day of the taxable year in which the loss or credit arose. Interest will continue to run beyond such last day on any portion of the deficiency which is not eliminated by the carryback. With respect to any portion of an investment credit carryback or a WIN credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such investment credit carryback or WIN credit carryback shall not affect the computation of interest on any income tax for the period commencing with the last day prescribed for the payment of such tax and ending with the last day of such subsequent taxable year.

(2) Where an extension of time for payment of income tax has been granted under section 6164 to a corporation expecting a net operating loss carryback or a net capital loss carryback, interest is payable at the annual rate established under section 6621 on the amount of such unpaid tax from the last date prescribed for payment thereof without regard to such extension.

(3) Where there has been an allowance of an overpayment attributable to a net operating loss carryback, a capital loss carryback, an investment credit carryback, or a WIN credit carryback and all or part of such allowance is later determined to be excessive, interest shall be computed on the excessive amount from the last day of the year in which the net operating loss, net capital loss, investment credit, or WIN credit arose until the date on which the repayment of such excessive amount is received. Where there has been an allowance of an overpayment with respect to any portion of an investment credit carryback or a WIN credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year and all or part of such allowance is later determined to be excessive, interest shall be computed on the excessive amount from the last day of such subsequent taxable year until the date on which the repayment of such excessive amount is received.

(f) *Applicable rules.* (1) Any interest prescribed by section 6601 shall be assessed and collected in the same manner as tax and shall be paid upon notice and demand by the district director or the director of the regional service center. Any reference in the Code (except in subchapter B, chapter 63, relating to deficiency procedures) to any tax imposed by the Code shall be deemed also to refer to the interest imposed by section 6601 on such tax. Interest on a tax may be assessed and collected at any time within the period of limitation on collection after assessment of the tax to which it relates. For rules relating to the period of limitation on collection after assessment, see section 6502.

(2) No interest under section 6601 shall be payable on any interest provided by such section. This paragraph (f)(2) shall not apply after December 31, 1982, with respect to interest accruing after such date, or accrued but unpaid on such date. See § 301.6622–1.

(3) Interest will not be imposed on any assessable penalty, addition to the

tax (other than an addition to tax described in section 6601(e)(2)(B)), or additional amount if the amount is paid within 21 calendar days (10 business days if the amount assessed and shown on the notice and demand equals or exceeds $100,000) from the date of the notice and demand. If interest is imposed, it will be imposed only for the period from the date of the notice and demand to the date on which payment is received. This paragraph (f)(3) is applicable with respect to any notice and demand made after December 31, 1996.

(4) If notice and demand is made after December 31, 1996, for any amount and the amount is paid within 21 calendar days (10 business days if the amount assessed and shown on the notice and demand equals or exceeds $100,000) from the date of the notice and demand, interest will not be imposed for the period after the date of the notice and demand.

(5) For purposes of paragraphs (f)(3) and (4) of this section—

(i) The term *business day* means any day other than a Saturday, Sunday, legal holiday in the District of Columbia, or a statewide legal holiday in the state where the taxpayer resides or where the taxpayer's principal place of business is located. With respect to the tenth business day (after taking into account the first sentence of this paragraph (f)(5)(i)), see section 7503 relating to time for performance of acts where the last day falls on a statewide legal holiday in the state where the act is required to be performed.

(ii) The term *calendar day* means any day. With respect to the twenty-first calendar day, see section 7503 relating to time for performance of acts where the last day falls on a Saturday, Sunday, or legal holiday.

(6) No interest shall be imposed for failure to pay estimated tax as required by section 59 of the Internal Revenue Code of 1939 or section 6153 or 6154 of the Internal Revenue Code of 1954.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7238, 37 FR 28742, Dec. 29, 1972; T.D. 7301, 39 FR 978, Jan. 4, 1974; T.D. 7384, 40 FR 49324, Oct. 22, 1975; T.D. 7838, 47 FR 44252, Oct. 7, 1982; T.D. 7907, 48 FR 38230, Aug. 23, 1983; T.D. 8725, 62 FR 39117, July 22, 1997]

### § 301.6602–1 Interest on erroneous refund recoverable by suit.

Any portion of an internal revenue tax (or any interest, assessable penalty, additional amount, or addition to tax) which has been erroneously refunded, and which is recoverable by a civil action pursuant to section 7405, shall bear interest at the annual rate referred to in the regulations under section 6621 from the date of the payment of the refund.

[T.D. 7384, 40 FR 49324, Oct. 22, 1975]

## INTEREST ON OVERPAYMENTS

### § 301.6611–1 Interest on overpayments.

(a) *General rule.* Except as otherwise provided, interest shall be allowed on any overpayment of any tax at the annual rate referred to in the regulations under section 6621 from the date of overpayment of the tax.

(b) *Date of overpayment.* Except as provided in section 6401(a), relating to assessment and collection after the expiration of the applicable period of limitation, there can be no overpayment of tax until the entire tax liability has been satisfied. Therefore, the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability (including any interest, addition to the tax, or additional amount) and the dates of payment of all amounts subsequently paid with respect to such tax liability. For rules relating to the determination of the date of payment in the case of an advance payment of tax, a payment of estimated tax, and a credit for income tax withholding, see paragraph (d) of this section.

(c) *Examples.* The application of paragraph (b) may be illustrated by the following examples:

*Example 1.* Corporation X files an income tax return on March 15, 1955, for the calendar year 1954 disclosing a tax liability of $1,000 and elects to pay the tax in installments. Subsequent to payment of the final installment, the correct tax liability is determined to be $900.

*Tax liability*

| | |
|---|---|
| Assessed | $1,000 |
| Correct liability | 900 |
| Overassessment | 100 |

*Tax liability*

*Record of payments*

| | |
|---|---|
| Mar. 15, 1955 | $500 |
| June 15, 1955 | 500 |

Since the correct liability in this case is $900, the payment of $500 made on March 15, 1955, and $400 of the payment made on June 15, 1955, are applied in satisfaction of the tax liability. The balance of the payment made on June 15, 1955 ($100) constitutes the amount of the overpayment, and the date on which such payment was made would be the date of the overpayment from which interest would be computed.

*Example 2.* Corporation Y files an income tax return for the calendar year 1954 on March 15, 1955, disclosing a tax liability of $50,000, and elects to pay the tax in installments. On October 15, 1956, a deficiency in the amount of $10,000 is assessed and is paid in equal amounts on November 15 and November 26, 1956. On April 15, 1957, it is determined that the correct tax liability of the taxpayer for 1954 is only $35,000.

*Tax liability*

| | |
|---|---|
| Original assessment | $50,000 |
| Deficiency assessment | 10,000 |
| Total assessed | 60,000 |
| Correct liability | 35,000 |
| Overassessment | 25,000 |

*Record of payments*

| | |
|---|---|
| Mar. 15, 1955 | $25,000 |
| June 15, 1955 | 25,000 |
| Nov. 15, 1956 | 5,000 |
| Nov. 26, 1956 | 5,000 |

Since the correct liability in this case is $35,000, the entire payment of $25,000 made on March 15, 1955, and $10,000 of the payment made on June 15, 1955, are applied in satisfaction of the tax liability. The balance of the payment made on June 15, 1955 ($15,000), plus the amounts paid on November 15 ($5,000), and November 26, 1956 ($5,000), constitute the amount of the overpayment. The dates of the overpayments from which interest would be computed are as follows:

| Date | Amount of overpayment |
|---|---|
| June 15, 1955 | $15,000 |
| Nov. 15, 1956 | 5,000 |
| Nov. 26, 1956 | 5,000 |

The amount of any interest paid with respect to the deficiency of $10,000 is also an overpayment.

(d) *Advance payment of tax, payment of estimated tax, and credit for income tax withholding.* In the case of an advance payment of tax, a payment of estimated income tax, or a credit for income tax withholding, the provisions of section 6513 (except the provisions of subsection (c) thereof), applicable in determining the date of payment of tax for purposes of the period of limitations on credit or refund, shall apply in determining the date of overpayment for purposes of computing interest thereon.

(e) *Refund of income tax caused by carryback.* If any overpayment of tax imposed by subtitle A of the Code results from the carryback of a net operating loss, a net capital loss, an investment credit, or a work incentive (WIN) credit, such overpayment, for purposes of this section, shall be deemed not to have been made prior to the end of the taxable year in which the loss or credit arises, or, with respect to any portion of an investment credit carryback or a WIN credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made prior to the close of such subsequent taxable year.

(f) *Refund of income tax caused by carryback of foreign taxes.* For purposes of paragraph (a) of this section, any overpayment of tax resulting from a carryback of tax paid or accrued to foreign countries or possessions of the United States shall be deemed not to have been paid or accrued before the close of the taxable year under subtitle F of the Code in which such taxes were in fact paid or accrued.

(g) *Period for which interest allowable in case of refunds.* If an overpayment of tax is refunded, interest shall be allowed from the date of the overpayment to a date determined by the district director or the director of the regional service center, which shall be not more than 30 days prior to the date of the refund check. The acceptance of a refund check shall not deprive the taxpayer of the right to make a claim for any additional overpayment and interest thereon, provided the claim is made within the applicable period of limitation. However, if a taxpayer does not accept a refund check, no additional interest on the amount of the overpayment included in such check shall be allowed.

(h) *Period for which interest allowable in case of credits*—(1) *General rule*. If an overpayment of tax is credited, interest shall be allowed from the date of overpayment to the due date (as determined under subparagraph (2) of this paragraph (h)) of the amount against which such overpayment is credited.

(2) *Determination of due date*—(i) *In general*. The term ''due date'', as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time), and not the date on which the district director or the director of the regional service center makes demand for the payment of the tax. Therefore, the due date of a tax (other than an additional assessment subject to the special rule provided by subdivision (iv) of this subparagraph) is the date fixed for the payment of the tax or the several installments thereof.

(ii) *Tax payable in installments—(a) In general*. In the case of a credit against a tax, where the taxpayer had properly elected to pay the tax in installments, the due date is the date prescribed for the payment of the installment against which the credit is applied.

(*b*) *Delinquent installment*. If the taxpayer is delinquent in payment of an installment of tax and a notice and demand has been issued for the payment of the delinquent installment and the remaining installments, the due date of each remaining installment shall then be the date of such notice and demand.

(iii) *Tax or installment not yet due*. If a taxpayer agrees to the crediting of an overpayment against tax or an installment of tax and the schedule of allowance is signed prior to the date on which such tax or installment would otherwise become due, then the due date of such tax or installment shall be the date on which such schedule is signed.

(iv) *Additional assessment satisfied by credit before January 1, 1958*. In the case of a credit made before January 1, 1958, against an additional assessment, the due date of the tax satisfied by the credit is the date the additional assessment was made. For purposes of this subdivision, the term ''additional assessment'' means a further assessment of a tax of the same character previously paid in part, and includes the assessment of a deficiency as defined in section 6211.

(v) *Interest*. In the case of a credit against interest that accrues for any period ending prior to January 1, 1983, the due date is the earlier of the date of assessment of such interest or December 31, 1982. In the case of a credit against interest that accrues for any period beginning on or after December 31, 1982, such interest is due as it economically accrues on a daily basis, rather than when it is assessed.

(vi) *Additional amount, addition to the tax, or assessable penalty*. In the case of a credit against an additional amount, addition to the tax, or assessable penalty, the due date is the earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit.

(vii) *Estimated income tax for succeeding year*. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

(i) [Reserved]

(j) *Refund of overpayment*. No interest shall be allowed on any overpayment of tax imposed by subtitle A of the Code if such overpayment is refunded—

(1) In the case of a return filed on or before the last date prescribed for filing the return of such tax (determined without regard to any extension of time for filing such return), within 45 days after such last date, or

(2) After December 17, 1966, in the case of a return filed after the last day prescribed for filing the return, within 45 days after the date on which the return is filed.

However, in the case of any overpayment of tax by an individual (other than an estate or trust and other than a nonresident alien individual) for a taxable year beginning in 1974, ''60 days'' shall be substituted for ''45 days'' each place it appears in this paragraph.

(k) *Effective date*. Paragraphs (h)(2)(v) and (h)(2)(vi) of this section are effective for credits made on or after August 25, 1992.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7301, 39 FR 979, Jan. 4, 1974; T.D. 7384, 40 FR 49325, Oct. 22, 1975; T.D. 7415, 41 FR 14369, Apr. 5, 1976; T.D. 8524, 59 FR 10076, Mar. 3, 1994]

DETERMINATION OF INTEREST RATE

**§ 301.6621–1 Interest rate.**

(a) *In general*. The interest rate established under section 6621 shall be—

(1) On amounts outstanding before July 1, 1975, 6 percent per annum (or 4 percent in the case of certain extensions of time for payment of taxes as provided in sections 6601 (b) and (j) prior to amendment by section 7(b) of the Act of Jan. 3, 1975 (Pub. L. 93–625, 88 Stat. 2115), and certain overpayments of the unrelated business income tax as provided in section 514(b)(3)(D), prior to its amendment by such Act).

(2) On amounts outstanding—

| After | And before | Rate per annum (percent) |
|---|---|---|
| June 30, 1975 ..... | Feb. 1, 1976 ..... | 9 |
| Jan. 31, 1976 ..... | Feb. 1, 1978 ..... | 7 |
| Jan. 31, 1978 ..... | Feb. 1, 1980 ..... | 6 |
| Jan. 31, 1980 ..... | Feb. 1, 1982 ..... | 12 |
| Jan. 31, 1982 ..... | Jan. 1, 1983 ..... | 20 |

(3) On amounts outstanding after December 31, 1982, the adjusted rate established by the Commissioner under section 6621(b). This adjusted rate shall be published by the Commissioner in a Revenue Ruling. See § 301.6622–1 for application of daily compounding in determining interest accruing after December 31, 1982. Because interest accruing after December 31, 1982, accrues at the prescribed rate per annum compounded daily, the effective annual percentage rate of interest will exceed the prescribed rate of interest.

(b) [Reserved]

(c) *Applicability of interest rate*—(1) *Computation*. Interest and additions to tax on any amount outstanding on a specific day shall be computed at the annual rate applicable on such day.

(2) *Additions to tax*. Additions to tax under any section of the Code that refers to the annual rate established under this section, including sections 644(a)(2)(B), 4497(c)(2), 6654(a), and 6655 (a) and (g), shall be computed at the same rate per annum as the interest rate set forth under paragraph (a) of this section.

(3) *Interest*. Interest provided for under any section of the Code that refers to the annual rate established under this section, including sections 47(d)(3)(G), 167(q), 6332(c)(1), 6343(c), 6601(a), 6602, 6611(a), 7426(g), and section 1961(c)(1) or 2411 of title 28 of the United States Code, shall be computed at the rate per annum set forth under paragraph (a) of this section.

(d) *Examples*. The provisions of this section may be illustrated by the following examples. Example 6 illustrates the computation of interest for interest accuring after December 31, 1982.

*Example 1*. A, an individual, files an income tax return for the calendar year 1974 on April 15, 1975, showing a tax due of $1,000. A pays the $1,000 on September 1, 1975. Pursuant to section 6601(a), interest on the underpayment of $1,000 is computed at the rate of 6 percent per annum from April 15, 1975, to June 30, 1975, a total of 76 days. Interest for 63 days, from June 30, 1975, to September 1, 1975, shall be computed at the rate of 9 percent per annum.

*Example 2*. An executor of an estate is granted, in accordance with section 6161(a)(2)(A), a two-year extension of time for payment of the estate tax shown on the estate tax return, which tax was otherwise due on January 15, 1974. The tax is paid on January 15, 1976. Interest on the underpayemnt shall be computed at the rate of 4 percent per annum from January 15, 1974, to June 30, 1975, and at the rate of 9 percent per annum from June 30, 1975, to January 15, 1976.

*Example 3*. X, a corporation, files its 1973 corporate income tax return on March 15, 1974, and pays the balance of tax due shown thereon. On August 1, 1975, an assessment of a deficiency is made against X with respect to such tax. The deficiency is paid on October 1, 1975. Interest at the rate of 6 percent per annum is due on the deficiency from March 15, 1974, the due date of the return, to June 30, 1975, and at the rate of 9 percent per annum from June 30, 1975, to October 1, 1975.

*Example 4*. Y, an individual, files an amended individual income tax return on October 1, 1975, for the refund of an overpayment of income tax Y made on April 15, 1975. Interest is allowed on the overpayment to December 1, 1975. Pursuant to section 6611(a), interest is computed at the rate of 6 percent per annum from April 15, 1975, the date of overpayment, to June 30, 1975. Interest from June 30, 1975, to December 1, 1975, shall be computed at the rate of 9 percent per annum.

*Example 5.* A, an individual, is liable for an addition to tax under section 6654 for the underpayment of estimated tax from April 15, 1975 until January 15, 1976. The addition to tax shall be computed at the annual rate of 6 percent per annum from April 15, 1975, to June 30, 1975, and at the annual rate of 9 percent per annum from June 30, 1975, to January 15, 1976.

*Example 6.* B, an individual, files an income tax return for calendar year 1980 on April 15, 1981, showing a tax due of $1,000. B pays the $1,000 on March 1, 1983. Under section 6601 (a), interest on the $1,000 underpayment is due from April 15, 1981, to March 1, 1983. Such interest is computed at the rate of 12 percent per annum, simple interest from April 15, 1981, to January 31, 1982, and at the rate of 20 percent per annum, simple interest from January 31, 1982, to December 31, 1982, and at the rate of 16 percent per annum, compounded daily, from December 31, 1982, to March 1, 1983. The total simple interest accrued but unpaid at the end of December 31, 1982, is combined with the $1,000 underpayment for purposes of determining the amount of daily compounded interest to be charged from December 31, 1982, to March 1, 1983.

[T.D. 7907, 48 FR 38230, Aug. 23, 1983; 48 FR 41018, Sept. 13, 1983; 48 FR 41581, Sept. 16, 1983]

### § 301.6621–2T Questions and answers relating to the increased rate of interest on substantial underpayments attributable to certain tax motivated transactions (temporary).

The following questions and answers relate to the increased rate of interest on substantial underpayments attributable to certain tax motivated transactions as provided in section 6621(d) of the Internal Revenue Code of 1954, as added by section 144 of the Tax Reform Act of 1984 (Pub. L. 98–369, 98 Stat. 682):

Q-1. What is the annual interest rate under section 6621 for purposes of computing the amount of interest that must be paid under section 6601 (relating to interest on underpayments)?

A-1. In general, the annual interest rate for purposes of section 6601 is the adjusted rate of interest established under section 6621 (b) § 301.6621–1 (''adjusted rate''). If, however, a tax motivated underpayment (as defined in A-2 of this section) for a taxable year is substantial (as defined in A-7 of this section), section 6621(d) provides that the annual rate of interest with respect to the tax motivated underpayment is 120 percent of the adjusted rate (''120 percent rate''), rounded to the nearest tenth of a percent.

Q-2. What is a tax motivated underpayment?

A-2. A tax motivated underpayment is the portion of a deficiency (as defined in section 6211) of tax imposed by subtitle A (income taxes) that is attributable to any of the following tax motivated transactions:

(1) Any instance in which the value of any property, or the adjusted basis of any property, claimed on a return is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (*i.e.*, a valuation overstatement within the meaning of section 6659(c)(1));

(2) Any loss disallowed for any period by reason of section 465(a) or any amount included in gross income by reason of section 465(e);

(3) Any credit disallowed for any period by reason of section 46(c)(8) or section 48(d)(6);

(4) Any loss disallowed for any period with respect to a straddle, as defined in section 1092(c), but without regard to sections 1092 (d) and (e);

(5) Any use of an accounting method that may result in a substantial distortion of income for any period (see A-3 of this section); and

(6) Any deduction disallowed with respect to any other tax motivated transactions (see A-4 of this section).

Q-3. What accounting methods may result in a substantial distortion of income for any period under A-2(5) of this section?

A-3. A deduction or credit disallowed, or income included, in any of the circumstances listed below shall be treated as attributable to the use of an accounting method that may result in a substantial distortion of income and shall thus be a tax motivated transaction that results in a tax motivated underpayment:

(1) Any deduction disallowed for any period by reason of section 464 or section 278(b), relating to certain expenses of farming syndicates;

(2) In the case of a taxpayer who computes taxable income using the

cash receipts and disbursements method of accounting, any interest deduction disallowed for any period by reason of section 461(g), relating to prepaid interest, provided the interest is not paid with respect to indebtedness incurred in connection with (i) the purchase, refinancing, or improvement of the principal residence of the taxpayer, or (ii) the purchase of consumer goods by the taxpayer;

(3) Any interest deduction disallowed for any period because the amount of the claimed deduction was computed using a method resulting in an amount of interest for a period that exceeds the true cost of the indebtedness for the period computed by applying the effective rate of interest on the loan to the unpaid balance of the loan for the period (*i.e.*, the economic accrual of interest for the period), provided the interest is not accrued with respect to indebtedness incurred in connection with (i) the purchase, refinancing, or improvement of the principal residence of the taxpayer, or (ii) the purchase of consumer goods by the taxpayer (see Rev. Rul. 83–84, 1983–1 C.B. 97, and sections 163(e), 446(b), and 483);

(4) Any deduction disallowed for any period under section 709, relating to organization or syndication expenditures of a partnership;

(5) In the case of any expenditure described in section 248(b) that was incurred by an S corporation, any deduction disallowed because it exceeds the amount allowable under section 248, relating to organizational expenditures;

(6) Any deduction disallowed for any period under section 267(a), relating to transactions between related taxpayers;

(7) Any deduction disallowed for any period, or any income required to be included for any period, under section 467, relating to certain payments for the use of property or services;

(8) Any deduction disallowed for any period under section 461(i), relating to certain deductions of tax shelters; and

(9) In the case of a taxpayer who computes taxable income using the cash receipts and disbursements method of accounting, any deduction disallowed for any period because (i) the expenditure resulting in the deduction was a deposit rather than a payment, (ii) the expenditure was prepaid for tax avoidance purposes and not for a business purpose, or (iii) the deduction resulted in a material distortion of income (see, *e.g.*, Rev. Rul. 79–229, 1979–2 C.B. 210).

Q-4. Are any transaction other than those specified in A-2 of this section and those involving the use of accounting methods under circumstances specified in A-3 of this section considered tax motivated transactions under A-2(6) of this section?

A-4. Yes. Deductions disallowed under the following provisions are considered to be attributable to tax motivated transactions:

(1) Any deduction disallowed for any period under section 183, relatiing to an activity engaged in by an individual or an S corporation that is not engaged in for profit, and

(2) Any deduction disallowed for any period under section 165(c)(2), relating to any transaction not entered into for profit.

Q-5. How is the amount of a tax motivated underpayment determined?

A-5. Except as provided in A-6 of this section, the amount of a tax motivated underpayment is detemined in the following manner:

(1) Calculate the amount of the tax liability for the taxable year as if all items of income, gain, loss, deduction, or credit, had been reported properly on the income tax return of the taxpayer (''total tax liability''); and

(2) Without taking into account any adjustments to items of income, gain, loss, deduction, or credit that are attributable to tax motivated transactions (as defined in A-2 through A-4 of this section), calculate the amount of the tax liability for the taxable year as if all other items of income, gain loss, deduction, or credit had been reported properly on the income tax return of the taxpayer (''tax liability without regard to tax motivated transactions'').

(3) The difference between the total tax liability and the tax liability without regard to tax motivated transactions is the amount of the tax motivated underpayment.

*Example*. Taxpayer A, a calendar year taxpayer, files his 1984 income tax return reporting $70,000 of taxable income and $23,171

of tax liability. On January 20, 1986, A enters into a closing agreement with the Internal Revenue Service that includes the following adjustments;

| | |
|---|---|
| Section 162 deduction disallowed (not tax motivated) | $7,500 |
| Loss disallowed under section 465 (tax motivated—see A-2(2) of this section) | 5,000 |
| Section 170 deduction disallowed because of a valuation overstatement (tax motivated—see A-2(1) of this section) | 10,000 |
| Loss disallowed with respect to a straddle as defined in section 1092(c) (tax motivated—see A-2(4) of this section) | 7,000 |
| Other adjustments (none of which are tax motivated) | 4,000 |
| 1. Reported taxable income | 70,000 |
| (Add all adjustments to items of income, gain, loss, deduction, or credit (including tax motivated transactions subject to section 6621(d))) | +33,500 |
| Tax=$39,685 (''total tax liability'') | 103,500 |
| 2. Reported taxable income | 70,000 |
| (Add adjustments to items of income, gain, loss, deduction, or credit other than those with respect to items that are tax motivated) | +11,500 |
| Tax=$28,691 (''tax liability without regard to tax motivated transactions'') | 81,500 |

The tax motivated underpayment (i.e., the underpayment attributable to tax motivated transactions) is $10,994 ($39,685 – $28,691). Accordingly, the interest on $10,994 would be computed at the 120 percent rate.

The remainder of the underpayment (*i.e.*, the underpayment not attributable to tax motivated transactions) is $5,520 ($28,691 (tax liability without regard to tax motivated items) – $23,171 (tax paid with return)). The interest on $5,520 would be computed at the adjusted rate.

Q-6: How are the amounts of the tax motivated underpayment and the underpayment attributable to fraud or negligence detemined if all or a portion of the taxpayer's underpayment is attributable to one or more tax motivated transactions and all or a portion is subject to the addition to tax imposed by section 6653(a)(2) (in the case of an underpayment attributable to negligence or intentional disregard) or section 6653(b)(2) (in the case of an underpayment attributable to fraud)?

A-6: If all or a portion of the taxpayer's underpayment is attributable to tax motivated transactions, and all or a portion is attributable to fraudulent or negligent items (*i.e.*, items that result in an underpayment subject to the addition to tax imposed by section 6653 (a)(2) or (b)(2)), the amount of the tax motivated underpayment and the underpayment attributable to fraud or negligence is determined in the following manner:

(1) Determine the following amounts;

(i) The tax liability for the taxable year of the taxpayer as if all items of income, gain, loss, deduction, or credit had been reported properly on the income tax return of the taxpayer (''total tax liability'');

(ii) The tax liability for the taxable year of the taxpayer as if all items of income, gain, loss, deduction, or credit without taking into account adjustments to items of income, gain, loss, deduction, or credit that are both (a) attributable to tax motivated transactions and (b) subject to section 6653(a)(2) or section 6653(b)(2), had been reported properly on the income tax return of the taxpayer (''tax liability without regard to fraudulent or negligent tax motivated items'');

(iii) The tax liability for the taxable year of the taxpayer as if all items of income, gain, loss, deduction, or credit, without taking into account adjustments to items of income, gain, loss, deduction, or credit that are subject to section 6653(a)(2) or section 6653(b)(2), had been reported properly on the income tax return of the taxpayer (''tax liability without regard to fraudulent or negligent items'');

(iv) The tax liability for the taxable year of the taxpayer as if all items of income, gain, loss, deduction, or credit, without taking into account adjustments to items of income, gain, loss, deduction, or credit that are either subject to section 6653(a)(2) or section 6653(b)(2) or attributable to tax motivated transactions, had been reported properly on the income tax return of the taxpayer (''tax liability without regard to tax motivated or fraudulent or negligent items'').

(2) The tax motivated underpayment attributable to fraudulent or negligent items is the excess of the total tax liability over the tax liability determined without regard to fraudulent or negligent tax motivated items ((i)–(ii)).

(3) The tax motivated underpayment is the sum of (a) the tax motivated underpayment attributable to fraudulent or negligent items ((i)–(ii)) plus (b) the excess of the tax liability without regard to fraudulent or negligent items

over the tax liability without regard to tax motivated or fraudulent or negligent items ((iii)–(iv)). Interest on this underpayment is computed at the 120 percent rate.

(4) The underpayment attributable to fraudulent or negligent items is the excess of the total tax liability over the tax liability without regard to fraudulent or negligent items ((i)–(iii)). The section 6653 addition to tax is 50 percent of the interest on this underpayment computed at the 120 percent rate on an amount equal to the tax motivated underpayment attributable to fraudulent or negligent items (computed in (2)) and at the adjusted rate on the remainder.

*Example*. Taxpayer A, a calendar year taxpayer, files his 1984 income tax return reporting $70,000 of taxable income and $23,171 of tax liability. On January 20, 1986, A enters into a closing agreement with the Internal Revenue Service that includes the following adjustments:

| | |
|---|---|
| Section 162 deduction disallowed (not tax motivated but fraudulent or negligent) | $7,500 |
| Loss disallowed under section 465(a) (tax motivated—see A-2(2) of this section—and fraudulent or negligent) | 5,000 |
| Section 170 deduction disallowed because of a valuation overstatement (tax motivated—see A-2(1) of this section—but not fraudulent or negligent | 10,000 |
| Loss disallowed with respect to a straddle as defined in section 1092(c) (tax motivated—see A-2(4) of this section but not fraudulent or negligent) | 7,000 |
| Other adjustments (none of which are tax motivated or fraudulent or negligent) | 4,000 |

The tax motivated underpayment is determined in the following manner:

| | |
|---|---|
| (1)(i) Reported taxable income | $70,000 |
| (Add all adjustment | +33,500 |
| Tax=$39,685 (“total tax liability”) | 103,500 |
| (ii) Reported taxable income | 70,000 |
| All adjustments other than those with respect to items that are both tax motivated and fraudulent or negligent | +28,500 |
| Tax=$37,185 (“tax liability without regard to fraudulent or negligent, tax motivated items”) | 98,500 |
| (iii) Reported taxable income | 70,000 |
| (All adjustments other than those with respect to items that are fraudulent or negligent) | +21,000 |
| Tax=$33,435 (“tax liability without regard fraudulent or negligent items”) | 91,000 |
| (iv) Reported taxable income | 70,000 |
| (All adjustments other than those with respect to items that are either tax motivated or fraudulent or negligent) | +4,000 |
| Tax=$25,091 (“tax liability without regard to tax motivated or fraudulent or negligent items”) | 74,000 |

(2) The tax motivated underpayment attributable to fraudulent or negligent items is $2,500 ((i))–(ii) or $39,685 – $37,185).

(3) The tax motivated underpayment is $10,844 ((2)+((iii)–(iv)) or $2,500+($33,435 – $25,091)). Interest on $10,844 is computed at the 120 percent rate.

(4) The underpayment attributable to fraudulent or negligent items is $6,250 ((i)–(iii) or $39,685 – $33,435). The section 6653 addition to tax is 50 percent of the interest on $6,250, computed at the 120 percent rate on an amount equal to the tax motivated underpayment attributable to fraudulent or negligent items ($2,500) and at the adjusted rate on the remainder ($3,750).

(5) In summary, therefore, the total underpayment is $16,514 (total tax liability ($39,685) less reported tax liability ($23,171)) of which $10,844 accrues interest at the 120 percent rate and $5,670 ($16,514 – $10,844) accrues interest at the adjusted rate. In addition, $6,250 of the underpayment is subject to the section 6653(a)(2) or section 6653(b)(2) addition to tax. The underlying interest, upon which the addition to tax is based, is computed using the 120 percent rate for the portion of the underpayment subject to section 6621(d) ($2,500) and the adjusted rate for the portion that is not subject to section 6621(d) ($3,750).

Q-7. Does the 120 percent rate apply to all tax motivated underpayments?

A-7. No. The 120 percent rate applies only if the tax motivated underpayment for the taxable year is substantial. A tax motivated underpayment is substantial only if it exceeds $1,000. If, for example, a taxpayer has a $600 underpayment attributable to a valuation overstatement (within the meaning of section 6659(c)(1)) and a $500 underpayment attributable to a loss disallowed under section 465(a), the amount of the tax motivated underpayment is $1,100. Because the amount of the tax motivated underpayment is thus substantial the 120 percent rate applies.

Q-8. How do carryovers affect the amount of the tax motivated underpayment and the amount of the underpayment attributable to fraudulent or negligent items?

A-8. For purposes of A-5 and A-6 of this section, a net operating loss carryover, capital loss carryover, or credit carryover is treated as a deduction or credit in the year in which taken into account. In any computation of tax liability required under A-5 or A-6 of this section (*i.e.*, total tax liability, tax liability without regard to tax motivated transactions, etc.), the amount of such deduction or credit is the amount of the carryover determined as if the taxpayer had properly reported in each taxable year all items of income, gain, loss, deduction, or credit affecting the amount of the carryover other than adjustments of a type not taken into account in such computation of tax liability. A net operating loss carryback, capital loss carryback, or credit carryback is not taken into account, however, in determining the amount of the tax motivated underpayment or the amount of the underpayment attributable to fraud or negligence for periods before the last date prescribed for filing the income tax return for the taxable year in which the carryback arises (determined without regard to extensions).

Q-9. What amount is subject to the 120 percent rate if the amount of a taxpayer's unpaid tax for a year is less than the taxpayer's substantial tax motivated underpayment?

A-9. The 120 percent rate applies with respect to the lesser of—

(1) The amount of unpaid tax for the taxable year determined in accordance with § 301.6601–1; or

(2) The substantial tax motivated underpayment for the taxable year.

Q-10. What is the effective date for the 120 percent rate?

A-10. The 120 percent rate applies to interest accruing on a deficiency attributable to a substantial tax motivated underpayment after December 31, 1984, including interest accruing with respect to transactions described in A-3 and A-4 of this section, regardless of the date prescribed for payment of the tax.

*Example.* Taxpayer A files his income tax return on April 15, 1983 (the last date prescribed for payment of tax for taxable year 1982 under section 6601). In January 1985, Taxpayer A files a petition in the Tax Court in response to a statutory notice of deficiency for taxable year 1982, which includes a tax motivated underpayment of $10,000. In September 1986, the Tax Court enters a decision for the Internal Revenue Service. Under section 6601, interest accrues at the adjusted rate, compounded daily, on tax motivated underpayments outstanding before January 1, 1985, and at the 120 percent rate, compounded daily, on amounts outstanding after December 31, 1984. The underpayment that is subject to the 120 percent rate includes both the $10,000 tax motivated underpayment and the interest that accrued on the underpayment at the adjusted rate from April 16, 1983, through December 31, 1984.

Q-11. Can a taxpayer stop the running of interest on a tax motivated underpayment by application of a remittance?

A-11. Yes. The running of interest on a tax liability stops on the date the remittance (either a payment of tax or a deposit in the nature of a cash bond) is received by the Internal Revenue Service, regardless of when the liability is assessed or the remittance is actually applied against the taxpayer's account. A taxpayer must make a remittance for both the tax liability and the interest that has accrued as of the date of remittance to stop the running of interest on both the tax liability and the accrued interest with respect to the liability. (See Rev. Proc. 84–58.) Taxpayer cannot make partial remittances applicable only to tax motivated underpayments. Under A-9 of this section, the 120 percent rate applies to the amount of unpaid tax to the extent that amount does not exceed the tax motivated underpayment. Therefore, a partial remittance is applied first to any tax due that is not attributable to a tax motivated underpayment. The excess of the partial remittance over tax that is not attributable to a tax motivated underpayment, if any, will then be applied to tax due that is attributable to a tax motivated underpayment.

Q-12. Does the 120 percent rate apply to interest accruing on interest, penalties, additional amounts, or additions to tax as provided in section 6601(e)(2)?

A-12. The 120 percent rate applies only to taxes imposed by subtitle A (income taxes) and to interest accrued with respect to such taxes. The penalties, additional amounts, and additions to tax specified in section 6601(e)(2) are not imposed by subtitle A and are not, therefore, included in the amount of a tax motivated underpayment. They are, however, included in the amount of unpaid tax for purposes of A-9 of this section.

*Example*. Taxpayer A, for taxable year 1984, has a $10,000 tax motivated underpayment and a $2,000 addition to tax for a total unpaid tax of $12,000. If A makes a $5,000 payment of tax, he will still have a $10,000 tax motivated underpayment but will now have only $7,000 of unpaid tax. Pursuant to A-9 of this section, therefore, the 120 percent rate would apply to the $7,000 of unpaid tax.

(Secs. 6621(d) and 7805, Internal Revenue Code of 1954 (98 Stat. 682, 26 U.S.C. 6621(d); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7998, 49 FR 50391, Dec. 28, 1984]

### § 301.6621–3 Higher interest rate payable on large corporate underpayments.

(a) *In general*. Section 6621 establishes the interest rate for purposes of computing the amount of interest that must be paid under section 6601, relating to interest on underpayments of tax. Section 6621(a)(2) provides that the underpayment rate is the sum of the Federal short-term rate (determined under section 6621(b)) plus 3 percentage points. That underpayment rate is referred to hereinafter as the ''section 6621(a)(2) rate.'' Section 6621(c) and this section, however, provide that the underpayment rate on any large corporate underpayment is the sum of the Federal short-term rate (determined under section 6621(b)) plus 5 percentage points. This higher underpayment rate is referred to hereinafter as the ''section 6621(c) rate.'' The section 6621(c) rate applies only for periods after the applicable date (as determined in paragraph (c) of this section).

(b) *Large corporate underpayment*—(1) *Defined*. For purposes of section 6621(c) and this section, ''large corporate underpayment'' means any underpayment of a tax by a C corporation for any taxable period if the amount of the threshold underpayment of the tax (as defined in paragraph (b)(2)(ii) of this section) for that taxable period exceeds $100,000.

(2) *Underpayment of a tax*—(i) *In general*. As used in section 6621(c) and this section, ''underpayment of a tax'' means the excess of a tax imposed by the Internal Revenue Code over the amount of such tax paid on or before the last date prescribed for payment. Except as provided in paragraph (b)(2)(ii) of this section, ''tax'' for such purposes includes interest, penalties, additional amounts, and additions to tax. See sections 6601(e)(1), 6665(a), and 6671(a). Thus, the section 6621(c) rate generally applies to any interest, penalties, additional amounts, and additions to tax, as well as to the underlying tax with respect to which such amounts are imposed.

(ii) *Threshold underpayment of a tax*. Solely for purposes of this section and not for any other purpose under section 6621(c) or elsewhere in the interpretation or administration of the federal tax laws, a ''threshold underpayment of a tax'' is the excess of a tax imposed by the Internal Revenue Code (exclusive of interest, penalties, additional amounts, and additions to tax) for the taxable period over the amount of such tax paid on or before the last date prescribed for payment. Thus, any payments made after the last date prescribed for payment (for example, by way of an amended return) will not affect the existence of a threshold underpayment. In determining whether there is a threshold underpayment, different types of taxes (such as income tax and FICA tax) and amounts that relate to different taxable periods are not added together.

(iii) *When determined*—(A) *In general*. The existence of a threshold underpayment of a tax and the amount of a large corporate underpayment are generally determined only when an assessment is made with respect to the taxable period. Thus, the amount of a deficiency or proposed deficiency set forth in a letter or notice pursuant to which the applicable date is determined (under paragraph (c) of this section) does not determine whether there is a large corporate underpayment.

(B) *Judicial determinations*. Notwithstanding any prior assessment made

with respect to a taxable period, the section 6621(c) rate does not apply if, after a federal court determines the taxpayer's liability for a period, the threshold underpayment for that taxable period does not exceed $100,000. See Example 3 in paragraph (d) of this section.

(iv) *Special rule.* The section 6621(c) rate is not used to compute the interest charges that a taxpayer timely assesses against itself in return for using a method of tax accounting or reporting that defers the payment of tax, such as the interest charges relating to passive foreign investment companies under section 1291(c) and installment obligations of nondealers under section 453A(c). However, to the extent such charges are not paid on or before the last date prescribed for payment and therefore become part of an underpayment of a tax, the section 6621(c) rate will apply to such amounts for periods after the applicable date (as determined in paragraph (c) of this section).

(3) *C corporation defined.* For purposes of section 6621(c)(3)(A) and this section, ''C corporation'' means, with respect to any taxable period, a corporation that is a C corporation during any part of the taxable period. Interest on a large corporate underpayment for a taxable period continues to be imposed at the section 6621(c) rate even if during or after the taxable period—

(i) The taxpayer ceases to be a C corporation; or

(ii) The underpayment becomes the liability of a successor or transferee that is not a C corporation.

(4) *Taxable period.* For purposes of section 6621(c) and this section, the ''taxable period'' is the taxable year in the case of any tax imposed by subtitle A of the Internal Revenue Code. In the case of any other tax, the ''taxable period'' is the period to which the underpayment relates. For example, the taxable period for an underpayment of FICA taxes is the calendar quarter. If the underpayment does not relate to a particular period (for example, in the case of certain transactional excise taxes), the ''taxable period'' is the period covered by a return on which the tax is required to be shown.

(5) *Last date prescribed for payment.* For purposes of this section, the ''last date prescribed for payment'' means the last date prescribed for payment as determined, without regard to any extension of time, under section 6601(b).

(c) *Applicable date*—(1) *In general.* The section 6621(c) rate applies only to periods after the applicable date. Pursuant to the effective date of section 6621(c) and paragraph (e) of this section, however, the section 6621(c) rate will not apply prior to January 1, 1991, even if the applicable date is prior to December 31, 1990. A letter or notice relating to a particular type of tax creates an applicable date only for that type of tax. For example, a letter or notice with respect to FUTA tax will not create an applicable date with respect to income tax for the same taxable year.

(2) *When deficiency procedures apply.* The applicable date, in the case of any underpayment of a tax to which the deficiency procedures of subchapter B of chapter 63 of the Internal Revenue Code apply, is the 30th day after the earlier of—

(i) The date on which the Service sends the taxpayer the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Service's Office of Appeals (commonly called a ''30-day letter''); or

(ii) The date on which the Service sends a deficiency notice under section 6212 of the Internal Revenue Code (commonly called a ''90-day letter'').

(3) *When deficiency procedures do not apply.* The applicable date, in the case of any underpayment of a tax to which the deficiency procedures do not apply, is the 30th day after the date on which the Service sends the first letter or notice that notifies the taxpayer of an assessment or proposed assessment of the tax. In the case of income taxes, for example, the deficiency procedures do not apply to amounts shown as due on the taxpayer's return if the taxpayer fails to remit the full amount on or before the last date prescribed for payment, and to amounts attributable to mathematical or clerical errors on a return (unless a request for abatement is filed by the taxpayer under section 6213(b)). Because no 30-day letter or 90-day letter is issued to the taxpayer in

such cases, the applicable date is the 30th day after the date on which an assessment notice under section 6303 of the Internal Revenue Code is sent.

(4) *Partnership items.* For purposes of section 6621(c) and this paragraph (c), 60-day letters and the notices described in sections 6223(a)(1) and 6223(a)(2) (relating to administrative proceedings at the partnership level) are not treated as letters of proposed deficiency that allow the taxpayer an opportunity for administrative review in the Service's Office of Appeals, deficiency notices under section 6212 of the Internal Revenue Code, or letters or notices that notify the taxpayer of an assessment or proposed assessment of the tax. Thus, in the absence of any other letter or notice described in paragraph (c)(2) or (c)(3) of this section that establishes an earlier applicable date, the applicable date in the case of any underpayment of a tax attributable, in whole or in part, to a partnership item (as defined in section 6231(a)(3)) is the 30th day after the date on which the Service sends the first letter or notice that notifies the taxpayer of an assessment of the tax.

(5) *Exception of payment of amount shown as due*—(i) *In general.* A letter of notice will be disregarded for purposes of determining the applicable date if the taxpayer makes a payment equal to the amount shown as due in the letter or notice within 30 days from the date that the Service sends the letter or notice.

(ii) *Special transition rule.* A letter or notice sent by the Service prior to January 1, 1991, will be disregarded by the Service for purposes of determining the applicable date if the taxpayer makes a payment on or before January 31, 1991, equal to the amount shown as due in the letter or notice plus a reasonable estimate of the interest payable on such amount computed by applying the section 6621(a)(2) rate. If the taxpayer has received two or more letters or notices with respect to the same tax for the same taxable period and pays the amount shown as due in the last letter or notice sent prior to December 19, 1990, (plus a reasonable estimate of the interest), all of the prior letters and notices with respect to the same tax for the same taxable period will be disregarded under this paragraph (c)(5)(ii). In the case of an assessment notice, the payment of the amount of interest shown as due on the last assessment notice sent to the taxpayer prior to December 19, 1990, will be treated as a payment of a reasonable estimate of the interest payable on the amount shown in that assessment notice or in any prior assessment notice sent with respect to the same tax for the same taxable period. The special transition rule in this paragraph (c)(5)(ii) applies even if the payment is not made within 30 days of the date on which the Service sent the letter or notice.

(iii) *Amount shown as due.* For purposes of section 6621(c)(2)(B)(ii) and this paragraph (c)(5), the ''amount shown as due'' in any letter or notice means the total amount of tax, as well as any interest, penalties, additional amounts, and additions to tax that are set forth in the letter or notice. A deposit in the nature of a cash bond will not be considered a payment of the amount shown as due.

(6) *Exception for withdrawn letters and notices*—(i) *Letters of proposed deficiency.* A letter of proposed deficiency will be disregarded for purposes of determining the applicable date if the letter of proposed deficiency is issued as a result of an administrative error either to the wrong taxpayer or for the wrong taxable period.

(ii) *Deficiency notices.* A deficiency notice under section 6212 of the Internal Revenue Code will be disregarded for purposes of determining the applicable date if the deficiency notice is rescinded under section 6212(d).

(iii) *Assessment letters and notices.* A letter or notice that notifies the taxpayer of an assessment or proposed assessment of tax will be disregarded for purposes of determining the applicable date if the full amount of tax assessed is subsequently abated.

(d) *Examples.* The application of this section may be illustrated by the following examples.

*Example 1.* V, a C corporation, timely files Form 941 on January 31, 1991, for the fourth quarter of 1990. On September 1, 1992, the Service sends V a section 6303 notice and demand reflecting an additional FICA tax liability for that quarter of $90,000. Interest computed at the section 6621(a)(2) rate totals $15,000 as of September 1, 1992. Accordingly,

V's underpayment of FICA tax for the fourth quarter of 1990 exceeds $100,000. However, V's $90,000 threshold underpayment of FICA tax for that taxable period is less than $100,000, so that the section 6621(c) rate will not apply to the underpayment for that taxable period.

*Example 2.* (i) W, a C corporation, timely files its 1990 income tax return on March 15, 1991, showing a liability of $95,000, of which W pays only $35,000 with the return. On June 1, 1991, the Service sends W an assessment notice reflecting the balance due of $60,000 plus interest computed at the section 6621(a)(2) rate. W pays all amounts due on August 1, 1991. On July 1, 1993, the Service sends W a 90-day letter (without having sent a 30-day letter) reflecting an additional income tax deficiency of $85,000 for the taxable year 1990. W files a petition in the Tax Court within 90 days. In 1995, the Tax Court determines a $50,000 income tax deficiency (exclusive of interest, penalties, additional amounts, and additions to tax) for 1990, which the Service promptly assesses against W.

(ii) As a result of the combination of the failure to timely pay the $60,000 of income tax reported as due on the return and the Tax Court's determination of an additional deficiency of $50,000, W's threshold underpayment of income tax for 1990 is $110,000. Because W is a C corporation and the threshold underpayment for 1990 exceeds $100,000, the section 6621(c) rate applies to W's 1990 large corporate underpayment for periods after the applicable date.

(iii) The applicable date is July 1, 1991, the 30th day after the date on which the Service sent W the first assessment notice.

(iv) From March 16, 1991, through July 1, 1991, interest on W's 1990 underpayment of income tax (including any interest, penalties, additional amounts, and additions to tax) is computed at the section 6621(a)(2) rate. From July 2, 1991, such interest is computed at the section 6621(c) rate.

(v) If W had paid the amount shown as due on the June 1, 1991, assessment notice on or before June 30, 1991, instead of on August 1, 1991, the applicable date would have been July 31, 1993.

(vi) Assume that W had paid the amount shown as due on the June 1, 1991, assessment notice on or before June 30, 1991. If W had made a $40,000 deposit in the nature of a cash bond on July 15, 1993, the applicable date would be July 31, 1993. Moreover, the deposit would have no effect on the existence or amount of W's threshold underpayment or large corporate underpayment for 1990. In such a case, however, when the Service assesses the amount due from W in 1995, the deposit would be treated as a payment made as of July 15, 1993, for purposes of computing interest due after that date. As a result, interest would accrue after July 15, 1993, (at the section 6621(c) rate) only on the portion of W's 1990 underpayment that exceeds the $40,000 deposit amount.

*Example 3.* (i) X, a C corporation, filed its 1989 income tax return ,on September 17, 1990, pursuant to an automatic extension. X enclosed payment of the $7,500 balance reported on the return as due (plus interest). On January 1, 1992, the Service sends X a written notification that X's 1989 income tax return is being examined. This written notification also contains a request that X provide supplemental information with respect to particular deductions totalling $1.5 million. On July 1, 1993, the Service sends X a 30-day letter proposing a $450,000 deficiency (without any reference to penalties, additional amounts, additions to tax, and interest) with respect to 1989. On December 15, 1993, the Service sends X a 90-day letter asserting a deficiency of $300,000 (excluding penalties, additional amounts, additions to tax, and other interest). X does not file a Tax Court petition and the Service assesses the $300,000 (plus interest and penalties) on April 1, 1994. On April 5, 1994, X pays the full amount assessed. Thereafter, X timely files an administrative claim for refund and a refund suit in federal district court for the amounts assessed on April 1, 1994. On September 30, 1995, the federal district court determines that, exclusive of interest and penalties, X overpaid its 1989 income tax by $250,000.

(ii) The April 1, 1994, assessment establishes at that time that X's threshold underpayment of income tax for 1989 is $300,000. Because X is a C corporation and the threshold underpayment for 1989 exceeds $100,000, X's underpayment of income tax for 1989 is a large corporate underpayment to which the section 6621(c) rate applies for periods after the applicable date. X's decision to file a refund claim does not affect, in and of itself, either the existence of a threshold underpayment or the amount of X's large corporate underpayment.

(iii) For purposes of determining the amount of interest to assess on April 1, 1994, the applicable date is July 31, 1993, the 30th day after the date on which the Service sent X a 30-day letter. The January 1, 1992, notice of examination and request for additional information has no effect on the applicable date. Similarly, the September 30, 1995, federal district court decision has no effect on the applicable date.

(iv) From March 16, 1990, through July 31, 1993, interest on X's 1989 underpayment of income tax (including any interest, penalties, additional amounts, and additions to tax) is computed at the section 6621(a)(2) rate. From August 1, 1993, through April 5, 1994, such interest is computed at the section 6621(c) rate.

(v) Because of the federal district court's decision that X's underpayment, exclusive of interest and penalties, was only $50,000, X

does not have a large corporate underpayment of income tax for 1989. Thus, the interest X paid with respect to the remaining $250,000 in taxes (exclusive of interest and penalties) becomes part of the overpayment and will be refunded. In addition, any interest computed at the section 6621(c) rate for the period from August 1, 1993, through April 5, 1994, should be recomputed at the section 6621(a)(2) rate and the difference refunded.

*Example 4.* (i) Y, a C corporation, timely filed its 1989 income tax return on March 15, 1990, and enclosed payment of the amount reported on the return as due. On May 1, 1990, the Service sent to Y an assessment notice for $1,000 resulting from a math error on Y's return. Y did not request an abatement of the assessment pursuant to section 6213(b). Instead, Y paid the $1,000, plus interest, on July 31, 1990. On March 31, 1992, the Service sends Y a 90-day letter showing an income tax deficiency for 1989 of $125,000 (exclusive of interest, penalties, additional amounts, and additions to tax). No 30-day letter had been issued previously to Y in connection with its 1989 taxable year. Y does not file a petition with the Tax Court, but files an amended return for 1989 on April 15, 1992, showing $30,000 of tax due. Y pays this amount (plus interest from March 15, 1990, computed at the section 6621(a)(2) rate) with the amended return. Shortly thereafter, the Service assesses the $125,000 deficiency (plus interest) and credits the April 15, 1992, payment against the assessment.

(ii) Y's threshold underpayment for 1989 is $125,000 notwithstanding Y's April 15, 1992, payment of $30,000. Because Y is a C corporation and the threshold underpayment for 1989 exceeds $100,000, Y has a large corporate underpayment of income tax for the taxable period 1989 to which the section 6621(c) rate applies for periods after the applicable date.

(iii) Because Y paid the $1,000 amount shown as due on the math error assessment notice (plus interest) on or before January 31, 1991, the applicable date is April 30, 1992, the 30th day after the 90-day letter is sent.

(iv) From March 16, 1990, through April 30, 1992, interest is computed on Y's underpayment of income tax (including any interest, penalties, additional amounts, and additions to tax) at the section 6621(a)(2) rate. From May 1, 1992, such interest is computed at the section 6621(c) rate.

(v) If Y had not paid the $1,000 amount shown as due on the math error assessment notice (plus interest) on or before January 31, 1991, the applicable date would have been May 31, 1990, and interest would be computed at the section 6621(c) rate beginning on January 1, 1991. If, however, Y had timely requested an abatement of the assessment under section 6213(b), the applicable date would be April 30, 1992.

*Example 5.* (i) Effective January 1, 1993, Y converts from a C corporation to an S corporation. On January 31, 1993 Y files its 1992 FUTA tax return and encloses a payment equal to the amount reported as due on the return. On March 15, 1993, Y files its 1992 income tax return and encloses a payment equal to the amount reported as due on the return. On August 1, 1993, the Service sends to Y an assessment notice for $150,000 of FUTA tax, plus interest, with respect to calendar year 1992. Y pays the full amount shown as due in the assessment notice on August 7, 1993. On January 1, 1995, Y files an amended income tax return for 1992 showing $15,000 of tax due. Y pays this amount with the amended return. On February 10, 1995, the Service sends Y an assessment notice for the interest payable on the $15,000. Y pays this interest on February 13, 1995.

(ii) Y's threshold underpayment of FUTA tax for 1992 is $150,000. Because Y was a C corporation in 1992 and the threshold underpayment of FUTA tax for 1992 exceeds $100,000, Y has a large corporate underpayment of FUTA tax. However, Y's threshold underpayment of income tax for the same taxable period (*i.e.*, calendar 1992) is $15,000, so that Y does not have a large corporate underpayment of income tax for that year.

(iii) Because Y pays within 30 days the amount shown as due on the August 1, 1993, assessment notice, there is no applicable date with respect to the large corporate underpayment of FUTA tax for 1992.

(iv) All of the interest payable with respect to the 1992 underpayments of FUTA and income taxes is computed at the section 6621(a)(2) rate.

(v) If Y had not paid the amount shown as due on the August 1, 1993, FUTA tax assessment notice within 30 days, the applicable date would have been August 31, 1993, (the 30th day after the assessment notice is sent). Thus, interest would have been computed at the section 6621(c) rate after that date, even though Y is not at that time a C corporation.

(vi) If the amended 1992 income tax return Y files on January 1, 1995, had shown $115,000 of tax due instead of $15,000, Y's threshold underpayment of income tax for 1992 would have been $115,000. Because Y was a C corporation in 1992 and the threshold underpayment of income tax for that year would have exceeded $100,000, Y would have a large corporate underpayment of income tax for that year. However, because Y would have paid the amount shown as due in the February 10, 1995, assessment notice within 30 days of when that assessment notice was sent, there would have been no applicable date with respect to that large corporate underpayment and the section 6621(c) rate would have not applied.

*Example 6.* (i) On August 1, 1990, the Service sent to Z, a C corporation, an assessment notice for $200,000 of income tax, plus $30,000 in

interest and penalties, with respect to calendar year 1988. Subsequent assessment notices were sent to Z on September 12, 1990, October 10, 1990, and November 14, 1990, each including additional interest. The November 14, 1990, assessment notice provided that the total amount of tax, interest and penalties due was $242,000. On December 31, 1990, Z pays $230,000. On February 13, 1991, the Service sends Z an assessment notice for the remaining balance (plus additional interest thereon). On December 31, 1991, Z pays all amounts owed as of that date in connection with its 1988 income tax liability.

(ii) Z's threshold underpayment of income tax for 1988 is $200,000. Because Z is a C corporation and its threshold underpayment of income tax for 1988 exceeds $100,000, Z has a large corporate underpayment for 1988 to which the section 6621(c) rate applies for periods after the applicable date.

(iii) Notwithstanding Z's payment of $230,000 on December 31, 1990, the applicable date with respect to the large corporate underpayment of 1988 income tax is August 31, 1990, the 30th day after the date on which the Service sent the first assessment notice.

(iv) From March 16, 1989, to December 31, 1990, interest is computed on Z's underpayment of income tax (including any interest, penalties, additional amounts and additions to tax) at the section 6621(a)(2) rate. From January 1, 1991, through December 31, 1991, interest is computed on that underpayment at the section 6621(c) rate.

(v) If Z had paid on or before January 31, 1991, the full $242,000 shown as due on the November 14, 1990, assessment notice, the applicable date with respect to any remaining unpaid interest would have been March 15, 1991, the 30th day after the Service sent the February 13, 1991, assessment notice.

(vi) The same result as in paragraph (v) of this *Example 6* would apply if the November 14, 1990, assessment notice had provided that only $150,000 was due with respect to calendar year 1988 (as a result of a correction by the Service of an error in its original August 1, 1990, assessment, and not as a result of any payment by Z), and if Z had paid that $150,000 on or before January 31, 1991.

(e) *Effective date.* Section 6621(c) and this section are effective for determining interest for periods after December 31, 1990, regardless of the taxable period to which the underlying tax may relate and even if the applicable date is prior to December 31, 1990.

[T.D. 8447, 57 FR 53554, Nov. 12, 1992; 57 FR 60846, Dec. 22, 1992]

## § 301.6622–1 Interest compounded daily.

(a) *General rule.* Effective for interest accruing after December 31, 1982, in computing the amount of any interest required to be paid under the Internal Revenue Code of 1954 or sections 1961(c)(1) or 2411 of title 28, United States Code, by the Commissioner or by the taxpayer, or in computing any other amount determined by reference to such amount of interest, or by reference to the interest rate established under section 6621, such interest or such other amount shall be compounded daily by dividing such rate of interest by 365 (366 in a leap year) and compounding such daily interest rate each day.

(b) *Exception.* Paragraph (a) of this section shall not apply for purposes of determining the amount of any addition to tax under sections 6654 or 6655 (relating to failure to pay estimated income tax).

(c) *Applicability to unpaid amounts on December 31, 1982*—(1) *In general.* The unpaid interest (or other amount) that shall be compounded daily includes the interest (or other amount) accrued but unpaid on December 31, 1982.

(2) *Illustration.* The provisions of this (c) may be illustrated by the following example.

*Example.* Individual A files a tax return for calendar year 1981 on April 15, 1982, showing a tax due of $10,000. A pays $10,000 on December 31, 1982, but A does not pay any interest with respect to this underpayment until March 1, 1983, on which date A paid all amounts of interest with respect to the $10,000 underpayment of tax. On December 31, 1982, A's unsatisfied interest liability was $1,424.66 ($10,000 × 20 percent × 260/365 days). Interest, compounded daily, accrues on this unsatisfied interest obligation beginning on January 1, 1983, until March 1, 1983, the date the total interest obligation is satisfied. On March 1, 1983, the total interest obligation is $1,462.62, computed as follows:

| Item | Amount |
|---|---|
| Unpaid tax at December 31, 1982 | 0 |
| Unpaid interest at December 31, 1982 | $1,424.66 |
| Total unsatisfied obligation at December 31, 1982 | 1,424.66 |
| Interest from December 31, 1982, to March 1, 1983, at 16 percent per year compounded daily | 37.96 |
| Total due, March 1, 1983 | 1,462.62 |

[T.D. 7907, 48 FR 38231, Aug. 23, 1983]

## Additions to the Tax, Additional Amounts, and Assessable Penalties

ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS

### § 301.6651–1 Failure to file tax return or to pay tax.

(a) *Addition to the tax*—(1) *Failure to file tax return*. In case of failure to file a return required under authority of—

(i) Subchapter A, chapter 61 of the Code, relating to returns and records (other than sections 6015 and 6016, relating to declarations of estimated tax, and part III thereof, relating to information returns);

(ii) Subchapter A, chapter 51 of the Code, relating to distilled spirits, wines, and beer;

(iii) Subchapter A, chapter 52 of the Code, relating to cigars, cigarettes, and cigarette papers and tubes; or

(iv) Subchapter A, chapter 53 of the Code, relating to machine guns, destructive devices, and certain other firearms; and

The regulations thereunder, on or before the date prescribed for filing (determined with regard to any extension of time for such filing), there shall be added to the tax required to be shown on the return the amount specified below unless the failure to file the return within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 percent thereof if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. The amount of any addition under this subparagraph shall be reduced by the amount of the addition under subparagraph (2) of this paragraph for any month to which an addition to tax applies under both subparagraphs (1) and (2) of this paragraph (a).

(2) *Failure to pay tax shown on return*. In case of failure to pay the amount shown as tax on any return (required to be filed after December 31, 1969, without regard to any extension of time for filing thereof) specified in subparagraph (1) of this paragraph (a), on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), there shall be added to the tax shown on the return the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director, or, as provided in paragraph (a) of this section, the Assistant Regional Commissioner (Alcohol, Tobacco and Firearms), the director of the service center, to be due to reasonable cause and not to willful neglect. Except as provided in paragraph (a)(4) of this section, the amount to be added to the tax is 0.5 percent of the amount of tax shown on the return if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

(3) *Failure to pay tax not shown on return*. In the case of failure to pay any amount of any tax required to be shown on a return specified in paragraph (a)(1) of this section that is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of the notice and demand (10 business days if the amount assessed and shown on the notice and demand equals or exceeds $100,000) with respect to any notice and demand made after December 31, 1996, there will be added to the amount stated in the notice and demand the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. Except as provided in paragraph (a)(4) of this section, the amount to be added to the tax is 0.5 percent of the amount stated in the notice and demand if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. For purposes of this paragraph (a)(3), see § 301.6601–1(f)(5) for

the definition of *calendar day* and *business day*.

(4) *Reduction of failure to pay penalty during the period an installment agreement is in effect*—(i) *In general*. In the case of a return filed by an individual on or before the due date for the return (including extensions)—

(A) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(2) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax; and

(B) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(3) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax.

(ii) *Effective date*. This paragraph (a)(4) applies for purposes of determining additions to tax for months beginning after December 31, 1999.

(b) *Month defined*. (1) If the date prescribed for filing the return or paying tax is the last day of a calendar month, each succeeding calendar month or fraction thereof during which the failure to file or pay tax continues shall constitute a month for purposes of section 6651.

(2) If the date prescribed for filing the return or paying tax is a date other than the last day of a calendar month, the period which terminates with the date numerically corresponding thereto in the succeeding calendar month and each such successive period shall constitute a month for purposes of section 6651. If, in the month of February, there is no date corresponding to the date prescribed for filing the return or paying tax, the period from such date in January through the last day of February shall constitute a month for purposes of section 6651. Thus, if a return is due on January 30, the first month shall end on February 28 (or 29 if a leap year), and the succeeding months shall end on March 30, April 30, etc.

(3) If a return is not timely filed or tax is not timely paid, the fact that the date prescribed for filing the return or paying tax, or the corresponding date in any succeeding calendar month, falls on a Saturday, Sunday, or a legal holiday is immaterial in determining the number of months for which the addition to the tax under section 6651 applies.

(c) *Showing of reasonable cause*. (1) Except as provided in subparagraphs (3) and (4) of this paragraph (b), a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed; *Provided*, That where special tax returns of liquor dealers are delivered to an alcohol, tobacco and firearms officer working under the supervision of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, such statement may be delivered with the return. If the district director, the director of the service center, or, where applicable, the Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161–1(b) of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including

the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

(2) In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501 that are collected or withheld from any other person.

(3) If, for a taxable year ending on or after December 31, 1995, an individual taxpayer satisfies the requirement of § 1.6081–4(a) of this chapter (relating to automatic extension of time for filing an individual income tax return), reasonable cause will be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if—

(i) The excess of the amount of tax shown on the individual income tax return over the amount of tax paid on or before the regular due date of the return (by virtue of tax withheld by the employer, estimated tax payments, and any payment with an application for extension of time to file pursuant to § 1.6081–4 of this chapter) is no greater than 10 percent of the amount of tax shown on the individual income tax return; and

(ii) Any balance due shown on the individual income tax return is remitted with the return.

(4) If, for a taxable year ending on or after December 31, 1972, a corporate taxpayer satisfies the requirements of § 1.6081–3 (a) (relating to an automatic extension of time for filing a corporation income tax return), reasonable cause shall be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if—

(i) The amount of tax (determined without regard to any prepayment thereof) shown on Form 7004, or the amount of tax paid on or before the regular due date of the return, is at least 90 percent of the amount of tax shown on the taxpayer's Form 1120, and

(ii) Any balance due shown on the Form 1120 is paid on, or before the due date of the return, including any extensions of time for filing.

(d) *Penalty imposed on net amount due*—(1) *Credits against the tax.* The amount of tax required to be shown on the return for purposes of section 6651(a)(1) and the amount shown as tax on the return for purposes of section 6651(a)(2) shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return.

(2) *Partial payments.* (i) The amount of tax required to be shown on the return for purposes of section 6651(a)(2) shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid after the date prescribed for payment and on or before the first day of such month.

(ii) The amount of tax stated in the notice and demand for purposes of section 6651(a)(3) shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the first day of such month.

(e) *No addition to tax if fraud penalty assessed.* No addition to the tax under section 6651 shall be assessed with respect to an underpayment of tax if a 50-percent addition to the tax for fraud is assessed with respect to the same underpayment under section 6653(b). See section 6653(d).

(f) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* (a) Under section 6072(a), income tax returns of individuals on a calendar year basis must be filed on or before the 15th day of April following the close of the calendar year. Assume an individual filed his income tax return for the calendar year 1969 on July 20, 1970, and the failure to file on or before the prescribed date is not due to reasonable cause. The tax shown on the return is $800 and a deficiency of $200 is subsequently assessed, making the tax required to be shown on the return, $1,000. Of this amount, $300 has been paid by withholding from wages and $400 has been paid as estimated tax. The balance due as shown on the return of $100 ($800 shown as tax on the return less $700 previously paid) is paid on August 21, 1970. The failure to pay on or before the prescribed date is not due to reasonable cause. There will be imposed, in addition to interest, an additional amount under section 6651(a)(2) of $2.50, which is 2.5 percent (2% for the 4 months from April 16 through August 15, and 0.5% for the fractional part of the month from August 16 through August 21) of the net amount due as shown on the return of $100 ($800 shown on the return less $700 paid on or before April 15). There will also be imposed an additional amount under section 6651(a)(1) of $58, determined as follows:

| | |
|---|---|
| 20 percent (5% per month for the 3 months from April 16 through July 15 and 5% for the fractional part of the month from July 16 through July 20) of the net amount due of $300 ($1,000 required to be shown on the return less $700 paid on or before April 15) | $60 |
| Reduced by the amount of the addition imposed under section 6651(a)(2) for those months | 2 |
| Addition to tax under section 6651(a)(1) | $50 |

(b) A notice and demand for the $200 deficiency is issued on January 8, 1971, but the taxpayer does not pay the deficiency until December 23, 1971. In addition to interest there will be imposed an additional amount under section 6651(a)(3) of $10, determined as follows:

| | |
|---|---|
| Addition computed without regard to limitation: | |
| 6 percent (5½% for the 11 months from January 19, 1971, through December 18, 1971, and 0.5% for the fractional part of the month from December 19 through December 23) of the amount stated in the notice and demand ($200) | $12 |
| Limitation on addition: | |
| 25 percent of the amount stated in the notice and demand ($200) | $50 |
| Reduced by the part of the addition under section 6651(a)(1) for failure to file attributable to the $200 deficiency (20% of $200) | $40 |
| Maximum amount of the addition under section 6651(a)(3) | $10 |

*Example 2.* An individual files his income tax return for the calendar year 1969 on December 2, 1970, and such delinquency is not due to reasonable cause. The balance due, as shown on the return, of $500 is paid when the return is filed on December 2, 1970. In addition to interest and the addition for failure to pay under section 6651(a)(2) of $20 (8 months at 0.5% per month, 4%), there will also be imposed an additional amount under section 6651(a)(1) of $112.50, determined as follows:

| | |
|---|---|
| Penalty at 5 percent for maximum of 5 months, 25 percent of $500 | $125.00 |
| Less reduction for the amount of the addition under section 6651(a)(2): | |
| Amount imposed under section 6651(a)(2) for the months in which there is also an addition for failure to file—2½ percent for the 5 months April 16 through September 15 of the net amount due ($500) | 12.50 |
| Addition to tax under section 6651(a)(1) | $112.50 |

(g) *Treatment of returns prepared by the Secretary*—(1) *In general.* A return prepared by the Secretary under section 6020(b) will be disregarded for purposes of determining the amount of the addition to tax for failure to file any return pursuant to paragraph (a)(1) of this section. However, the return prepared by the Secretary will be treated as a return filed by the taxpayer for purposes of determining the amount of the addition to tax for failure to pay the tax shown on any return and for failure to pay the tax required to be shown on a return that is not so shown pursuant to paragraphs (a)(2) and (3) of this section, respectively.

(2) *Effective date.* This paragraph (g) applies to returns the due date for

which (determined without regard to extensions) is after July 30, 1996.

[T.D. 7133, 36 FR 13594, July 22, 1971, as amended by T.D. 7160, 37 FR 2507, Feb. 2, 1972; T.D. 7260, 38 FR 4259, Feb. 12, 1973; T.D. 8651, 61 FR 262, Jan. 4, 1996; T.D. 8703, 61 FR 69031, Dec. 31, 1996; T.D. 8725, 62 FR 39117, July 22, 1997; T.D. 8895, 65 FR 50408, Aug. 18, 2000; T.D. 9163, 69 FR 70550, Dec. 7, 2004]

### § 301.6652–1 Failure to file certain information returns.

(a) *Returns with respect to payments made in calendar years after 1962*—(1) *Payments of dividends, interest, or patronage dividends aggregating $10 or more.* In the case of each failure to file a statement required by—

(i) Section 6042(a)(1), relating to information returns with respect to payments of dividends aggregating $10 or more in a calendar year, in effect with respect to payments made after December 31, 1962,

(ii) Section 6044(a)(1), relating to information returns with respect to certain payments by cooperatives aggregating $10 or more in a calendar year, in effect with respect to payments made on or after the first day of the first taxable year of the cooperative beginning after December 31, 1962, with respect to patronage occurring on or after such first day, or

(iii) Section 6049(a)(1), relating to information returns with respect to payments of interest aggregating $10 or more in a calendar year, in effect with respect to payments made after December 31, 1962, and the regulations under such section, within the time prescribed for filing such statement (determined with regard to any extension of time for filing), there shall be paid by the person failing to so file the statement $10 for each such statement not so filed. However, the total amount imposed on the delinquent person for all such failures under section 6652(a) and this section during any calendar year shall not exceed $25,000.

(2) *Other payments; statements with respect to tips.* In the case of each failure—

(i) To file a statement of a payment made to another person required under authority of section 6041, relating to information returns with respect to certain information at source, or section 6051(d), relating to information returns with respect to payments of wages as defined in section 3401(a), or section 6050(a), relating to information returns with respect to remuneration of certain crew members defined in section 3121(b)(20), or

(ii) To furnish a statement required under authority of section 6053(b), relating to statements furnished by employers with respect to tips, or section 6050A(b), relating to statements furnished by fishing boat operators with respect to remuneration of certain crew members, within the time prescribed by regulations under those sections for filing such statements (determined with regard to any extension of time for filing),

There shall be paid by the person failing to so file the statement $1 for each such statement not so filed. However, the total amount imposed on the delinquent person for all such failures during any calendar year shall not exceed $1,000.

(b) *Returns with respect to payments made in calendar years before 1963 and to certain payments by cooperatives after 1962.* In the case of each failure to file a statement, with respect to a payment to another person, required under authority of—

(1) Section 6041, relating to information returns with respect to certain information at source, in effect with respect to payments made before 1963,

(2) Section 6042(1), relating to information returns with respect to payments of corporate dividends, in effect with respect to payments made before 1963,

(3) Section 6044, relating to information returns with respect to payments of patronage dividends, in effect with respect to payments made by a cooperative with respect to patronage occurring before the first day of the first taxable year of the cooperative beginning after December 31, 1962, or

(4) Section 6051(d), relating to information returns with respect to payments of wages as defined in section 3401(a), in effect with respect to payments made before 1963,

and the regulations under such section, within the time prescribed for filing

such statement (determined with regard to any extension of time for filing), there shall be paid by the person failing to so file such statement $1 for each such statement not so filed. However, the total amount imposed on the delinquent person for all such failures during any calendar year shall not exceed $1,000.

(c) *Returns with respect to reporting payments of wages in the form of group-term life insurance provided in a calendar year after December 31, 1963.* In the case of each failure to file a return required by section 6052(a), relating to reporting payment of wages in the form of group-term life insurance provided for any employee on his life in a calendar year after December 31, 1963, and the regulations under such section, within the time prescribed for filing such return (determined with regard to any extension of time for filing), there shall be paid by the person failing to so file such return $10 for each such return not so filed. However, the total amount imposed on the delinquent person for all such failures under section 6652(a) and this section during any calendar year shall not exceed $25,000.

(d) *Returns with respect to transfer of stock or record title thereto pursuant to options exercised on or after January 1, 1964.* In the case of each failure to file a statement of the transfer of stock or of record title thereto as required by section 6039(a) and the regulations under such section within the time prescribed for filing such statement (determined with regard to any extension of time for filing), there shall be paid by the corporation failing to so file such statement, $10 for each such statement not so filed. However, the total amount imposed on the delinquent corporation for all such failures under section 6652(a) and this section during any calendar year shall not exceed $25,000.

(e) *Manner of payment.* The amount imposed under subsection (a), (b), or (c) of section 6652 and this section on any person shall be paid in the same manner as tax upon the issuance of a notice and demand therefor.

(f) *Showing of reasonable cause.* The amount imposed by subsection (a), (b), or (c) of section 6652 shall not apply with respect to a failure to file a statement within the time prescribed if it is established to the satisfaction of the district director or the director of the Internal Revenue Service Center that such failure was due to reasonable cause and not to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration that it is made under the penalties of perjury, setting forth all the facts alleged as a reasonable cause.

(g) *Alcohol and tobacco taxes.* For penalties for failure to file certain information returns with respect to alcohol and tobacco taxes, see, generally, subtitle E of the Code.

(h) *Tips.* For regulations under section 6652(c) in respect of failure to report tips, see § 31.6652–1 of this chapter (Employment Tax Regulations).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7001, 34 FR 1006, Jan. 23, 1969; T.D. 7127, 36 FR 11503, June 15, 1971; T.D. 7716, 45 FR 57124, Aug. 27, 1980]

### § 301.6652–2 Failure by exempt organizations and certain nonexempt organizations to file certain returns or to comply with section 6104(d) for taxable years beginning after December 31, 1969.

(a) *Exempt organization or trust.* In the case of a failure to file a return required by—

(1) Section 6033, relating to returns by exempt organizations, trusts described in section 4947(a)(1) and nonexempt private foundations,

(2) Section 6034, relating to returns by certain trusts, or

(3) Section 6043(b), relating to returns regarding the liquidation, dissolution, termination, or substantial contraction of an exempt organization,

within the time and in the manner prescribed for filing such return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid by the exempt organization or trust failing to file such return $10 for each day during which such failure continues. However, the total amount imposed on any exempt organization or trust under this paragraph for such failure with regard to any one return shall not exceed $5,000.

(b) *Managers*. If an exempt organization or trust fails to file under section 6652(d)(1), the Commissioner may, by written demand, request that such organization or trust file the delinquent return within 90 days after the date of mailing of such demand, or within such additional period as the Commissioner shall determine is reasonable under the circumstances. If such organization or trust does not so file on or before the date specified in such demand, there shall be paid by the person or persons responsible for such failure to file $10 for each day after such date during which such failure continues, unless it is shown that such failure is due to reasonable cause. However, the total amount imposed under this paragraph on all persons responsible for such failure with regard to any one return shall not exceed $5,000.

(c) *Public inspection of private foundations' annual returns*—(1) *In general*. In the case of a failure to comply with the requirements of section 6104(d), relating to public inspection of private foundations' annual returns, within the time and in the manner prescribed for complying with section 6104(d), unless it is shown that such failure is due to reasonable cause, there shall be paid by the person or persons responsible for failing to comply with section 6104(d) $10 for each day during which such failure continues. However, the total amount imposed under this subparagraph on all persons responsible for any such failure with regard to any one annual return shall not exceed $5,000.

(2) *Amount imposed*. The amount imposed under section 6652(d)(3) is $10 per day for a failure to comply with section 6104(d). For example, assume that an annual return must be filed by private foundation X on or before May 15, 1982, for the calendar year 1981. The foundation without reasonable cause does not comply with section 6104(d) by publishing notice of the availability of the annual return until July 30, 1982. In this case, the person failing to comply with section 6104(d) within the prescribed time is required to pay $760 for complying with section 6104(d) 76 days late.

(3) *Cross reference*. For the penalty for willful failure to comply with section 6104(d), see § 301.6685–1.

(d) *Special rules*. For purposes of section 6652(d) and this section—

(1) *Person*. The term ''person'' means any officer, director, trustee, employee, member, or other individual whose duty it is to perform the act in respect of which the violation occurs.

(2) *Liability*. If more than one person (as defined in subparagraph (1) of this paragraph (d)) is liable for a failure to file or to comply with section 6652(d)(2) or (3), all such persons shall be jointly and severally liable with respect to such failure.

(e) *Manner of payment*. The amount imposed under section 6652(d) and this section on any exempt organization, trust, or person (as defined in paragraph (d)(1) of this section) shall be paid in the same manner as tax upon the issuance of a notice and demand therefor.

(f) *Showing of reasonable cause*. No amount imposed by section 6652(d) shall apply with respect to a failure to file or comply under this section if it is established to the satisfaction of the district director or director of the internal revenue service center that such failure was due to reasonable cause. An affirmative showing of reasonable cause must be made in the form of a written statement containing a declaration by the appropriate person (as defined in paragraph (d)(1) of this section), or in his absence, by any officer, director, or trustee of the organization, that the statement is made under the penalties of perjury, setting forth all the facts alleged as reasonable cause.

(g) *Group returns*. If a central organization is authorized to file a group return on behalf of two or more of its local organizations for the taxable year in accordance with paragraph (d) of § 1.6033–2 (Income Tax Regulations), the responsibility for timely filing of such a return is placed upon the central organization for purposes of this section. Consequently, the amount imposed by section 6652(d)(1) for failure to file the group return shall be paid by the central organization and the amount imposed by section 6652(d)(2) for failure to file the group return within the time prescribed by the Commissioner shall be paid by the person or persons responsible for filing the group return.

(h) *Effective date.* This section shall apply for taxable years beginning after December 31, 1969.

[T.D. 7127, 36 FR 11503, June 15, 1971, as amended by T.D. 8026, 50 FR 20758, May 20, 1985]

### § 301.6652–3 Failure to file information with respect to employee retirement benefit plan.

(a) *Amount imposed*—(1) *Annual registration statement.* The plan administrator (within the meaning of section 414(g)) of an employee retirement benefit plan defined in § 301.6057–1(a)(3) is liable for the amount imposed by section 6652(e)(1) in each case in which there is a failure to file information relating to the deferred vested retirement benefit of a plan participant, as required by section 6057(a) and § 301.6057–1, at the time and place and in the manner prescribed therefor (determined without regard to any extension of time for filing). The amount imposed by section 6652(e)(1) on the plan administrator is $1 for each participant with respect to whom there is a failure to file the required information, multiplied by the number of days during which the failure continues. However, the total amount imposed by section 6652(e)(1) on the plan administrator with respect to a failure to file on behalf of a plan for a plan year shall not exceed $5,000.

(2) *Notification of change in status.* The plan administrator (within the meaning of section 414(g)) of an employee retirement benefit plan defined in § 301.6057–1(a)(3) is liable for the amount imposed by section 6652(e)(2) in each case in which there is a failure to file a notification of a change in plan status, as described in section 6057(b) and § 301.6057–2, at the time and place and in the manner prescribed therefor (determined without regard to any extension of time for filing). The amount imposed by section 6652(e)(2) on the plan administrator is $1 for each day during which the failure to so file a notification of a change in plan status continues. However, the total amount imposed by section 6652(e)(2) on the plan administrator with respect to a failure to file a notification of a change in plan status shall not exceed $1,000.

(3) *Annual return of funded plan of deferred compensation.* Under section 6652(f) the amount described in this subparagraph is imposed in each case in which there is a failure to file the annual return described in section 6058(a) on behalf of a plan described in § 301.6058–1(a) at the time and in the manner prescribed therefor (determined with regard to any extension of time for filing). The employer maintaining the plan is liable for the amount imposed with respect to a failure to so file the annual return in each case in which the employer must file the return under § 301.6058–1(a). The plan administrator (within the meaning of section 414(g)) is liable for the amount imposed in each case in which the plan administrator must file the return under § 301.6058–1(a). In the case of an individual retirement account or annuity described in section 408, the individual described in § 301.6058–1(d)(2) who must file the annual return under § 301.6058–1(d) is liable for the amount imposed with respect to a failure to so file the annual return. The amount imposed is $10 for each day during which the failure to file the annual return on behalf of a plan for a year continues. However, the total amount imposed with respect to a failure to file on behalf of a plan for any year shall not exceed $5,000.

(4) *Actuarial statement in case of mergers.* The plan administrator (within the meaning of section 414(g)) is liable for an amount imposed by section 6652(f) in each case in which there is a failure to file the actuarial statement described in section 6058(b) at the time and in the manner prescribed therefor (determined with regard to any extension of time for filing). The amount imposed by section 6652(f) on the plan administrator is $10 for each day during which the failure to file the statement with respect to a merger, consolidation or transfer of assets or liabilities continues. However, the amount imposed by section 6652(f) on the plan administrator with respect to a failure to file the statement with respect to a merger, consolidation or transfer shall not exceed $5,000.

(5) *Information relating to certain trusts and annuity and bond purchase plans.*

Under section 6652(f) the amount described in this subparagraph is imposed in each case in which there is a failure to file a return or statement required by section 6047 at the time and in the manner prescribed therefor in § 1.6047–1 (determined with regard to any extension of time for filing). The amount is imposed upon the trustee of a trust described in section 401(a), custodian of a custodial account or issuer of an annuity contract, as the case may be (see § 1.6047–1(a)(1) (i) and (ii)). The amount imposed by section 6652(f) is $10 for each day during which the failure to file with respect to a payee for a calendar year continues. However, the amount imposed with respect to a failure to file with respect to a payee for a calendar year shall not exceed $5,000.

(b) *Showing of reasonable cause.* (1) No amount imposed by section 6652(e) shall apply with respect to a failure to file information relating to the deferred vested retirement benefit of a plan participant under section 6057(a), or a failure to give notice of a change in plan status under section 6057(b), if it is established to the satisfaction of the director of the internal revenue service center at which the information or notice is required to be filed that the failure was due to reasonable cause.

(2) No amount imposed by section 6652(f) shall apply with respect to a failure to file a return or statement required by section 6058 or 6047, or a failure to provide material items of information called for on such a return or statement, if it is established to the satisfaction of the appropriate district director or the director of the internal revenue service center at which the return or statement is required to be filed that the failure was due to reasonable cause.

(3) An affirmative showing of reasonable cause must be made in the form of a written statement setting forth all the facts alleged as reasonable cause. The statement must contain a declaration by the appropriate individual that the statement is made under the penalties of perjury.

(c) *Joint liability.* If more than one person is responsible for a failure to comply with sections 6057 (a) or (b) or section 6058 (a) or (b) or section 6047, all such persons shall be jointly and severally liable with respect to the failure.

(d) *Manner of payment.* An amount imposed under section 6652 (e) or (f) and this section shall be paid in the same manner as a tax upon the issuance of notice and demand therefor.

(e) *Effective dates*—(1) *Annual registration statement.* With respect to the annual registration statement described in section 6057(a), this section is effective—

(i) In the case of a plan to which only one employer contributes, for plan years beginning after December 31, 1975, with respect to participants who separate from service covered by the plan in plan years beginning after that date, and

(ii) In the case of a plan to which more than one employer contributes, for plan years beginning after December 31, 1977, and with respect to participants who complete two consecutive 1-year breaks in service under the plan in service computation periods beginning after December 31, 1974.

(2) *Notification of change in status.* With respect to the notification of change in plan status required by section 6057(b), this section is effective with respect to a change in status occurring within plan years beginning after December 31, 1975.

(3) *Annual return of employee benefit plan.* With respect to the annual return of employee benefit plan required by section 6058(a), this section is effective for plan years beginning after September 2, 1974.

(4) *Actuarial statement in case of mergers.* With respect to the actuarial statement required by section 6058(b), this section is effective with respect to mergers, consolidations or transfers of assets or liabilities occurring after September 2, 1974.

(5) *Information relating to certain trusts and annuity and bond purchase plans.* With respect to reports or statements required to be filed by section 6047 and the regulations thereunder, this section is effective with respect to calendar years ending after September 2, 1974.

[T.D. 7551, 43 FR 29293, July 7, 1978, and T.D. 7561, 43 FR 38006, Aug. 25, 1978; 44 FR 24285, Apr. 25, 1979]

**§ 301.6653–1 Failure to pay tax.**

(a) *Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.* If any part of any underpayment, as defined in section 6653(c)(1) and paragraph (c)(1) of this section, of any income tax imposed by subtitle A of the Code, or gift tax imposed by chapter 12, subtitle B, of the Code, is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, there shall be added to the tax an amount equal to 5 percent of the underpayment.

(b) *Fraud.* (1) If any part of any underpayment of tax, as defined in section 6653(c) and paragraph (c) of this section, required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment.

(2) If a 50 percent addition to the tax for fraud is assessed under section 6653(b) with respect to an underpayment—

(i) The addition to the tax under section 6651, relating to failure to file a tax return, will not be assessed with respect to the same underpayment, and

(ii) In the case of the income taxes imposed by subtitle A and the gift tax imposed by chapter 12 of subtitle B, the 5 percent addition to the tax under section 6653(a), relating to negligence and intentional disregard of rules and regulations, will not be assessed with respect to the same underpayment.

(c) *Definition of underpayment*—(1) *Income, estate, gift, and chapter 41, 42, 43, and 44 taxes.* In the case of income, estate, gift, and chapter 41, 42, 43, and 44 taxes, an underpayment for purposes of section 6653 and this section is—

(i) The total amount of all deficiencies as defined in section 6211, if a return was filed on or before the last date (determined with regard to any extension of time) prescribed for filing such return, or

(ii) The amount of the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44, as the case may be, if a return was not filed on or before the last date (determined with regard to any extension of time) prescribed for filing such return.

However, for purposes of paragraph (c)(1)(i) of this section, any amount of additional tax shown on the amended return, so called, filed after the due date of the return is a deficiency.

(2) *Other taxes.* In the case of any tax other than an income, estate, gift or chapter 41, 42, 43, or 44 tax, an underpayment for purposes of section 6653 and this section is the amount by which the tax imposed exceeds—

(i) In the case of any tax with respect to which the taxpayer is required to file a return, the sum of (*a*) the amount shown as tax by the taxpayer upon his return filed in respect of such tax, but only if the return is filed on or before the last date (determined with regard to any extension of time) prescribed for filing such return, plus (*b*) any amount not shown on a return filed by the taxpayer which is paid in respect of such tax prior to the date prescribed for filing the return. The ''amount shown as tax by the taxpayer upon his return'' for the purposes of this subparagraph shall be determined without regard to any credit for an overpayment for any prior tax return period, and without regard to any adjustment made under section 6205(a), or section 6413(a), relating to special rules applicable to certain employment taxes.

(ii) In the case of any tax payable by stamp, the amount paid (on or before the date prescribed for payment) in respect of such tax.

The amounts specified in subdivisions (i) and (ii) of this subparagraph shall be reduced, for purposes of determining the amount of the underpayment, by the amount of any rebates made. For purposes of this subparagraph, the term ''rebates'' means so much of an abatement, credit, refund, or other repayment as was made on the ground that the tax imposed was less than the excess of the amount specified in subdivision (i) or (ii) of this subparagraph, whichever is applicable, over any rebates previously made.

(d) *No delinquency penalty if fraud assessed.* See paragraph (b)(2) of this section.

(e) *Failure to pay stamp tax.* Any person (as defined in section 6671(b)) who willfully fails to pay any tax payable by stamp, coupons, tickets, books or other devices or methods prescribed by the Code or regulations promulgated thereunder, or willfully attempts in

any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of 50 percent of the total amount of the underpayment of the tax.

(f) *Joint returns*. No person filing a joint return shall be held liable for a fraud penalty except for his own personal fraudulent conduct. Thus, for the fraud penalty to apply to a taxpayer who files a joint return some part of the underpayment in such return must be due to the fraud of such taxpayer. A taxpayer shall not be subject to the fraud penalty solely by reason of the fraud of a spouse and his filing of a joint return with such spouse.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7320, 39 FR 28279, Aug. 6, 1974; 39 FR 29353, Aug. 15, 1974; T.D. 7838, 47 FR 44252, Oct. 7, 1982]

### § 301.6654–1 Failure by individual to pay estimated income tax.

For regulations under section 6654, see §§ 1.6654–1 to 1.6654–5, inclusive, of this chapter (Income Tax Regulations).

[T.D. 7282, 38 FR 19029, July 19, 1973]

### § 301.6655–1 Failure by corporation to pay estimated income tax.

For regulations under section 6655, see §§ 1.6655–1 to 1.6655–3, inclusive, and § 1.6655–5, of this chapter (Income Tax Regulations).

[T.D. 7059, 35 FR 14549, Sept. 17, 1970]

### § 301.6656–1 Abatement of penalty.

(a) *Exception for first time depositors of employment taxes*—(1) *Waiver*. The Secretary will generally waive the penalty imposed by section 6656(a) on a person's failure to deposit any employment tax under subtitle C of the Internal Revenue Code if—

(i) The failure is inadvertent;

(ii) The person meets the requirements referred to in section 7430(c)(4)(A)(ii) (relating to the net worth requirements applicable for awards of attorney's fees);

(iii) The failure occurs during the first quarter that the person is required to deposit any employment tax; and

(iv) The return of the tax is filed on or before the due date.

(2) *Inadvertent failure*. For purposes of paragraph (a)(1)(i) of this section, the Secretary will determine if a failure to deposit is inadvertent based on all the facts and circumstances.

(b) *Deposit sent to Secretary*. The Secretary may abate the penalty imposed by section 6656(a) if the first time a depositor is required to make a deposit, the amount required to be deposited is inadvertently sent to the Secretary instead of to the appropriate government depository.

(c) *Effective date*. This section applies to deposits required to be made after July 30, 1996.

[T.D. 8725, 62 FR 39118, July 22, 1997. Redesignated by T.D. 8947, 66 FR 32542, June 15, 2001]

### § 301.6657–1 Bad checks.

(a) *In general*. Except as provided in paragraph (b) of this section, if a check or money order is tendered in the payment of any amount receivable under the Code, and such check or money order is not paid upon presentment, a penalty of one percent of the amount of the check or money order, in addition to any other penalties provided by law shall be paid by the person who tendered such check or money order. If, however, the amount of the check or money order is less than $500, the penalty shall be $5 or the amount of the check or money order, whichever amount is the lesser. Such penalty shall be paid in the same manner as tax upon the issuance of a notice and demand therefor.

(b) *Reasonable cause*. If payment is refused upon presentment of any check or money order and the person who tendered such check or money order establishes to the satisfaction of the district director that it was tendered in good faith with reasonable cause to believe that it would be duly paid, the penalty set forth in paragraph (a) of this section shall not apply.

### § 301.6658–1 Addition to tax in case of jeopardy.

Upon a finding by the district director that any taxpayer violated, or attempted to violate, section 6851 (relating to termination of taxable year) there shall, in addition to all other penalties, be added as part of the tax 25

percent of the total amount of the tax or deficiency in the tax.

**§ 301.6659–1 Applicable rules.**

(a) *Additions treated as tax.* Except as otherwise provided in the Code, any reference in the Code to ''tax'' shall be deemed also to be a reference to any addition to the tax, additional amount, or penalty imposed by chapter 68 of the Code with respect to such tax. Such additions to the tax, additional amounts, and penalties shall become payable upon notice and demand therefor and shall be assessed, collected, and paid in the same manner as taxes.

(b) *Additions to tax for failure to file return or pay tax.* Any addition under section 6651 or section 6653 to a tax shall be considered a part of such tax for the purpose of the assessment and collection of such tax. For applicability of deficiency procedures to additions to the tax, see paragraph (c) of this section.

(c) *Deficiency procedures*—(1) *Addition to the tax for failure to file tax return.* (i) Subchapter B, chapter 63, of the Code (deficiency procedures) applies to the additions to the income estate, gift, and chapter 41, 42, 43, and 44 taxes imposed by section 6651 for failure to file a tax return to the same extent that it applies to such taxes. Accordingly, if there is a deficiency (as defined in section 6211) in the tax (apart from the addition to the tax) where a return has not been timely filed, deficiency procedures apply to the addition to the tax under section 6651. If there is no deficiency in the tax where a return has not been timely filed, the addition to the tax under section 6651 may be assessed and collected without deficiency procedures.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following examples:

*Example 1.* A filed his income tax return for the calendar year 1955 on May 15, 1956, not having been granted an extension of time for such filing. His failure to file on time was not due to reasonable cause. The return showed a liability of $1,000 and it was determined that A is liable under section 6651 for an addition to such tax of $50 (5 percent a month for 1 month). The provisions of subchapter B of chapter 63 (deficiency procedures) do not apply to the assessment and collection of the addition to the tax since such provisions are not applicable to the tax with respect to which such addition was asserted, there being no statutory deficiency for purposes of section 6211.

*Example 2.* Assume the same facts as in example 1 and assume further that a deficiency of $500 in tax and a further $25 addition to the tax under section 6651 is asserted against A for the calendar year 1955. Thus, the total addition to the tax under section 6651 is $75. Since the provisions of subchapter B of chapter 63 are applicable to the $500 deficiency, they likewise apply to the $25 addition to the tax asserted with respect to such deficiency (but not to the $50 addition to the tax under example 1).

(2) *Additions to the tax for negligence or fraud.* Subchapter B of chapter 63 (deficiency procedures) applies to all additions to the income, estate, gift, and chapter 41, 42, 43, and 44 taxes imposed by section 6653 (a) and (b) for negligence and fraud.

(3) *Additions to tax for failure to pay estimated income taxes*—(i) *Return filed by taxpayer.* The addition to the tax for underpayment of estimated income tax imposed by section 6654 (relating to failure by individuals to pay estimated income tax) or section 6655 (relating to failure by corporations to pay estimated income tax) is determined by reference to the tax shown on the return if a return is filed. Therefore, such addition may be assessed and collected without regard to the provisions of subchapter B of chapter 63 (deficiency procedures) if a return is filed since such provisions are not applicable to the assessment of the tax shown on the return. Further, since the additions to the tax imposed by section 6654 or 6655 are determined solely by reference to the amount of tax shown on the return if a return is filed, the assertion of a deficiency with respect to any tax not shown on such return will not make the provisions of subchapter B of chapter 63 (deficiency procedures) apply to the assessment and collection of any additions to the tax under section 6654 or 6655.

(ii) *No return filed by taxpayer.* If the taxpayer has not filed a return and his entire income tax liability is asserted as a deficiency to which the provisions of subchapter B of chapter 63 apply, such provisions likewise will apply to

any addition to such tax imposed by section 6654 or 6655.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7838, 47 FR 44252, Oct. 7, 1982]

ASSESSABLE PENALTIES

### § 301.6671–1 Rules for application of assessable penalties.

(a) *Penalty assessed as tax.* The penalties and liabilities provided by subchapter B, chapter 68, of the Code (sections 6671 to 6675, inclusive) shall be paid upon notice and demand by the district director or the director of the regional service center and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in the Code to ''tax'' imposed thereunder shall also be deemed to refer to the penalties and liabilities provided by subchapter B of chapter 68.

(b) *Person defined.* For purposes of subchapter B of chapter 68, the term ''person'' includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

### § 301.6672–1 Failure to collect and pay over tax, or attempt to evade or defeat tax.

Any person required to collect, truthfully account for, and pay over any tax imposed by the Code who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. The penalty imposed by section 6672 applies only to the collection, accounting for, or payment over of taxes imposed on a person other than the person who is required to collect, account for, and pay over such taxes. No penalty under section 6653, relating to failure to pay tax, shall be imposed for any offense to which this section is applicable. For further guidance regarding the determination of the proper address for mailing the notice required under section 6672(b)(1), see § 301.6212–2.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8939, 66 FR 2821, Jan. 12, 2001]

### § 301.6673–1 Damages assessable for instituting proceedings before the Tax Court merely for delay.

Any damages awarded to the United States by the Tax Court under section 6673 against a taxpayer for instituting proceedings before the Tax Court merely for delay shall be assessed at the same time at the deficiency and shall be paid upon notice and demand from the district director or the director of the regional service center and shall be collected as a part of the tax.

### § 301.6674–1 Fraudulent statement or failure to furnish statement to employee.

For regulations under section 6674, see § 31.6674–1 of this chapter (Employment Tax Regulations).

### § 301.6678–1 Failure to furnish statements to payees.

(a) *In general.* In the case of each failure to furnish a statement required—

(1) Under section 6042(c) and § 1.6042–4 to a person with respect to whom a return has been made under section 6042(a)(1), relating to information returns with respect to payment of dividends aggregating $10 or more in a calendar year,

(2) Under section 6044(e) and § 1.6044–5 to a person with respect to whom a return has been made under section 6044(a)(1), relating to information returns with respect to certain payments by cooperatives aggregating $10 or more in a calendar year,

(3) Under section 6049(c) and § 1.6049–3 to a person with respect to whom a return has been made under section 6049(a)(1), relating to information returns with respect to payments of interest aggregating $10 or more in a calendar year,

(4) Under section 6039(b) and § 1.6039–2 to a person with respect to whom a return has been made under section 6039(a), relating to information returns with respect to certain stock option transactions occurring in a calendar year, or

(5) Under section 6052(b) and § 1.6052–2 to a person with respect to whom a return has been made under section 6052(a), relating to information returns with respect to payment of wages in the form of group-term life insurance provided for an employee on his life, within the time prescribed for furnishing such statement (determined with regard to any extension of time for furnishing), there shall be paid by the person failing to so furnish the statement $10 for each such statement not so furnished. However, the total amount imposed on the delinquent person for all such failures during a calendar year shall not exceed $25,000.

(b) *Manner of payment.* The penalty imposed under section 6678 and this section on any person shall be paid in the same manner as tax upon the issuance of a notice and demand therefor.

(c) *Showing of reasonable cause.* The penalty imposed by section 6678 shall not apply with respect to a failure to furnish a statement within the time prescribed if it is established to the satisfaction of the district director or the director of the regional service center that such failure was due to reasonable cause and not to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration that it is made under the penalties of perjury, setting forth all the facts alleged as a reasonable cause.

### § 301.6679–1 Failure to file returns, etc. with respect to foreign corporations or foreign partnerships for taxable years beginning after September 3, 1982.

(a) *Civil penalty*—(1) *In general.* In addition to any criminal penalty provided by law, each U.S. citizen, resident, or person filing a separate or joint information return or on whose behalf a return is filed, pursuant to sections 6035, 6046, or 6046A, and the regulations thereunder, who fails to file such a return within the time provided, or who files a return which does not show the required information, shall pay a penalty of $1,000, unless such failure is shown to be due to reasonable cause.

(2) *Joint return.* The penalty imposed by section 6679 and this section shall apply to each U.S. citizen, resident, or person filing a joint return pursuant to the provisions of section 6035, 6046, or 6046A, which does not show the required information.

(3) *Showing of reasonable cause.* The district director, the director of the Internal Revenue service center, and the director of International Operations are authorized to make the determination that such failure was due to a reasonable cause and that, accordingly, the penalty imposed by section 6679 shall not apply. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration that it is made under the penalties of perjury, setting forth all the facts alleged as a reasonable cause. If the taxpayer exercises ordinary business care and prudence and is nevertheless unable to furnish any item of information required under section 6035, 6046, or 6046A and the regulations thereunder, such failure shall be considered due to a reasonable cause. In determining the extent of a taxpayer's ability to obtain information, the percentage of stock owned by such taxpayer and the nature of the other interests in the foreign corporation will be considered.

(b) *Deficiency procedures not to apply.* The penalty imposed by section 6679 may be assessed and collected without regard to the deficiency procedures provided by subchapter B of chapter 63 of the Code.

[32 FR 15421, Nov. 3, 1967, as amended by T.D. 7288, 38 FR 27215, Oct. 1, 1973; T.D. 7542, 43 FR 18552, May 1, 1978; T.D. 8028, 50 FR 23409, June 4, 1985]

### § 301.6682–1 False information with respect to withholding allowances based on itemized deductions.

For regulations under section 6682, see § 31.6682–1 of this chapter (Employment Tax Regulations).

[T.D. 7109, 35 FR 16544, Oct. 23, 1970]

### § 301.6684–1 Assessable penalties with respect to liability for tax under chapter 42.

(a) *In general.* If any person (as defined in section 7701(a)(1)) becomes liable for tax under any section of chapter 42 (other than section 4940 or 4948(a)), relating to private foundations, by reason of any act or failure to act which is

not due to reasonable cause and either—

(1) Such person has theretofore (at any time) been liable for tax under any section of such chapter (other than section 4940 or 4948(a)), or

(2) Such act or failure to act is both willful and flagrant,

then such person shall be liable for a penalty equal to the amount of such tax.

(b) *Showing of reasonable cause.* The penalty imposed by section 6684 shall not apply to any person with respect to a violation of any section of chapter 42 if it is established to the satisfaction of the district director or director of the internal revenue service center that such violation was due to reasonable cause. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration by such person that it is made under the penalties of perjury, setting forth all the facts alleged as reasonable cause.

(c) *Willful and flagrant.* For purposes of this section, the term ''willful and flagrant'' has the same meaning as such term possesses in section 507(a)(2)(A) and the regulations thereunder.

(d) *Effective date.* This section shall take effect on January 1, 1970.

[T.D. 7127, 36 FR 11504, June 15, 1971]

### § 301.6685–1 Assessable penalties with respect to private foundations' failure to comply with section 6104(d).

(a) *In general.* In addition to the penalty imposed by section 7207, relating to fraudulent returns, statements, or other documents, any person (as defined in paragraph (b) of this section) who is required to comply with the requirements of section 6104(d), relating to public inspection of private foundations' annual returns, and who fails so to comply, if such failure is willful, shall pay a penalty of $1,000 with respect to each such return with respect to which there is a failure so to comply.

(b) *Person.* For purposes of this section, the term ''person'' means any officer, director, trustee, employee, member, or other individual whose duty it is to perform the act in respect of which the failure occurs.

(c) *Effective date.* This section shall take effect on January 1, 1970.

(d) *Cross reference.* For the amount imposed for failure to comply with section 6104(d), see paragraph (c) of § 301.6652–2.

[T.D. 7127, 36 FR 11505, June 15, 1971, as amended by T.D. 8026, 50 FR 20758, May 20, 1985]

### § 301.6686–1 Failure of DISC to file returns.

(a) *In general.* In addition to the penalty imposed by section 7203 (relating to willful failure to file a return, supply information, or pay tax) any person who is required to supply informatin or to file a return under section 6011(c) (relating to records and returns of DISC's) and who fails to supply such information of file such return at the time prescribed in sections 6072(b) and 1.6072–2(e) shall pay a penalty of $100 for each failure to supply information (provided that the total amount imposed on the delinquent person for all such failures during a calendar year shall not exceed $25,000) and a penalty of $1,000 with respect to each failure to file a return, unless it is shown that such failure is due to a reasonable cause.

(b) *Showing of reasonable cause.* The penalty imposed by section 6686 shall not apply to any person with respect to a failure to supply information, or to file a return, under section 6011(c) if it is established to the satisfaction of the district director or director of the Internal Revenue Service Center that such failure was due to reasonable cause. An affirmative showing of reasonable cause must be made in the form of a written statement, which contains a declaration by such person that the statement is made under the penalties of perjury, and sets forth all the facts alleged as reasonable cause.

[T.D. 7533, 43 FR 6604, Feb. 15, 1978]

### § 301.6688–1 Assessable penalties with respect to information required to be furnished with respect to possessions.

[Reserved] For further guidance, see § 301.6688–1T.

[T.D. 9194, 70 FR 18947, Apr. 11, 2005]

**§ 301.6688–1T Assessable penalties with respect to information required to be furnished with respect to possessions (temporary).**

(a) *In general.* Each individual who is subject to an information reporting requirement promulgated under the authority of section 937(c) or 7654 and who fails to fully satisfy such requirement within the time prescribed for reporting such information shall, in addition to any criminal penalty provided by law, pay a penalty of $1000 for each such failure. Information reporting requirements promulgated under the authority of sections 937(c) and 7654(e) include the following:

(1) The requirement to file Form 8689, ''Allocation of Individual Income Tax to the Virgin Islands,'' under § 1.932–1T(b)(1) of this chapter, for certain individuals with income from sources within the United States Virgin Islands.

(2) [Reserved]

(3) [Reserved]

(4) The requirement for individuals to report that they became or ceased to be a bona fide resident of a possession under § 1.937–1T(g) of this chapter.

(b) *Manner of payment.* The penalty set forth in paragraph (a) of this section shall be paid in the same manner as tax upon the issuance of a notice and demand therefor.

(c) *Reasonable cause*—(1) *In general.* The penalty set forth in paragraph (a) of this section shall not apply if it is established to the satisfaction of the appropriate tax authority (as defined in paragraph (c)(2) of this section) that the failure to file the information return or furnish the information within the prescribed time was due to reasonable cause and not to willful neglect. An individual who wishes to avoid the penalty must make an affirmative showing of all facts alleged as a reasonable cause for failure to file the information return on time, or furnish the information on time, in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement must be filed with the appropriate tax authority. In determining whether there was reasonable cause for failure to furnish the required information, account will be taken of the fact that the individual was unable to furnish the required information in spite of the exercise of ordinary business care and prudence in his effort to furnish the information. An individual will be considered to have exercised ordinary business care and prudence in his effort to furnish the required information if he made reasonable efforts to furnish the information but was unable to do so because of a lack of sufficient facts on which to make a proper determination.

(2) *Appropriate tax authority.* For purposes of this section, the appropriate tax authority is the person responsible for tax administration in the jurisdiction to which the information is required to be provided. Thus, in the case of information required under section 937(c) or under section 7654 to be provided to the Internal Revenue Service, the appropriate tax authority is the Commissioner. In the case of information required under section 7654 (as in effect with respect to section 935 possessions (as defined in § 1.935–1T(a)(3)(i) of this chapter) to be provided to the tax authorities of a section 935 possession, the appropriate tax authority is the person responsible for tax administration in such possession or his delegate. See § 1.935–1(b) of this chapter for the rules that specify where returns of income tax must be filed for the taxable year by individuals to whom section 935 applies.

(d) *Effective date.* This section shall apply for taxable years ending after October 22, 2004.

[T.D. 9194, 70 FR 18947, Apr. 11, 2005]

**§ 301.6689–1T Failure to file notice of redetermination of foreign tax (temporary).**

(a) *Application of civil penalty.* If a foreign tax redetermination was made with respect to taxes for which the taxpayer previously claimed the foreign tax credit, and the taxpayer failed to notify the Service on or before the date prescribed in regulations under section 905(c) or in regulations under section 404A(g)(2) for giving notice of a foreign tax redetermination, then, unless paragraph (d) of this section applies, there shall be added to the deficiency attributable to such redetermination an amount determined under paragraph (b) of this section.

(b) *Amount of penalty*. The amount of the penalty shall be equal to—

(1) Five percent of the deficiency if the failure is for not more than one month, plus

(2) An additional five percent of the deficiency for each month (or fraction thereof) during which the failure continues, but not to exceed in the aggregate twenty-five percent of the deficiency. If the penalty imposed under paragraph (a) of this section applies, then the penalty imposed under section 6653(a), relating to failure to pay by reason of negligent or intentional disregard of rules and regulations, shall not apply.

(c) *Foreign tax redetermination defined*. For purposes of this section, a foreign tax redetermination is any redetermination for which a notice is required under section 905(c) and the regulations thereunder, or section 404A(g)(2) and the regulations thereunder.

(d) *Reasonable cause*. The penalty set forth in this section shall not apply if it is established to the satisfaction of the Service that the failure to file the notification within the prescribed time was due to reasonable cause and not due to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement that sets forth all the facts alleged as reasonable cause for the failure to file the notification on time and that contains a declaration by the taxpayer that the statement is made under the penalties of perjury. This statement must be filed with the service center in which the notification was required to be filed. The taxpayer must file this statement with the notice required under section 905(c) and the regulations thereunder or section 404A(g)(2) and the regulations thereunder. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the notification within the prescribed time, then the delay will be considered to be due to reasonable cause and not willful neglect.

(e) *Effective date*. This section is effective with respect to foreign tax redeterminations occurring after December 31, 1979.

[T.D. 8210, 53 FR 23618, June 23, 1988]

**§ 301.6690–1 Penalty for fraudulent statement or failure to furnish statement to plan participant.**

(a) *Penalty*. Any plan administrator required by section 6057(e) and § 301.6057–1(e) to furnish a statement of deferred vested retirement benefit to a plan participant is subject to a penalty of $50 in each case in which the administrator (1) willfully fails to furnish the statement to the participant in the manner, at the time, and showing the information required by section 6057(e) and § 301.6057–1(e), or (2) willfully furnishes a false or fraudulent statement to the participant. The penalty shall be assessed and collected in the same manner as the tax imposed on employers under the Federal Insurance Contributions Act.

(b) *Effective date*. This section shall take effect on September 2, 1974.

[T.D. 7561, 43 FR 38007, Aug. 25, 1978]

**§ 301.6692–1 Failure to file actuarial report.**

(a) *Penalty*. In each case in which the plan administrator (within the meaning of section 414(g)) of a defined benefit plan to which the minimum funding standards of section 412 apply fails to file the actuarial report described in section 6059 and § 301.6059–1 within the time prescribed, the plan administrator shall pay a penalty of $1,000. A failure to provide a material item of information called for in the actuarial report is considered a failure to file the report. For this purpose, the signature of an enrolled actuary (see § 301.6059–1(d)) is considered a material item of information.

Further, for any report filed for a plan year ending after January 25, 1982, if the actuary seeks to materially qualify a statement required by § 301.6059–1(c) (4) or (5) there is a failure to provide a material item of information called for in the report. For rules relating to statements not considered as materially qualifying the required statements, see § 301.6059–1(d).

(b) *Failure to make actuarial valuation*. Section 412(c)(9) and the regulations thereunder prescribe the time for making an actuarial valuation of a defined benefit plan. For purposes of this section, the failure to base information called for in the actuarial report upon

an actuarial valuation of the plan which is made within the time prescribed by section 412(c)(9) and the regulations thereunder is considered a failure to file the actuarial report.

(c) *Showing of reasonable cause.* The penalty imposed by this section does not apply if it is established to the satisfaction of the appropriate district director or the director of the Internal Revenue Service Center at which the actuarial report is required to be filed that the failure to file the report was due to reasonable cause. An affirmative showing of reasonable cause must be made in the form of a written statement setting forth all the facts alleged as reasonable cause. The statement must contain a declaration by the appropriate individual that the statement is made under the penalties of perjury.

(d) *Joint liability.* If more than one person is responsible as a plan administrator for a failure to file the actuarial report, all such persons are jointly and severally liable with respect to the failure.

(e) *Manner of payment.* The penalty imposed for the failure to file an actuarial report shall be paid in the same manner as a tax upon the issuance of notice and demand therefor.

(f) *Effective dates.* In the case of a plan in existence on January 1, 1974, this section is effective beginning with the first plan year beginning after December 31, 1975, for which the minimum funding standards of section 412 apply to the plan. In the case of a plan not in existence on January 1, 1974, this section is effective beginning with the first plan year beginning after September 2, 1974, for which the minimum funding standards apply to the plan.

(Secs. 6059 and 7805 of the Internal Revenue Code of 1954 (88 Stat. 947, 68A Stat. 917; 26 U.S.C. 6059, 7805))

[T.D. 7798, 46 FR 57484, Nov. 24, 1981]

### § 301.6693–1 Penalty for failure to provide reports and documents concerning individual retirement accounts or annuities.

(a) *In general*—(1) *Annual reports, etc.* The trustee of an individual retirement account described in section 408(a), or the issuer of an individual retirement annuity described in section 408(b), who fails to furnish or file a report or any other document required under section 408(i) and § 1.408–5 within the time and in the manner prescribed for furnishing or filing such item shall pay a penalty of $10 for each failure unless it is shown that such failure is due to reasonable cause.

(2) *Disclosure statements.* The trustee of an individual retirement account described in section 408(a), or the issuer of an individual retirement annuity described in section 408(b), who fails to furnish or file a disclosure statement, a governing instrument, an amendment to either, or any other document required under section 408(i) and § 1.408–6, within the time and in the manner prescribed for furnishing or filing such item, shall pay a penalty of $10 for each failure unless it is shown that such failure is due to reasonable cause.

(b) *Showing of reasonable cause.* The penalty imposed by section 6693 shall not apply to any person with respect to a failure to furnish or file a report, statement, or other document within the time and in the manner prescribed if it is established to the satisfaction of the district director that such failure was due to reasonable cause. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration by such person that it is made under the penalties of perjury and setting forth all the facts alleged to constitute reasonable cause.

(c) *Deficiency procedures not to apply.* The penalty imposed by section 6693 may be assessed and collected without regard to the deficiency procedures provided by subchapter B of chapter 63 of the Code.

(d) *Other penalties.* The penalties of section 6693 and this section are in lieu of any penalty imposed by section 6652(f) for violation of section 6047(d), with respect to any failure to furnish or file described in this section.

(e) *Effective date.* This section shall take effect on January 1, 1975.

[T.D. 7730, 45 FR 72652, Nov. 3, 1980]

**§ 301.6707–1T Questions and answers relating to penalties for failure to furnish information regarding tax shelters.**

The following questions and answers relate to the penalties imposed by section 6707 of the Internal Revenue Code of 1954, as added by section 141(b) of the Tax Reform Act of 1984 (Pub. L. 98–369, 98 Stat. 681), for failure to furnish information regarding tax shelters.

PENALTIES FOR FAILURE TO REGISTER AND FOR PROVIDING FALSE OR INCOMPLETE INFORMATION

Q-1. What are the consequences if a person required to register a tax shelter (''tax shelter organizer'') fails to register the shelter timely?

A-1. Generally, a penalty will be imposed. The penalty for failure to register timely is the greater of (i) $500 or (ii) 1 percent of the aggregate amount invested in the tax shelter, not to exceed $10,000. The $10,000 limitation does not apply, however, if the tax shelter organizer intentionally disregards the registration requirements. For purposes of this penalty, the aggregate amount invested in the tax shelter is computed in the manner prescribed in A-21 of § 301.6111–1T, except that the amount to be received from the sale of an interest is taken into account to determine the amount of the penalty only if the interest is sold to an investor. No penalty will be imposed on a person for failure to register a tax shelter if the failure is due to reasonable cause. See A-4 through A-6 of this section for rules relating to reasonable cause.

Q-2. Will registration of a tax shelter by a person participating in the management (''manager'') or a person participating in the sale (''seller'') of a tax shelter after the date that interests in the tax shelter were first offered for sale relieve a person principally responsible for organizing the tax shelter (''principal organizer'') or a person who participated in the organization of the tax shelter of liability for failure to register?

A-2. No. A principal organizer of a tax shelter and a person who participates in the organization of a tax shelter are subject to penalty if they fail to register a tax shelter by the day interests in the tax shelter are first offered for sale, regardless of whether a seller or manager subsequently registers the tax shelter.

Q-3. Does registration of a tax shelter by a seller or manager relieve other sellers or managers who are required to register the tax shelter from liability for failure to register?

A-3. No. Sellers and managers who are required to register a tax shelter and fail to do so are subject to the penalty unless their failure to register is due to reasonable cause. A seller or manager, however, is not required to register a tax shelter once the seller or manager knows the tax shelter has been registered. See A-6 of this section for rules relating to reasonable cause for failure to register in the case of a seller.

Q-4. What constitutes reasonable cause for failure to register a tax shelter?

A-4. In general, the determination of whether reasonable cause exists for failure to register a tax shelter is a question of fact. In determining whether reasonable cause exists, all representations known to the tax shelter organizer (or for which there is reason for the tax shelter organizer to have known) must be taken into account. A tax shelter organizer (other than a seller) ordinarily will be deemed to know of all representations (including those made by sellers) that the tax shelter organizer would have discovered through inquiry that a reasonable person acting in the tax shelter organizer's capacity could have undertaken. Thus, for example, a principal organizer generally will be obligated to make a more thorough inquiry than a person who merely participated in the management of a tax shelter.

Q-5. Will a tax shelter organizer who is required to register a tax shelter before October 1, 1984, have reasonable cause for failure timely to register the tax shelter, if the tax shelter organizer registers the tax shelter after the day on which the first offering for sale of interests occurs, but before October 1, 1984?

A-5. Yes. A person who is required to register a tax shelter before October 1, 1984 (*i.e.*, a tax shelter in which the

first offering for sale of an interest occurred before September 1, 1984, but in which interests will be sold after August 31, 1984, or a tax shelter in which the first offering for sale of an interest occurs after August 31, 1984, and before October 1, 1984), will have reasonable cause for the failure to register timely if the person registers the tax shelter on or before September 30, 1984.

Q-6. What constitutes reasonable cause for failure to register a tax shelter in the case of a seller of interests in the tax shelter?

A-6. Reasonable cause for failure to register a tax shelter will generally exist with respect to a seller who is required to register the tax shelter under A-36 or A-39 of § 301.6111–1T, if the seller registers the tax shelter as soon as practicable after the seller first knows or has reason to know that the tax shelter has not been timely registered. A seller will not have reasonable cause, however, if the seller fails to make a reasonable inquiry to determine whether the tax shelter is registered.

Q-7. If a group of tax shelter organizers enters into a designation agreement under A-38 of § 301.6111–1T and the designated organizer fails to register the tax shelter timely, will the other persons who have signed the designation agreement have reasonable cause for failure to register the tax shelter?

A-7. Each of the persons who signs a designation agreement, other than the designated organizer, will have reasonable cause for failure to register the tax shelter timely, provided the person does not participate in the tax shelter at a time when the person knows or has reason to know the tax shelter is not registered (without registering the tax shelter) and the person registers the tax shelter as required by A-39 of § 301.6111–1T.

Q-8. What are the consequences if a tax shelter organizer files false or incomplete information on Form 8264?

A-8. Generally, a penalty will be imposed for filing information that a reasonable person would know or have reason to know is false or incomplete. The amount of the penalty is the greater of (i) $500 or (ii) 1 percent of the aggregate amount invested in the tax shelter (computed in the manner prescribed in A-1 of this section), but not to exceed $10,000. The $10,000 limitation does not apply, however, if the tax shelter organizer intentionally disregards the requirements relating to registration.

Q-9. What is the maximum penalty that may be imposed on any one tax shelter?

A-9. Although the penalty for failure to register a tax shelter timely and the penalty for providing false or incomplete information may be imposed on each person who fails to register a tax shelter timely or who provides false or incomplete information, the maximum penalty is $10,000 for any one tax shelter, provided there is no intentional disregard of the registration requirements. For example, assume that A is the principal organizer of a tax shelter, and seven other persons participate in the organization of the tax shelter, and assume the tax shelter is not registered before the day on which the first offering for sale of an interest in the tax shelter occurs. Assume also that the A and other participants do not have reasonable cause for failure to register timely and the failure is not due to intentional disregard of the registration requirement on the part of any of the participants. The maximum penalty that may be imposed is $10,000, for which the 8 participants are jointly and severally liable.

Q-10. How will the Internal Revenue Service determine whether a person has intentionally disregarded any of the registration requirements?

A-10. The determination of intentional disregard will be made individually for each tax shelter organizer. If one tax shelter organizer intentionally disregards the registration requirements, the $10,000 limitation will not apply to that organizer. The limitation will apply, however, to any tax shelter organizers whose failure to register timely or whose furnishing of false or incomplete information was not due to intentional disregard.

Q-11. What is the maximum penalty that may be imposed if a tax shelter that is a substantial investment consisting of similar investments that are required to be aggregated under A-22 of § 301.6171–1T is not timely registered or if false or incomplete information is filed with respect to the tax shelter?

A-11. The maximum penalty is $10,000 as determined under A-6 of this section, with respect to any investment that is a tax shelter within the meaning of A-4 of § 301.6111–1T without regard to the aggregation rules provided in A-22 of § 301.6111–1T. The maximum penalty that may be imposed with respect to investments that are considered in a single tax shelter only by reason of the aggregation rules of A-22 of § 301.6111–1T is $10,000, even if more than one Form 8264 is required with respect to the aggregated investment (see A-48 of § 301.6111–1T). The penalty may be imposed, however, if there is a failure with respect to any of the required forms.

PENALTY FOR FAILURE TO FURNISH A REGISTRATION NUMBER

Q-12. What is the penalty for failure to furnish the registration number to a purchaser or other transferee of an interest in a tax shelter as required by A-52 through A-54 of § 301.6111–1T?

A-12. The penalty for failure to furnish the tax shelter registration number in the form required by A-55 through A-54 of § 301.6111–1T is $100 for each failure.

PENALTY FOR FAILURE TO REPORT A REGISTRATION NUMBER ON A RETURN

Q-13. What is the penalty for failure to include the tax shelter registration number on a return on which any deduction, loss, credit, other tax benefit, or any income attributable to a registered tax shelter is included?

A-13. The penalty for each failure by an investor to furnish the tax shelter registration number on such a return is $50 for each tax shelter, unless the failure is due to reasonable cause.

There is a need for immediate guidance with respect to provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of title 5 of United States Code or subject to the effective date limitation of subsection (d) of that section.

(Secs. 6111 and 7805, Internal Revenue Code of 1954 (98 Stat. 678, 26 U.S.C. 6111; 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7964, 49 FR 32725, Aug. 15, 1984; 49 FR 44461, Nov. 7, 1984]

### § 301.6708–1T Failure to maintain list of investors in potentially abusive tax shelters (temporary).

The following questions and answers issued under section 6708 of the Internal Revenue Code of 1954, as added by section 142 of the Tax Reform Act of 1984 (Pub. L. 98–369; 98 Stat. 683), relate to the penalty for failure to maintain a list of investors in potentially abusive tax shelters.

Q-1: What penalties are provided with respect to the failure properly to maintain a list of persons who acquire interests in potentially abusive tax shelters?

A-1: Any organizer (as defined in A-5 of § 301.6112–1T) of a tax shelter (as defined in A-3 of § 301.6112–1T) or seller (as defined in A-6 of § 301.6112–1T) of interests in a tax shelter who fails to meet any requirement imposed by section 6112 regarding the requirement to maintain a list of persons who have acquired interests in a tax shelter shall pay a penalty of $50 for each investor with respect to whom there is such a failure, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. For example, if an organizer who is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter fails to maintain the list, the organizer will be liable for a penalty of $5,000 ($50 × 100 persons), unless the organizer can show the failure was due to reasonable cause and not due to willful neglect. As another example, if a seller is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter from the seller and fails properly to maintain such list by omitting the TIN of each person, the seller will be liable for a penalty of $5,000 ($50 × 100 persons), unless the seller can show the failure was due to reasonable cause and not due to willful neglect.

Q-2: If an organizer or seller properly maintains a list, but fails to make the

list available to the Internal Revenue Service upon request, will the organizer or seller be subject to a penalty?

A-2: Yes. A penalty applies if an organizer or seller fails to meet any requirement imposed by section 6112, including the requirement, upon request, to make the list available to the Internal Revenue Service as soon as practicable, but in any event within 10 calendar days. (See A-21 of § 301.6112–1T). The amount of the penalty is $50 for each person required to be on the list at the time of the request by the Internal Revenue Service. Assume, for example, that an organizer of a tax shelter properly maintains a list of 200 persons who have acquired interests in a tax shelter and that the Internal Revenue Service requests the organizer to provide the list. If the organizer fails to provide the list to the Internal Revenue Service as soon as practicable (as required by A-21 of § 301.6112–1T), or in a form that enables the Internal Revenue Service to obtain the required information without undue delay or difficulty (as required by A-16 of § 301.6112–1T), the organizer will be liable for a penalty of $10,000 ($50 × 200 persons), unless the organizer can show that the failure to provide the list was due to reasonable cause and not to willful neglect.

Q-3: If an organizer or seller is required to maintain lists for more than one tax shelter in which the same person has acquired interests, how does the penalty apply if the organizer or seller fails to identify the person on each of the lists?

A-3: A separate $50 penalty applies with respect to the list for each tax shelter on which the person who acquired interests is not identified.

Q-4: Is there a limitation on the amount of the penalty imposed on a seller or organizer required to maintain a list of persons who have acquired interests in a tax shelter?

A-4: Yes. The maximum penalty that may be imposed on a person for any calendar year may not exceed $50,000.

Q-5: How does the calendar year limitation apply?

A-5: A separate $50,000 limitation applies to each calendar year in which a failure occurs, and to each tax shelter for which a list is required to be maintained. See A-6 of this section for special rules for determining how the $50,000 limitation applies to a designated person who fails properly to maintain a list of investors.

*Example 1.* Assume that A, an organizer of a tax shelter, fails to maintain and to provide to the Internal Revenue Service a list of 900 persons who acquired interests in the tax shelter in 1986. In addition, assume that A again fails to maintain and to provide the list of 900 investors upon request in 1987. A is subject to a penalty of $45,000 (900 persons × $50) for each calendar year in which there is a failure to comply with the requirements of section 6112. Thus, A is subject to $45,000 in penalties for the failures to maintain and to provide the list in 1986, and $45,000 in penalties for the failures to maintain and to provide the list in 1987, unless A can show reasonable cause for the failures.

*Example 2.* Assume that B, an organizer of Tax Shelter I, fails to provide a list of 1,500 persons who acquired interests in the tax shelter to the Internal Revenue Service upon request in 1987. Assume also that B, an organizer of Tax Shelter II, fails to provide a list of 2,000 persons who acquired interests in Tax Shelter II to the Internal Revenue Service upon request in 1987. Because the $50,000 calendar year limitation applies separately with respect to each tax shelter for which a list must be maintained, B is subject to a penalty of $50,000 for failing to provide the list for Tax Shelter I in 1987 and a $50,000 penalty for failing to provide the list for Tax Shelter II in 1987.

Q-6: How does the penalty apply to a designated person?

A-6: Separate penalties, each with its own $50,000 calendar year limitation, apply with respect to the portion of the list kept by the designated person in that person's capacity as organizer and to each portion of the list kept by the designated person in that person's capacity as the designated person with respect to each organizer and seller who signed the agreement under A-12 of § 301.6112–1T and for whom the designated person is responsible for complying with the requirements of section 6112.

*Example.* Assume that X, an organizer and seller, sells interests in a tax shelter directly to 750 investors in 1985. In addition, assume that A, an agent of X, negotiates for X sales of interests in the tax shelter to an additional 500 persons in 1985. If no agreement to designate X is made pursuant to A-11 of § 301.6112–1T, X would be required to maintain a list of the 1,250 investors who acquired

interests in the tax shelter (see paragraph (a) of A-8 of § 301.6112–1T) and A would be required to maintain a list of the 500 persons who acquired interests through A (see A-10 of § 301.6112–1T). If, therefore, neither X nor A complied with the requirements of section 6112 in 1985, X would be liable for $50,000 in penalties ($50 × 1,250 investors, subject to the $50,000 maximum) and A would be liable for $25,000 in penalties $50 × 500 investors). Assume, however, that X and A enter into a written agreement to designate X to maintain the list for the tax shelter. Pursuant to that agreement, A submits to X all of the required information regarding the sales to the 500 persons otherwise required to be maintained on A's list and provides the notice required by A-13 of § 301.6112–1T to each person. In 1986, X fails to provide any list of investors to the Internal Revenue Service upon request. For calendar year 1986, X is liable for penalties of $50,000 in X's capacity as an organizer ($50 × 1,250 persons, subject to the $50,000 maximum). In addition, X, as the person designated to maintain the list for A, is liable for penalties of $25,000 for failing properly to maintain A's list of investors ($50 × 500 persons). A would not be liable for any penalties.

Q-7: If an organizer or seller is subject to a penalty with respect to a tax shelter under section 6708, may the organizer or seller also be liable for other fines or penalties with respect to the tax shelter?

A-7: Yes. The penalty imposed by section 6708 is in addition to any other penalty provided by law. If, for example, an organizer of a tax shelter is subject to a penalty under section 6700 for promoting an abusive tax shelter, the organizer also would be liable for any applicable penalties for failing properly to maintain a list for the tax shelter. Similarly, if an organizer or seller fails to furnish a list upon request by the Internal Revenue Service, the organizer or seller may be subject both to the fine under section 7203 for the willful failure to supply information, and to the penalty for failing properly to maintain a list for the tax shelter.

Q-8: When is the penalty under section 6708 effective?

A-8: The penalty under section 6708 applies with respect to any interest in a tax shelter which is required to be included on a list under section 6112. See A-22 of § 301.6112–1T.

(Secs. 6112 and 7805, Internal Revenue Code of 1954 (98 Stat. 681; 68A Stat. 917; 26 U.S.C. 6112 and 7805))

[T.D. 7969, 49 FR 34204, Aug. 29, 1984]

### § 301.6712–1 Failure to disclose treaty-based return positions.

(a) *Penalty imposed.* A taxpayer who fails in a material way to disclose one or more positions taken for a taxable year, as required by section 6114 and the regulations thereunder, is subject to a separate penalty for each failure to disclose a position taken with respect to each separate payment or separate income item in the amount of—

(1) For a corporation taxable as such under the Code $10,000; or

(2) For all other taxpayers, $1,000.

The penalty imposed by this section may be imposed more than once for a single taxable year if a taxpayer has failed to disclose one or more positions taken with respect to more than one separate payment or separate income item and may be imposed in addition to any other penalty imposed by law. For this purpose, separate payments or income items of the same type (*e.g.*, interest payments) received from the same ultimate payor (*e.g.*, the obligor on the note) will be treated as separate payments or income items (and not aggregated). However, for purposes of determining the number of separate penalties to be imposed under this section, the District Director shall have the discretion to aggregate separate payments or income items, in whole or in part, in accordance with the rules for aggregation of such items for purposes of reporting, as described in § 301.6114–1(d).

(b) *Penalty waived.* Pursuant to the authority contained in section 6712(b) of the Code, the penalty imposed by paragraph (a) of this section may be waived, in whole or in part, if it is established to the satisfaction of the Assistant Commissioner (International), the District Director or the Director of the Internal Revenue Service Center that the taxpayer's failure to disclose the required information was not due to willful neglect. An affirmative showing of lack of willful neglect must be

made in the form of a written statement that sets forth all the facts alleged to show lack of willful neglect and contains a declaration by such person that the statement is made under the penalties of perjury.

(c) *Manner of payment.* The penalty set forth in paragraph (a) of this section shall be paid in the same manner as tax upon the issuance of a notice and demand thereof.

(d) *Effective date.* This section is effective for taxable years of the taxpayer for which the due date for filing returns (without extension) occurs after December 31, 1988.

[T.D. 8292, 55 FR 9441, Mar. 14, 1990]

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In order to facilitate the use of §§ 301.6721–1 through 6724–1, this § 301.6721–0 lists the paragraph headings contained in these sections.

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[T.D. 8386, 56 FR 67182, Dec. 30, 1991, as amended by T.D. 8734, 62 FR 53496, Oct. 14, 1997]

### § 301.6721–1 Failure to file correct information returns.

(a) *Imposition of penalty*—(1) *General rule*. A penalty of $50 is imposed for each information return (as defined in section 6724(d)(1) and paragraph (g) of this section) with respect to which a failure (as defined in section 6721(a)(2) and paragraph (a)(2) of this section) occurs. No more than one penalty will be imposed under this paragraph (a)(1) with respect to a single information return even though there may be more than one failure with respect to such return. The total amount imposed on any person for all failures during any calendar year with respect to all information returns shall not exceed $250,000. See paragraph (b) of this section for a reduction in the penalty when the failures are corrected within specified periods. See paragraph (c) of this section for an exception to the penalty for inconsequential errors or omissions. See paragraph (d) of this section for an exception to the penalty for a *de minimis* number of failures. See paragraph (e) of this section for lower limitations to the $250,000 maximum penalty. See paragraph (f) of this section for higher penalties when a failure is due to intentional disregard of the requirement to file timely correct information returns. See paragraph (a)(1) of § 301.6724–1 for waiver of the penalty for a failure that is due to reasonable cause.

(2) *Failures subject to the penalty*. The failures to which section 6721(a) and paragraph (a)(1) of this section apply are—

(i) A failure to file an information return on or before the required filing date (''failure to file timely''), and

(ii) A failure to include all of the information required to be shown on the return or the inclusion of incorrect information (''failure to include correct information''). A failure to file timely includes a failure to file in the required manner, for example, on magnetic media or in other machine-readable form as provided under section 6011(e). However, no penalty is imposed under paragraph (a)(1) of this section solely by reason of any failure to comply with the requirements of section 6011(e)(2), except to the extent that such a failure occurs with respect to more than 250 information returns (the 250-threshold requirement) or in the case of a partnership with more than 100 partners, more than 100 information returns (the 100-threshold requirement) (collectively, the threshold requirements). Each Schedule K–1 considered in applying the 100-threshold requirement will be treated as a separate information return. These threshold requirements

apply separately to each type of information return required to be filed. Further, these threshold requirements apply separately to original and corrected returns. Thus, for example, if a filer files 300 returns on Form 1099–DIV and later files 70 corrected returns on Form 1099–DIV, the corrected returns may be filed either on the prescribed paper form (because they fall below the 250-threshold requirement) or on magnetic media or other machine-readable form. Filers who are required to file information returns on magnetic media and who file such information returns electronically are considered to have satisfied the magnetic media filing requirement. Except as provided in paragraph (c)(1) of this section, a failure to include correct information encompasses a failure to include the information required by applicable information reporting statutes or by any administrative pronouncements issued thereunder (such as regulations, revenue rulings, revenue procedures, or information reporting forms and form instructions). A failure to include information in the correct format may be either a failure to file timely an information return or a failure to include correct information on an information return. For example, an error on a magnetic media submission to the Internal Revenue Service that prevents processing by the Internal Revenue Service may constitute a failure to file timely. However, if information is set forth on the wrong field of the magnetic media submission, such an error may constitute a failure to file timely or a failure to include correct information, depending upon the extent of the failure.

(b) *Reduction in the penalty when a correction is made within specified periods*—(1) *Correction within 30 days*. The penalty imposed under section 6721(a) for a failure to file timely or for a failure to include correct information shall be $15 in lieu of $50 if the failure is corrected on or before the 30th day after the required filing date (''within 30 days''). The total amount imposed on a person for all failures during any calendar year that are corrected within 30 days shall not exceed $75,000.

(2) *Correction after 30 days but on or before August 1*. The penalty imposed under section 6721(a) for a failure to file timely or for a failure to include correct information shall be $30 in lieu of $50 if the failure is corrected after the 30-day period described in paragraph (b)(1) of this section but on or before August 1 of the year in which the required filing date occurs (''after 30 days but on or before August 1''). (See paragraph (b)(6) of this section for an exception to the provisions of this paragraph (b)(2) for returns that are not due on February 28 or March 15.) The total amount imposed on a person for all failures during any calendar year corrected after 30 days but on or before August 1 shall not exceed $150,000.

(3) *Required filing date defined*. The term ''required filing date'' means the date prescribed for filing an information return with the Internal Revenue Service (or the Social Security Administration in the case of Forms W-2) determined with regard to any extension of time for filing.

(4) *Penalty amount for return with multiple failures*. If a return is subject to a penalty for more than one failure, and the penalty amounts for the failures differ, the higher penalty amount will be imposed.

(5) *Examples*. The provisions of paragraphs (a) and (b) (1) through (4) of this section may be illustrated by the following examples. These examples do not take into account any possible application of the *de minimis* exception under paragraph (d) of this section, the lower small business limitations under paragraph (e) of this section, the penalty for intentional disregard under paragraph (f) of this section, or the reasonable cause waiver under paragraph (a) of § 301.6724–1:

*Example 1*. Corporation R fails to file timely 11,000 Forms 1099–MISC (relating to miscellaneous income) for the 1990 calendar year. Five thousand of these returns are filed with correct information within 30 days, and 6,000 after 30 days but on or before August 1, 1991. For the same year R fails to file timely 400 Forms 1099–INT (relating to payments of interest) which R eventually files on September 28, 1991, after the period for reduction of the penalty has elapsed. R is subject to a penalty of $20,000 for the 400 forms which were not filed by August 1 ($50 × 400 =$20,000), $150,000 for the 6,000 forms filed after 30 days ($30 × 6,000 =$180,000, limited to $150,000 under

paragraph (b)(2) of this section), and $75,000 for the 5,000 forms filed within 30 days ($15 × 5,000 =$75,000), for a total penalty of $245,000.

*Example 2.* Corporation T fails to file timely 6,000 Forms 1099–MISC for the 1990 calendar year. T files the 6000 Forms 1099–MISC on September 1, 1991. Because T does not correct the failure by August 1, 1991, T is subject to a penalty of $250,000, the maximum penalty under paragraph (a) of this section. Without the limitation of paragraph (a), T would be subject to a $300,000 penalty ($50 × 6,000 =$300,000).

*Example 3.* Corporation U files timely 300 Forms 1099–MISC on paper for the 1990 calendar year with correct information. Under section 6011(e)(2) a person required to file at least 250 returns during a calendar year must file those returns on magnetic media. U does not correct its failures to file these returns on magnetic media by August 1, 1991. It is therefore subject to a penalty for a failure to file timely under paragraph (a)(2) of this section. However, pursuant to section 6724(c) and paragraph (a)(2) of this section, the penalty for a failure to file timely on magnetic media applies only to the extent the number of returns exceeds 250. As U was required to file 300 returns on magnetic media, U is subject to a penalty of $2,500 for 50 returns ($50 × 50 =$2,500).

*Example 4.* Corporation V files 300 Forms 1099–MISC on paper for the 1990 calendar year. The forms were filed on March 15, 1991, rather than on the required filing date of February 28, 1991. Under section 6011(e)(2), a person required to file at least 250 returns during a calendar year must file those returns on magnetic media. V does not correctly file these returns on magnetic media by August 1, 1991. V is subject to a penalty of $3,750 for filing 250 of the returns late ($15 × 250) and $2,500 for failing to file 50 returns on magnetic media ($50 × 50) for a total penalty of $6,250.

(6) *Application to returns not due on February 28, or March 15.* For returns that are not due on February 28 or March 15 (for example, Forms 8300 reporting certain cash payments of $10,000 or more), the penalty is $15 if the failure is corrected within 30 days. If the failure is corrected after 30 days, the penalty is $50 rather than $30. There is no period during which the penalty is reduced to $30 under paragraph (b)(2) of this section.

(c) *Exception for inconsequential errors or omissions*—(1) *In general.* An inconsequential error or omission is not considered a failure to include correct information. For purposes of this paragraph (c)(1), the term ''inconsequential error or omission'' means any failure that does not prevent or hinder the Internal Revenue Service from processing the return, from correlating the information required to be shown on the return with the information shown on the payee's tax return, or from otherwise putting the return to its intended use. See paragraph (g)(5) of this section for the definition of ''payee.''

(2) *Errors or omissions that are never inconsequential.* Errors or omissions relating to the following are never inconsequential—

(i) A taxpayer identification number;

(ii) A surname of a payee (*i.e.*, the person required to be furnished a copy of the information set forth on an information return); and

(iii) Any monetary amounts. The Internal Revenue Service may, by administrative pronouncement, specify other types of errors or omissions that are never inconsequential.

(3) *Examples.* The provisions of this paragraph (c) may be illustrated by the following examples, which do not take into account any possible application of the penalty for intentional disregard under paragraph (f) of this section or the reasonable cause waiver under paragraph (a) of § 301.6724–1:

*Example 1.* A filer files a Form 1099–MISC (relating to miscellaneous income) with the Internal Revenue Service. The Form 1099–MISC is complete and correct except that the word ''street'' is misspelled in the payee's address. The error does not prevent or hinder the Internal Revenue Service from processing the return, from correlating the information required to be shown on the return with the information shown on the payee's tax return, or from otherwise putting the return to its intended use. Therefore, no penalty is imposed under paragraph (a) of this section.

*Example 2.* A filer files a Form 1099–MISC with the Internal Revenue Service. The Form 1099–MISC is complete and correct except that the payee's first name, William, is misspelled as ''Willaim.'' the error does not prevent or hinder the Internal Revenue Service from processing the return, from correlating the information required to be shown on the return with the information shown on the payee's tax return, or from otherwise putting the return to its intended use. See paragraph (c)(2) of this section. Therefore, no penalty is imposed under paragraph (a) of this section.

*Example 3.* A filer files a Form 1099–MISC with the Internal Revenue Service. The

Form 1099–MISC is complete and correct except that the payee's name, ''John Doe,'' is misspelled as ''John Ode.'' Under paragraph (c)(2) of this section, supplying an incorrect surname for a payee is never considered an inconsequential error. Therefore, a penalty is imposed under paragraph (a) of this section.

(d) *Exception for a de minimis number of failures*—(1) *Requirements*. The penalty under paragraph (a) of this section is not imposed for a *de minimis* number of failures to include correct information if the filer corrects such failures on or before August 1 of the year in which the required filing date occurs. (See paragraph (d)(4) of this section for special rules relating to returns that are not due on February 28 or March 15.)

(2) *Calculation of the de minimis exception*. The number of returns to which the *de minimis* exception applies for any calendar year shall not exceed the greater of 10 or one-half of one percent of the total number of all information returns the filer is required to file during the year. If the number of returns on which the filer fails to include correct information exceeds the number of returns to which the *de minimis* exception applies, the *de minimis* exception applies to those returns that will afford the filer the greatest reduction in penalty. The *de minimis* exception applies to failures to include correct information that exist after the application (if any) of the waiver for reasonable cause under section 6724(a) and § 301.6724–1. Returns to which the *de minimis* exception applies are treated as having been originally filed with correct information.

(3) *Examples*. The provisions of this paragraph (d) may be illustrated by the following examples. In each of the examples, the failures to file and to include correct information are subject to penalty under paragraph (a) of this section. The examples do not take into account any possible application of paragraph (f) of this section or the reasonable cause waiver under paragraph (a) of § 301.6724–1 of this section.

*Example 1*. Corporation T files timely 10,000 Forms 1099–INT (relating to payments of interest) for 1990 by February 28, 1991. The 10,000 returns are all the information returns that T is required to file during the 1991 calendar year. Of the returns filed, 70 contained incorrect information. T corrects the failures on July 12, 1991. No penalty is imposed for 50 of the failures (*i.e.*, the greater of 10 or .005 × 10,000 =50) even though the total failures, 70, exceed the number to which the *de minimis* exception may apply. The $30 penalty under paragraph (b)(2) of this section is imposed, in lieu of $50, for the remaining 20 failures, which were corrected after 30 days but on or before August 1, resulting in a total penalty of $600 ($30 × 20 =$600).

*Example 2*. Corporation U files timely 9,500 Forms 1099–INT for 1990 by February 28, 1991, the required filing date. Fifty of these returns contain incorrect information with respect to which U files correct information on August 1, 1991. U also files 500 Forms 1099–INT for 1990 on August 30, 1991, after the required filing date. The 10,000 returns are all the information returns that U is required to file during the 1991 calendar year. The calculation of the *de minimis* exception is based on the 10,000 returns required to be filed during the 1991 calendar year even though 500 of the returns filed during the year were not filed timely. Therefore, the number of failures for which the *de minimis* exception applies is 50, and accordingly no penalty is imposed for the 50 Forms 1099–INT that were corrected on August 1, 1991. However, the $50 penalty under paragraph (a)(1) of this section is imposed for each failure to file timely, resulting in a total penalty of $25,000 ($50 × 500 =$25,000).

*Example 3*. Corporation V files timely 9,950 Forms 1099–INT for 1990 by February 28, 1991. However, V fails to file timely 50 of its Forms 1099–INT. The 10,000 returns are all the information returns that V is required to file during the 1991 calendar year. Upon discovering the error, V files the 50 returns within 30 days of February 28, 1991. The 50 returns are complete and correct except that V fails to include the taxpayer identification numbers of the payees on the returns. V files corrected returns on August 1, 1991. Absent application of the *de minimis* exception, the penalty imposed for the failure to include correct information would be $1,500 ($30 × 50 =$1,500). Because the incorrect returns are corrected on August 1, the 50 forms are treated under the *de minimis* exception as originally filed with correct information, and therefore no penalty is imposed under paragraph (a) of this section for the failure to include correct information. Nevertheless, the penalty under paragraph (a) of this section is imposed for the failure to file timely the 50 returns because the *de minimis* exception does not apply to the penalty for the failure to file timely. Hence, a penalty of $750 ($15 × 50 =$750) is imposed.

*Example 4*. Corporation W files timely 100 Forms 1099–DIV and files an additional 50 Forms 1099–DIV late, but within 30 days of

February 28, 1991. These are all the information returns that W was required to file during the 1991 calendar year. W discovers errors on 10 of the returns that were filed timely, and on 5 of the returns that were filed late. W corrects all the errors on August 1. The *de minimis* exception applies to 10 of the corrected returns. The exception will be allocated to the 10 returns that were filed timely with incorrect information, because that allocation is most favorable to W (*i.e.*, applying the exception to a return filed late with incorrect information would save W $15, by reducing the penalty on that return from $30 to $15, but applying the exception to a return filed timely would save W $30, by reducing the penalty on that return from $30 to $0). (See paragraph (b)(4) of this section.)

(4) *Nonapplication to returns not due on February 28 or March 15.* The exception for a *de minimis* number of failures provided in paragraph (d)(1) of this section does not apply to failures with respect to returns that are not due on February 28 or March 15 (for example, Forms 8300 reporting certain cash payments of $10,000 or more). Nevertheless, the returns that are not due on February 28 or March 15 are included in the total number of all information returns that the filer is required to file during a year for purposes of calculating the number of the returns subject to the *de minimis* exception under paragraph (d)(2) of this section.

(e) *Lower limitations on the $250,000 maximum penalty amount with respect to persons with gross receipts of not more than $5,000,000*—(1) *In general.* If a person meets the gross receipts test (as defined in paragraph (e)(2) of this section) for any calendar year, the total amount of the penalty imposed on such person for all failures described in section 6721(a)(2) and paragraph (a)(2) of this section during such calendar year shall not exceed $100,000. The total amount of the penalty imposed under paragraph (b)(1) of this section for failures corrected within 30 days shall not exceed $25,000 for such calendar year. The total amount of the penalty imposed under paragraph (b)(2) of this section for failures corrected after 30 days but on or before August 1 shall not exceed $50,000 for such calendar year.

(2) *Gross receipts test.* A person meets the gross receipts test for any calendar year if the average annual gross receipts for such person for the three most recent taxable years ending before such calendar year do not exceed $5,000,000. For purposes of determining the amount of gross receipts during the three most recent taxable years, the rules of section 448(c) (2) and (3) shall apply.

(f) *Higher penalty for intentional disregard of requirement to file timely correct information returns*—(1) *Application of section 6721(e).* If a failure is due to intentional disregard of the requirement to file timely or to include correct information on a return as described in paragraph (g) of this section, the amount of the penalty imposed under paragraph (a) of this section shall be determined under paragraph (f)(4) of this section.

(2) *Meaning of ''intentional disregard.''* A failure is due to intentional disregard if it is a knowing or willful—

(i) Failure to file timely, or

(ii) Failure to include correct information. Whether a person knowingly or willfully fails to file timely or fails to include correct information is determined on the basis of all the facts and circumstances in the particular case.

(3) *Facts and circumstances considered.* The facts and circumstances that are considered in determining whether a failure is due to intentional disregard include, but are not limited to—

(i) Whether the failure to file timely or the failure to include correct information is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely or repeatedly failing to include correct information;

(ii) Whether correction was promptly made upon discovery of the failure;

(iii) Whether the filer corrects a failure to file or a failure to include correct information within 30 days after the date of any written request from the Internal Revenue Service to file or to correct; and

(iv) Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return.

(4) *Amount of the penalty.* If one or more failures to file timely or to include correct information are due to

intentional disregard of the requirement to file timely or to include correct information, then, with respect to each such failure determined under this paragraph (f)—

(i) Paragraphs (b), (d), and (e) of this section shall not apply;

(ii) The $250,000 limitation under paragraph (a) of this section shall not apply, and the penalty under this paragraph (f) shall not be taken into account in applying the $250,000 limitation (or any similar limitation under paragraph (b) or (e) of this section) to penalties not determined under this paragraph (f);

(iii) The penalty imposed under paragraph (a) of this section shall be $100 or, if greater, the statutory percentage; and

(iv) The term ''statutory percentage'' means—

(A) In the case of a return other than a return required under section 6045(a), 6041A(b), 6050H, 6050I (for amounts received after November 5, 1990), 6050J, 6050K, or 6050L, 10 percent of the aggregate dollar amount of the items required to be reported correctly,

(B) In the case of a return required to be filed by section 6045(a), 6050K, or 6050L, 5 percent of the aggregate dollar amount of the items required to be reported correctly, or

(C) In the case of a return required to be filed under section 6050I(a) with respect to amounts received after November 5, 1990, for any transaction (or related transactions), the greater of $25,000 or the amount of cash (within the meaning of section 6050I(d)) received in such transaction to the extent the amount of such cash does not exceed $100,000.

(5) *Computation of the penalty; aggregate dollar amount of the items required to be reported correctly.* The aggregate dollar amount used in computing the penalty under this paragraph (f) is the amount that is not reported or is reported incorrectly. If the intentional disregard relates to a dollar amount, the statutory percentage is applied to the difference between the dollar amount reported and the amount required to be reported correctly. If the intentional disregard relates to any other item on the return, the statutory percentage is applied to the aggregate amount of items required to be reported correctly. In determining the aggregate amount of items required to be reported correctly, no item shall be taken into account more than once. For example, if a filer willfully fails to file a Form 1099–INT on which $800 of interest and $160 of Federal income tax withheld (*i.e.*, backup withholding) is required to be reported, only the $800 amount is taken into account in computing the penalty.

(6) *Examples.* The provisions of this paragraph (f) may be illustrated by the following examples:

*Example 1.* On December 1, 1990, Automobile dealer P receives $55,000 from an individual for the purchase of an automobile in a transaction subject to reporting under section 6050I. The individual presents documents to P that identify him as ''John Doe.'' However, P completes the Form 8300 (relating to cash received in a trade or business) and reflects the name of a cartoon character as the payor. Because P knew at the time of filing the Form 8300 that the payor's name was not the name of the cartoon character, he willfully failed to include correct information as described under paragraph (f)(2) of this section. Therefore, the penalty under paragraph (f)(4) of this section is imposed for the intentional disregard of the requirement to include correct information. The amount used in computing the penalty under paragraph (f)(5) of this section is $55,000 (*i.e.*, the amount required to be reported on the return with respect to which the payee is not correctly identified). The amount of the penalty determined under paragraph (f)(4)(ii)(C) of this section is $55,000 (*i.e.*, the greater of $25,000 or the amount of cash received in the transaction up to $100,000).

*Example 2.* On December 1, 1990, Individual B contacts his agent, F, to act as his intermediary in the purchase of an automobile. B gives F $20,000 and requests F to purchase the automobile in F's name, which F does. F prepares the Form 8300 as required under section 6050I, but in the area designated for the name of the payor, F writes ''confidential.'' Because F knew at the time the return was filed that it contained incomplete information, the penalty under paragraph (f)(4) of this section is imposed for the intentional disregard of the requirement to include correct information. The amount used in computing the penalty under paragraph (f)(5) of this section is $20,000 (*i.e.*, the amount required to be reported on the return with respect to which the payee is not correctly identified). The amount of the penalty determined under paragraph (f)(4)(ii)(C) of this section is $25,000 (*i.e.*, the greater of $25,000 or

the amount of cash received in the transaction up to $100,000).

*Example 3.* Corporation M deliberately does not include $5,000 of dividends on a Form 1099–DIV (relating to payments of dividends) on which a total of $200,000 (including the $5,000 dividends) is required to be reported under section 6042(a). Because the failure was deliberate, Corporation M's failure is due to intentional disregard of the requirement to include correct information. Accordingly, the amount of the penalty imposed under paragraph (a) is determined under paragraph (f)(4) of this section. Because the Form 1099–DIV is required to be filed under section 6042(a), under paragraph (f)(4)(ii)(A) the amount of the penalty with respect to such failure is 10 percent of the aggregate dollar amount of the items that were required to be but that were not reported correctly. Under paragraph (f)(5) of this section, $5,000 is the difference between the dollar amount reported and the amount required to be reported correctly. Therefore, the amount of the penalty is $500 ($5,000 × .10 =$500).

*Example 4.* Form 8027 requires certain large food and beverage establishments to report certain information with respect to tips. The form requires (among other things) that the establishment report its gross receipts from food and beverage operations. Establishment A, in intentional disregard of the information reporting requirement, reported gross receipts of $1,000,000, when the correct amount was $1,500,000. The significance of the gross receipts reporting requirement is that section 6053(c)(3)(A) requires an establishment to allocate as tips among its employees the excess of 8 percent of its gross receipts over the aggregate amount reported by employees to the establishment as tips under section 6053(a). A's misstatement of its gross receipts caused A to show $80,000 on the Form 8027 as 8 percent of its gross receipts, rather than the correct amount of $120,000. A correctly reported the amount of tips reported to it by employees under section 6053(a) as $80,000. Thus A reported the excess of 8 percent of its gross receipts over tips reported to it as zero, rather than as the correct amount of $40,000. The requirement of reporting gross receipts is considered merely a step in the computation of the excess of 8 percent of gross receipts over tips reported to A under section 6053(a), so that the penalty for intentional disregard will be $4,000 (*i.e.*, 10 percent of the difference between the $40,000 required to be reported as the excess of 8 percent of gross receipts over tips reported under section 6053(a), and the zero amount actually reported).

(g) *Definitions*—(1) *Information return.* For purposes of this section the term ''information return'' means any statement described in paragraph (g)(2) of this section, any return described in paragraph (g)(3) of this section, and any other items described in paragraph (g)(4) of this section.

(2) *Statements.* The statements subject to this section are the statements required by—

(i) Section 6041 (a) or (b) (relating to certain information at source, generally reported on Form 1099–MISC, Form W-2G, Form W-2, and Form 1099–INT),

(ii) Section 6042(a)(1) (relating to payments of dividends, generally reported on Form 1099–DIV),

(iii) Section 6044(a)(1) (relating to payments of patronage dividends, generally reported on Form 1099–PATR),

(iv) Section 6049(a) (relating to payments of interest, generally reported on Form 1099–INT),

(v) Section 6050A(a) (relating to reporting requirements of certain fishing boat operators, generally reported on Form 1099–MISC),

(vi) Section 6050N(a) (relating to payments of royalties, generally reported on Form 1099–INT), or

(vii) Section 6051(d) (relating to information returns with respect to income tax withheld, generally reported on Form W-2).

(3) *Returns.* The returns subject to this section are the returns required by—

(i) Section 6041A(a) or (b) (relating to returns of direct sellers, generally reported on Form 1099–MISC),

(ii) Section 6045(a) or (d) (relating to returns of brokers generally reported on Form 1099–B for broker transactions, Form 1099–S for gross proceeds from the sale or exchange of real estate, and Form 1099–MISC for certain substitute payments),

(iii) Section 6050H(a) (relating to mortgage interest received in trade or business from individuals, generally reported on Form 1098),

(iv) Section 6050I(a) (relating to cash received in trade or business, generally reported on Form 8300),

(v) Section 6050J(a) (relating to foreclosures and abandonments of security, generally reported on Form 1099–A),

(vi) Section 6050K(a) (relating to exchanges of certain partnership interests, generally reported on Form 8308),

(vii) Section 6050L(a) (relating to returns relating to certain dispositions of

donated property, generally reported on Form 8282),

(viii) Section 6052(a) (relating to reporting payment of wages in the form of group-life insurance, generally reported on Form W-2),

(ix) Section 6053(c)(1) (relating to reporting with respect to certain tips, generally reported on Form 8027),

(x) Section 1060(b) (relating to reporting requirements of transferors and transferees in certain asset acquisitions, generally reported on Form 8594), or section 1060(e) (relating to information required in the case of certain transfers of interests in entities (effective for acquisitions after October 9, 1990, except any acquisition pursuant to a written binding contract in effect on October 9, 1990, and at all times thereafter before such acquisition)),

(xi) Section 4093(c)(4)(A) or (C) or, effective for information returns required to be filed after December 31, 1989, and before December 1, 1990, section 4093(e) (relating to information reporting with respect to tax on diesel and aviation fuels),

(xii) Section 4101(d) (relating to information reporting with respect to fuel oils (effective for information returns required to be filed after November 30, 1990)), or

(xiii) Section 338(h)(10)(C) (relating to information required to be furnished to the Secretary in case of elective recognition of gain or loss (effective for acquisitions after October 9, 1990, except any acquisition pursuant to a written binding contract in effect on October 9, 1990, and at all times thereafter before such acquisition)).

(4) *Other items*. The term *information return* also includes any form, statement, or schedule required to be filed with the Internal Revenue Service with respect to any amount from which tax is required to be deducted and withheld under chapter 3 of the Internal Revenue Code (or from which tax would be required to be so deducted and withheld but for an exemption under the Internal Revenue Code or any treaty obligation of the United States), generally Forms 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' and 8805, ''Foreign Partner's Information Statement of Section 1446 Withholding Tax.'' The provisions of this paragraph (g)(4) referring to Form 8805, shall apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 of this chapter apply by reason of an election under § 1.1446–7 of this chapter.

(5) *Payee*. For purposes of section 6721 the term ''payee'' means any person who is required to receive a copy of the information set forth on an information return by the filer of the return as defined in section 6724(d)(1).

(6) *Filer*. For purposes of this section the term ''filer'' means a person that is required to file an information return as defined in paragraph (g)(1) of this section under the applicable information reporting section described in paragraph (g) (2) through (4) of this section.

[T.D. 8386, 56 FR 67182, Dec. 30, 1991, as amended by T.D. 8843, 64 FR 61504, Nov. 12, 1999; T.D. 9200, 70 FR 28742, May 18, 2005]

### § 301.6722–1 Failure to furnish correct payee statements.

(a) *Imposition of penalty*—(1) *General rule*. A penalty of $50 is imposed for each payee statement (as defined in section 6724(d)(2)) with respect to which a failure (as defined in section 6722(a) and paragraph (a)(2) of this section) occurs. No more than one penalty will be imposed under this paragraph (a) with respect to a single payee statement even though there may be more than one failure with respect to such statement. However, the penalty shall apply to failures on composite substitute payee statements as though each type of payment and other required information were furnished on separate statements. A ''composite substitute payee statement'' is a single document created by a filer to reflect several types of payments made to the same payee. The total amount imposed on any person for all failures during any calendar year with respect to all payee statements shall not exceed $100,000. See section 6722(c) and paragraph (c) of this section for higher penalties when a failure is due to intentional disregard of the requirement to furnish timely correct payee statements. See paragraph (a)(1) of § 301.6724–1 for a waiver of the penalty for a failure that is due to reasonable cause.

(2) *Failures subject to the penalty*. The failures to which section 6722(a) and paragraph (a)(1) of this section apply are—

(i) A failure to furnish a payee statement on or before the prescribed date therefore to the person to whom such statement is required to be furnished (''failure to furnish timely''), and

(ii) A failure to include all of the information required to be shown on a payee statement or the inclusion of incorrect information (''failure to include correct information''). A failure to furnish timely includes a failure to furnish a written statement to the payee in a statement mailing as required under sections 6042(c), 6044(e), 6049(c), and 6050N(b), as well as a failure to furnish the statement on a form acceptable to the Internal Revenue Service. Except as provided in paragraph (b) of this section, a failure to include correct information encompasses a failure to include the information required by applicable information reporting statutes or by any administrative pronouncements issued thereunder (such as regulations, revenue rulings, revenue procedures, or information reporting forms).

(b) *Exception for inconsequential errors or omissions*—(1) *In general*. An inconsequential error or omission is not considered a failure to include correct information. For purposes of this paragraph (b), the term ''inconsequential error or omission'' means any failure that cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her return or from otherwise putting the statement to its intended use.

(2) *Errors or omissions that are never inconsequential*. Errors or omissions relating to the following are never inconsequential:

(i) A dollar amount,

(ii) The significant items in the address of a payee, which is the address provided by the payee to the filer,

(iii) The appropriate form for the information provided (*i.e.*, whether or not the form is an acceptable substitute for an official form of the Internal Revenue Service), and

(iv) The manner of furnishing a statement required under sections 6042(c), 6044(e), 6049(e), and 6050N(b). The Internal Revenue Service may, by administrative pronouncement, specify other types of errors or omissions that are never inconsequential.

(3) *Examples*. The provisions of this paragraph (b) may be illustrated by the following examples which do not take into account any possible application of the penalty for intentional disregard under paragraph (c) of this section or the reasonable cause waiver under paragraph (a) of § 301.6724–1:

*Example 1*. A payor furnishes a statement with respect to a Form 1099–MISC (relating to miscellaneous income). The payee statement is complete and correct, except the word ''boulevard'' is misspelled in the payee's address. The error cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her tax return or from otherwise putting the statement to its intended use. Therefore, no penalty is imposed under paragraph (a) of this section.

*Example 2*. Assume the same facts in *Example 1*, except that the only error on the payee statement is that the payee's street address, 4821 Grant Boulevard, is reported incorrectly as 8421 Grant Boulevard. A penalty is imposed under paragraph (a) of this section with respect to the payee statement because the error can reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her tax return or from otherwise putting the statement to its intended use.

(c) *Higher penalty for intentional disregard of requirement to furnish timely correct payee statements*—(1) *Application of section 6722(c)*. If a failure is due to intentional disregard of the requirement to furnish timely correct payee statements, the amount of the penalty shall be determined under paragraph (c)(2) of this section. Whether a failure is due to intentional disregard of the requirement to furnish timely correct payee statements is based upon the facts and circumstances surrounding the failure. The facts and circumstances considered include those under § 301.6721–1(f)(3), which shall apply in determining whether a failure under this section is due to intentional disregard.

(2) *Amount of the penalty*. If one or more failures under paragraph (a) of this section are due to intentional disregard of the requirement to furnish

timely payee statements or of the requirement to include correct information, then, with respect to each such failure determined under this paragraph (c)(2)—

(i) The $100,000 limitation under paragraph (a) of this section shall not apply and the penalty under this paragraph (c)(2) shall not be taken into account in applying the $100,000 limitation to penalties not determined under this paragraph (c)(2);

(ii) The penalty imposed under paragraph (a) of this section shall be $100 or, if greater, the statutory percentage; and

(iii) The term ''statutory percentage'' means—

(A) In the case of a payee statement other than a statement required under section 6045(b), 6041A(e) (in respect of a return required under section 6041A(b)), 6050H(d), 6050J(e), 6050K(b), or 6060L(c), 10 percent of the aggregate dollar amount of the items required to be reported correctly, or

(B) In the case of a payee statement required under section 6045(b), 6050K(b), or 6050L(c), 5 percent of the aggregate dollar amount of the items required to be reported correctly.

(3) *Computation of the penalty; aggregate dollar amount of items required to be shown correctly*. The aggregate dollar amount used in computing the penalty under this paragraph (c) is the amount that is not reported or is reported incorrectly. If the intentional disregard relates to a dollar amount, the statutory percentage is applied to the difference between the dollar amount reported and the amount required to be reported correctly. If the intentional disregard relates to any other item on the return, the statutory percentage is applied to the aggregate amount of items required to be reported correctly. In determining such amount the same item shall be counted only once. For example, if a filer willfully fails to furnish a Form 1099–INT on which $800 of interest and $160 of Federal income tax withheld (*i.e.*, backup withholding) is required to be shown, only the $800 amount is taken into account in computing the penalty.

(d) *Definitions*—(1) *Payee*. See § 301.6721–1(g)(5) for the definition of ''payee.''

(2) *Payee statement*. The term ''payee statement'' means any statement required to be furnished under—

(i) Section 6031(b) or (c), 6034A, or 6037(b) (relating to statements furnished by certain pass-thru entities, generally a Schedule K–1 (Form 1065) for section 6031(b) or (c), a copy of the Schedule K–1 (Form 1041) for section 6034A, and a copy of Schedule K–1 (Form 1120S) for section 6037(b)),

(ii) Section 6039(a) (relating to information required in connection with certain options),

(iii) Section 6041(d) (relating to information at source, generally the recipient copy of Form 1099–MISC, Form W-2, Form 1099–INT, and the winner's copies of Form W-2G),

(iv) Section 6041A(e) (relating to returns regarding payments of remuneration for services and direct sales, generally the recipient copy of Form 1099–MISC),

(v) Section 6042(c) (relating to returns regarding payments of dividends and corporate earnings and profits, generally the recipient copy of Form 1099–DIV),

(vi) Section 6044(e) (relating to returns regarding payments of patronage dividends, generally the recipient copy of Form 1099–PATR),

(vii) Section 6045(b) or (d) (relating to returns of brokers, generally the recipient copy of Form 1099–B for broker transactions, the transferor copy of Form 1099–S for reporting proceeds from real estate transactions, and the recipient copy of Form 1099–MISC for certain substitute payments),

(viii) Section 6049(c) (relating to returns regarding payments of interest, generally the recipient copy of Form 1099–INT),

(ix) Section 6050A(b) (relating to reporting requirements of certain fishing boat operators, generally the recipient copy of Form 1099–MISC),

(x) Section 6050H(d) (relating to returns relating to mortgage interest received in trade or business from individuals, generally the payor copy of Form 1098),

(xi) Section 6050I(e) (relating to returns relating to cash received in trade or business, generally a copy of Form 8300),

(xii) Section 6050J(e) (relating to returns relating to foreclosures and abandonments of security, generally the borrower copy of Form 1099–A),

(xiii) Section 6050K(b) (relating to returns relating to exchanges of certain partnership interests, generally a copy of Form 8308),

(xiv) Section 6050L(c) (relating to returns relating to certain dispositions of donated property, generally a copy of Form 8282),

(xv) Section 6050N(b) (relating to returns regarding payments of royalties, generally the recipient copy of Form 1099–MISC),

(xvi) Section 6051 (relating to receipts for employees, generally the employee copy of Form W-2),

(xvii) Section 6052(b) (relating to returns regarding payment of wages in the form of group-term life insurance, generally the employee copy of Form W-2),

(xviii)( Section 6053(b) or (c) (relating to reports of tips, generally the employee copy of Form W-2), and

(xix) Section 4093(c)(4)(B) (relating to certain purchasers of diesel and aviation fuels).

(3) *Other items*. The term ''payee statement'' also includes any form, statement, or schedule required to be furnished to the recipient of any amount from which tax is required to be deducted and withheld under chapter 3 of the Code (or from which tax would be required to be so deducted and withheld but for an exemption under the Code or any treaty obligation of the United States), generally the recipient copy of Form 1042S.

[T.D. 8386, 56 FR 67182, Dec. 30, 1991]

### § 301.6723–1 Failure to comply with other information reporting requirements.

(a) *Imposition of penalty*—(1) *General rule*. A penalty of $50 is imposed for each failure to comply timely with a specified information reporting requirement (as defined in paragraph (a)(4) of this section) or for each failure to include correct specified information. Multiple penalties are imposed with respect to a document with failures to comply with more than one of the requirements set forth in paragraph (a)(4) of this section or multiple instances of failures to comply with any one of these requirements. Nonetheless, if a failure that occurs with respect to any requirement defined in paragraph (a)(4) of this section would be subject to a penalty under both paragraph (a)(2)(i) and paragraph (a)(2)(ii) of this section, no more than one penalty is imposed for such failure. The total amount imposed on any person for all failures during any calendar year with respect to all specified information reporting requirements shall not exceed $100,000. See paragraph (a) of § 301.6724–1 for the waiver of the penalty for a failure that is due to reasonable cause.

(2) *Failures subject to the penalty*. The failures to which paragraph (a)(1) of this section apply are—

(i) A failure to comply timely with a specified information reporting requirement on or before the date prescribed therefor (''failure to comply timely''), and

(ii) A failure to include all the information required by a specified information reporting requirement or the inclusion of incorrect information (''failure to include correct information'').

(3) *Exception for inconsequential errors or omissions*. An inconsequential error or omission is not considered a failure to comply with a specified information reporting requirement. For purposes of paragraph (a)(3) of this section, an error or omission is considered inconsequential if it does not frustrate the purpose or use for which the information is intended.

(4) *Specified information reporting requirement defined*. For purposes of section 6723 and this section, a ''specified information reporting requirement'' means—

(i) The requirement to provide the notice under section 6050K(c)(1) (relating to the requirement that a transferor notify the partnership of an exchange of a partnership interest);

(ii) Any requirement contained in the regulations under section 6109 that a person—

(A) Include his or her taxpayer identification number (''TIN'') on any return, statement, or other document (other than an information return or payee statement),

(B) Include on any return, statement, or other document (other than an information return or payee statement) made with respect to another person the TIN of such person, or

(C) Furnish his or her TIN to another person;

(iii) Any requirement contained in the regulations under section 215 that a person—

(A) Furnish his or her TIN to another person, or

(B) Include on his or her return the TIN of another person; and

(iv) The requirement under section 6109(e) that a person include the TIN of any dependent on his or her return.

(b) *Examples*. The provisions of paragraph (a) of this section may be illustrated by the following examples which do not take into account the reasonable cause waiver under section 6724(a) and paragraph (a)(1) of § 301.6724–1.

*Example 1*. Individual A, who has two dependents ages 7 and 9, files his 1990 Form 1040 in 1991. The Form 1040 requires him to provide the TINs of his two dependents, which A fails to do. Because A fails to comply timely with two requirements to include on his return the TIN of another person, a $50 penalty under paragraph (a) of this section is imposed on A for each of the two failures, for a total penalty of $100.

*Example 2*. In 1991 Individual B opens with Bank X an account which pays reportable interest under section 6049. When B opens the account, Bank X requests that B provide his TIN on a Form W–9. B does not provide his TIN as required by § 301.6109–1(b). As a result B fails to comply timely with a specified information reporting requirement under paragraph (a) of this section for furnishing his TIN to another person. Therefore, a $50 penalty is imposed on B under paragraph (a) of this section for the failure. See section 6721(a) for the penalty to which X may be subject if X files a Form 1099–INT (relating to payments of interest) for calendar year 1991 without B's TIN. See section 3406(a)(1)(A) which requires X to impose backup withholding on reportable payments of interest to B's account.

*Example 3*. In 1991 Individual C is a nonresident alien with an account inside the U.S. with Bank Z. The account pays interest that would be reportable under section 6049 but for the fact that it is paid to a nonresident alien. Under section 6109 and § 301.6109–1(b), Bank Z is required to request the TIN from C. C claims that he is a nonresident alien and that his account is not subject to information reporting under section 6049. Because of this, C contends he is not required to provide any TIN information. As a result of this discussion, Bank Z then requests C to provide it with a Form W–8 in order for C to certify that he is a nonresident alien which C fails to do. C fails to comply timely with a specified information reporting requirement under paragraph (a) of this section to furnish his TIN to another person. Therefore, a penalty is imposed on C under paragraph (a) of this section for the failure. See section 6721(a) for the penalty that may be imposed on Z if Z files a Form 1099–INT for calendar year 1991 without C's TIN. See section 3406(a)(1)(A) under which Z is required to impose backup withholding on reportable payment of interest to C's account.

*Example 4*. In 1991 Partnership D opens with Bank Y an account that pays reportable interest under section 6049. When D opens the account, Y requests the partnership's employer identification number (EIN) on a Form W–9 as required under § 301.6109–1(b). The partnership provides its EIN on the Form W–9. Y files an information return with respect to D for the 1991 calendar year. Subsequently, the Internal Revenue Service later notifies Y that D's EIN is incorrect as defined under section 3406 and § 35a.3406–1(a)(6). D fails to comply timely with a specified reporting requirement under paragraph (a) of this section of furnishing its correct EIN to another person. Therefore, a penalty is imposed on D under paragraph (a) of this section for the failure. See section 6721(a) for the penalty to which Y may be subject if Y files a Form 1099–INT for calendar year 1991 without D's correct EIN. See section 3406(a)(1)(B), which requires Y to impose backup withholding on reportable payments of interest to B's account when the Internal Revenue Service or a broker has notified Y that the EIN is incorrect.

[T.D. 8386, 56 FR 67182, Dec. 30, 1991]

### § 301.6724–1 Reasonable cause.

(a) *Waiver of the penalty*—(1) *General rule*. The penalty for a failure relating to an information reporting requirement (as defined in paragraph (j) of this section) is waived if the failure is due to reasonable cause and is not due to willful neglect.

(2) *Reasonable cause defined*. The penalty is waived for reasonable cause only if the filer establishes that either—

(i) There are significant mitigating factors with respect to the failure, as described in paragraph (b) of this section; or

(ii) The failure arose from events beyond the filer's control (''impediment''), as described in paragraph (c) of this section.

Moreover, the filer must establish that the filer acted in a responsible manner, as described in paragraph (d) of this section, both before and after the failure occurred. Thus, if the filer establishes that there are significant mitigating factors for a failure but is unable to establish that the filer acted in a responsible manner, the mitigating factors will not be sufficient to obtain a waiver of the penalty. Similarly, if the filer establishes that a failure arose from an impediment but is unable to establish that the filer acted in a responsible manner, the impediment will not be sufficient to obtain a waiver of the penalty. See paragraph (g) of this section for the reasonable cause safe harbor for persons who exercise due diligence.

(b) *Significant mitigating factors.* In order to establish reasonable cause under this paragraph (b), the filer must satisfy paragraph (d) of this section and must show that there are significant mitigating factors for the failure. The mitigating factors include, but are not limited to—

(1) The fact that prior to the failure the filer was never required to file the particular type of return or furnish the particular type of statement with respect to which the failure occurred, or

(2) The fact that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred. In determining whether the filer has such an established history, significant consideration is given to—

(i) Whether the filer has incurred any penalty under §§ 301.6721–1, 301.6722–1, or 301.6723–1 in prior years for the failure (or under parallel provisions of prior law), and

(ii) If the filer has incurred any such penalty in prior years, the extent of the filer's success in lessening its error rate from year to year.

A filer may treat as a penalty not incurred any penalty under sections 6721 through 6723 that was self-assessed under section 6724(c)(3) and any penalty under section 6676(b) that was self-assessed under section 6676(d), prior to amendment or repeal by the Omnibus Budget Reconciliation Act of 1989. See paragraph (c)(5) of this section for the application of this paragraph (b) to failures attributable to the actions of a filer's agent.

(c) *Events beyond the filer's control*—(1) *In general.* In order to establish reasonable cause under this paragraph (c)(1), the filer must satisfy paragraph (d) of this section and must show that the failure was due to events beyond the filer's control. Events which are generally considered beyond the filer's control include but are not limited to—

(i) The unavailability of the relevant business records (as described in paragraph (c)(2) of this section),

(ii) An undue economic hardship relating to filing on magnetic media (as described in paragraph (c)(3) of this section),

(iii) Certain actions of the Internal Revenue Service (as described in paragraph (c)(4) of this section),

(iv) Certain actions of an agent (as described in paragraph (c)(5) of this section), and

(v) Certain actions of the payee or any other person providing necessary information with respect to the return or payee statement (as described in paragraph (c)(6) of this section).

(2) *Unavailability of the relevant business records.* In order to establish reasonable cause under paragraph (c)(1) of this section due to the unavailability of the relevant business records, the filer's business records must have been unavailable under such conditions, in such manner, and for such period as to prevent timely compliance (ordinarily at least a 2-week period prior to the due date (with regard to extensions) of the required return or the required date (with regard to extensions) for furnishing the payee statement), and the unavailability must have been caused by a supervening event. A ''supervening event'' includes, but is not limited to—

(i) A fire or other casualty that damages or impairs the filer's relevant business records or the filer's system for processing and filing such records;

(ii) A statutory or regulatory change that has a direct impact upon data processing and that is made so close to the time that the return or payee

statement is required that, for all practical purposes, the change cannot be complied with; or

(iii) The unavoidable absence (*e.g.*, due to death or serious illness) of the person with the sole responsibility for filing a return or furnishing a payee statement.

(3) *Undue economic hardship relating to filing on magnetic media*. In order to establish reasonable cause under paragraph (c)(1) of this section due to an undue economic hardship for filing on magnetic media, the filer must show that it failed to file on magnetic media because the filer lacked the necessary hardware. For purposes of this paragraph (c)(3), the filer will not be considered to have acted in a responsible manner under paragraph (d) of this section unless—

(i) The filer attempted on a timely basis to contract out the magnetic media filing;

(ii) The cost of filing on magnetic media was prohibitive as determined at least 45 days before the due date of the returns (without regard to extensions) (90 days for information returns the due date for which (without regard to extensions) is after December 31, 1989, and by or before February 28, 1991 (March 15, 1991, for Forms 1042S));

(iii) The cost was supported by a minimum of two cost estimates from unrelated parties; and

(iv) The filer filed the returns on paper. Reasonable cause will not ordinarily be established under this paragraph (c)(3) if a filer received a reasonable cause waiver in any prior year under paragraph (c)(1) of this section due to an undue economic hardship relating to filing on magnetic media.

(4) *Actions of the Internal Revenue Service*. In order to establish reasonable cause under paragraph (c)(1) of this section due to certain actions of the Internal Revenue Service, a filer must show that the failure was due to the filer's reasonable reliance on erroneous written information from the Internal Revenue Service. Reasonable reliance means that the filer relied in good faith on the information. The filer shall not be considered to have relied in good faith if the Internal Revenue Service was not aware of all the facts when it provided the information to the filer. In order to substantiate reasonable cause under this paragraph (c)(4), the filer must provide a copy of the written information provided by the Internal Revenue Service and, if applicable, the filer's written request for the information.

(5) *Actions of agent—imputed reasonable cause*. In order to establish reasonable cause under paragraph (c)(1) of this section due to actions of an agent, the filer must show the following:

(i) The filer exercised reasonable business judgment in contracting with the agent to file timely correct returns or furnish timely correct payee statements with respect to which the failure occurred. This includes contracting with the agent and providing the proper information sufficiently in advance of the due date of the return or statement to permit timely filing of correct returns or timely furnishing of correct payee statements; and

(ii) The agent satisfied the reasonable cause criteria set forth in paragraph (b) or one of the reasonable cause criteria set forth in paragraph (c) (2) through (6) of this section.

(6) *Actions of the payee or any other person*. In order to establish reasonable cause under paragraph (c)(1) of this section due to the actions of the payee or any other person, such as a broker as defined in section 6045(c) or a Qualified Payment Card Agent (QPCA) as defined in § 31.3406(g)–1(f)(2)(v) of this chapter, providing information with respect to the return or payee statement, the filer must show either—

(i) That the failure resulted from the failure of the payee, or any other person required to provide information necessary for the filer to comply with the information reporting requirements (''any other person''), to provide information to the filer, or

(ii) That the failure resulted from incorrect information provided by the payee (or any other person) upon which information the filer relied in good faith. To substantiate reasonable cause under this paragraph (c)(6), the filer must provide documentary evidence upon request of the Internal Revenue Service showing that the failure was attributable to the payee (or any other person). See paragraph (d)(2) of this section for special rules relating to the

availability of a waiver where the filer's failure relates to a taxpayer identification number (TIN), and the failure is attributable to actions of the payee described in paragraph (c)(6) (i) or (ii) of this section.

(d) *Responsible manner*—(1) *In general.* Acting in a responsible manner means—

(i) That the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations and in handling account information such as account numbers and balances, and

(ii) That the filer undertook significant steps to avoid or mitigate the failure, including, where applicable—

(A) Requesting appropriate extensions of time to file, when practicable, in order to avoid the failure,

(B) Attempting to prevent an impediment or a failure, if it was foreseeable,

(C) Acting to remove an impediment or the cause of a failure, once it occurred, and

(D) Rectifying the failure as promptly as possible once the impediment was removed or the failure was discovered. Ordinarily, a rectification is considered prompt if it is made within 30 days after the date the impediment is removed or the failure is discovered or on the earliest date thereafter on which a regular submission of corrections is made. Submissions will be considered regular only if made at intervals of 30 days or less. A failure may be rectified by filing or correcting the information return, furnishing or correcting the payee statement, or by providing or correcting the information to satisfy the specified information reporting requirement with respect to which the failure occurs. Paragraph (d)(ii)(D) of this section does not apply with respect to information the filer is prohibited from altering under specific information reporting rules. See § 1.6045–4(i)(5) of this chapter.

(2) *Special rule for filers seeking a waiver pursuant to paragraph (c)(6) of this section.* A filer seeking a waiver for reasonable cause pursuant to paragraph (c)(6) of this section with respect to a failure resulting from a missing or an incorrect TIN will be deemed to have acted in a responsible manner in compliance with this paragraph (d) only if the filer satisfies the requirements of paragraph (e) of this section (relating to missing TINs) or paragraph (f) of this section (relating to incorrect TINs), whichever is applicable.

(e) *Acting in a responsible manner—special rules for missing TINs*—(1) *In general.* A filer that is seeking a waiver for reasonable cause under paragraph (c)(6) of this section will satisfy paragraph (d)(2) of this section with respect to establishing that a failure to include a TIN or an information return resulted from the failure of the payee to provide information to the filer (*i.e.*, a missing TIN) only if the filer makes the initial and, if required, the annual solicitations described in this paragraph (e) (required solicitations). For purposes of this section, a number is treated as a ''missing TIN'' if the number does not contain nine digits or includes one or more alpha characters (a character or symbol other than an Arabic numeral) as one of the nine digits. A solicitation means a request by the filer for the payee to furnish a correct TIN. See paragraph (f) of this section for the rules that a filer must follow to establish that the filer acted in a responsible manner with respect to providing incorrect TINs on information returns. See paragraph (e)(1)(vi)(A) of this section for alternative solicitation requirements. See paragraph (g) of this section for the safe harbor due diligence rules. See paragraph (h) of this section for the rule applicable to failures with respect to information returns the due date for which (without regard to extensions) is after December 31, 1989, and on or before April 22, 1991.

(i) *Initial solicitation.* An initial solicitation for a payee's correct TIN must be made at the time an account is opened. The term ''account'' includes accounts, relationships, and other transactions. However, a filer is not required to make an initial solicitation under this paragraph (e)(1)(i) with respect to a new account if the filer has the payee's TIN and uses that TIN for all accounts of the payee. For example, see § 31.3406(h)–3(a) of this chapter. Further, a filer is not required to make an initial solicitation under this paragraph (e)(1)(i) with respect to accounts

for which the filer filed an information return subject to paragraph (h) of this section. For purposes of this section, the initial solicitation requirement is deemed to have been met with respect to accounts opened after December 31, 1989, and on or before April 22, 1991. If the account is opened in person, the initial solicitation may be made by oral or written request, such as on an account creation document. If the account is opened by mail, telephone, or other electronic means, the TIN may be requested through such communications. If the account is opened by the payee's completing and mailing an application furnished by the filer that requests the payee's TIN, the initial solicitation requirement is considered met. If a TIN is not received as a result of an initial solicitation, the filer may be required to make additional solicitations (''annual solicitations'').

(ii) *First annual solicitation.* Except as provided in paragraph (e)(1)(vi) of this section, a filer must undertake an annual solicitation if a TIN is not received as a result of an initial solicitation (or if the filer was not required to make an initial solicitation under paragraph (e)(1)(i) of this section and the filer has not received a payee's TIN). The first annual solicitation must be made on or before December 31 of the year in which the account is opened (for accounts opened before December) or January 31 of the following year (for accounts opened in the preceding December) (''annual solicitation period'').

(iii) *Second annual solicitation.* If the TIN is not received as a result of the first annual solicitation, the filer must undertake a second annual solicitation. The second annual solicitation must be made after the expiration of the annual solicitation period and on or before December 31 of the year immediately succeeding the calendar year in which the account is opened.

(iv) *Additional requirements.* After receiving a TIN, a filer must include that TIN on any information returns the original due date of which (with regard to extensions) is after the date that the filer receives the TIN.

(v) *Failures to which a solicitation relates.* The initial and first annual solicitations relate to failures on returns filed for the year in which an account is opened. The second annual solicitation relates to failures on returns filed for the year immediately following the year in which an account is opened and for succeeding calendar years.

(vi) *Exceptions and limitations.* (A) The solicitation requirements under this paragraph (e) do not apply to the extent an information reporting provision under which a return, as defined in paragraph (g) of § 301.6721–1, is filed provides specific requirements relating to the manner or the time period in which a TIN must be solicited. In that event, the requirements of this paragraph (e) will be satisfied only if the filer complies with the manner and time period requirements of the specific information reporting provision and the provisions of this paragraph (e) to the extent applicable. Also, see section 3406(e) which provides rules on the manner and time period in which a TIN must be provided for certain accounts with respect to interest, dividends, patronage dividends, and amounts subject to broker reporting.

(B) An annual solicitation is not required to be made for a year under this paragraph (e) with respect to an account if no payments are made to the account for such year or if no return as defined in paragraph (g) of § 301.6721–1 is required to be filed for the account for the year.

(C) If a filer fails to make one (or more) of the required solicitations under paragraphs (e)(1) (i), (ii), and (iii) of this section, the filer may satisfy the requirements of this section by—

(*1*) Making two consecutive annual solicitations in subsequent years (''make-up solicitations''), and

(*2*) Satisfying paragraph (e)(1)(iv) of this section.

For example, a filer who has made none of the required solicitations may satisfy the requirements of this section by making two consecutive solicitations. In determining whether a filer has made two consecutive solicitations, years to which paragraph (e)(1)(vi)(B) of this section applies shall be disregarded. If a filer fails to make the initial solicitation under paragraph (e)(1)(i) of this section, the make-up solicitations described in this paragraph (e)(1)(vi)(C) may be made in the years

in which the first and second annual solicitations are required to be made; however, the penalty will apply with respect to the year in which the filer failed to make the initial solicitation. The penalty will apply to failures with respect to years for which a required solicitation is not made and to failures with respect to all subsequent years until the filer conducts its make-up solicitations. The penalty will not apply with respect to the year in which the first make-up solicitation is made (unless it is also the year in which the filer fails to make its initial solicitation) if the second make-up solicitation is made in the following year.

(D) A financial institution is not required to make an annual solicitation by mail on accounts with ''stop-mail'' or ''hold-mail'' instructions, provided the filer furnishes the solicitation material to the payee in the same manner as it furnishes other mail.

(E) A filer is not required to make annual solicitations on accounts with respect to which the filer undertook two consecutive annual mailings by December 31, 1989, under Q/A-5 through Q/A-7B or under Q/A-56 of § 35a.9999–1 of the Temporary Employment Tax Regulations under the Interest and Dividend Tax Compliance Act of 1983, as provided under section 6676(b) (prior to its amendment by the Omnibus Budget Reconciliation Act of 1989).

(F) A filer is not required to make annual solicitations by mail on accounts with respect to which the filer has an undeliverable address, *i.e.*, where other mailings to that address have been returned to the filer because the address was incorrect and no new address has been provided to the filer.

(G) Except as provided in paragraph (e)(1)(vi) (A) and (C) of this section, no more than two annual solicitations are required under this paragraph (e) in order for a filer to establish reasonable cause.

(H) In the case of information returns required to be filed, and information statements required to be furnished, after December 31, 2005, the filer—

(*1*) Satisfies the solicitation requirements of paragraphs (e)(1)(i) and (ii) of this section with respect to a payment made through a QPCA if the filer relies in good faith on the QPCA to solicit, record, validate, and furnish the payee's TIN; and

(*2*) Satisfies the solicitation requirement of paragraph (e)(1)(iii) of this section with respect to such a payment if, on or before December 31 of the year immediately succeeding the calendar year in which the payment is made, the filer undertakes a solicitation of the payee's TIN or receives from the QPCA a TIN that the filer believes in good faith to be the payee's correct TIN.

(2) *Manner of making annual solicitations—by mail or telephone*—(i) *By mail.* A mail solicitation must include—

(A) A letter informing the payee that he or she must provide his or her TIN and that he or she is subject to a $50 penalty imposed by the Internal Revenue Service under section 6723 if he or she fails to furnish his or her TIN,

(B) A Form W–9 or an acceptable substitute form, as defined in § 31.3406 (h)–3 (a), (b), or (c) of this chapter, on which the payee may provide the TIN, and

(C) A return envelope for the payee to provide the TIN which may be, but is not required to be, postage prepaid.

(ii) *By telephone.* An annual solicitation may be made by telephone if the solicitation procedure is reasonably designed and carried out in a manner that is conducive to obtaining the TIN. An annual solicitation is made pursuant to this paragraph (e)(2)(ii) for a failure if the filer—

(A) Completes a call to each person with a missing TIN and speaks to an adult member of the household, or to an officer of the business or the organization,

(B) Requests the TIN of the payee,

(C) Informs the payee that he or she is subject to a $50 penalty imposed by the Internal Revenue Service under section 6723 if he or she fails to furnish his or her TIN,

(D) Maintains contemporaneous records showing that the solicitation was properly made, and

(E) Provides such contemporaneous records to the Internal Revenue Service upon request.

(f) *Acting in a responsible manner—special rules for incorrect TINS*—(1) *In general.* A filer that is seeking a waiver for reasonable cause under paragraph (c)(6) of this section will satisfy paragraph

(d)(2) of this section with respect to establishing that a failure resulted from incorrect information provided by the payee or any other person (*i.e.*, inclusion of an incorrect TIN) on an information return only if the filer makes the initial and annual solicitations described in this paragraph (f). See paragraph (e)(1) of this section for the definition of the term ''solicitation.'' See paragraph (f)(5)(i) of this section for alternative solicitation requirements. See paragraph (g) of this section for the safe harbor due diligence rules. See paragraph (h) of this section for the rule applicable to failures with respect to information returns the due date for which (without regard to extensions) is after December 31, 1989, and on or before April 22, 1991.

(i) *Initial solicitation.* An initial solicitation for a payee's correct TIN must be made at the time the account is opened. The term ''account'' includes accounts, relationships, and other transactions. However, a filer is not required to make an initial solicitation under this paragraph (f)(1)(i) with respect to a new account if the filer has the payee's TIN and uses that TIN for all accounts of the payee. For example, see § 31.3406(h)–3(a) of this chapter. Further, a filer is not required to make an initial solicitation under this paragraph (f)(1)(i) with respect to accounts for which the filer filed an information return subject to paragraph (h) of this section. For purposes of this section, the initial solicitation requirement is deemed to have been met with respect to accounts opened after December 31, 1989, and on or before April 22, 1991. No additional solicitation is required after the filer receives the TIN unless the Internal Revenue Service or, in some cases, a broker notifies the filer that the TIN is incorrect. Following such notification the filer may be required to make an annual solicitation to obtain the correct TIN as provided in paragraph (f)(1) (ii) and (iii) of this section.

(ii) *First annual solicitation.* Except as provided in paragraph (f)(5) of this section, a filer must undertake an annual solicitation only if the payor has been notified of an incorrect TIN and such account contains the incorrect TIN at the time of the notification. The first annual solicitation must be made as required by paragraph (f) (2) or (3) of this section, whichever applies. An account contains an incorrect TIN at the time of notification if the name and number combination on the account matches the name and number combination set forth on the notice from the Internal Revenue Service or a broker. A filer may be notified of an incorrect TIN by the Internal Revenue Service or by a broker pursuant to section 3406(a)(1)(B) or by a penalty notice issued by the Internal Revenue Service pursuant to section 6721. Except as otherwise provided in this section, the annual solicitation required by this paragraph (f) must be made on or before December 31 of the year in which the filer is notified of the incorrect TIN or by January 31 of the following year if the filer is notified of an incorrect TIN in the preceding December.

(iii) *Second annual solicitation.* A filer must undertake a second annual solicitation as required by paragraph (f) (2) or (3) of this section, whichever applies, if the filer is notified in any year following the year of the notification described in paragraph (f)(1)(ii) of this section that the account of a payee contains an incorrect TIN, as described in paragraph (f)(1)(ii) of this section.

(iv) *Additional requirements.* Upon receipt of a TIN, a filer must include that TIN on any information returns the original due date of which (with regard to extensions) is after the date that the filer receives the TIN.

(2) *Manner of making annual solicitation if notified pursuant to section 6721.* A filer that has been notified of an incorrect TIN by a penalty notice or other notification pursuant to section 6721 may satisfy the solicitation requirement of this paragraph (f) either by mail, in the manner set forth in paragraph (e)(2)(i) of this section; by telephone, in the manner set forth in paragraph (e)(2)(ii) of this section; or by requesting the TIN in person.

(3) *Coordination with solicitations under section 3406(a)(1)(b).* (i) A filer that has been notified of an incorrect TIN pursuant to section 3406(a)(1)(B) (except filers to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies) will satisfy the solicitation requirement of

this paragraph (f) only if it makes a solicitation in the manner and within the time period required under § 31.3406(d)-5(d)(2)(i) or (g)(1)(ii) of this chapter, whichever applies.

(ii) A filer that has been notified of an incorrect TIN by a notice pursuant to section 6721 (except filers to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies) is not required to make the annual solicitation of this paragraph (f) if—

(A) The filer has received an effective notice pursuant to section 3406(a)(1)(B) with respect to the same payee, either during the same calendar year or for information returns filed for the same year; and

(B) The filer makes a solicitation in the manner and within the time period required under § 31.3406(d)-5(d)(2)(i) or (g)(1)(ii) of this chapter, whichever applies, before the filer is required to make the annual solicitation of this paragraph (f).

(iii) A filer that has been notified of an incorrect TIN by a notice pursuant to section 6721 with respect to a fiduciary or nominee account to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies is required to make the annual solicitation of this paragraph (f).

(4) *Failures to which a solicitation relates.* The initial solicitation relates to failures on returns filed for the year an account is opened and for any succeeding year that precedes the year in which the filer receives a notification of an incorrect TIN. The first and second annual solicitations relate to failures on returns filed for the year in which a notification of an incorrect TIN is received. The second solicitation also relates to failures on returns filed for succeeding calendar years.

(5) *Exceptions and limitations.*—(i) The solicitation requirements under this paragraph (f) do not apply to the extent that an information reporting provision under which a return, as defined in paragraph (g) of § 301.6721–1, is filed provides specific requirements relating to the manner or the time period in which a TIN must be solicited. In that event, the requirements of this paragraph (f) will be satisfied only if the filer complies with the manner and time period requirement under the specific information reporting provisions and this paragraph (f), to the extent applicable.

(ii) An annual solicitation is not required to be made for a year under this paragraph (f) with respect to an account if no payments are made to the account for such year or if no return as defined in paragraph (g) of § 301.6721–1 is required to be filed for the account for such year.

(iii) If a filer fails to make one (or more) of the required solicitations under paragraph (f)(1) (i), (ii), and (iii) of this section, the filer may satisfy the requirements of this section by:

(A) Making two consecutive annual solicitations in subsequent years (''make-up solicitations''), and

(B) Satisfying paragraph (f)(1)(iv) of this section.

For example, a filer who has made none of the required solicitations may satisfy the requirements of this section by making two consecutive solicitations. In determining whether a filer has made two consecutive solicitations, years to which paragraph (f)(5)(ii) of this section applies are disregarded. If a filer fails to make the initial solicitation under paragraph (f)(1)(i) of this section, the make-up solicitations described in this paragraph (f)(5)(iii) may be made in the years in which the first and second annual solicitations are required to be made; however, the penalty will apply with respect to the year in which the filer failed to make the initial solicitation. The penalty will apply to failures in years in which a required solicitation is not made and to failures with respect to all subsequent years until the filer conducts its make-up solicitations. The penalty will not apply with respect to the year in which the first make-up solicitation is made (unless it is also the year in which the filer fails to make the initial solicitation) if the second make-up solicitation is made in the following year.

(iv) A financial institution is not required to make an annual solicitation by mail on accounts with ''stop-mail'' or ''hold-mail'' instructions, provided the filer furnishes the solicitation material to the payee in the same manner as it furnishes other mail.

(v) A filer is not required to make annual solicitations by mail on accounts

with respect to which the filer has an undeliverable address, *i.e.*, where other mailings to that address have been returned to the filer because the address was incorrect and no new address has been provided to the filer.

(vi) In general, except as provided in paragraph (f)(5) (i) and (iii) of this section, no more than two annual solicitations are required under this paragraph (f) in order for a filer to establish reasonable cause. However, a filer who complies with this paragraph (f) during a calendar year after receiving a notice under section 6721 and who later during the same calendar year receives a notice pursuant to section 3406 may be required to undertake additional annual mailings in such calendar year pursuant to section 3406(a)(1)(B) in order to satisfy the annual solicitation requirement in paragraph (f)(3) of this section.

(vii) In the case of information returns required to be filed, and information statements required to be furnished, after December 31, 2005, the filer—

(A) Satisfies the solicitation requirement of paragraph (f)(1)(i) of this section with respect to a payment made through a QPCA if the filer relies in good faith on the QPCA to solicit, record, validate, and furnish the payee's TIN; and

(B) Satisfies the solicitation requirement of paragraph (f)(1)(ii) or (iii) of this section, whichever is applicable, with respect to such a payment if, after the date the filer is notified that the account of the payee contains an incorrect TIN and on or before the date by which the applicable requirement must be satisfied, the filer solicits the payee's correct TIN in a manner that satisfies the applicable requirement or receives from the QPCA a TIN that the filer believes in good faith to be the payee's correct TIN.

(g) *Due diligence safe harbor*—(1) *In general*. A filer may establish reasonable cause with respect to a failure relating to an information reporting requirement as described in paragraph (j) of this section if the filer exercises due diligence with respect to failures described in sections 6721 through 6723.

(2) *Special rules relating to TINs*. The following questions and answers provide guidance on the exercise of due diligence for an exception to a penalty under sections 6721 through 6723 for a failure to provide a correct TIN on any information return (as defined in § 301.6721–1(g)), payee statement (as defined in § 301.6722–1(d)), document (as described in § 301.6723–1(a)(4)), or the failure merely to provide a TIN as described in § 301.6723–1(a)(4)(ii).

GENERAL RULE

Q-1. Is a payor subject to a penalty for a failure to provide a correct TIN on an information return with respect to a reportable interest or dividend payment if the payee has certified, under penalties of perjury, that the TIN furnished to the payor is the payee's correct number, the payor provided that number on an information return, and the number is later determined not to be the payee's correct number?

A-1. A payor is not subject to a penalty for failure to provide the payee's correct TIN on an information return, if the payee has certified, under penalties of perjury, that the TIN provided to the payor was his correct number, and the payor included such number on the information return before being notified by the Internal Revenue Service (IRS) (or a broker) that the number is incorrect.

DUE DILIGENCE DEFINED FOR ACCOUNTS OPENED AND INSTRUMENTS ACQUIRED AFTER DECEMBER 31, 1983

Q-2. In order for a payor of a reportable interest or dividend payment (other than in a window transaction) to be considered to have exercised due diligence in furnishing the correct TIN of a payee with respect to an account opened or an instrument acquired after December 31, 1983, what actions must the payor take?

A-2. (1) In general, the payor of an account or instrument that is not a pre-1984 account nor a window transaction must use a TIN provided by the payee under penalties of perjury on information returns filed with the IRS to satisfy the due diligence requirement. Therefore, if a payor permits a payee to open an account without obtaining the payee's TIN under penalties of perjury and files an information return

with the IRS with a missing or an incorrect TIN, the payor will be liable for the $50 penalty for the year with respect to which such information return is filed. However, in its administrative discretion, the IRS will not enforce the penalty with respect to a calendar year if the certified TIN is obtained after the account is opened and before December 31 of such year, provided that the payor exercises due diligence in processing such number, i.e., the payor uses the same care in processing the TIN provided by the payee that a reasonably prudent payor would use in the course of the payor's business in handling account information such as account numbers and balances.

(2) Once notified by the IRS (or a broker) that a number is incorrect, a payor is liable for the penalty for all prior years in which an information return was filed with that particular incorrect number if the payor has not exercised due diligence with respect to such years. A pre-existing certified TIN does not constitute an exercise of due diligence after the IRS or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions described in § 31.3406(d)–5(d)(2)(i) of this chapter with respect to accounts receiving reportable payments described in section 3406(b)(1) and reported on information returns described in sections 6724(d)(1)(A) (i) through (iv).

Q-3. Is a payor as described in A-2 liable for the penalty if the payor obtained a certified TIN from a payee but inadvertently processed the name or number incorrectly on the information return?

A-3. Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the TIN and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

SPECIAL RULES

Q-4. With respect to an instrument transferred without the assistance of a broker, is a payor liable for the penalty for filing an information return with a missing or an incorrect TIN if the payor records on its books a transfer of a readily tradable instrument in a transaction in which the payor was not a party?

A-4. Generally, a payor as described in Q-4 will be considered to have exercised due diligence with respect to a readily tradable instrument that is not part of a pre-1984 account with the payor if the payor records on its books a transfer in which the payor was not a party. This exception applies until the calendar year in which the payor receives a certified TIN from the payee.

Q-5. Is the payor described in A-4 required to solicit the TIN of a payee of an account with a missing TIN in order to be considered as having exercised due diligence in a subsequent calendar year?

A-5. There is no requirement on the payor to solicit the TIN in order to be considered to have exercised due diligence in a subsequent calendar year under the rule set forth in A-4.

Q-6. Is a payor as described in Q-4 considered to have exercised due diligence if the payee provides a TIN to the payor (whether or not certified), the payor uses that number on the information return filed for the payee, and the number is later determined to be incorrect?

A-6. A payor as described in Q-4 who records on its books a transfer in which it was not a party is considered to have exercised due diligence under the rule set forth in A-4 where the transfer is accompanied with a TIN provided that the payor uses the same care in processing the TIN provided by a payee that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. Thus, a payor will not be liable for the penalty if the payor uses the TIN provided by the payee on information returns that it files, even if the TIN provided by the payee is later determined to be incorrect. However, a payor will not be considered as having exercised due diligence under A-4 after the IRS or a broker notifies the payor that the number is incorrect unless the payor undertakes the required additional actions described in the second paragraph of A-2.

Q-7. Is a payor liable for a penalty for filing an information return with a missing or an incorrect TIN with respect to a post-1983 account or instrument if the payor could have met the due diligence requirements but for the fact that the payor incurred an undue hardship?

A-7. A payor of a post-1983 account or instrument is not liable for a penalty under section 6721(a) for filing an information return with a missing or an incorrect TIN if the IRS determines that the payor could have satisfied the due diligence requirements but for the fact that the payor incurred an undue hardship. An undue hardship is an extraordinary or unexpected event such as the destruction of records or place of business of the payor by fire or other casualty (or the place of business of the payor's agent who under a pre-existing written contract had agreed to fulfill the payor's due diligence obligations with respect to the account subject to the penalty and there was no means for the obligations to be performed by another agent or the payor). Undue hardship will also be found to exist if the payor could have met the due diligence requirements only by incurring an extraordinary cost.

Q-8. How does a payor obtain a determination from the IRS that the payor has met the undue hardship exception to the penalty under section 6721(a) for the failure to include the correct TIN on an information return for the year with respect to which the payor is subject to the penalty?

A-8. A determination of undue hardship may be established only by submitting a written statement to the IRS signed under penalties of perjury that sets forth all the facts and circumstances that make an affirmative showing that the payor could have satisfied the due diligence requirements but for the occurrence of an undue hardship. Thus, the statement must describe the undue hardship and make an affirmative showing that the payor either was in the process of exercising or stood ready to exercise due diligence when the undue hardship occurred. A payor may request an undue hardship determination from the district director or the director of the Internal Revenue Service Center where the payor is required to remit the penalty under section 6721(a).

Q-9. Is a pre-1984 account or instrument of a payor that is exchanged for an account or instrument of another payor as a result of a merger of the other payor or acquisition of the accounts or instruments of such payor transformed into a post-1983 account or instrument if the merger or acquisition occurs after December 31, 1983?

A-9. No. A pre-1984 account or instrument that is exchanged for another account or instrument pursuant to a statutory merger or the acquisition of accounts or instruments is not transformed into a post-1983 account or instrument because the exchange occurs without the participation of the payee.

Q-10. May the acquiring taxpayer described in A-9 rely upon the business records and past procedures of the merged payor or the payor whose accounts or instruments were acquired in order to establish that due diligence has been exercised on the acquired pre-1984 and post-1983 accounts or instruments?

A-10. Yes. The acquiring payor may rely upon the business records and past procedures of the merged payor or of the payor whose accounts or instruments were acquired in order to establish due diligence to avoid the penalty under section 6721(a) with respect to information returns that have been or will be filed.

Q-11. To what extent may a payor rely on the due diligence rules set forth in §§ 35a.9999–1, 35a.9999–2, and 35a.9999–3 of this chapter in effect prior to January 1, 2001 (see §§ 35a.9999–1, 35a.9999–2, and 35a.9999–3 as contained in 26 CFR part 35a, revised April 1, 1999).

A-11. A payor may rely on the due diligence rules set forth in §§ 35a.9999–1, 35a.9999–2, and 35a.9999–3 of this chapter in effect prior to January 1, 2001 (see §§ 35a.9999–1, 35a.9999–2, and 35a.9999–3 as contained in 26 CFR part 35a, revised April 1, 1999) solely for the definitions of terms or phrases used in this paragraph (g)(2).

(3) *Effective dates*. This paragraph (g) is effective for information returns (as defined in section 6724(d)(1)) required to be filed, payee statements (as defined in section 6724(d)(2)) required to be furnished, and specified information (as

described in section 6724(d)(3)) required to be reported after December 31, 2000. See § 301.6724–1(g) in effect prior to January 1, 2001 (see § 301. 6724–1(g) as contained in 26 CFR part 301, revised April 1, 1999) for substantially similar rules applicable prior to January 1, 2001.

(h) *Transitional rules for information returns required to be filed (or payee statements required to be furnished) after December 31, 1989 (without regard to extensions), and on or before April 22, 1991*—(1) *In general*. With respect to information returns required to be filed (or payee statements required to be furnished) after December 31, 1989 (without regard to extensions), and on or before April 22, 1991, a filer will be deemed to have satisfied reasonable cause if, with respect to the failure, the filer would have satisfied reasonable cause under sections 6721, 6722, or 6723 (prior to their amendment by the Omnibus Budget Reconciliation Act of 1989) and the regulations thereunder.

(2) *Special rule on TINs*. With respect to information returns required to be filed after December 31, 1989 (without regard to extensions), and on or before April 22, 1991, which contain a missing or an incorrect TIN, a filer will be deemed to have satisfied reasonable cause if, at the time the account was opened, the filer—

(i) Exercised due diligence or fulfilled the requirements of Q/A-56 of § 35a.9999–1 of this chapter, as in effect on December 31, 1989, as provided under section 6676(b) (prior to its repeal by the Omnibus Budget Reconciliation Act of 1989),

(ii) Requested the TIN according to the regulations under the section requiring the filing of the information return, but if none, under section 6109, or

(iii) Would have satisfied reasonable cause under section 6676(a) (prior to its repeal by the Omnibus Budget Reconciliation Act of 1989).

(i) [Reserved]

(j) *Failures to which this section relates*. For purposes of this section, a failure relating to an information reporting requirement means—

(1) A failure described under § 301.6721–1(a)(2) relating to the failure to file timely correct information returns as defined in section 6724(d)(1),

(2) A failure described under § 301.6722–1(a)(2) relating to the failure to furnish timely a correct payee statement as defined in section 6724(d)(2), and

(3) A failure described under § 301.6723–1(a)(2) relating to the failure to timely comply with and to include correct specified information as defined in section 6724(d)(3).

(k) *Examples*. The provisions of this section may be illustrated by the following examples:

*Example 1*. (i) On August 1, 1991, Individual A, an independent contractor, establishes a relationship (''an account'') with Institution L, which pays A amounts reportable under section 6041. When A opens the account L requests that A supply his TIN on the account creation document. A fails to provide his TIN. On October 1, 1991, L mails a solicitation for A's TIN that satisfies the requirement of paragraph (e)(1)(ii) of this section. A does not provide a TIN to L during 1991. L timely files an information return subject to section 6721, that does not contain A's TIN, for payments made during the 1991 calendar year with respect to A's account. A penalty is imposed on L pursuant to paragraph (a)(2) of § 301.6721–1 for L's failure to file a correct information return because A's TIN was not shown on the return. The penalty will be waived, however, if L establishes that the failure was due to reasonable cause as defined in this section.

(ii) To establish reasonable cause under this section, L must satisfy both paragraphs (c)(6) and (d) of this section. The criteria for obtaining a waiver under these paragraphs are as follows:

(A) L acted in a responsible manner in attempting to satisfy the information reporting requirement as described in paragraph (d) of this section, and

(B) L demonstrates that the failure arose from events beyond L's control, as described in paragraph (c)(6) of this section.

(iii) Pursuant to paragraph (d)(2) of this section, L may demonstrate that it acted in a responsible manner only by complying with paragraph (e) of this section. Paragraph (e) of this section requires a filer to request a TIN at the time the account is opened (the initial solicitation) and, if the filer does not receive the TIN at that time, to solicit the TIN on or before December 31 of the year the account is opened (for accounts opened before December) or January 31 of the following year (for accounts in the preceding December) (the annual solicitation). Because L has performed these solicitations within the time and in the manner prescribed by paragraph (e) of this section, L has acted in

a responsible manner as described in paragraph (d) of this section. L satisfies paragraph (c)(6) of this section because under the facts, L can show that the failure was caused by A's failure to provide a TIN, an event beyond L's control. As a result, L has established reasonable cause under paragraph (a)(2) of this section. Therefore, the penalty imposed under paragraph (a)(2) of § 301.6721–1 for the failure on the 1991 information return is waived. See section 3406(a)(1)(A) which requires L to impose backup withholding on reportable payments to A if L has not received A's TIN.

*Example 2.* (i) On August 1, 1991, Individual B opens an account with Bank M, which pays B interest reportable under section 6049. When B opens the account, M requests that B supply his TIN on the account creation document. B provides his TIN to M. On February 28, 1992, M includes the TIM that B provided on the Form 1099–INT for the 1991 calendar year. In October 1992 the Internal Revenue Service, pursuant to section 3406(a)(1)(B), notifies M that the 1991 return filed for B contains an incorrect TIN. In April 1993 a penalty is imposed on M pursuant to paragraph (a)(2) of § 301.6721–1 for M's failure to file a correct information return for the 1991 calendar year, *i.e.*, the return did not contain B's correct TIN. The penalty will be waived, however, if M establishes that the failure was due to reasonable cause as defined in this section.

(ii) To establish reasonable cause under this section, M must satisfy the criteria in both paragraphs (c)(6) and (d) of this section. Pursuant to paragraph (d)(2) of this section, M can demonstrate that it acted in a responsible manner only if M complies with paragraph (f) of this section. Paragraph (f) of this section requires a filer to request a TIN at the time the account is opened, an initial solicitation. Under paragraph (f)(4) of this section the initial solicitation relates to failures on returns filed for the year an account is opened. Because M performed the initial solicitation in 1991 in the time and manner prescribed in paragraph (f)(1)(i) of this section and reflected the TIM received from B on the 1991 return as required by paragraph (f)(1)(iv) of this section, M has acted in a responsible manner as described in paragraph (d) of this section. M satisfies paragraph (c)(6) of this section because, under the facts, M can show that the failure was caused by B's failure to provide a correct TIN, an event beyond M's control. As a result, M has established reasonable cause under paragraph (a)(2) of this section. Therefore, the penalty imposed under paragraph (a)(2) of § 301.6721–1 for the failure on the 1991 information return is waived. See section 3406(a)(1)(B) which requires M to impose backup withholding on reportable payments to B if M has not received B's correct TIN.

*Example 3.* (i) *Table.*

| 1991 | 2/92 | 10/92 | 2/93 |
|---|---|---|---|
| Account opened (solicits TIN). | 1991 return | B-notice w/ respect to 1991 return. | 1992 return filed. |

| 4/93 | 10/93 | 2/94 | 4/94 |
|---|---|---|---|
| 6721 penalty notice for 1991 return. | B-notice w/ respect to 1992 return. | 1993 return filed. | 6721 penalty notice for 1992 return. |

(ii) The facts are the same as in *Example 2*. Under § 31.3406(d)–5(d)(2)(i) of this chapter and paragraph (f)(3) of this section, within 15 days of the October 1992 notification of the incorrect TIN from the Internal Revenue Service, M solicits the correct TIN from B. B fails to respond. M timely files the return for 1992 with respect to the account setting forth B's incorrect TIN. In October 1993 the Internal Revenue Service notifies M pursuant to section 3406(a)(1)(B) that the 1992 return contains an incorrect TIN. In April 1994, a penalty is imposed on M pursuant to paragraph (a)(1)(2) of § 301.6721–1 for M's failure to include B's correct TIN on the return for 1992. The penalty will be waived, if M establishes that the failure was due to reasonable cause as defined in this section.

(iii) M must satisfy the reasonable cause criteria in paragraphs (c)(6) and (d) of this section. M may demonstrate that it acted in a responsible manner as required under paragraph (d) of this section only by complying with paragraph (f) of this section. Paragraph (f) of this section requires a filer to make an initial solicitation for a TIN when an account is opened. Further, a filer must make an annual solicitation for a TIN by mail within 15 business days after the date that the Internal Revenue Service notifies the filer of an incorrect TIN pursuant to section 3406(a)(1)(B). M made the initial solicitation for the TIN in 1991 and, after being notified of the incorrect TIN in October 1992, the first annual solicitation within the time and manner prescribed by section 31.3406(d)–5(d)(2)(i) of this chapter and paragraph (f) (1)(ii) and (2) of this section. M acted in a responsible manner. M satisfies paragraph (c)(6) of this section because, under the facts, M can show that the failure was caused by B's failure to provide his correct TIN, an event beyond M's control. As a result M has established reasonable cause under paragraph (a)(2) of this section. Therefore, the penalty imposed under paragraph (a)(2) of § 301.6721–1 for the failure on the 1992 return is waived due to reasonable cause.

*Example 4.* (i) *Table.*

| 1991 | 2/92 | 10/92 | 2/93 |
|---|---|---|---|
| Account opened (solicits TIN). | 1991 return filed. | B-notice w/ respect to 1991 return. | 1992 return filed. |

| 4/93 | 10/93 | 2/94 | 4/94 |
|---|---|---|---|
| 6721 penalty notice for 1991 return. | B-notice w/ respect to 1992 return. | 1993 return filed. | 6721 penalty notice for 1992 return. |

(ii) The facts are the same as in *Example 3*. M timely solicits B's TIN in October 1993, which B fails to provide. M files the return for 1993 with the incorrect TIN. In April 1995 the Internal Revenue Service informs M that the 1993 return contains an incorrect TIN. M does not solicit a TIN from B in 1994 and files a return for 1994 with B's incorrect TIN. M seeks a waiver of the penalty under paragraph (a)(2) of § 301.6721–1 for reasonable cause. M must satisfy the reasonable cause criteria in paragraphs (c)(6) and (d) of this section. Because M made the initial and two annual solicitations as required by paragraph (f) of this section, M has demonstrated that it acted in a responsible manner and is not required to solicit B's TIN in 1994. See paragraph (f)(5)(iv) of this section. M satisfies paragraph (c)(6) of this section because, under the facts, M can show that the failure was caused by B's failure to provide his correct TIN, an event beyond M's control. Therefore, M has established reasonable cause under paragraph (a)(2) of this section.

*Example 5*. In 1992, Mortgage Finance Company N lends money to C to purchase property in a transaction subject to reporting under section 6050H and to section 6721. As part of the transaction, C gives N a promissory note providing for repayment of principal and the payment of interest. At the time C incurs the obligation N requests C's TIN, as required under § 1.6050H–2(f) of this chapter. C fails to provide the TIN as required by § 1.6050H–2(f) of this chapter. N sends solicitations by mail in 1992 and 1993 for the missing TIN, which C fails to provide. However, for 1994 M fails to send the solicitation required by § 1.6050H–2(f) of this chapter. N files returns for the 1992, 1993, and 1994 calendar years pursuant to section 6050H without C's TIN. Although N made the initial and the first annual solicitations in 1992 and the second annual solicitation in 1993, N did not solicit the TIN in 1994 as required under section 6050H, which requires continued annual solicitations until the TIN is obtained. Therefore, under paragraph (e)(1)(vi)(A) of this section the penalty imposed under paragraph (a) of § 301.6721–1 for the 1994 information return is not waived.

*Example (6)*. (i) *Table*.

| 10/91 | 2/92 | 10/92 | 2/93 |
|---|---|---|---|
| Account opened. (solicits TIN). | 1991 return filed. | B-notice w/ respect to 1991 return. | 1992 return filed. |

| 4/93 | 10/93 | 02/94 | 4/94 |
|---|---|---|---|
| 6721 penalty notice. | B-notice w/ respect to 1992 return. | 1993 return filed. | 6721 penalty notice for 1992 return. |

(ii) On October 1, 1991, Individual E opens an account with Institution R, which pays E amounts reportable under section 6049. When E opens the account, R requests that E supply his TIN on an account creation document, which E does. Pursuant to paragraph (f)(1)(iv) of this section, R uses the TIN furnished by E on the information return filed for the 1991 calendar year. In October 1992 the Internal Revenue Service notifies R pursuant to section 3406(a)(1)(B) that the information return filed for E for the 1991 calendar year contained an incorrect TIN. At the time R receives this notification, E's account contains the incorrect TIN. On December 31, 1992, R telephones E pursuant to paragraphs (f)(2) and (e)(2)(ii) of this section and receives different TIN information from E. R uses this information on the return that it files timely for E for the 1992 calendar year, *i.e.*, in February 1993.

(iii) In April 1993, the Internal Revenue Service notifies R pursuant to paragraph (a)(2) of § 301.6721–1 that the information return filed for the 1991 calendar year contains an incorrect TIN. The penalty will be waived, however, if R establishes the failure was due to reasonable cause as defined in this section.

(iv) To establish reasonable cause under this section, R must satisfy the criteria in both paragraphs (c)(6) and (d)(2) of this section. Pursuant to paragraph (d)(2) of this section, R can demonstrate that it acted in a responsible manner only if it complies with paragraph (f) of this section. R solicited E's TIN at the time the account was opened (initial solicitation). Under paragraphs (d)(2) and (f)(4) of this section, the initial solicitation relates to failures on returns filed for the year in which an account is opened (*i.e.*, 1991) and for subsequent years until the calendar year in which the filer receivers a notification of an incorrect TIN pursuant to section 3406. Because E failed to provide the correct TIN upon request, the failure arose from events beyond R's control as described in paragraph (c)(6) of this section. Therefore, the penalty with respect to the failure on the 1991 calendar year information return is waived due to reasonable cause.

*Example (7)*. (i) The facts are the same as in *Example 6*. In April 1994 the Internal Revenue Service notifies R pursuant to paragraph

(a)(2) of § 301.6721–1 that the information return filed for the 1992 calendar year for E contained an incorrect TIN.

(ii) To establish reasonable cause for the failure under this section, R must satisfy the criteria in both paragraphs (c)(6) and (d)(2) of this section. Pursuant to paragraph (d)(2) of this section R may establish that it acted in a responsible manner only by complying with paragraph (f) of this section. Pursuant to paragraph (f)(1)(ii) of this section, R must make an annual solicitation after being notified of an incorrect TIN if the payee's account contains the incorrect TIN at the time of the notification. Paragraph (f)(3) of this section provides that if the filer is notified pursuant to section 3406(a)(1)(B) the time and manner of making an annual solicitation is that required under § 31.3406(d)–5(g)(1)(ii) of this chapter. Section 31.3406(d)–5(g)(1)(ii) of this chapter requires R to notify E by mail within 15 business days after the date of the notice from the Internal Revenue Service, which R failed to do. As a result, R has failed to act in a responsible manner with respect to the failure on the 1992 information return, and the penalty will not be waived due to reasonable cause.

(l) [Reserved]

(m) *Procedure for seeking a waiver.* In seeking an administrative determination that the failure was due to reasonable cause and not willful neglect, the filer must submit a written statement to the district director or the director of the Internal Revenue Service Center where the returns, as defined in section 6724(d), are required to be filed. The statement must—

(1) State the specific provision under which the waiver is being requested, *i.e.*, paragraph (b) or under paragraph (c) (2) through (6),

(2) Set forth all the facts alleged as the basis for reasonable cause,

(3) Contain the signature of the person required to file the return, and

(4) Contain a declaration that it is made under penalties of perjury. See § 1.6061–1 of the Income Tax Regulations for the rules on the signing of returns.

(n) *Manner of payment.* The penalty due under sections 6721 through 6723 shall be paid upon notice and demand by Internal Revenue Service, and in the same manner as a tax liability is paid.

[T.D. 8386, 56 FR 67182, Dec. 30, 1991, and amended by T.D. 8409, 57 FR 13035, Apr. 15, 1992; T.D. 8734, 62 FR 53496, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73413, Dec. 30, 1999; T.D. 9055, 68 FR 22595, Apr. 29, 2003; T.D. 9136, 69 FR 41943, July 13, 2004]

REGULATIONS APPLICABLE TO INFORMATION RETURNS AND PAYEE STATEMENTS THE DUE DATE FOR WHICH (WITHOUT REGARD TO EXTENSIONS) IS AFTER DECEMBER 31, 1986, AND BEFORE JANUARY 1, 1990

### § 301.6723–1A Failure to include correct information.

(a) *General rule.* If any person files an information return (as defined in section 6724(d)(1)) or furnishes a payee statement (as defined in section 6724(d)(2)) the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990, and such person fails to include all of the information required to be shown on such return or statement or includes incorrect information, such person will be considered to have failed to include correct information. For this purpose, information required to be shown on a return or statement is the information required by the applicable information reporting statute or by any administrative pronouncement issued thereunder (such as a regulation, revenue ruling, revenue procedure, or information reporting form). Except as otherwise provided in this section, any person who fails to include correct information shall pay $5 for each return or statement with respect to which such failure occurs; however, the total amount imposed on any person for all such failures during any calendar year shall not exceed $20,000. See paragraph (e) of this section regarding the higher penalties for intentional disregard of the correct information reporting requirement and for interest and dividend returns and statements.

(b) *Exception for inconsequential omissions and inaccuracies*—(1) *Exception.* The penalty imposed by paragraph (a) of this section will not be assessed for any failure to include correct information on an information return if the

failure does not prevent or hinder the Internal Revenue Service from processing the return or from correlating the information required to be shown on the return with the information shown on the payee's tax return. Similarly, the penalty imposed by paragraph (a) of this section will not be assessed for any failure to include correct information on a payee statement if the failure cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her tax return.

(2) *Examples*. The provisions of this paragraph (b) may be illustrated by the following examples:

*Example 1*. A payor files a form 1099–MISC (relating to miscellaneous income) with the Internal Revenue Service and furnishes a corresponding statement to the payee. Both the form 1099–MISC and the payee statement are complete and correct, except that the word ''Street'' is misspelled in the payee's address. The error does not prevent or hinder the Internal Revenue Service from processing the return or from correlating the information required to be shown on the return with the information shown on the payee's tax return. In addition, the error cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her tax return. Therefore, the penalty imposed by paragraph (a) of this section will not be assessed.

*Example 2*. Assume the same facts as in *Example 1*, except that the only error on the form 1099–MISC and the payee statement is that the payee's first name, ''William,'' is misspelled as ''Willaim.'' The penalty imposed by paragraph (a) of this section will not be assessed, for the reasons set forth in *Example 1*.

*Example 3*. Assume the same facts as in *Example 1*, except that the only error on the form 1099–MISC and the payee statement is that the payee's street address, 4821 Main Street, is incorrectly reported as 8421 Main Street. The penalty imposed by paragraph (a) of this section will not be assessed with respect to the form 1099–MISC if the error does not prevent or hinder the Internal Revenue Service from processing the return or from correlating the information required to be shown on the return with the information shown on the payee's tax return. However, the penalty will be assessed with respect to the payee statement because the error can reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her tax return. See paragraph (d) of this section regarding waiver of the penalty for reasonable cause or due diligence.

(c) *Exception for corrected omissions and inaccuracies*—(1) *Exception*. The penalty imposed by paragraph (a) of this section generally will not be assessed for a failure to include correct information on an information return or payee statement if the person who filed the return or furnished the statement corrects the failure by the earliest of—

(i) The date that is 30 days after the date that the person discovers the failure; or

(ii) The date that is 30 days after the date of a written request, from the Internal Revenue Service to the person, for corrected information; or

(iii) October 1 (March 1 for payee statements) of the calendar year in which the return or statement is due.

(2) *Limitations on exception*. Notwithstanding paragraph (c)(1) of this section, timely correction of a failure to include correct information on a return or statement will not prevent assessment of the penalty for any failure that is part of a pattern of conduct, by the person who filed the return or furnished the statement, of repeatedly failing to include correct information. Further, correction of a failure to include correct information will not prevent assessment of the penalty for intentional disregard of the correct information reporting requirement. See paragraph (e)(1) of this section with respect to intentional disregard.

(3) *Examples*. The provisions of this paragraph (c) may be illustrated by the following examples:

*Example 1*. In January 1987, Bank M prepares forms 1099–INT (relating to interest income) with respect to interest income earned by its depositors in calendar year 1986. M timely files the forms with the Internal Revenue Service and timely furnishes copies to its depositors. On March 16, 1987, M discovers that the amount of backup withholding tax (Federal income tax withheld) was inadvertently omitted from several of the forms and payee copies. Several days later M files corrected forms with the Service and furnishes corrected copies to the affected payees. The penalty for failure to include correct information will not be due with respect to the incomplete forms 1099–INT filed with the Internal Revenue Service, since they were corrected within 30 days after M discovered the omission and before October 1, 1987. However,

the penalty will be due with respect to the incomplete copies furnished to the payees, since they were not corrected by March 1, 1987.

*Example 2.* In January 1987, Corporation N files forms 1099–DIV (relating to dividends and distributions) for calendar year 1986 and furnishes copies to its shareholders. A significant number of the forms and payee copies do not include the amount of backup withholding tax. On December 1, 1987, the Internal Revenue Service provides N with a written request for corrected information. On December 15, 1987, N files corrected forms with the Service and furnishes corrected copies to the payees. The penalty for failure to include correct information will be due with respect to the incomplete forms, since they were not corrected by October 1, 1987. In addition, the penalty will be due with respect to the incomplete copies furnished to the payees, since they were not corrected by March 1, 1987. However, N's correction of the forms is a fact to be considered, along with other facts, in determining whether the higher penalty for intentional failures will be imposed; see paragraph (e)(1)(ii)(B) of this section.

*Example 3.* In January 1987, Corporation O files forms 1099–DIV for calendar year 1986 and furnishes copies to its shareholders. O intentionally does not include the amount of backup withholding tax for any shareholder. Since the omissions represent an intentional disregard of the correct information reporting requirement, correction of the omissions will not prevent assessment of the penalty for intentional failure to include correct information.

(d) *Waiver for reasonable cause or due diligence*—(1) *Reasonable cause.* Except as provided in paragraph (d)(2) of this section (relating to interest or dividend returns or statements), the penalty imposed by paragraph (a) of this section will be waived for any failure to include correct information if it is established to the satisfaction of the district director or the director of the internal revenue service center that such failure was due to reasonable cause and not to willful neglect.

(2) *Due diligence.* Paragraph (d)(1) of this section will not apply in the case of any interest or dividend return or statement (as defined in section 6724(c)(5). However, in such a case, the penalty imposed by paragraph (a) of this section will be waived for any failure to include correct information if it is established to the satisfaction of the district director or the director of the internal revenue service center that the person otherwise liable for such penalty exercised due diligence in attempting to include such information. The requirement to exercise due diligence imposes a higher standard of conduct than required under the reasonable cause defense.

(3) *Procedure for seeking waiver.* Reasonable cause (or due diligence) may be established only by submitting a written statement that sets forth all the facts alleged as reasonable cause (or due diligence) and makes an affirmative showing of reasonable cause (or due diligence). The statement must be signed by the person required to file the information return or furnish the payee statement to which the penalty imposed by paragraph (a) of this section relates, and must contain a declaration that is is made under the penalties of perjury. See § 301.6061–1 for rules on the signing of returns.

(e) *Higher penalties in certain cases*—(1) *Intentional disregard of the correct information reporting requirement*—(i) *Application of section 6723(b).* If a person fails to include correct information on an information return and such failure is due to intentional disregard of the correct information reporting requirement, the penalty imposed by paragraph (a) of this section with respect to such return will be determined under section 6723(b). The penalty prescribed by section 6723(b) for such a return is $100 or, if greater, the amount equal to 10 percent (or, in some cases, 5 percent) of the aggregate amount of the items required to be reported correctly on the return. In the case of any penalty determined under section 6723(b), the $20,000 limitation of paragraph (a) of this section will not apply. In addition, such penalty will not be taken into account in applying the $20,000 limitation to penalties not determined under section 6723(b).

(ii) *Meaning of intentional disregard.* A failure to include correct information on an information return will be treated as due to intentional disregard of the correct information reporting requirement if the person who filed the return knowingly or willfully failed to include correct information at the time the return was filed. Whether a person knowingly or willfully failed to

include correct information will be determined on the basis of all of the facts and circumstances in the particular case. Facts and circumstances to be considered for this purpose include, but are not limited to, the following—

(A) Whether the failure to include correct information is part of a pattern of conduct, by the person who filed the return, of repeatedly failing to include correct information on information returns;

(B) Whether the person who filed the return corrects the failure within 30 days after the date of any written request from the Internal Revenue Service for corrected information; and

(C) Whether the person who filed the return can reasonably be expected to have discovered the failure during the calendar year the return was due and, if so, whether timely correction was made.

(2) *Interest and dividend returns and statements.* In the case of any interest or dividend return or statement (as defined in section 6724(c)(5)), the $20,000 limitation of paragraph (a) of this section will not apply. In addition, any penalty imposed by paragraph (a) of this section with respect to such a return or statement—

(i) Will not be taken into account in applying the $20,000 limitation of paragraph (a) of this section with respect to other returns or statements, and

(ii) Will not be taken into account in applying the $100,000 limitations of sections 6721(a) and 6722(a) with respect to any return or statement.

(f) *Manner of payment*—(1) *In general.* Except as provided in paragraph (f)(2) of this section (relating to interest and dividend returns and statements), any penalty imposed by paragraph (a) of this section shall be paid on notice and demand by the Internal Revenue Service and in the same manner as a tax liability is paid.

(2) *Self-assessment for interest and dividend returns and statements.* Any penalty imposed by paragraph (a) of this section with respect to an interest or dividend return or statement will be assessed and collected in the same manner as an excise tax imposed by subtitle D of the Internal Revenue Code, and the deficiency procedures of subchapter B of chapter 63 of the Code will not apply. In such a case, the penalty must be self-assessed and will be due and payable on April 1 of the calendar year following the calendar year for which the return or statement is required. The penalty should be remitted with a properly executed Form 8210 (Self-Assessed Penalties Return).

(g) *Coordination with other penalties*—(1) *Penalty for failure to supply identifying numbers.* Pursuant to section 6723(c), no penalty shall be imposed under paragraph (a) of this section with respect to any return or statement if a penalty is imposed under section 6676 (relating to the failure to supply identifying numbers) with respect to such return or statement.

(2) *Penalty for failure to file information returns or furnish payee statements.* No penalty shall be imposed under paragraph (a) of this section with respect to any return or statement if a penalty is imposed under section 6721 (relating to the failure to file certain information returns) or section 6722 (relating to the failure to furnish certain payee statements) with respect to such return or statement.

(3) *Examples.* The provisions of this paragraph (g) may be illustrated by the following examples:

*Example 1.* Corporation P timely files Forms 1099–DIV (relating to dividends and distributions) for a calendar year and furnishes copies to its shareholders. Several of these forms and shareholder copies do not include correct taxpayer identification numbers (TINs), and Corporation P does not show that it exercised due diligence in attempting to include correct TINs; therefore, a penalty is imposed under section 6676(b) with respect to these several forms and shareholder copies. Since a penalty is imposed under section 6676, no penalty is imposed under paragraph (a) of this section with respect to the same several forms and shareholder copies.

*Example 2.* Corporation Q, a bank, fails to file certain required Forms 1099–INT (relating to interest income of its depositors) in a timely fashion. Corporation Q claims that it exercised due diligence in attempting to file the forms on time and that therefore no penalty under section 6721 or 6723 should apply. If the Internal Revenue Service finds that Corporation Q did not exercise due diligence and imposes the failure-to-file penalty under section 6721 with respect to the forms, no penalty will be imposed under paragraph (a) of this section.

*Example 3.* Corporation R files with the Internal Revenue Service a document purporting to be an information return. The document contains so many omissions and inaccuracies that its utility as an information return is minimized or eliminated. The Service imposes the failure-to-file penalty under section 6721 with respect to the document. Since the failure-to-file penalty is imposed, no penalty will be imposed under paragraph (a) of this section.

(h) *Effective date.* The rules contained in this section are effective January 1, 1987, as applicable to information returns and payee statements the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990. See section 7711 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239, 103 Stat. 2106 (1989)) for the applicable penalty for certain failures related to information returns and payee statements the due date for which, without regard to extensions, is after December 31, 1989.

[56 FR 15042, Apr. 15, 1991]

## General Provisions Relating to Stamps

### § 301.6801–1 Authority for establishment, alteration, and distribution.

(a) *Establishment and alteration.* The Commissioner may establish, and from time to time alter, renew, replace, or change the form, style, character, material, and device of any stamp, mark, or label under any provision of the law relating to internal revenue.

(b) *Preparation and distribution of forms, stamps and dies.* The Commissioner shall prepare and distribute all the instructions, directions, forms, blanks, and stamps; and shall provide proper and sufficient adhesive stamps and other stamps or dies for expressing and denoting the several stamp taxes.

### § 301.6802–1 Supply and distribution.

(a) *Postmaster General.* The Commissioner shall furnish to the Postmaster General, without prepayment, a suitable quantity of adhesive stamps (other than the stamps on playing cards), coupons, tickets, or such other devices as may be prescribed pursuant to section 6302(b) (authorizing a discretionary method for collecting certain specified taxes) or chapter 69 of the Code, to be distributed to, and kept on sale by, the various postmasters in the United States in all post offices of the first and second classes, and such post offices of the third and fourth classes as are located in county seats or Postmaster General as necessary.

(b) *Designated depositary of the United States.* The district director for the district in which any designated depositary of the United States is located shall furnish to such designated depositary, without prepayment, a suitable quantity of adhesive stamps to be kept on sale by the designated depositary.

(c) *State agents.* Any person who is duly appointed and acting as agent of any State for the sale of stock transfer stamps of such State may make application to the district director for the district in which the State agent is located, to be designated for the purpose of being furnished without prepayment, for sale, stamps to be used in payment of the tax imposed by section 4301. The application shall contain the location and post office address of the State agent, and the maximum amount of stamps he desires to maintain on hand. A copy of the agent's appointment as State agent should be attached to the application.

### § 301.6803–1 Accounting and safeguarding.

In cases coming within the provisions of section 6802 (2) and (3) and paragraphs (b) and (c) of § 301.6802–1, the district director may require a bond in such amount as he deems advisable, conditioned for the faithful return, whenever so required, of all quantities or amounts of adhesive stamps undisposed of and for the payment monthly for all quantities or amounts of adhesive stamps sold or not remaining on hand. Such bond shall be furnished in accordance with the provisions contained in section 7101 and § 301.7101–1.

### § 301.6804–1 Attachment and cancellation.

For provisions relating to the attachment and cancellation of specific stamps used with respect to a particular tax, see the regulations relating to such tax.

### § 301.6805–1 Redemption of stamps.

(a) *Authorization.* (1) Upon receipt of satisfactory evidence of the facts by the district director or director of the service center, he may make allowance for or redeem stamps issued under the authority of any internal revenue law if—

(i) The stamps have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or

(ii) The owner of the stamps has no use therefor.

(2) If a stamp has been in use for any period of time, it may not be redeemed under section 6805. Similarly, no allowance shall be made for stamps which have been lost or stolen.

(b) *Method and conditions of allowance.* Such allowance or redemption may be made, either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof. Claims for the redemption of or allowance for stamps shall be made on Form 843 and filed with the district director or director of the service center within three years from the date of the purchase of the stamps from the Government. The stamps for which redemption or allowance is claimed shall be submitted with the claim. If the stamps are destroyed or damaged to the extent that they cannot be presented for redemption or allowance, proof satisfactory to the district director or director of the service center that they have been destroyed or so damaged must accompany the claim before allowance or redemption shall be made. In any case where the actual date of purchase of the stamps from the Government cannot be established, it must be definitely shown in the claim whether they were so purchased within three years prior to the date of filing of the claim.

(c) *Time for filing claims.* No claim for the redemption of, or allowance for, stamps shall be allowed under this section unless presented within 3 years after the purchase of such stamps from the Government.

(d) *Finality of decisions.* The findings of fact in and the decision of the district director or director of the service center upon the merits of any claim presented under or authorized by this section, shall in the absence of fraud or mistake in mathematical calculation, be final and not subject to revision by any accounting officer.

[T.D. 7188, 37 FR 12795, June 29, 1972]

### § 301.6806–1 Posting occupational tax stamps.

For provisions relating to the posting of specific stamps used with respect to a particular tax, other than a special tax under subchapter B of chapter 35, subchapter B of chapter 36, or subtitle E, see the regulations relating to such tax. For penalties for failure to post occupational tax stamps, see section 7273.

[T.D. 7188, 37 FR 12795, June 29, 1972]

## Jeopardy, Bankruptcy, and Receiverships

JEOPARDY

TERMINATION OF TAXABLE YEAR

### § 301.6851–1 Termination of taxable year.

For regulations under section 6851, see §§ 1.6851–1 to 1.6851–3, inclusive, of this chapter (Income Tax Regulations).

### § 301.6852–1 Termination assessments of tax in the case of flagrant political expenditures of section 501(c)(3) organizations.

(a) *Authority for making.* Any assessment under section 6852 as a result of a flagrant violation by a section 501(c)(3) organization of the prohibition against making political expenditures must be authorized by the District Director.

(b) *Determination of income tax.* An organization shall be subject to an assessment of income tax under section 6852 only if the flagrant violation of the prohibition against making political expenditures results in revocation of the organization's tax exemption under section 501(a) because it is not described in section 501(c)(3). An organization subject to such an assessment is not liable for income taxes for any period prior to the effective date of the revocation of the organization's tax exemption.

(c) *Payment*. Where a District Director has made a determination of income tax under paragraph (b) of this section or of section 4955 excise tax, notwithstanding any other provision of law, any tax will become immediately due and payable. The taxpayer is required to pay the amount of the assessment within 10 days after the District Director sends the notice and demand for immediate payment regardless of the filing of an administrative appeal or of a court petition. Regardless of filing an administrative appeal or of petitioning a court, enforced collection action may proceed after the 10-day payment period unless the taxpayer posts the bond described in section 6863. For purposes of collection procedures such as section 6331 (regarding levy), assessments under the authority of paragraph (a) of this section do not constitute situations in which the collection of such tax is in jeopardy and, therefore, do not suspend normal collection procedures.

(d) *Effective date*. This section is effective December 5, 1995.

[T.D. 8628, 60 FR 62212, Dec. 5, 1995]

JEOPARDY ASSESSMENTS

### § 301.6861–1 Jeopardy assessments of income, estate, gift, and certain excise taxes.

(a) *Authority for making*. If a district director or director of a service center believes that the assessment or collection of a deficiency in income, estate, gift, or chapter 41, 42, 43, or 44 tax will be jeopardized by delay, then the director is required to assess such deficiency immediately, together with the interest, additional amounts, and additions to the tax provided by law. A district director will make an assessment under this section if collection is determined to be in jeopardy because at least one of the conditions described in § 1.6851–1(a)(1) (i), (ii), or (iii) (relating to termination assessments) exists. A jeopardy assessment may be made before or after the mailing of the notice of deficiency provided by section 6212. However, a jeopardy assessment for a taxable year under section 6861 cannot be made after a decision of the Tax Court with respect to such taxable year has become final (see section 7481) or after the taxpayer has filed a petition for review of the decision of the Tax Court with respect to such taxable year. In the case of a deficiency determined by a decision of the Tax Court which has become final or with respect to which the taxpayer has filed a petition for review and has not filed a bond as provided in section 7485, assessment may be made in accordance with the provisions of section 6215, without regard to section 6861.

(b) *Amount of jeopardy assessment*. If a notice of a deficiency is mailed to the taxpayer before it is discovered that delay would jeopardize the assessment or collection of the tax, a jeopardy assessment may be made in an amount greater or less than that included in the deficiency notice. If a deficiency is assessed on account of jeopardy after the decision of the Tax Court is rendered, the jeopardy assessment may be made only with respect to the deficiency determined by the Tax Court.

(c) *Jurisdiction of Tax Court*. If the jeopardy assessment is made before the notice in respect of the tax to which the jeopardy assessment relates has been mailed pursuant to section 6212(a), the district director shall, within 60 days after the making of the assessment, send the taxpayer a notice of deficiency pursuant to such subsection. The taxpayer may file a petition with the Tax Court for a redetermination of the amount of the deficiency within the time prescribed in section 6213(a). If the petition of the taxpayer is filed with the Tax Court, either before or after the making of the jeopardy assessment, the Commissioner, through his counsel, is required to notify the Tax Court of such assessment or of any abatement thereof, and the Tax Court has jurisdiction to redetermine the amount of the deficiency, together with all other amounts assessed at the same time in connection therewith.

(d) *Payment and collection of jeopardy assessment*. After a jeopardy assessment has been made, the district director is required to send notice and demand to the taxpayer for the amount of the jeopardy assessment. Regardless of whether the taxpayer has filed a petition with the Tax Court, he is required to make payment of the amount of

such assessment (to the extent that it has not been abated) within 10 days after the sending of notice and demand by the district director, unless before the expiration of such 10-day period he files with the district director a bond as provided in section 6863. Section 6331 provides that, if the district director makes a finding that the collection of the tax is in jeopardy, he may make demand for immediate payment of the amount of the jeopardy assessment and, in such case, the taxpayer shall immediately pay such amount or shall immediately file the bond provided in section 6863. If a petition is not filed with the Tax Court within the period prescribed in section 6213(a), the district director will be so advised, and, if collection of the deficiency has been stayed by the timely filing of a bond as provided in section 6863, he should then give notice and make demand for payment of the amount assessed plus interest. After the Tax Court has rendered its decision and such decision has become final, the district director will be notified of the action taken. He will then send notice and demand for payment of the unpaid portion of the amount determined by the Tax Court, the collection of which has been stayed by the bond. If the amount of the jeopardy assessment is less than the amount determined by the Tax Court, the difference will be assessed and collected as part of the tax upon the issuance of a notice and demand therefor. If the amount of the jeopardy assessment is in excess of the amount determined by the Tax Court, the unpaid portion of such excess will be abated. If any part of the excess amount has been paid, it will be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor.

(e) *Abatement of excessive assessment.* The district director or the director of the regional service center may, at any time before the decision of the Tax Court is rendered, abate a jeopardy assessment in whole or in part if the district director believes that such assessment is excessive in amount.

(f) *Abatement if jeopardy does not exist.* (1) The district director or the director of the regional service center may abate a jeopardy assessment in whole or in part, if it is shown to the satisfaction of the district director that jeopardy does not exist. An abatement may not be made under this paragraph after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with such court, after the expiration of the period for filing such petition.

(2) After abatement of a jeopardy assessment in whole or in part, a deficiency may be assessed and collected in the manner authorized by law as if the jeopardy assessment or part thereof so abated had not existed. If a notice of deficiency has been sent to the taxpayer before the abatement of the jeopardy assessment in whole or in part, whether such notice was sent before or after the making of the assessment, such abatement will not affect the validity of the notice or of any proceedings for redetermination based thereon. The period of limitation on the making of assessments and the beginning of levy or a proceeding in court for collection in respect of any deficiency shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the tenth day after the date on which such jeopardy assessment is abated in whole or in part. The provisions of this subparagraph may be illustrated by the following example:

*Example.* On March 18, 1958, 28 days before the last day of the 3-year period of limitations on assessment, a jeopardy assessment is made in respect of a proposed deficiency. On May 2, 1958, before the mailing of the notice of deficiency provided by section 6861(b), this assessment is abated. By virtue of this subparagraph, the last day of the period of limitations for the making of an assessment is June 9, 1958, that is, the 38th day after the date of the abatement. If the notice of deficiency provided for in section 6861(b) has been sent before the abatement, the running of the period of limitations on assessment would have been suspended pursuant to the provisions of the section 6503(a).

(3) See section 7429 with respect to requesting the district director to review the making of the jeopardy assessment.

(g) *Special rules for chapters 42 and 43 taxes.* For purposes of paragraph (a) of

this section, the amount of a deficiency with respect to any tax imposed by section 4941(a), 4942(a), 4943(a), 4944(a), 4945(a), 4951(a), 4952(a), 4955(a), 4971(a) or 4975(a) shall include the amount of additional tax imposed by section 4941(b), 4942(b), 4943(b), 4944(b), 4945(b), 4951(b), 4952(b), 4955(b), 4971(b) or 4975(b) for failure to correct the act (or failure to act) which gave rise to liability for the initial tax.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7575, 43 FR 58817, Dec. 18, 1978; T.D. 7838, 47 FR 44253, Oct. 7, 1982; T.D. 8084, 51 FR 16305, May 2, 1986; T.D. 8628, 60 FR 62213, Dec. 5, 1995]

### § 301.6862–1 Jeopardy assessment of taxes other than income, estate, gift, and certain excise taxes.

(a) If the district director believes that the collection of any tax (other than income, estate, gift, chapter 41, 42, 43, or 44 tax) will be jeopardized by delay, the director shall, whether or not the time otherwise prescribed by law for filing the return or paying such tax has expired, immediately assess such tax, together with all interest, additional amounts and additions to the tax provided by law. A district director will make an assessment under this section if collection is determined to be in jeopardy because at least one of the conditions described in § 1.6851–1(a)(1)(i), (ii), or (iii) (relating to termination assessments) exists. For example, assume that a taxpayer incurs on January 18, 1977, liability for tax imposed by section 4061, that the last day on which return and payment of such tax is required to be made is May 2, 1977, and that on January 18, 1977, the district director determines that collection of such tax would be jeopardized by delay. In such case, the district director shall immediately assess the tax.

(b) The tax, interest, additional amounts, and additions to the tax will, upon assessment, become immediately due and payable, and the district director shall, without delay, issue a notice and demand for payment thereof in full. Upon failure or refusal to pay the amount demanded, collection thereof by levy shall be lawful without regard to the 10-day period provided in section 6331 (a). However, the collection of the whole or any part of the amount of the jeopardy assessment may be stayed by timely filing with the district director a bond as provided in section 6863.

(c) See section 7429 with respect to requesting the district director to review the making of the jeopardy assessment.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7575, 43 FR 58817, Dec. 18, 1978; T.D. 7838, 47 FR 44253, Oct. 7, 1982]

### § 301.6863–1 Stay of collection of jeopardy assessments; bond to stay collection.

(a) *General rule.* (1) The collection of an assessment under section 6851, 6861, or 6862 (referred to as a ''jeopardy assessment'' for purposes of this section), or under section 6852 (referred to as a political assessment for purposes of this section) of any tax may be stayed by filing with the district director a bond on the form to be furnished by the district director upon request.

(2) The bond may be filed—

(i) At any time before the time collection by levy is authorized under section 6331(a), or

(ii) After collection by levy is authorized and before levy is made on any property or rights to property, or

(iii) In the discretion of the district director, after any such levy has been made and before the expiration of the period of limitations on collection.

(3) The bond must be in an amount equal to the portion (including interest thereon to the date of payment as calculated by the district director) of the jeopardy assessment or political assessment collection of which is sought to be stayed. See section 7101 and § 301.7101–1, relating to the form of bond and the sureties thereon. The bond shall be conditioned upon the payment of the amount (together with interest thereon), the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due.

(4) Upon the filing of a bond in accordance with this section, the collection of so much of the assessment as is covered by the bond will be stayed. The taxpayer may at any time waive the stay of collection of the whole or any part of the amount covered by the bond. If as a result of such waiver any

part of the amount covered by the bond is paid, or if any portion of the jeopardy assessment or political assessment is abated by the district director, then the bond shall be at the request of the taxpayer be proportionately reduced.

(b) *Additional conditions applicable to income, estate, gift, and chapter 41, 42, 43 and 44 tax assessments.* In the case of jeopardy assessment or political assessment of income, estate, gift, chapter 41, 42, 43, or 44 tax, the bond must be conditioned upon the payment of so much of the amount included therein as is not abated by a decision of the Tax Court which has become final, together with the interest on such amount. If the Tax Court determines that the amount assessed is greater than the correct amount of the tax, the bond will be proportionately reduced at the request of the taxpayer after the Tax Court renders its decision. If the bond is given before the taxpayer has filed his petition with the Tax Court, it must contain a further condition that if a petition is not filed before the expiration of the period provided in section 6213(a) for the filing of such petition the amount stayed by the bond will be paid upon notice and demand at any time after the expiration of such period, together with interest thereon at the annual rate referred to in the regulations under section 6621 from the date of the jeopardy (or political assessment) notice and demand to the date of the notice and demand made after the expiration of the period for filing petition with the Tax Court.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7384, 40 FR 49325, Oct. 22, 1975; T.D. 7575, 43 FR 58817, Dec. 18, 1978; T.D. 7838, 47 FR 44253, Oct. 7, 1982; T.D. 8628, 60 FR 62213, Dec. 5, 1995]

### § 301.6863–2 Collection of jeopardy assessment; stay of sale of seized property pending Tax Court decision.

(a) *General rule.* In the case of an assessment under section 6851, 6852, 6861, or 6862, any property seized for the collection of such assessment shall not (except as provided in paragraph (b) of this section) be sold until the latest of the following occurs:

(1) The period provided in section 7429(a)(2) to request the district director to review the action taken expires.

(2) The period provided in section 7429(b)(1) to file an action in U.S. District Court expires if a request for a redetermination is made to the district director.

(3) The U.S. District Court judgment in such action becomes final, if a civil action is begun in accordance with section 7429(b).

(4) In addition to the occurrences described in paragraphs (a), (1), (2), and (3) of this section, in the case of an assessment of income, estate, gift, chapter 41, 42, 43, or 44 excise taxes, until the latest of the following occurs:

(i) The expiration of the period provided in section 6213(a) within which the taxpayer may file a petition with the Tax Court; or

(ii) The decision of the Tax Court becomes final, if a petition for redetermination is filed with the Tax Court (whether before or after the making of the assessment).

However, notwithstanding paragraph (a)(4)(i) of this section, in the case of a termination assessment under section 6851, property seized may be sold after the due date (determined with extensions) of the taxpayer's return if the taxpayer does not file a return by such date. Furthermore, for the purposes of paragraph (a)(4)(ii) of this section, a petition will not operate as a further stay of the sale of the seized property unless the taxpayer files a bond as provided in section 7485.

(b) *Exceptions.* Notwithstanding the provisions of paragraph (a) of this section, any property seized may be sold—

(1) If the taxpayer files with the district director a written consent to the sale, or

(2) If the district director determines that the expenses of conservation and maintenance of the property will greatly reduce the net proceeds from the sale of such property, or

(3) If the property is of a type to which section 6336 (relating to sale of perishable goods) is applicable.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7575, 43 FR 58817, Dec. 18, 1978; T.D. 8628, 60 FR 62213, Dec. 5, 1995]

**§ 301.6867–1 Presumptions where owner of large amount of cash is not identified.**

(a) *General rule*. For purposes of section 6851 (relating to termination assessments) and section 6861 (relating to jeopardy assessments), if cash in excess of $10,000 is found in the physical possession of an individual who does not claim either ownership of that cash or ownership by some other person whose identity the Commissioner can readily ascertain and who acknowledges ownership of that cash as of the date the cash was found, then, it shall be presumed that—

(1) The cash represents gross income of an unknown single individual; and

(2) That the collection of tax on that income will be jeopardized by delay.

(b) *Rules for assessment*. The Commissioner may make an assessment pursuant to section 6851 or section 6861, as appropriate, using the rules for assessment specified in this paragraph. In the case of any assessment resulting from the application of paragraph (a) of this section—

(1) The entire amount of cash is treated as taxable income for the taxable year in which the cash is found;

(2) The income is treated as taxable at the highest rate of tax specified in section 1 of the Internal Revenue Code; and

(3) Except as provided in paragraph (c), the possessor of the cash is treated (solely with respect to that cash) as the taxpayer for purposes of chapters 63 and 64 and section 7429(a)(1) of the Internal Revenue Code.

(c) *Effect of later substitution of true owner*—(1) *In general*. If an assessment resulting from the application of paragraph (a) of this section is later abated and replaced by an assessment against the true owner of the cash, the later assessment is treated for purposes of all laws relating to lien, levy, and collection as relating back to the date of the original assessment. Notwithstanding the preceding sentence, any notice and review provided for by section 7429 and the notice of deficiency issued to the true owner relative to the later assessment are to be made within the prescribed time limits, using the actual date of the later assessment against the true owner.

(2) *Example*. The provisions of paragraph (c)(1) of this section may be illustrated by the following example:

*Example*. On June 5, 1994, A is found in possession of a bag, containing $200,000, which A claims he was holding for a friend whose name A cannot remember. Because A does not claim ownership of the cash and does not provide the name of the true owner so that the Commissioner can identify the true owner and have that person acknowledge ownership of the cash, it is presumed that the cash represents gross income of an individual for calendar year 1994, and that the collection of tax on that gross income will be jeopardized by delay. Accordingly, on June 17, 1994, a termination assessment under section 6851 is made against A, in his capacity as possessor of the cash. On June 21, 1994, the written statement of information provided for by section 7429(a)(1) is given to A. No request for review under section 7429(a)(2) is made by the true owner within 30 days after the day on which A was furnished the written statement provided for in section 7429(a)(1). Subsequently, individual B comes to the Service and states that he is the owner of the cash. On September 2, 1994, the Service determines that B was the true owner of the cash on June 5, 1994. On September 9, 1994, the Service abates the termination assessment made against A solely as possessor of cash and, after determining that jeopardy exists, replaces it with a termination assessment under section 6851 against B. The lien against B that arises under section 6321 is treated as arising on June 17, 1994. However, within 5 days after September 9, 1994, the Service must give B the written statement of information required by section 7429(a)(1) so that B can make a request for review under section 7429(a)(2). In addition, a notice of deficiency must be sent to B within 60 days after the later of the due date or the actual filing of B's tax return for 1994, as required by section 6851(b).

(d) *Rights of possessor of cash*—(1) *Action permitted*. Section 6867 provides that the possessor of cash is treated as the taxpayer for purposes of chapter 63 (relating to assessment) and chapter 64 (relating to collection) of the Internal Revenue Code. Accordingly, the possessor of cash may file a petition with the United States Tax Court, within the applicable time limits, challenging the notice of deficiency issued to the possessor solely in that person's capacity as possessor of cash.

(2) *Actions not permitted*. Section 6867 provides that the possessor of cash is

treated as the taxpayer solely for purposes of section 7429(a)(1), and is entitled to the written statement of information provided for by that section. The possessor of cash is not treated as the taxpayer for purposes of sections 7429(a)(2) and 7429(b), relating to administrative and judicial review of termination and jeopardy assessments, and may not maintain an action under section 7429 for such review. The possessor of cash is not treated as the taxpayer for purposes of section 7422, relating to civil actions for refund, or chapter 65 of the Internal Revenue Code, relating to abatements, credits, and refunds, and may not institute a suit for refund in district court after the deficiency has been collected.

(e) *Rights of true owner of cash*—(1) *Actions permitted*. The true owner of cash may request administrative review under section 7429(a)(2) and may maintain a civil action under section 7429(b) for judicial review of an assessment under section 6851 or section 6861 made against the possessor solely in that person's capacity as possessor of cash. Such an action, however, must be preceded by a request for review under section 7429(a)(2) made by the true owner within 30 days after the day on which the possessor is furnished the written statement provided for in section 7429(a)(1). In addition, after the deficiency asserted against the possessor of cash has been levied upon, the true owner of cash may bring an action in federal district court to recover the cash, as provided in section 7426, relating to civil actions by persons other than taxpayers. See, however, section 6532(c), relating to the 9-month statute of limitations for suits under section 7426. In addition, the true owner of cash, with the permission of the court, may appear before the United States Tax Court in any proceeding that may be filed by the possessor of the cash challenging the notice of deficiency issued to the possessor solely in that person's capacity as possessor of the cash.

(2) *Actions not permitted*. The true owner of cash may not file a petition with the United States Tax Court challenging the notice of deficiency issued to the possessor solely in that person's capacity as possessor of cash. Notwithstanding the preceding sentence, the true owner of cash may file a petition with the United States Tax Court challenging any notice of deficiency issued to the true owner following the abatement of the assessment made against the possessor of cash.

(f) *Definitions*. For the purposes of this section and section 6867—

(1) *Cash*. The term *cash* includes any cash equivalents.

(2) *Cash equivalent*—(i) *In general*. The term *cash* equivalent includes foreign currency, any bearer obligation, and any medium of exchange that is of a type that has been frequently used in illegal activities, as listed in paragraph (f)(2)(ii) of this section.

(ii) *Specific cash equivalents*. For purposes of paragraph (f)(2)(i), the following are also cash equivalents—

(A) Coins;

(B) Precious metals;

(C) Jewelry;

(D) Precious stones;

(E) Postage stamps;

(F) Traveler's checks in any form;

(G) Negotiable instruments (including personal checks, business checks, official bank checks, cashier's checks, notes, and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery;

(H) Incomplete instruments (including personal checks, business checks, official bank checks, cashier's checks, notes, and money orders) signed but with the payee's name omitted; and

(I) Securities or stock in bearer form or otherwise in such form that title thereto passes upon delivery.

(iii) *Value of cash equivalents*. A cash equivalent is taken into account at its fair market value except in the case of a bearer obligation, in which case it is taken into account at its face value.

(3) *Possessor of cash*. An individual is considered to be the possessor of cash if the cash is found on that individual's person or in that individual's possession or is found in any object, container, vehicle, or area under that individual's custody or control.

(4) *True owner of the cash*. The true owner of cash is the individual who beneficially owns the cash on the date

such cash is found in the physical possession of the individual described in paragraph (f)(3) of this section. An agent, bailee, or other custodian of the cash is not the true owner of cash. A true owner of cash does not include an individual who, subsequent to the date on which the cash is found in the physical possession of the individual described in paragraph (f)(3) of this section, obtains ownership of the cash by purchase, subrogation, descent, or other means.

(g) *Effective date.* This section is effective with respect to cash found in the physical possession of an individual on or after August 3, 1995.

[T.D. 8605, 60 FR 39654, Aug. 3, 1995]

BANKRUPTCY AND RECEIVERSHIPS

**§ 301.6871(a)–1 Immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership proceedings.**

(a) Upon (1) the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act, 11 U.S.C. Chapters 1–14) the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of any receiver for any taxpayer in a receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, the district director shall immediately assess any deficiency of income, estate, or gift tax (together with all interest, additional amounts, or additions to the tax provided by law), determined by him, if such deficiency has not heretofore been assessed in accordance with law. Such assessment shall be made immediately, whether or not a notice of deficiency has been issued, and without regard to the restrictions upon assessment under section 6213.

(b) As used in this section and §§ 301.6871(a)–2 to 301.6873–1, inclusive, the term ''proceeding under the Bankruptcy Act'' includes a proceeding under chapters I to VII, inclusive, of the Bankruptcy Act, or under section 75 or 77 (11 U.S.C. 203, 205), or chapters X to XIII, inclusive, of such Act, or any other proceeding under the Act.

**§ 301.6871(a)–2 Collection of assessed taxes in bankruptcy and receivership proceedings.**

(a) During a proceeding under the Bankruptcy Act (11 U.S.C. chapters 1–14) or a receivership proceeding in either a Federal or State court, generally the assets of the taxpayer are under the control of the court in which such proceeding is pending, and the collection of taxes cannot be made by levying upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to levy. See paragraph (b) of this section and § 301.6871(b)–1 with respect to claims for such taxes. See section 6873 with respect to collection of unpaid claims.

(b) District directors should, promptly after ascertaining the existence of any outstanding liability against a taxpayer in any proceeding under the Bankruptcy Act or in any receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, or by the appropriate orders of the court in which such proceeding is pending, file proof of claim covering such liability in the court in which such proceeding is pending. Such proof of claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the instructions of the Commissioner direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. At the same time proof of claim is filed with the bankruptcy or receivership court, the district director will send notice and demand for payment to the taxpayer, together with a copy of such proof of claim.

(c) Under sections 3466 and 3467 of the Revised Statutes (31 U.S.C. 191, 192) and section 64 of the Bankruptcy Act (11 U.S.C. 104), taxes are entitled to the priority over other claims therein specified, and the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which the proceeding under the Bankruptcy Act or receivership proceeding is pending,

may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Sections 75(l), 77(e), 199, 337(2), 455, and 659(6) of the Bankruptcy Act (11 U.S.C. 203(l), 205(e), 599, 737(2), 855, and 1059(6)) also contain provisions with respect to the rights of the United States relative to priority of payment. For the filing of returns by a trustee in bankruptcy or by a receiver, see section 6012(b)(3) and 28 U.S.C. 960. Bankruptcy courts have jurisdiction under the Bankruptcy Act to determine all disputes regarding the amount and validity of taxes claimed in a proceeding under the Bankruptcy Act. A proceeding under the Bankruptcy Act or a receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under section 77 or chapter X of the Bankruptcy Act. However, the claim may be settled or compromised as in other cases in court.

(d) For the requirement that a receiver, trustee in bankruptcy, or other like fiduciary give notice as to his qualification as such, see section 6036 and the regulations thereunder.

### § 301.6871(b)–1 Claims for income, estate, and gift taxes in proceedings under the Bankruptcy Act and receivership proceedings; claim filed despite pendency of Tax Court proceedings.

(a) If it is determined that a deficiency is due in respect of income, estate, or gift tax and the taxpayer has filed a petition with the Tax Court before (1) the adjudication of bankruptcy in any liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act, 11 U.S.C. chapters 1–14) the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of a receiver, the trustee, receiver, debtor in possession, or other like fiduciary, may, upon his own motion, be made a party to the Tax Court proceeding and thereafter may prosecute the appeal before the Tax Court as to that particular determination. No petition shall be filed with the Tax Court for a redetermination of the deficiency after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver.

(b) Even though the determination of a deficiency is pending before the Tax Court for redetermination, proof of claim for the amount of such deficiency may be filed with the court in which the proceeding under the Bankruptcy Act or receivership proceeding is pending without awaiting final decision of the Tax Court. In case of a final decision of the Tax Court before the payment or the disallowance of the claim in the proceeding under the Bankruptcy Act or receivership proceeding, a copy of the Tax Court's decision may be filed by the district director with the court in which such proceeding is pending.

(c) While a district director is required by section 6871(a) and paragraph (a) of § 301.6871(a)–1 to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 6861, and consequently the provisions of that section do not apply to any assessment made under section 6871. Therefore, the notice of deficiency provided in section 6861(b) will not be mailed. Although such notice will not be issued, a letter will be sent to the taxpayer or to the trustee, receiver, debtor in possession, or other like fiduciary, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a conference by the district director with respect to such deficiency. However, such letter will not provide for such a conference where a petition was filed with the Tax Court before (1) the adjudication of bankruptcy in a liquidating proceeding, (2) the filing with a court of competent jurisdiction or (where approval is required by the Bankruptcy Act), the approval of a petition of, or the approval of a petition against, any taxpayer in any other proceeding under the Bankruptcy Act, or (3) the appointment of a receiver.

**§ 301.6872–1 Suspension of running of period of limitations on assessment.**

If any fiduciary in any proceeding under the Bankruptcy Act (11 U.S.C. chapters 1–14), including a trustee, receiver, or debtor in possession, or a receiver in any other court proceeding is required, pursuant to section 6036, to give notice in writing to the district director of his qualification as such, then the running of the period of limitations on assessment shall be suspended from the date the proceeding is instituted to the date such notice is received by the district director, and for an additional 30 days thereafter. However, the suspension under this section of the running of the period of limitation on assessment shall in no case exceed 2 years.

**§ 301.6873–1 Unpaid claims in bankruptcy or receivership proceedings.**

(a) If any portion of the claim allowed by the court in a receivership proceeding, or in any proceeding under the Bankruptcy Act (11 U.S.C. chs. 1–14) remains unpaid after the termination of such proceeding, the district director will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in section 6601 may be collected from the taxpayer by levy or proceeding in court within the period of limitation for collection after assessment. For the general rule as to such period of limitation, see section 6502, and for suspension of the running of the period provided in section 6502, see, for example, section 6503. For suspensions under other provisions of law, see, for example, section 11f of the Bankruptcy Act (11 U.S.C. 29(f)). Extension of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in section 6161(c).

(b) Section 6873 is applicable only where a claim for taxes is allowed in a receivership proceeding or in a proceeding under the Bankruptcy Act. Claims for taxes, interest, additional amounts, or additions to the tax may be collectible in equity or under other provisions of law although no claim was allowed in the proceeding because, for example, such items were not included in a proof of claim filed in the proceeding or no proof of claim was filed. Except in the case of a proceeding under section 77 or chapter X of the Bankruptcy Act, a tax or a liability in respect thereof is not discharged by a proceeding under such act, whether or not a claim is filed in such proceeding, and provisions suspending the running of the period of limitation on the collection of taxes are applicable, whether or not a claim is filed in such proceeding.

## Transferees and Fiduciaries

**§ 301.6901–1 Procedure in the case of transferred assets.**

(a) *Method of collection*—(1) *Income, estate, and gift taxes.* The amount for which a transferee of property of—

(i) A taxpayer, in the case of a tax imposed by subtitle A of the Code (relating to income taxes),

(ii) A decedent, in the case of the estate tax imposed by chapter 11 of the Code, or

(iii) A donor, in the case of the gift tax imposed by chapter 12 of the Code, is liable, at law or

in equity, and the amount of the personal liability of a fiduciary under section 3467 of the Revised Statutes, as amended (31 U.S.C. 192), in respect of the payment of such taxes, whether shown on the return of the taxpayer or determined as a deficiency in the tax, shall be assessed against such transferee or fiduciary and paid and collected in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax with respect to which such liability is incurred, except as hereinafter provided.

(2) *Other taxes.* The liability, at law or in equity, of a transferee of property of any person liable in respect of any other tax, in any case where the liability of the transferee arises on the liquidation of a corporation or partnership, or a corporate reorganization within the meaning of section 368(a), shall be assessed against such transferee and paid and collected in the same manner and subject to the same provisions and limitations as in the case of the tax with respect to which

such liability is incurred, except as hereinafter provided.

(3) *Applicable provisions.* The provisions of the Code made applicable by section 6901(a) to the liability of a transferee or fiduciary referred to in subparagraphs (1) and (2) of this paragraph (a), include the provisions relating to:

(i) Delinquency in payment after notice and demand and the amount of interest attaching because of such delinquency;

(ii) The authorization of distraint and proceedings in court for collection;

(iii) The prohibition of claims and suits for refund; and

(iv) In any instance in which the liability of a transferee or fiduciary is one referred to in subparagraph (1) of this paragraph (a), the filing of a petition with the Tax Court of the United States and the filing of a petition for review of the Tax Court's decision.

For detailed provisions relating to assessments, collections, and refunds, see chapters 63, 64, and 65 of the Code, respectively.

(b) *Definition of transferee.* As used in this section, the term ''transferee'' includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 368, and all other classes of distributees. Such term also includes, with respect to the gift tax, a donee (without regard to the solvency of the donor) and, with respect to the estate tax, any person who, under section 6324(a)(2), is personally liable for any part of such tax.

(c) *Period of limitation on assessment.* The period of limitation for assessment of the liability of a transferee or of a fiduciary is as follows:

(1) *Initial transferee.* In the case of the liability of an initial transferee, one year after the expiration of the period of limitation for assessment against the taxpayer in the case of a tax imposed by subtitle A (relating to income taxes), the executor in the case of the estate tax imposed by chapter 11, or the donor in the case of the gift tax imposed by chapter 12, each of which for purposes of this section is referred to as the ''taxpayer'' (see subchapter A, chapter 66, of the Code).

(2) *Transferee of transferee.* In the case of the liability of a transferee of a transferee, 1 year after the expiration of the period of limitation for assessment against the preceding transferee, or 3 years after the expiration of the period of limitation for assessment against the taxpayer, whichever of such periods first expires.

(3) *Court proceeding against taxpayer or last preceding transferee.* If, before the expiration of the period specified in subparagraph (1) or subparagraph (2) of this paragraph (c), (whichever is applicable), a court proceeding against the taxpayer or last preceding transferee for the collection of the tax or liability in respect thereof, respectively, has been begun within the period of limitation for the commencement of such proceeding, then within one year after the return of execution in such proceeding.

(4) *Fiduciary.* In the case of the liability of a fiduciary, not later than 1 year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

(d) *Extension by agreement*—(1) *Extension of time for assessment.* The time prescribed by section 6901 for the assessment of the liability of a transferee or fiduciary may, prior to the expiration of such time, be extended for any period of time agreed upon in writing by the transferee or fiduciary and the district director or an assistant regional commissioner. The extension shall become effective when the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(2) *Extension of times for credit or refund.* (i) For the purposes of determining the period of limitation on credit or refund to the transferee or fiduciary of overpayments made by such transferee or fiduciary or overpayments made by the taxpayer to which such transferee or fiduciary may be legally entitled to credit or refund, an agreement and any extension thereof referred to in subparagraph (1) of this

paragraph (d), shall be deemed an agreement and extension thereof for purposes of section 6511(c) (relating to limitations on credit or refund in case of extension of time by agreement).

(ii) For the purpose of determining the limit specified in section 6511(c)(2) on the amount of the credit or refund, if the agreement is executed after the expiration of the period of limitation for assessment against the taxpayer with reference to whom the liability of such transferee or fiduciary arises, the periods specified in section 6511(b)(2) shall be increased by the period from the date of such expiration to the date the agreement is executed. The application of this subdivision may be illustrated by the following example:

*Example*. Assume that Corporation A files its income tax return on March 15, 1955, for the calendar year 1954, showing a liability of $100,000 which is paid with the return. The period within which an assessment may be made against Corporation A expires on March 15, 1958. Corporation B is a transferee of Corporation A. An agreement is executed on October 9, 1958, extending, beyond its normal expiration date of March 15, 1959, the period within which an assessment may be made against Corporation B. Under section 6511(c)(2) and section 6511(b)(2)(A) the portion of an overpayment, paid before the execution of an agreement extending the period for assessment, may not be credited or refunded unless paid within three years prior to the date on which the agreement is executed. However, as applied to Corporation B such 3-year period is increased under section 6901(d)(2) to include the period from March 15, 1958, to October 9, 1958, the date on which the agreement was executed.

(e) *Period of assessment against taxpayer*. For the purpose of determining the period of limitation for assessment against a transferee or a fiduciary, if the taxpayer is deceased, or, in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(f) *Suspension of running of period of limitations*. In the cases of the income, estate, and gift taxes, if a notice of liability of a transferee or the liability of a fiduciary has been mailed to such transferee or to such fiduciary under the provisions of section 6212, then the running of the statute of limitations shall be suspended for the period during which assessment is prohibited in respect of liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

### § 301.6902–1 Burden of proof.

In proceedings before the Tax Court the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

### § 301.6903–1 Notice of fiduciary relationship.

(a) *Rights and obligations of fiduciary*. Every person acting for another person in a fiduciary capacity shall give notice thereof to the district director in writing. As soon as such notice is filed with the district director such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the taxpayer with respect to the taxes imposed by the Code. If the person is acting as a fiduciary for a transferee or other person subject to the liability specified in section 6901, such fiduciary is required to assume the powers, rights, duties, and privileges of the transferee or other person under that section. The amount of the tax or liability is ordinarily not collectible from the personal estate of the fiduciary but is collectible from the estate of the taxpayer or from the estate of the transferee or other person subject to the liability specified in section 6901.

(b) *Manner of notice*—(1) *Notices filed before April 24, 2002*. This paragraph (b)(1) applies to notices filed before April 24, 2002. The notice shall be signed by the fiduciary, and shall be filed with the Internal Revenue Service office where the return of the person for whom the fiduciary is acting is required to be filed. The notice must state the name and address of the person for whom the fiduciary is acting, and the nature of the liability of such person; that is, whether it is a liability for tax, and, if so, the type of tax, the year or years involved, or a liability at

law or in equity of a transferee of property of a taxpayer, or a liability of a fiduciary under section 3467 of the Revised Statutes, as amended (31 U.S.C. 192) in respect of the payment of any tax from the estate of the taxpayer. Satisfactory evidence of the authority of the fiduciary to act for any other person in a fiduciary capacity must be filed with and made a part of the notice. If the fiduciary capacity exists by order of court, a certified copy of the order may be regarded as satisfactory evidence. When the fiduciary capacity has terminated, the fiduciary, in order to be relieved of any further duty or liability as such, must file with the Internal Revenue Service office with whom the notice of fiduciary relationship was filed written notice that the fiduciary capacity has terminated as to him, accompanied by satisfactory evidence of the termination of the fiduciary capacity. The notice of termination should state the name and address of the person, if any, who has been substituted as fiduciary. Any written notice disclosing a fiduciary relationship which has been filed with the Commissioner under the Internal Revenue Code of 1939 or any prior revenue law shall be considered as sufficient notice within the meaning of section 6903. Any satisfactory evidence of the authority of the fiduciary to act for another person already filed with the Commissioner or district director need not be resubmitted.

(2) *Notices filed on or after April 24, 2002.* This paragraph (b)(2) applies to notices filed on or after April 24, 2002. The notice shall be signed by the fiduciary, and shall be filed with the Internal Revenue Service Center where the return of the person for whom the fiduciary is acting is required to be filed. The notice must state the name and address of the person for whom the fiduciary is acting, and the nature of the liability of such person; that is, whether it is a liability for tax, and if so, the type of tax, the year or years involved, or a liability at law or in equity of a transferee of property of a taxpayer, or a liability of a fiduciary under 31 U.S.C. 3713(b), in respect of the payment of any tax from the estate of the taxpayer. The fiduciary must retain satisfactory evidence of his or her authority to act for any other person in a fiduciary capacity as long as the evidence may become material in the administration of any internal revenue law.

(c) *Where notice is not filed.* If the notice of the fiduciary capacity described in paragraph (b) of this section is not filed with the district director before the sending of notice of a deficiency by registered mail or certified mail to the last known address of the taxpayer (see section 6212), or the last known address of the transferee or other person subject to liability (see section 6901(g)), no notice of the deficiency will be sent to the fiduciary. For further guidance regarding the definition of last known address, see § 301.6212–2. In such a case the sending of the notice to the last known address of the taxpayer, transferee, or other person, as the case may be will be a sufficient compliance with the requirements of the Code, even though such taxpayer, transferee, or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. Under such circumstances, if no petition is filed with the Tax Court of the United States within 90 days after the mailing of the notice (or within 150 days after mailing in the case of such a notice addressed to a person outside the States of the Union and the District of Columbia) to the taxpayer, transferee, or other person, the tax, or liability under section 6901, will be assessed immediately upon the expiration of such 90-day or 150-day period, and demand for payment will be made. See paragraph (a) of § 301.6213–1 with respect to the expiration of such 90-day or 150-day period.

(d) *Definition of fiduciary.* The term ''fiduciary'' is defined in section 7701(a)(6) to mean a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(e) *Applicability of other provisions.* This section, relating to the provisions of section 6903, shall not be taken to

abridge in any way the powers and duties of fiduciaries provided for in other sections of the Code.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8939, 66 FR 2821, Jan. 12, 2001; T.D. 8989, 67 FR 20032, Apr. 24, 2002; T.D. 9040, 68 FR 4921, Jan. 31, 2003]

### § 301.6905–1 Discharge of executor from personal liability for decedent's income and gift taxes.

(a) *Discharge of liability*. With respect to decedents dying after December 31, 1970, the executor of a decedent's estate may make written application to the applicable internal revenue officer with whom the estate tax return is required to be filed, as provided in § 20.6091–1 of this chapter, for a determination of the income or gift taxes imposed upon the decedent by subtitle A or by chapter 12 of the Code, and for a discharge of personal liability therefrom. If no estate tax return is required to be filed, then such application should be filed where the decedent's final income tax return is required to be filed. The application must be filed after the return with respect to such income or gift taxes is filed. Within 9 months (1 year with respect to the estate of a decedent dying before January 1, 1974) after receipt of the application, the executor shall be notified of the amount of the income or gift tax and, upon payment thereof, he will be discharged from personal liability for any deficiency in income or gift tax thereafter found to be due. If no such notification is received, the executor is discharged at the end of such 9 months (1 year with respect to the estate of a decedent dying before January 1, 1974) period from personal liability for any deficiency thereafter found to be due. The discharge of the executor under this section from personal liability applies only to him in his personal capacity and to his personal assets. The discharge is not applicable to his liability as executor to the extent of the assets of the estate in his possession or control. Further, the discharge does not operate as a release of any part of the property from the lien provided under section 6321 or the special lien provided under subsection (a) or (b) of section 6324.

(b) *Definition of ''executor''*. For purposes of this section, the term ''executor'' means the executor or administrator of the decedent appointed, qualified, and acting within the United States.

(c) *Cross reference*. For provisions concerning the discharge of the executor from personal liability for estate taxes imposed by chapter 11 of the Code, see section 2204 and the regulations thereunder.

[T.D. 7238, 37 FR 28742, Dec. 29, 1972]

## Licensing

### § 301.7001–1 License to collect foreign items.

(a) *In general*. Any bank or agent undertaking as a matter of business or for profit the collection of foreign items must obtain a license from the district director for the district in which is located its principal place of business within the United States. For definitions of the terms ''foreign item'' and ''collection'', see paragraph (b) of this section.

(b) *Definitions*—(1) *Foreign item*. The term ''foreign item'' as used in this section, means any item of interest upon the bonds of a foreign country or of a nonresident foreign corporation not having a fiscal or paying agent in the United States (including Puerto Rico as if a part of the United States), or any item of dividends upon the stock of such corporation.

(2) *Collection*. The term ''collection'' as used in this section, includes the following:

(i) The payment by the licensee of the foreign item in cash;

(ii) The crediting by the licensee of the account of the person presenting the foreign item;

(iii) The tentative crediting by the licensee of the account of the person presenting the foreign item until the amount of the foreign item is received by the licensee from abroad; and

(iv) The receipt of foreign items by the licensee for the purpose of transmitting them abroad for deposits.

(c) *Application for license*. Application for the license required by paragraph (a) of this section shall be made in writing and shall contain the following information:

(1) The name and present business of the person, partnership (including

names of all partners), or corporation applying for the license;

(2) The address of the applicant's principal place of business in the United States and of any branch offices in the United States;

(3) The date on which the applicant intends to commence the collection of foreign items; and

(4) An estimate of the aggregate amount of annual collections of foreign items (in dollars).

The application shall be signed by the applicant (a partner, in the case of a partnership, or an officer, in the case of a corporation).

(d) *Issuance of license*. The license will be issued by the district director in letter form without cost to the licensee.

(e) *Previous license holders*. Any person who has been issued a license under the corresponding provision of the Internal Revenue Code of 1939, or any prior revenue law, is not required to renew such license under this section.

(f) *Returns of information as to foreign items*. For provisions relating to the filing of returns as to foreign items, see section 6041(b) and §1.6041–4 of this chapter (Income Tax Regulations).

## Bonds

### § 301.7101–1 Form of bond and security required.

(a) *In general*. Any person required to furnish a bond under the provisions of the Code (other than section 6803(a)(1), relating to bonds required of certain postmasters before June 6, 1972, and section 7485, relating to bonds to stay assessment and collection of a deficiency pending review of a Tax Court decision), or under any rules or regulations prescribed under the Code, shall (except as provided in paragraph (d) of this section) execute such bond—

(1) On the appropriate form prescribed by the Internal Revenue Service (which may be obtained from the district director), and

(2) With satisfactory surety.

For provisions as to what will be considered ''satisfactory surety'', see paragraph (b) of this section. The bonds referred to in this paragraph shall be drawn in favor of the United States.

(b) *Satisfactory surety*—(1) *Approved surety company or bonds or notes of the United States*. For purposes of paragraph (a) of this section, a bond shall be considered executed with satisfactory surety if:

(i) It is executed by a surety company holding a certificate of authority from the Secretary as an acceptable surety on Federal bonds; or

(ii) It is secured by bonds or notes of the United States as provided in 6 U.S.C. 15 (see 31 CFR part 225).

(2) *Other surety acceptable in discretion of district director*. Unless otherwise expressly provided in the Code, or the regulations thereunder, a bond may, in the discretion of the district director, be considered executed with satisfactory surety if, in lieu of being executed or secured as provided in subparagraph (1) of this paragraph (b), it is:

(i) Executed by a corporate surety (other than a surety company) provided such corporate surety establishes that it is within its corporate powers to act as surety for another corporation or an individual;

(ii) Executed by two or more individual sureties, provided such individual sureties meet the conditions contained in subparagraph (3) of this paragraph (b);

(iii) Secured by a mortgage on real or personal property;

(iv) Secured by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or any State, Territory, or possession of the United States, or by a U.S. postal, bank, express or telegraph money order;

(v) Secured by corporate bonds or stocks, or by bonds issued by a State or political subdivision thereof, of recognized stability; or

(vi) Secured by any other acceptable collateral. Collateral shall be deposited with the district director or, in his discretion, with a responsible financial institution acting as escrow agent.

(3) *Conditions to be met by individual sureties*. If a bond is executed by two or more individual sureties, the following conditions must be met by each such individual surety:

(i) He must reside within the State in which the principal place of business or legal residence of the primary obligor is located;

(ii) He must have property subject to execution of a current market value, above all encumbrances, equal to at least the penalty of the bond;

(iii) All real property which he offers as security must be located in the State in which the principal place of business or legal residence of the primary obligor is located;

(iv) He must agree not to mortgage, or otherwise encumber, any property offered as security while the bond continues in effect without first securing the permission of the district director; and

(v) He must file with the bond, and annually thereafter so long as the bond continues in effect, an affidavit as to the adequacy of his security, executed on the appropriate form furnished by the district director.

Partners may not act as sureties upon bonds of their partnership. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their holdings of the stock of the corporation.

(4) *Adequacy of surety*. No surety or security shall be accepted if it does not adequately protect the interest of the United States.

(c) *Bonds required by Internal Revenue Code of 1939*. This section shall also apply in the case of bonds required under the Internal Revenue Code of 1939 (other than sections 1423(b) and 1145) or under the regulations under such Code.

(d) *Bonds required under subtitle E and chapter 75 of the Internal Revenue Code of 1954*. Bonds required under subtitle E and chapter 75, subtitle F, of the Internal Revenue Code of 1954 (or under the corresponding provisions of the Internal Revenue Code of 1939) shall be in such form and with such surety or sureties as are prescribed in the regulations in subchapter E of this chapter (Alcohol, Tobacco, and Other Excise Taxes).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7239, 37 FR 28628, Dec. 28, 1972]

### § 301.7102–1 Single bond in lieu of multiple bonds.

(a) *In general*. Except as provided in paragraph (b) of this section, a person who is required, or authorized, under the Code (other than sections 6803(a)(1) and 7485), or under any rules or regulations under the Code, to execute two or more bonds may, in the discretion of the district director, furnish a single bond in lieu of such two or more bonds but only if such single bond meets all the conditions and requirements prescribed for each of the separate bonds which it replaces. This section shall also apply in the case of bonds required or authorized under the Internal Revenue Code of 1939 (other than sections 1423(b) and 1145) or under the regulations under such Code.

(b) *Bonds required under subtitle E and chapter 75 of the Internal Revenue Code of 1954*. In the case of bonds required under subtitle E and chapter 75, subtitle F, of the Internal Revenue Code of 1954 (or under the corresponding provisions of the Internal Revenue Code of 1939), a single bond will not be accepted in lieu of two or more bonds except as provided in the regulations in subchapter E of this chapter (Alcohol, Tobacco, and Other Excise Taxes).

## Closing Agreements and Compromises

### § 301.7121–1 Closing agreements.

(a) *In general*. The Commissioner may enter into a written agreement with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period ending prior or subsequent to the date of such agreement. A closing agreement may be entered into in any case in which there appears to be an advantage in having the case permanently and conclusively closed, or if good and sufficient reasons are shown by the taxpayer for desiring a closing agreement and it is determined by the Commissioner that the United States will sustain no disadvantage through consummation of such an agreement.

(b) *Scope of closing agreement*—(1) *In general*. A closing agreement may be executed even though under the agreement the taxpayer is not liable for any tax for the period to which the agreement relates. There may be a series of closing agreements relating to the tax liability for a single period.

(2) *Taxable periods ended prior to date of closing agreement.* Closing agreements with respect to taxable periods ended prior to the date of the agreement may relate to the total tax liability of the taxpayer or to one or more separate items affecting the tax liability of the taxpayer, as, for example, the amount of gross income, deduction for losses, depreciation, depletion, the year in which an item of income is to be included in gross income, the year in which an item of loss is to be deducted, or the value of property on a specific date. A closing agreement may also be entered into for the purpose of allowing a deficiency dividend deduction under section 547. In addition, a closing agreement constitutes a determination as defined by section 1313.

(3) *Taxable periods ending subsequent to date of closing agreement.* Closing agreements with respect to taxable periods ending subsequent to the date of the agreement may relate to one or more separate items affecting the tax liability of the taxpayer.

(4) *Illustration.* The provisions of this paragraph may be illustrated by the following example:

*Example.* A owns 500 shares of stock in the XYZ Corporation which he purchased prior to March 1, 1913. A is considering selling 200 shares of such stock but is uncertain as to the basis of the stock for the purpose of computing gain. Either prior or subsequent to the sale, a closing agreement may be entered into determining the market value of such stock as of March 1, 1913, which represents the basis for determining gain if it exceeds the adjusted basis otherwise determined as of such date. Not only may the closing agreement determine the basis for computing gain on the sale of the 200 shares of stock, but such an agreement may also determine the basis (unless or until the law is changed to require the use of some other factor to determine basis) of the remaining 300 shares of stock upon which gain will be computed in a subsequent sale.

(c) *Finality.* A closing agreement which is approved within such time as may be stated in such agreement, or later agreed to, shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact:

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

However, a closing agreement with respect to a taxable period ending subsequent to the date of the agreement is subject to any change in, or modification of, the law enacted subsequent to the date of the agreement and made applicable to such taxable period, and each closing agreement shall so recite.

(d) *Procedure with respect to closing agreements*—(1) *Submission of request.* A request for a closing agreement which relates to a prior taxable period may be submitted at any time before a case with respect to the tax liability involved is docketed in the Tax Court of the United States. All closing agreements shall be executed on forms prescribed by the Internal Revenue Service. The procedure with respect to requests for closing agreements shall be under such rules as may be prescribed from time to time by the Commissioner in accordance with the regulations under this section.

(2) *Collection, credit, or refund.* Any tax or deficiency in tax determined pursuant to a closing agreement shall be assessed and collected, and any overpayment determined pursuant thereto shall be credited or refunded, in accordance with the applicable provisions of law.

## § 301.7122–0 Table of contents.

This section lists the major captions that appear in the regulations under § 301.7122–1.

*§ 301.7122–1 Compromises.*

(a) In general.
(b) Grounds for compromise.
(c) Special rules for the evaluation of offers to compromise.
(d) Procedures for submission and consideration of offers.
(e) Acceptance of an offer to compromise a tax liability.
(f) Rejection of an offer to compromise.
(g) Effect of offer to compromise on collection activity.
(h) Deposits.

(i) Statute of limitations.
(j) Inspection with respect to accepted offers to compromise.
(k) Effective date.

[T.D. 9007, 67 FR 48029, July 23, 2002]

**§ 301.7122–1 Compromises.**

(a) *In general*—(1) If the Secretary determines that there are grounds for compromise under this section, the Secretary may, at the Secretary's discretion, compromise any civil or criminal liability arising under the internal revenue laws prior to reference of a case involving such a liability to the Department of Justice for prosecution or defense.

(2) An agreement to compromise may relate to a civil or criminal liability for taxes, interest, or penalties. Unless the terms of the offer and acceptance expressly provide otherwise, acceptance of an offer to compromise a civil liability does not remit a criminal liability, nor does acceptance of an offer to compromise a criminal liability remit a civil liability.

(b) *Grounds for compromise*—(1) *Doubt as to liability*. Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the liability. See paragraph (f)(4) of this section for special rules applicable to rejection of offers in cases where the Internal Revenue Service (IRS) is unable to locate the taxpayer's return or return information to verify the liability.

(2) *Doubt as to collectibility*. Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the liability.

(3) *Promote effective tax administration*. (i) A compromise may be entered into to promote effective tax administration when the Secretary determines that, although collection in full could be achieved, collection of the full liability would cause the taxpayer economic hardship within the meaning of § 301.6343–1.

(ii) If there are no grounds for compromise under paragraphs (b)(1), (2), or (3)(i) of this section, the IRS may compromise to promote effective tax administration where compelling public policy or equity considerations identified by the taxpayer provide a sufficient basis for compromising the liability. Compromise will be justified only where, due to exceptional circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner. A taxpayer proposing compromise under this paragraph (b)(3)(ii) will be expected to demonstrate circumstances that justify compromise even though a similarly situated taxpayer may have paid his liability in full.

(iii) No compromise to promote effective tax administration may be entered into if compromise of the liability would undermine compliance by taxpayers with the tax laws.

(c) *Special rules for evaluating offers to compromise*—(1) *In general*. Once a basis for compromise under paragraph (b) of this section has been identified, the decision to accept or reject an offer to compromise, as well as the terms and conditions agreed to, is left to the discretion of the Secretary. The determination whether to accept or reject an offer to compromise will be based upon consideration of all the facts and circumstances, including whether the circumstances of a particular case warrant acceptance of an amount that might not otherwise be acceptable under the Secretary's policies and procedures.

(2) *Doubt as to collectibility*—(i) *Allowable expenses*. A determination of doubt as to collectibility will include a determination of ability to pay. In determining ability to pay, the Secretary will permit taxpayers to retain sufficient funds to pay basic living expenses. The determination of the amount of such basic living expenses will be founded upon an evaluation of the individual facts and circumstances presented by the taxpayer's case. To guide this determination, guidelines published by the Secretary on national and local living expense standards will be taken into account.

(ii) *Nonliable spouses*—(A) *In general.* Where a taxpayer is offering to compromise a liability for which the taxpayer's spouse has no liability, the assets and income of the nonliable spouse will not be considered in determining the amount of an adequate offer. The assets and income of a nonliable spouse may be considered, however, to the extent property has been transferred by the taxpayer to the nonliable spouse under circumstances that would permit the IRS to effect collection of the taxpayer's liability from such property (e.g., property that was conveyed in fraud of creditors), property has been transferred by the taxpayer to the nonliable spouse for the purpose of removing the property from consideration by the IRS in evaluating the compromise, or as provided in paragraph (c)(2)(ii)(B) of this section. The IRS also may request information regarding the assets and income of the nonliable spouse for the purpose of verifying the amount of and responsibility for expenses claimed by the taxpayer.

(B) *Exception.* Where collection of the taxpayer's liability from the assets and income of the nonliable spouse is permitted by applicable state law (e.g., under state community property laws), the assets and income of the nonliable spouse will be considered in determining the amount of an adequate offer except to the extent that the taxpayer and the nonliable spouse demonstrate that collection of such assets and income would have a material and adverse impact on the standard of living of the taxpayer, the nonliable spouse, and their dependents.

(3) *Compromises to promote effective tax administration*—(i) Factors supporting (but not conclusive of) a determination that collection would cause economic hardship within the meaning of paragraph (b)(3)(i) of this section include, but are not limited to—

(A) Taxpayer is incapable of earning a living because of a long term illness, medical condition, or disability, and it is reasonably foreseeable that taxpayer's financial resources will be exhausted providing for care and support during the course of the condition;

(B) Although taxpayer has certain monthly income, that income is exhausted each month in providing for the care of dependents with no other means of support; and

(C) Although taxpayer has certain assets, the taxpayer is unable to borrow against the equity in those assets and liquidation of those assets to pay outstanding tax liabilities would render the taxpayer unable to meet basic living expenses.

(ii) Factors supporting (but not conclusive of) a determination that compromise would undermine compliance within the meaning of paragraph (b)(3)(iii) of this section include, but are not limited to—

(A) Taxpayer has a history of noncompliance with the filing and payment requirements of the Internal Revenue Code;

(B) Taxpayer has taken deliberate actions to avoid the payment of taxes; and

(C) Taxpayer has encouraged others to refuse to comply with the tax laws.

(iii) The following examples illustrate the types of cases that may be compromised by the Secretary, at the Secretary's discretion, under the economic hardship provisions of paragraph (b)(3)(i) of this section:

*Example 1.* The taxpayer has assets sufficient to satisfy the tax liability. The taxpayer provides full time care and assistance to her dependent child, who has a serious long-term illness. It is expected that the taxpayer will need to use the equity in his assets to provide for adequate basic living expenses and medical care for his child. The taxpayer's overall compliance history does not weigh against compromise.

*Example 2.* The taxpayer is retired and his only income is from a pension. The taxpayer's only asset is a retirement account, and the funds in the account are sufficient to satisfy the liability. Liquidation of the retirement account would leave the taxpayer without an adequate means to provide for basic living expenses. The taxpayer's overall compliance history does not weigh against compromise.

*Example 3.* The taxpayer is disabled and lives on a fixed income that will not, after allowance of basic living expenses, permit full payment of his liability under an installment agreement. The taxpayer also owns a modest house that has been specially equipped to accommodate his disability. The taxpayer's equity in the house is sufficient to permit payment of the liability he owes.

However, because of his disability and limited earning potential, the taxpayer is unable to obtain a mortgage or otherwise borrow against this equity. In addition, because the taxpayer's home has been specially equipped to accommodate his disability, forced sale of the taxpayer's residence would create severe adverse consequences for the taxpayer. The taxpayer's overall compliance history does not weigh against compromise.

(iv) The following examples illustrate the types of cases that may be compromised by the Secretary, at the Secretary's discretion, under the public policy and equity provisions of paragraph (b)(3)(ii) of this section:

*Example 1.* In October of 1986, the taxpayer developed a serious illness that resulted in almost continuous hospitalizations for a number of years. The taxpayer's medical condition was such that during this period the taxpayer was unable to manage any of his financial affairs. The taxpayer has not filed tax returns since that time. The taxpayer's health has now improved and he has promptly begun to attend to his tax affairs. He discovers that the IRS prepared a substitute for return for the 1986 tax year on the basis of information returns it had received and had assessed a tax deficiency. When the taxpayer discovered the liability, with penalties and interest, the tax bill is more than three times the original tax liability. The taxpayer's overall compliance history does not weigh against compromise.

*Example 2.* The taxpayer is a salaried sales manager at a department store who has been able to place $2,000 in a tax-deductible IRA account for each of the last two years. The taxpayer learns that he can earn a higher rate of interest on his IRA savings by moving those savings from a money management account to a certificate of deposit at a different financial institution. Prior to transferring his savings, the taxpayer submits an e-mail inquiry to the IRS at its Web Page, requesting information about the steps he must take to preserve the tax benefits he has enjoyed and to avoid penalties. The IRS responds in an answering e-mail that the taxpayer may withdraw his IRA savings from his neighborhood bank, but he must redeposit those savings in a new IRA account within 90 days. The taxpayer withdraws the funds and redeposits them in a new IRA account 63 days later. Upon audit, the taxpayer learns that he has been misinformed about the required rollover period and that he is liable for additional taxes, penalties and additions to tax for not having redeposited the amount within 60 days. Had it not been for the erroneous advice that is reflected in the taxpayer's retained copy of the IRS e-mail response to his inquiry, the taxpayer would have redeposited the amount within the required 60-day period. The taxpayer's overall compliance history does not weigh against compromise.

(d) *Procedures for submission and consideration of offers*—(1) *In general.* An offer to compromise a tax liability pursuant to section 7122 must be submitted according to the procedures, and in the form and manner, prescribed by the Secretary. An offer to compromise a tax liability must be made in writing, must be signed by the taxpayer under penalty of perjury, and must contain all of the information prescribed or requested by the Secretary. However, taxpayers submitting offers to compromise liabilities solely on the basis of doubt as to liability will not be required to provide financial statements.

(2) *When offers become pending and return of offers.* An offer to compromise becomes pending when it is accepted for processing. The IRS may not accept for processing any offer to compromise a liability following reference of a case involving such liability to the Department of Justice for prosecution or defense. If an offer accepted for processing does not contain sufficient information to permit the IRS to evaluate whether the offer should be accepted, the IRS will request that the taxpayer provide the needed additional information. If the taxpayer does not submit the additional information that the IRS has requested within a reasonable time period after such a request, the IRS may return the offer to the taxpayer. The IRS may also return an offer to compromise a tax liability if it determines that the offer was submitted solely to delay collection or was otherwise nonprocessable. An offer returned following acceptance for processing is deemed pending only for the period between the date the offer is accepted for processing and the date the IRS returns the offer to the taxpayer. See paragraphs (f)(5)(ii) and (g)(4) of this section for rules regarding the effect of such returns of offers.

(3) *Withdrawal.* An offer to compromise a tax liability may be withdrawn by the taxpayer or the taxpayer's representative at any time prior to the IRS' acceptance of the offer to compromise. An offer will be

considered withdrawn upon the IRS' receipt of written notification of the withdrawal of the offer either by personal delivery or certified mail, or upon issuance of a letter by the IRS confirming the taxpayer's intent to withdraw the offer.

(e) *Acceptance of an offer to compromise a tax liability.*—(1) An offer to compromise has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative.

(2) As additional consideration for the acceptance of an offer to compromise, the IRS may request that taxpayer enter into any collateral agreement or post any security which is deemed necessary for the protection of the interests of the United States.

(3) Offers may be accepted when they provide for payment of compromised amounts in one or more equal or unequal installments.

(4) If the final payment on an accepted offer to compromise is contingent upon the immediate and simultaneous release of a tax lien in whole or in part, such payment must be made in accordance with the forms, instructions, or procedures prescribed by the Secretary.

(5) Acceptance of an offer to compromise will conclusively settle the liability of the taxpayer specified in the offer. Compromise with one taxpayer does not extinguish the liability of, nor prevent the IRS from taking action to collect from, any person not named in the offer who is also liable for the tax to which the compromise relates. Neither the taxpayer nor the Government will, following acceptance of an offer to compromise, be permitted to reopen the case except in instances where—

(i) False information or documents are supplied in conjunction with the offer;

(ii) The ability to pay or the assets of the taxpayer are concealed; or

(iii) A mutual mistake of material fact sufficient to cause the offer agreement to be reformed or set aside is discovered.

(6) *Opinion of Chief Counsel.* Except as otherwise provided in this paragraph (e)(6), if an offer to compromise is accepted, there will be placed on file the opinion of the Chief Counsel for the IRS with respect to such compromise, along with the reasons therefor. However, no such opinion will be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $50,000. Also placed on file will be a statement of—

(i) The amount of tax assessed;

(ii) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed; and

(iii) The amount actually paid in accordance with the terms of the compromise.

(f) *Rejection of an offer to compromise.* (1) An offer to compromise has not been rejected until the IRS issues a written notice to the taxpayer or his representative, advising of the rejection, the reason(s) for rejection, and the right to an appeal.

(2) The IRS may not notify a taxpayer or taxpayer's representative of the rejection of an offer to compromise until an independent administrative review of the proposed rejection is completed.

(3) No offer to compromise may be rejected solely on the basis of the amount of the offer without evaluating that offer under the provisions of this section and the Secretary's policies and procedures regarding the compromise of cases.

(4) *Offers based upon doubt as to liability.* Offers submitted on the basis of doubt as to liability cannot be rejected solely because the IRS is unable to locate the taxpayer's return or return information for verification of the liability.

(5) *Appeal of rejection of an offer to compromise*—(i) *In general.* The taxpayer may administratively appeal a rejection of an offer to compromise to the IRS Office of Appeals (Appeals) if, within the 30-day period commencing the day after the date on the letter of rejection, the taxpayer requests such an administrative review in the manner provided by the Secretary.

(ii) *Offer to compromise returned following a determination that the offer was nonprocessable, a failure by the taxpayer*

*to provide requested information, or a determination that the offer was submitted for purposes of delay*. Where a determination is made to return offer documents because the offer to compromise was nonprocessable, because the taxpayer failed to provide requested information, or because the IRS determined that the offer to compromise was submitted solely for purposes of delay under paragraph (d)(2) of this section, the return of the offer does not constitute a rejection of the offer for purposes of this provision and does not entitle the taxpayer to appeal the matter to Appeals under the provisions of this paragraph (f)(5). However, if the offer is returned because the taxpayer failed to provide requested financial information, the offer will not be returned until a managerial review of the proposed return is completed.

(g) *Effect of offer to compromise on collection activity*—(1) *In general*. The IRS will not levy against the property or rights to property of a taxpayer who submits an offer to compromise, to collect the liability that is the subject of the offer, during the period the offer is pending, for 30 days immediately following the rejection of the offer, and for any period when a timely filed appeal from the rejection is being considered by Appeals.

(2) *Revised offers submitted following rejection*. If, following the rejection of an offer to compromise, the taxpayer makes a good faith revision of that offer and submits the revised offer within 30 days after the date of rejection, the IRS will not levy to collect from the taxpayer the liability that is the subject of the revised offer to compromise while that revised offer is pending.

(3) *Jeopardy*. The IRS may levy to collect the liability that is the subject of an offer to compromise during the period the IRS is evaluating whether that offer will be accepted if it determines that collection of the liability is in jeopardy.

(4) *Offers to compromise determined by IRS to be nonprocessable or submitted solely for purposes of delay*. If the IRS determines, under paragraph (d)(2) of this section, that a pending offer did not contain sufficient information to permit evaluation of whether the offer should be accepted, that the offer was submitted solely to delay collection, or that the offer was otherwise nonprocessable, then the IRS may levy to collect the liability that is the subject of that offer at any time after it returns the offer to the taxpayer.

(5) *Offsets under section 6402*. Notwithstanding the evaluation and processing of an offer to compromise, the IRS may, in accordance with section 6402, credit any overpayments made by the taxpayer against a liability that is the subject of an offer to compromise and may offset such overpayments against other liabilities owed by the taxpayer to the extent authorized by section 6402.

(6) *Proceedings in court*. Except as otherwise provided in this paragraph (g)(6), the IRS will not refer a case to the Department of Justice for the commencement of a proceeding in court, against a person named in a pending offer to compromise, if levy to collect the liability is prohibited by paragraph (g)(1) of this section. Without regard to whether a person is named in a pending offer to compromise, however, the IRS may authorize the Department of Justice to file a counterclaim or third-party complaint in a refund action or to join that person in any other proceeding in which liability for the tax that is the subject of the pending offer to compromise may be established or disputed, including a suit against the United States under 28 U.S.C. 2410. In addition, the United States may file a claim in any bankruptcy proceeding or insolvency action brought by or against such person.

(h) *Deposits*. Sums submitted with an offer to compromise a liability or during the pendency of an offer to compromise are considered deposits and will not be applied to the liability until the offer is accepted unless the taxpayer provides written authorization for application of the payments. If an offer to compromise is withdrawn, is determined to be nonprocessable, or is submitted solely for purposes of delay and returned to the taxpayer, any amount tendered with the offer, including all installments paid on the offer, will be refunded without interest. If an offer is rejected, any amount tendered

with the offer, including all installments paid on the offer, will be refunded, without interest, after the conclusion of any review sought by the taxpayer with Appeals. Refund will not be required if the taxpayer has agreed in writing that amounts tendered pursuant to the offer may be applied to the liability for which the offer was submitted.

(i) *Statute of limitations*—(1) *Suspension of the statute of limitations on collection*. The statute of limitations on collection will be suspended while levy is prohibited under paragraph (g)(1) of this section.

(2) *Extension of the statute of limitations on assessment*. For any offer to compromise, the IRS may require, where appropriate, the extension of the statute of limitations on assessment. However, in any case where waiver of the running of the statutory period of limitations on assessment is sought, the taxpayer must be notified of the right to refuse to extend the period of limitations or to limit the extension to particular issues or particular periods of time.

(j) *Inspection with respect to accepted offers to compromise*. For provisions relating to the inspection of returns and accepted offers to compromise, see section 6103(k)(1).

(k) *Effective date*. This section applies to offers to compromise pending on or submitted on or after July 18, 2002.

[T.D. 9007, 67 FR 48029, July 23, 2002; 67 FR 53879, Aug. 20, 2002]

## Crimes, Other Offenses, and Forfeitures

CRIMES

GENERAL PROVISIONS

### § 301.7207–1 Fraudulent returns, statements, or other documents.

Any person who willfully delivers or discloses to any officer or employee of the Internal Revenue Service any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047 (b) or (c) or, section 6104(d), to furnish information to any officer or employee of the Internal Revenue Service or any other person who willfully furnishes to such officer or employee of the Internal Revenue Service or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

[T.D. 7127, 36 FR 11505, June 15, 1971, as amended by T.D. 8026, 50 FR 20758, May 20, 1985]

### § 301.7209–1 Unauthorized use or sale of stamps.

(a) Any person who buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in the Code or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device prescribed by the Commissioner under the Code for the collection or payment of any tax imposed by the Code, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 6 months, or both.

(b) For use or resale of unused documentary stamps, see paragraph (c) of § 43.6802–1 of this chapter (Documentary Stamp Tax Regulations).

### § 301.7214–1 Offenses by officers and employees of the United States.

Any officer or employee of the United States acting in connection with any revenue law of the United States required to make a written report under the provisions of section 7214(a)(8) shall submit such report to the Commissioner, or to a regional commissioner or district director.

### § 301.7216–1 Penalty for disclosure or use of tax return information.

(a) *In general*. Section 7216(a) provides in effect that, except as provided in section 7216(b), any tax return preparer (as described in paragraph (b)(2) of this section) who on or after January 1, 1972, discloses or uses any tax return information (as described in paragraph (b)(3) of this section) other than for the specific purpose of preparing, assisting in preparing, or obtaining or providing

services in connection with the preparation of, any tax return of the taxpayer by or for whom the information was made available to a tax return preparer, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Pursuant to section 7216(b), the provisions of section 7216(a) and this paragraph do not apply to any disclosure or use permitted under § 301.7216–2 or § 301.7216–3.

(b) *Definitions*. For purposes only of section 7216 and §§ 301.7216–1 through 301.7216–3—

(1) *Tax return*. The term ''tax return'' means any return (or amended return) of the income tax imposed by chapter 1 or 2 of the Code, or any declaration (or amended declaration) of estimated tax made under section 6015.

(2) *Tax return preparer*. (i) The term tax return preparer means any person—

(A) Who is engaged in the business of preparing tax returns,

(B) Who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns,

(C) Who is remunerated for preparing, or assisting in preparing, a tax return for any other person, or

(D) Any individual who, as part of his duties or employment with any person described in (A), (B), or (C) of this subdivision, performs services which assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, a tax return.

For example, assume that a bank is a tax return preparer within the meaning of (A) of this subdivision and it employs one individual to solicit the necessary tax return information for the preparation of a tax return and another individual to prepare the return on the basis of the information that is furnished. Under these circumstances, both employees are tax return preparers. Also, for example, a secretary to a tax return preparer who types or otherwise works on returns prepared by the preparer is a tax return preparer.

(ii) A person is engaged in the business of preparing tax returns as described in subdivision (i)(A) of this subparagraph if, in the course of his business, he holds himself out to taxpayers as a person who prepares tax returns, whether or not tax return preparation is his sole business activity and whether or not he charges a fee for such services.

(iii) A person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns as described in subdivision (i)(B) of this subparagraph if, in the course of his business, he holds himself out to tax return preparers or to taxpayers as a person who performs such auxiliary services, whether or not providing such auxiliary services is his sole business activity and whether or not he charges a fee for such services. For example, a person part or all of whose business is to provide a computerized tax return processing service based on tax return information furnished by another person is a tax return preparer.

(iv) A tax return preparer described in subdivision (i)(C) of this subparagraph includes any person who—

(A) For remuneration but not in the course of a business prepares a tax return for another person, or

(B) For remuneration and on a casual basis helps a relative, friend, or other acquaintance to prepare the latter's tax return.

(v) A person is not a tax return preparer merely because he leases office space to a tax return preparer, furnishes credit to a taxpayer whose tax return is prepared by a tax return preparer, or otherwise performs some service which only incidentally relates to the preparation of tax returns. For example, assume that a tax return preparer contracts with a department store for the rental of space in the store, and that the store advertises that taxpayers who use the tax return preparation service may charge the cost of having their tax return prepared to their charge account with the department store. Under such circumstances, the department store is not a tax return preparer.

(3) *Tax return information*. The term ''tax return information'' means any information, including but not limited to a taxpayer's name, address, or identifying number, which is furnished in

any form or manner by a taxpayer for, or in connection with, the preparation of a tax return of such taxpayer. Information furnished by a taxpayer includes information which is furnished on behalf of the taxpayer by any person; for example, any person required under section 6012 to make a return for such taxpayer, such as a guardian for a minor, by a duly authorized agent for his principal, by a fiduciary for an estate or trust, or by a receiver, trustee in bankruptcy, or assignee for a corporation.

[T.D. 7310, 39 FR 11538, Mar. 29, 1974]

### § 301.7216–2 Disclosure or use without formal consent of taxpayer.

(a) *Disclosure pursuant to other provisions of Internal Revenue Code.* The provisions of section 7216(a) and § 301.7216–1 shall not apply to any disclosure of tax return information if such disclosure is made pursuant to any other provision of the Code or the regulations thereunder. Thus, for example, the provisions of such sections do not apply to a disclosure pursuant to section 7269 to an officer or employee of the Internal Revenue Service of information concerning the estate of a decedent or a disclosure pursuant to section 7602 to an officer or employee of the Internal Revenue Service of books, papers, records, or other data which may be relevant to the liability of any person for the income tax.

(b) *Disclosure or use of information in the case of related taxpayers.* (1) A tax return preparer may use, in preparing a tax return of a second taxpayer, and may disclose to such second taxpayer in the form in which it appears on such return, any tax return information which the preparer obtained from a first taxpayer if—

(i) The second taxpayer is related to the first taxpayer within the meaning of subparagraph (2) of this paragraph (a),

(ii) The first taxpayer's tax interest in such information is not adverse to the second taxpayer's tax interest in such information, and

(iii) The first taxpayer has not expressly prohibited such disclosure or use.

(2) For purposes of subparagraph (1)(i) of this paragraph (a), one taxpayer is related to another taxpayer if they have any one of the following relationships: husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

(3) See § 301.7216–3(a)(3) for disclosure or use of tax return information of the taxpayer in preparing the tax return of a second taxpayer where the requirements of this paragraph are not satisfied.

(c) *Disclosure pursuant to an order of a court or a Federal or State agency.* The provisions of section 7216(a) and § 301.7216–1 do not apply to any disclosure of tax return information if such disclosure is made pursuant to any one of the following documents:

(1) The order of any court of record, Federal, State, or local, or

(2) A subpoena issued by a grand jury, Federal or State, or

(3) An administrative order, demand, summons or subpoena which is issued in the performance of its duties by—

(i) Any Federal agency, or

(ii) A State agency, body, or commission charged under the laws of the State or a political subdivision of the State with the licensing, registration, or regulation of tax return preparers. Information must be clearly identified in the document in order to be disclosed under this paragraph (c).

(d) *Disclosure for use in revenue investigations or court proceedings.* A tax return preparer may disclose tax return information (1) to his attorney, or to an employee of the Internal Revenue Service, for use in connection with an investigation of such tax return preparer conducted by the Internal Revenue Service or (2) to his attorney, or to any officer of a court, for use in connection with proceedings involving such tax return preparer before the court, or before any grand jury which may be convened by the court.

(e) *Certain disclosure by attorneys and accountants.* The provisions of section 7216(a) and § 301.7216–1 do not apply to any disclosure of tax return information permitted by this paragraph (e).

(1) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may use the tax return information of the taxpayer, or disclose such information to another employee or member of the preparer's law or accounting firm who may use it, to render other legal or accounting services to or for such taxpayer. Thus, for example, a lawyer who prepares a tax return for a taxpayer may use the tax return information of the taxpayer for, or in connection with, rendering legal services, such as estate planning or administration, or preparation of trial briefs or trust instruments, for the taxpayer or the estate of the taxpayer; or if another member of the same firm renders the other legal services for the taxpayer, the lawyer who prepared the tax return may disclose the tax return information to that other member for use in rendering those services for the taxpayer. In further illustration, an accountant who prepares a tax return for a taxpayer may use the tax return information, or disclose it to another member of the firm for use, for, or in connection with, the preparation of books of account, working papers, or accounting statements or reports to or for the taxpayer. Further, in the normal course of rendering such legal or accounting services to or for the taxpayer, the attorney or accountant may, with the express or implied consent of the taxpayer, make such tax return information available to third parties, such as stockholders, management, suppliers, or lenders.

(2) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may (i) take such tax return information into account, and may act upon it, in the course of performing legal or accounting services for a client other than the taxpayer or (ii) disclose such information to another employee or member of the preparer's law or accounting firm to enable that other employee or member to take the information into account, and act upon it, in the course of performing legal or accounting services for a client other than the taxpayer, when such information is or may be relevant to the subject matter of such legal or accounting services for the other client and its consideration by those performing the services is necessary for the proper performance by them of such services. In no event, however, may such tax return information be disclosed to a person who is not an employee or member of the law or accounting firm unless such disclosure is exempt from the application of section 7216(a) and § 301.7216–1 by reason of another provision, other than this paragraph, of § 301.7216–2 or § 301.7216–3.

(3) The application of this paragraph may be illustrated by the following examples:

*Example 1.* A, a member of an accounting firm, renders an opinion on a financial statement of M Corporation that is part of a registration statement filed with the Securities and Exchange Commission. After the filing of such registration statement, but before its effective date, B, a member of the same accounting firm, prepares an income tax return for N Corporation. In the course of preparing such income tax return, B discovers that N does business with M and concludes that information he is given by N should be considered by A to determine whether the financial statement reported on by A contains an untrue statement of material fact or omitted to state a material fact required to keep the statement from being misleading. B discloses to A the tax return information of N for this purpose. A determines that there is an omission of material fact and that an amended statement should be filed. A so advises M and the Securities and Exchange Commission. A explains that the omission was revealed as a result of confidential information which came to A's attention after the statement was filed, but A does not disclose the identity of the taxpayer or the tax return information itself. Section 7216(a) and § 301.7216–1 do not apply to the foregoing disclosure of N's tax return information by B to A and the use of such information by A in advising M and the Securities and Exchange Commission of the necessity for filing an amended statement. Section 7216(a) and § 301.7216–1 would apply to a disclosure of N's tax return information to M or to the Securities and Exchange Commission unless such disclosure is exempt from the application of section 7216 (a) and § 301.7216–1 by reason of another provision of either § 301.7216–2 or § 301.7216–3.

*Example 2.* A, a member of an accounting firm, is conducting an audit of M Corporation, and B, a member of the same accounting firm, prepares an income tax return for D, an officer of M. In the course of preparing such return, B obtains information from D

indicating that D, pursuant to an arrangement with a supplier doing business with M, has been receiving from the supplier, a percentage of the amounts which the supplier invoices to M. B discloses this information to A who, acting upon it, searches in the course of the audit for indications of such a kickback scheme. As a result, A discovers information from audit sources which also, but independently, indicates the existence of such a scheme. Without revealing the tax return information A has received from B, A brings to the attention of officers of M the audit information indicating the existence of the kickback scheme. Section 7216(a) and § 301.7216–1 do not apply to the foregoing disclosure of D's tax return information by B to A, the use by A of such information in the course of the audit, and the disclosure by A to M of the audit information indicating the existence of the kickback scheme. See also § 301.7216–2(j). Section 7216(a) and § 301.7216–1 would apply to a disclosure to M, or to any other person not an employee or member of the accounting firm, of D's tax return information furnished to B.

(f) *Corporate fiduciaries.* A trust company, trust department of a bank, or other corporate fiduciary which prepares a tax return for a taxpayer to or for whom it renders fiduciary, investment, or other custodial or management services may (1) disclose or use the tax return information of such taxpayer in the ordinary course of rendering such services to or for the taxpayer or (2), with the express or implied consent of the taxpayer, make such information available to the taxpayer's attorney, accountant, or investment advisor.

(g) *Disclosure to taxpayer's fiduciary.* If after furnishing tax return information to a tax return preparer the taxpayer dies or becomes incompetent, insolvent, or bankrupt, or his assets are placed in conservatorship or receivership, the tax return preparer may disclose such information to the duly appointed fiduciary of the taxpayer or his estate, or to the duly authorized agent of such fiduciary.

(h) *Disclosure by tax return preparer to tax return processor.* A tax return preparer may disclose tax return information of a taxpayer to another tax return preparer described in § 301.7216–1(b)(2)(i)(B) for the purpose of having the second tax return preparer transfer that information to, and compute the tax liability on, a tax return of such taxpayer by means of electronic, mechanical, or other form of tax return processing service.

(i) *Disclosure by one officer, employee, or member to another officer, employee, or member.* An officer, employee, or member of a tax return preparer may transfer any tax return information to another officer, employee, or member of the same tax return preparer for the purpose of performing services which assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, the tax return of a taxpayer by or for whom the information was furnished.

(j) *Identical information obtained from other sources.* The provisions of section 7216(a) and § 301.7216–1 shall not apply to the disclosure or use by a tax return preparer of information which is identical to any tax return information which has been furnished to him if such identical information was obtained otherwise than in connection with the preparation of, or providing auxiliary services in connection with the preparation of, a tax return.

(k) *Disclosure or use of information in preparation or audit of State returns.* The provisions of section 7216(a) and § 301.7216–1 shall not apply to the disclosure or use by any tax return preparer of any tax return information in the preparation or audit of, or in connection with the preparation or audit of, any tax return or declaration of estimated tax required of the taxpayer under the law of any State or political subdivision therefor, of the District of Columbia, or of any possession of the United States.

(l) *Retention of records.* A tax return preparer may retain tax return information of a taxpayer, including copies of tax returns or data processing tapes prepared on the basis of such tax return information, and may use such information in connection with the preparation of other tax returns of the taxpayer or in connection with an audit by the Internal Revenue Service of any tax return. The provisions of paragraph (m) of this section respecting the transfer of a taxpayer list apply also to the transfer of any records and related workpapers to which this paragraph applies.

(m) *Lists for solicitation of tax return business.* Any tax return preparer may

compile and maintain a separate list containing the names and address of taxpayers whose tax returns he has prepared or processed. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of offering tax information or additional tax return preparation services to such taxpayers. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless such transfer takes place in conjunction with the sale or other disposition of the tax return preparation business of such compiler. A person who acquires a taxpayer list, or a part thereof, in conjunction with such a sale or other disposition shall be subject to the provisions of this paragraph with respect to such list as if he had been the compiler of such list. The term ''list'', as used in this paragraph, includes any record or system whereby the names and addresses of taxpayers are retained.

(n) *Disclosure to report the commission of a crime.* The provisions of section 7216(a) and § 301.7216–1 do not apply to the disclosure of any tax return information to the proper Federal, State or local official in order, and to the extent necessary, to inform the official of activities which may constitute, or may have constituted, a violation of any criminal law. In addition, such a disclosure made in the bona fide but mistaken belief that the activities constituted a violation of criminal law is not subject to section 7216(a) and § 301.7216–1.

(o) *Disclosure or use of information for quality or peer reviews.* The provisions of section 7216(a) and § 301.7216–1 do not apply to any disclosure of tax return information permitted by this paragraph (o) made after December 28, 1990. Tax return information may be disclosed for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or peer review is a review that is undertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to practice before the Internal Review Service. See Department of the Treasury Circular 230, 31 CFR part 10. Disclosure of tax return information is also authorized to persons who provide administrative or support services to an individual who is conducting a quality or peer review under this paragraph (o), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the preparer being reviewed. The preparer being reviewed shall maintain a record of the review including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel. Any person (including administrative and support personnel) receiving tax return information in connection with a quality or peer review is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(p) *Disclosure of tax return information due to a tax return preparer's incapacity or death.* The provisions of section 7216(a) and § 301.7216–1 do not apply to any disclosure of tax return information permitted by this paragraph (p) made after December 28, 1990. In the event of incapacity or death of a tax return preparer, disclosure of tax return information may be made for the purpose of assisting the tax return preparer or his legal representative (or the representative of a deceased preparer's estate) in operating the business. Any person receiving tax return information under the provisions of this paragraph (p) is a tax return preparer for purposes of sections 7216(a) and 6713(a).

[T.D. 7310, 39 FR 11539, Mar. 29, 1974, as amended by T.D. 7676, 45 FR 11471, Feb. 21, 1980; T.D. 7780, 45 FR 49547, July 25, 1980; T.D. 7948, 49 FR 8602, Mar. 8, 1984; T.D. 8383, 56 FR 66996, Dec. 27, 1991; 57 FR 12, Jan 2, 1992; T.D. 8427, 57 FR 37085, Aug. 18, 1992]

**§ 301.7216–3 Disclosure or use only with formal consent of taxpayer.**

(a) *Written consent to use or disclosure*—(1) *Solicitation of other business.* (i) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use the tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would not apply if the other person is a corporation which is owned or controlled directly or indirectly by the same interests which own or control the tax return preparer but which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

(ii) For prohibition against solicitation of employment in matters related to the Internal Revenue Service, see 31 CFR 10.30 (Treasury Department Circular No. 230) and section 7 of Rev. Proc. 68–20, 1968–1 C.B. 812.

(2) *Permissible disclosures to third parties.* If a tax return preparer has obtained from a taxpayer a consent described in paragraph (b) of this section, he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct. However, see § 301.7216–2 for certain permissible disclosures without formal written consent.

(3) *Disclosure or use of information in connection with another person's return.* A tax return preparer may disclose or use any tax return information, which was obtained from a first taxpayer, in preparing a tax return of a second taxpayer if the tax return preparer has obtained from the first taxpayer a written consent described in paragraph (b) of this section. See § 301.7216–2(b) for disclosure or use in certain cases without formal consent.

(b) *Form of consent.* A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a) (1), (2) or (3) of this section and shall contain—

(1) The name of the tax return preparer,

(2) The name of the taxpayer,

(3) The purpose for which the consent is being furnished.

(4) The date on which such consent is signed,

(5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216–2) other than that stated in the consent, and

(6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure or use of such information for the purpose described in subparagraph (3) of this paragraph (b).

(c) *Illustrations.* The application of this section may be illustrated by the following examples:

*Example 1.* In order to stimulate the making of loans, a bank advertises that it is in the business of preparing tax returns. A taxpayer goes to the bank to have his tax return prepared. After the return has been completed by the bank, the employee of the bank who obtained the tax return information from the taxpayer explains that the taxpayer owes an additional $400 in taxes and that the bank's loan department may be able to offer the taxpayer a loan to pay the tax due. If the taxpayer decides to accept the opportunity offered to apply for a loan, the bank must first have the taxpayer execute a written consent described in paragraph (b) of this

section for the bank to use any of such information which is required in determining whether to make the tax loan.

*Example 2.* An individual who sells life insurance and shares in a mutual fund is also in the business of preparing tax returns. A taxpayer who has gone to the individual to have his tax return prepared is requested, at the time he picks up his completed tax return, to give his consent to the individual's use of his tax return information in connection with such individual's solicitation of the taxpayer's purchasing a life insurance policy and shares in the mutual fund. Before the individual may use such tax return information as a basis for soliciting such additional business from the taxpayer, the taxpayer must execute separate written consents under paragraph (b) of this section, one authorizing the use of such information as a basis for soliciting the sale of the mutual fund shares and a second authorizing the use of such information as a basis for soliciting the sale of the life insurance.

*Example 3.* The facts are the same as in example 2 except that the individual does not sell life insurance but does sell shares in several mutual funds. If the request is for the purpose of using the tax return information as a basis for soliciting the sale at one time of shares in mutual funds A and B, only one written consent under paragraph (b) of this section is required of the taxpayer. If, however, the request is for the purpose of using the tax return information as a basis for soliciting the sale of shares in fund A at one time, and the sale of shares in fund B at a later time, two written consents under such paragraph are required of the taxpayer.

[T.D. 7310, 39 FR 11540, Mar. 29, 1974]

PENALTIES APPLICABLE TO CERTAIN TAXES

### § 301.7231–1 Failure to obtain license for collection of foreign items.

For provisions relating to the obtaining of a license for the collection of foreign items, see section 7001 and § 301.7001–1.

## Other Offenses

### § 301.7269–1 Failure to produce records.

Whoever fails to comply with any duty imposed upon him by section 6018, 6036 (in the case of an executor), or 6075(a), or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request of any officer or employee of the Internal Revenue Service who desires to examine the same in the performance of his duties under chapter 11 of the Code (relating to estate taxes) shall be liable to a penalty of not exceeding $500, to be recovered with costs of suit, in a civil action in the name of the United States.

### § 301.7272–1 Penalty for failure to register.

(a) Any person who fails to register with the district director as required by the Code or by regulations issued thereunder shall be liable to a penalty of $50 except that on and after September 3, 1958, this section shall not apply to persons required to register under subtitle E of the Code, or persons engaging in a trade or business on which a special tax is imposed by such subtitle.

(b) For provisions relating to registration under sections 4101, 4412, 4455, 4722, 4753, and 4804(d), see the regulations relating to the particular tax. For regulations under section 7011, see § 301.7011–1.

FORFEITURES

PROPERTY SUBJECT TO FORFEITURE

### § 301.7304–1 Penalty for fraudulently claiming drawback.

Whenever any person fraudulently claims or seeks to obtain an allowance of drawback on goods, wares, or merchandise on which no internal tax shall have been paid, or fraudulently claims any greater allowance of drawback than the tax actually paid, he shall forfeit triple the amount wrongfully or fraudulently claimed or sought to be obtained, or the sum of $500, at the election of the district director.

PROVISIONS COMMON TO FORFEITURES

### § 301.7321–1 Seizure of property.

Any property subject to forfeiture to the United States under any provision of the Code may be seized by the district director or assistant regional commissioner (alcohol, tobacco, and firearms). Upon seizure of property by

the district director he shall notify the assistant regional commissioner (alcohol, tobacco, and firearms) for the region wherein the district is located who will take charge of the property and arrange for its disposal or retention under the provisions of law and regulations applicable thereto.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12794, June 29, 1972; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976]

### § 301.7322–1 Delivery of seized property to U.S. marshal.

Any forfeitable property which may be seized under the provisions of the Code may, at the option of the assistant regional commissioner (alcohol, tobacco, and firearms) be delivered to the U.S. marshal of the judicial district wherein the property was seized, and remain in the care and custody and under the control of such marshal, pending the disposal thereof as provided by law.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12794, June 29, 1972; T.D. ATF–33, 41 FR 44038, Oct. 6, 1976]

### § 301.7324–1 Special disposition of perishable goods.

For regulations relating to the disposal of perishable goods, see § 172.30 of this chapter (Disposition of Seized Personal Property).

### § 301.7325–1 Personal property valued at $2,500 or less.

For regulations relating to the forfeiture of personal property valued at $2,500 or less, see part 172 of this chapter (Disposition of Seized Personal Property).

### § 301.7326–1 Disposal of forfeited or abandoned property in special cases.

(a) *Coin-operated gaming devices.* For regulations relating to the disposal of coin-operated gaming devices, see § 172.65 of this chapter (Disposition of Seized Personal Property).

(b) *Narcotics.* For regulations relating to the disposal of forfeited narcotic drugs, see 21 CFR 302.56. For the disposal of forfeited marihuana, see 26 CFR (1939) 152.99 and 152.100 (Regulations under the Marihuana Tax Act of 1937, as amended).

(c) *Firearms.* For regulations relating to the disposal of forfeited firearms or ammunition, see § 178.166 of this chapter (Commerce in Firearms and Ammunition), and § 179.182 of this chapter (Machine Guns, Destructive Devices, and Certain Other Firearms).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12796, June 29, 1972]

### § 301.7327–1 Customs laws applicable.

For regulations relating to the remission or mitigation of forfeitures, see part 172 of this chapter (Disposition of Seized Personal Property).

## Judicial Proceedings

CIVIL ACTIONS BY THE UNITED STATES

### § 301.7401–1 Authorization.

(a) *In general.* No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner (or the Director, Alcohol, Tobacco and Firearms Division, with respect to the provisions of subtitle E of the Code), or the Chief Counsel for the Internal Revenue Service or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

(b) *Property held by banks.* The Commissioner shall not authorize or sanction any civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, from any deposits held in a foreign office of a bank engaged in the banking business in the United States or a possession of the United States unless the Commissioner believes—

(1) That the taxpayer is within the jurisdiction of a U.S. court at the time the civil action is authorized or sanctioned and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office of the bank outside the United States or a possession of the United States; or

(2) That the taxpayer is not within the jurisdiction of a U.S. court at the time the civil action is authorized or sanctioned, that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office outside the United States or a possession of the United States, and that

such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code.

For purposes of this paragraph, the term ''possession of the United States'' includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7188, 37 FR 12796, June 29, 1972]

### § 301.7403–1 Action to enforce lien or to subject property to payment of tax.

(a) *Civil actions.* In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Commissioner (or the Director, Bureau of Alcohol, Tobacco, and Firearms, or the Chief Counsel for the Bureau, with respect to the provisions of subtitle E of the Code), or the Chief Counsel for the Internal Revenue Service or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under the Code with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability. In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Commissioner or the Chief Counsel for the Internal Revenue Service during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(b) *Bid by the United States.* If property is sold to satisfy a first lien held by the United States, the United States may bid at the sale a sum which does not exceed the amount of its lien and the expenses of the sale. See also 31 U.S.C. 195.

[T.D. 7305, 39 FR 9950, Mar. 15, 1974]

### § 301.7404–1 Authority to bring civil action for estate taxes.

(a) If the estate tax imposed by chapter 11 of the Code is not paid on or before the last date prescribed for payment, the district director shall proceed to collect the tax under the provisions of general law; or appropriate proceedings in the name of the United States may be commenced in any court having jurisdiction to subject the property of the decedent to be sold under the judgment or decree of the court.

(b) The remedy by action provided in section 7404 is not exclusive. The district director may proceed to collect the tax by levy, as provided in section 6331, on any or all property or rights to property of the estate, or collection may be enforced by an appropriate action against the executor, certain transferees, trustees, and beneficiaries for their personal liability. See § 20.2002–1 of this chapter (Estate Tax Regulations).

### § 301.7406–1 Disposition of judgments and moneys recovered.

All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties shall be paid to the district director as collections of internal revenue taxes.

### § 301.7409–1 Action to enjoin flagrant political expenditures of section 501(c)(3) organizations.

(a) *Letter to organization.* When the Assistant Commissioner (Employee Plans and Exempt Organizations) concludes that a section 501(c)(3) organization has engaged in flagrant political intervention and is likely to continue to engage in political intervention that involves political expenditures, the Assistant Commissioner (Employee Plans and Exempt Organizations) shall send a letter to the organization providing it with the facts based on which the Service believes that the organization has been engaging in flagrant political intervention and is likely to continue to engage in political intervention that involves political expenditures. The organization will have 10 calendar days after the letter is sent to respond by establishing that it will immediately cease engaging in political intervention, or by providing the Service with

sufficient information to refute the Service's evidence that it has been engaged in flagrant political intervention. The Internal Revenue Service will not proceed to seek an injunction under section 7409 until after the close of this 10-day response period.

(b) *Determination by Commissioner.* If the organization does not respond within 10 calendar days to the letter under paragraph (a) of this section in a manner sufficient to dissuade the Assistant Commissioner (Employee Plans and Exempt Organizations) of the need for an injunction, the file will be forwarded to the Commissioner of Internal Revenue. The Commissioner of Internal Revenue will personally determine whether to forward to the Department of Justice a recommendation that it immediately bring an action to enjoin the organization from making further political expenditures. The Commissioner may also recommend that the court action include any other action that is appropriate in ensuring that the assets of the section 501(c)(3) organization are preserved for section 501(c)(3) purposes. The authority of the Commissioner to make the determinations described in this paragraph may not be delegated to any other persons.

(c) *Flagrant political intervention.* For purposes of this section, *flagrant political intervention* is defined as participation in, or intervention in (including the publication and distribution of statements), any political campaign by a section 501(c)(3) organization on behalf of (or in opposition to) any candidate for public office in violation of the prohibition on such participation or intervention in section 501(c)(3) and the regulations thereunder if the participation or intervention is flagrant.

(d) *Effective date.* This section is effective December 5, 1995.

[T.D. 8628, 60 FR 62213, Dec. 5, 1995]

PROCEEDINGS BY TAXPAYERS AND THIRD PARTIES

### § 301.7422–1 Special rules for certain excise taxes imposed by chapter 42 or 43.

(a) *Finality of refund proceeding.* For purposes of sections 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4961, 4963, 4971, and 4975, and the regulations thereunder, a decision in a suit for refund instituted under the provisions of this section shall be final—

(1) Upon the expiration of the time allowed for filing a notice of appeal from a decision of the United States Claims Court or of the United States District Court, if no timely notice of appeal is filed; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari from a decision of the United States Claims Court, or from a decision of the United States District Court, which has been affirmed or the appeal dismissed by the United States Court of Appeals, if no timely petition for certiorari is filed; or

(3) If a petition for certiorari has been filed, thirty days from the denial of such petition; or

(4) Thirty days from the date of a decision of the United States Supreme Court if no timely petition for rehearing is filed; however, if a timely petition for rehearing from such a decision is filed, and is denied, thirty days from the denial thereof; or

(5) If a decision is entered upon a rehearing or if a decision is modified or reversed as the result of a decision of a higher court, upon the expiration, with respect to the decision on rehearing or the modified or reversed decision, of periods similar to those provided in subparagraphs (1) through (4).

(b) *Right to bring action.* With respect to any taxable event, payment of the full amount of first tier tax for the taxable period shall constitute sufficient payment in order to maintain an action under this section with respect to the second tier tax.

(c) *Limitation on suit for refund.* No suit may be maintained under this section for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975 with respect to any taxable event unless—

(1) No other suit has been maintained for credit or refund of any tax imposed by such sections with respect to such taxable event; and

(2) No petition has been filed in the Tax Court with respect to a deficiency in any tax imposed by such sections with respect to such taxable event.

(d) *Final determination of issues.* For purposes of this section, any suit for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975, together with a supplemental proceeding (if any) under section 4961 (b), with respect to any taxable event, shall constitute a suit to determine all questions with respect to any other tax imposed with respect to such taxable event under such sections. Consequently, failure by the parties to the suit to bring before the Court any question described in the preceding sentence shall constitute a bar to the question.

(e) *Definitions.* For definitions of the terms ''taxable event,'' ''first tier tax,'' and ''second tier tax,'' see § 53.4963–1.

[T.D. 8084, 51 FR 16305, May 2, 1986, as amended by T.D. 8628, 60 FR 62213, Dec. 5, 1995; T.D. 8920, 66 FR 2171, Jan. 10, 2001]

### § 301.7423–1 Repayments to officers or employees.

The Commissioner is authorized to repay to any officer or employee of the United States the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit, and all damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the official performance of his duties under the Code.

### § 301.7424–2 Intervention.

If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under title 26 of the United States Code on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit. If the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien.

[T.D. 7305, 39 FR 9951, Mar. 15, 1974]

### § 301.7425–1 Discharge of liens; scope and application; judicial proceedings.

(a) *In general.* A tax lien of the United States, or a title derived from the enforcement of a tax lien of the United States, may be discharged or divested under local law only in the manner prescribed in section 2410 of title 28 of the United States Code or in the manner prescribed in section 7425 of the Internal Revenue Code. Section 7425 (a) contains provisions relating to the discharge of a lien when the United States is not joined as a party in the judicial proceedings described in subsection (a) of section 2410 of title 28 of the United States Code. These judicial proceedings are plenary in nature and proceed on formal pleadings. Section 7425(b) contains provisions relating to the discharge of a lien or a title derived from the enforcement of a lien in the event of a nonjudicial sale with respect to the property involved. Section 7425 (c) contains special rules relating to the notice of sale requirements contained in section 7425(b). Section 301.7425–2 contains rules with respect to the nonjudicial sales described in section 7425(b). Paragraph (a) of § 301.7425–3 contains rules with respect to the notice of sale provisions of section 7425(c)(1). Paragraph (b) of § 301.7425–3 contains rules relating to the consent to sale provisions of section 7425(c)(2). Paragraph (c) of § 301.7425–3 contains rules relating to the sale of perishable goods provisions of section 7425(c)(3). Paragraph (d) of § 301.7425–3 contains the requirements with respect to the contents of a notice of sale. Section 301.7425–4 prescribes rules with respect to the redemption of real property by the United States.

(b) *Effective date.* The provisions of section 7425, as added by the Federal Tax Lien Act of 1966, are effective with respect to sales described in section 7425 occurring after November 2, 1966. The notice of sale provisions of section 7425 (c) (1) or (3) do not apply to sales occurring after Nobember 2, 1966, if the seller of the property performed an act before November 3, 1966, which act at

the time of performance was required and effective under local law with respect to the sale. An example of such an act is publication of a notice of the sale in a local newspaper before November 3, 1966, if local law requires such publication before a sale and the publication is effective under local law. Accordingly, in such a case, it is not necessary to notify the Internal Revenue Service pursuant to the provisions of section 7425 (c) (1) or (3). With respect to a notice of sale required under section 7425 (c) (1) or (3)—

(1) Any notice of sale given to an office of the Internal Revenue Service or the Treasury Department during the period November 3, 1966, through December 21, 1966, shall be considered as adequate;

(2) Any notice of sale given during the period December 22, 1966, through January 31, 1968, which complies with the provisions of either—

(i) Revenue Procedure 67–25, 1967–1 C.B. 626 (based on Technical Information Release 873, dated December 22, 1966), or

(ii) Section 301.7425–3, shall be considered as adequate; and

(3) Any notice of sale given after January 31, 1968, which complies with the provisions of § 301.7425–3 shall be considered as adequate.

(c) *Judicial proceedings*—(1) *In general.* Section 7425 (a) provides rules, where the United States is not joined as a party, to determine the effect of a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code (relating to joinder of the United States in certain proceedings), or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title. If the United States is improperly named as a party to a judicial proceeding, the effect is the same as if the United States were not joined.

(2) *Notice of lien filed when the proceeding is commenced.* Where the United States is not properly joined as a party in the court proceeding and a notice of lien has been filed in accordance with section 6323 (f) or (g) in the place provided by law for such filing at the time the action or suit is commenced, a judgment or judicial sale pursuant to such a judgment shall be made subject to and without disturbing the lien of the United States.

(3) *Notice of lien not filed when the proceeding is commenced*—(i) *General rule.* Where the United States is not joined as a party in the court proceeding and either a notice of lien has not been filed in accordance with section 6323 (f) or (g) in the place provided by law for such filing at the time the action or suit is commenced, or the law makes no provision for that filing, a judgment or judicial sale pursuant to such a judgment shall have the same effect with respect to the discharge or divestment of the lien of the United States as may be provided with respect to these matters by the local law of the place where the property is situated.

(ii) *Examples.* The provisions of subparagraph (3) may be illustrated by the following examples:

*Example 1.* A, the first mortgagee of an apartment building located in State Y, commenced a foreclosure action on the mortgage prior to the time that a notice of a Federal tax lien, on that building, had been filed. Under the law of Y, junior liens on real property are discharged by a judicial sale pursuant to a judgment in a foreclosure action. Therefore, the Federal tax lien on the building will be discharged by the judicial sale. This result is the same whether the tax lien arose before or after the date of commencement of the foreclosure action and whether notice of the tax lien was filed at any time after commencement of the foreclosure action.

*Example 2.* On January 10, 1969, B dies testate and devises Blackacre to C. At B's death, Blackacre is subject to a first mortgage held by D. Realty is subject to administration as part of a decedent's estate under the laws of State X. However, C takes possession of Blackacre with the assent of E, the executor of B's estate. On January 5, 1970, D commences a foreclosure action on the mortgage. Under the law of X, junior liens on real property are discharged by a judicial sale pursuant to a judgment in a foreclosure action. After commencement of the proceedings, an assesssment for estate taxes is made and, thereafter, a notice of lien is filed in accordance with section 6323. The special lien on Blackacre, arising at the date of B's death, for estate taxes under section 6324(a) will be discharged by the judicial sale because there are no provisions for filing a notice thereof under law and junior liens are discharged by the sale under local law. The lien is discharged even though the executor

failed to obtain a discharge of his personal liability under section 2204. Furthermore, the general lien on Blackacre under section 6321 will be discharged by the judicial sale because the foreclosure action was commenced prior to the time that a notice of lien was filed.

(4) *Proceeds of a judicial sale.* If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of the Internal Revenue Code of 1954, the United States may claim the proceeds of the sale (exclusive of costs) prior to the time that distribution of the proceeds is ordered. The claim of the United States in such a case is treated as having the same priority with respect to the proceeds as the lien had with respect to the property which was discharged from the lien by the judicial sale.

[T.D. 7430, 41 FR 35178, Aug. 20, 1976]

### § 301.7425–2 Discharge of liens; nonjudicial sales.

(a) *In general.* Section 7425(b) contains provisions with respect to the effect on the interest of the United States in property in which the United States has or claims a lien, or a title derived from the enforcement of a lien, of a sale made pursuant to—

(1) An instrument creating a lien on the property sold,

(2) A confession of judgment on the obligation secured by an instrument creating a lien on the property sold, or

(3) A statutory lien on the property sold.

For purposes of this section, such a sale is referred to as a ''nonjudicial sale.'' The term ''nonjudicial sale'' includes, but is not limited to, the divestment of the taxpayer's interest in property which occurs by operation of law, by public or private sale, by forfeiture, or by termination under provisions contained in a contract for a deed or a conditional sales contract. Under section 7425(b)(1), if a notice of lien is filed in accordance with section 6323 (f) or (g), or the title derived from the enforcement of a lien is recorded as provided by local law, more than 30 days before the date of sale, and the appropriate district director is not given notice of the sale (in the manner prescribed in § 301.7425–3), the sale shall be made subject to and without disturbing the lien or title of the United States. Under section 7425(b)(2)(C), in any case in which notice of the sale is given to the district director not less than 25 days prior to the date of sale (in the manner prescribed in section 7425(c)(1)), the sale shall have the same effect with respect to the discharge or divestment of the lien or title as may be provided by local law with respect to other junior liens or other titles derived from the enforcement of junior liens. A nonjudicial sale pursuant to a lien which is junior to a tax lien does not divest the tax lien, even though notice of the nonjudicial sale is given to the appropriate district director. However, under the provisions of section 6325(b) and § 301.6325–1, a district director may discharge the property from a tax lien, including a tax lien which is senior to another lien upon the property.

(b) *Date of sale.* In the case of a nonjudicial sale subject to the provisions of section 7425(b), in order to compute any period of time determined with reference to the date of sale, the date of sale shall be determined in accordance with the following rules:

(1) In the case of divestment of junior liens on property resulting directly from a public sale, the date of sale is deemed to be the date the public sale is held, regardless of the date under local law on which junior liens on the property are divested or the title to the property is transferred,

(2) In the case of divestment of junior liens on property resulting directly from a private sale, the date of sale is deemed to be the date title to the property is transferred, regardless of the date junior liens on the property are divested under local law, and

(3) In the case of divestment of junior liens on property not resulting directly from a public or private sale, the date of sale is deemed to be the date on which junior liens on the property are divested under local law.

For provisions relating to the right of redemption of the United States, see section 7425(d) and § 301.7425–4.

(c) *Examples*. The provisions of this section may be illustrated by the following examples:

*Example 1*. (i) Under the law of State M, upon entry of judgment, the judgment creditor obtains a statutory lien upon the real property of the judgment debtor, and certain procedures are provided by which the judgment creditor may execute by public sale upon such real property. These procedures provide, among other things, for notification by personal service or registered or certified mail to other lien creditors, if any, and publication of a notice of the sale in a local newspaper. After the expiration of a prescribed period of time after such notification and publication, the sheriff of the county where the real property is located may sell the property at public sale. After payment of the amount bid at the public sale, the sheriff issues to the purchaser a deed to the real property, and the interests of junior lienors in the property are divested.

(ii) For purposes of this section, such an execution sale is a nonjudicial sale described in section 7425(b) because the sale is made pursuant to a statutory lien on the property sold. The date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the public sale is held because junior liens on the real property are divested directly as a result of the public sale. This result obtains even though the junior liens are legally divested on a later date when the sheriff issues the deed.

*Example 2*. (i) Under the law of State N, mortgages on real property may contain a power of sale which authorizes the mortgagee, upon breach by the mortgagor of one of the conditions of the mortgage, to have the mortgaged property sold at public sale. This public sale must be preceded by notice by advertisement in a local newspaper, and the time, place, description of the property, and other terms of the sale must be specified. The purchaser at such a public sale obtains a title to the real property which is not subject to a right of redemption by the mortgagor and which divests the interests of the junior lienors in the property.

(ii) For purposes of this section, a sale pursuant to such a power of sale is a nonjudicial sale described in section 7425(b) because the sale is made pursuant to the mortgage instrument which created a lien on the property sold. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date of the public sale because junior liens on the property are divested directly as a result of the public sale.

*Example 3*. Assume the same facts as in example 2 except that the purchaser at the public sale obtains a title which is defeasible by the exercise of a right of redemption in the mortgagor. The purchaser's title divests the interests of junior lienors in the property as of the time of public sale. The interests of junior leinors in the property revive if the mortgagor exercises his right of redemption. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date of the public sale because junior liens on the property are divested directly as a result of the public sale although such junior liens may be revived by a subsequent redemption by the mortgagor.

*Example 4*. (i) Under the law of State O, upon breach by a mortgagor of real property of one of the conditions of the mortgage, the mortgagee may foreclose the mortgage by securing possession of the property by one of several procedures provided by statute. These procedures are generally referred to as ''strict foreclosure.'' In order for a foreclosure to be effective under these procedures, a certificate attesting the fact of entry must be recorded with the proper registrar of deeds within 30 days after the mortgagee enters the property. During the one-year period following the date on which the certificate of entry is recorded, the mortgagor or a junior lienor may redeem the property by paying the mortgagee the amount of the mortgage obligation. If, during such one-year period the property is not redeemed and the mortgagee's possession is continued, the interests of the mortgagor and the junior lienors in the property are divested as of the date such one-year period expires.

(ii) For purposes of this section, such a foreclosure procedure is a nonjudicial sale described in section 7425(b) because it results in the divestment of the mortgagor's interest in the property by operation of law pursuant to the mortgage which created a lien on the property. In addition, because there is no public or private sale which directly results in the divestment of junior liens on the property, the date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the one-year period following the recording of the certificate of entry expires.

*Example 5*. The law of State P contains a procedure which permits a county to collect a delinquent tax assessment with respect to real property by the means of a tax sale of the property. First, a notice of a public auction with respect to the tax assessment on the real property is published in a local newspaper. At the public auction, the purchaser, upon payment of the delinquent taxes and interest, obtains from the county tax collector a tax certificate with respect to the real property. Because the obtaining of this tax certificate does not directly result in the divestment of either the owner's title or junior liens with respect to the property, the public auction is not a nonjudicial sale

described in section 7425(b). At any time before a tax deed with respect to the property is issued by the clerk of the county court, the owner or any holder of a lien or other interest with respect to the property may obtain the tax certificate by paying the holder of the tax certificate the amount of the taxes, interest, and costs. After a date which is two years after the date on which the tax assessment became delinquent, the holder of the tax certificate may request the clerk of the county court to have the property advertised for sale. After advertisement of the sale, the clerk of the county court conducts a public sale of the real property and the purchaser obtains a tax deed. The interests of all junior lienors in the property are divested and the property is not subject to a right of redemption under the law of State P. For purposes of this section, this public sale is considered to be a nonjudicial sale described in section 7425(b) because the sale is made pursuant to a statutory lien on the property sold. The date of the sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the public sale is held at which the purchaser obtains a tax deed as this sale directly results in the divestment of junior liens on the property.

*Example 6.* The law of State Q contains a provision which permits a county to collect a delinquent tax assessment with respect to real property by the means of a tax sale of the property. After public notice is given, a ''tax sale'' of the real property is conducted. Upon payment of the delinquent taxes and interest, a purchaser obtains a tax certificate with respect to the real property. If there is no purchaser at the tax sale, the property is deemed to be bid in by the State. Because the obtaining of this tax certificate by a purchaser or State Q does not directly result in the divestment of either the owner's title or junior liens with respect to the property, the tax sale is not a nonjudicial sale described in section 7425(b). Following the tax sale, there is a three-year period during which any person having an interest in the property may redeem the property by paying the holder of the tax certificate the amount of taxes, interest, and costs. Unless, redeemed, the holder of the tax certificate may obtain an absolute title at the expiration of the period of redemption provided he serves a notice of the expiration of the redemption period upon the owner at least 60 days prior to the date of expiration. Because there is no public or private sale which directly results in the divestment of junior liens on the property, the date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the holder of the tax certificate obtains absolute title.

[T.D. 7430, 41 FR 35178, Aug. 20, 1976]

## § 301.7425–3 Discharge of liens; special rules.

(a) *Notice of sale requirements*—(1) *In general.* Except in the case of the sale of perishable goods described in paragraph (c) of this section, a notice (as described in paragraph (d) of this section) of a nonjudicial sale shall be given, in writing by registered or certified mail or by personal service, not less than 25 days prior to the date of sale (determined under the provisions of paragraph (b) of § 301.7425–2), to the district director (marked for the attention of the chief, special procedures staff) for the internal revenue district in which the sale is to be conducted. Thus, under this section, a notice of sale is not effective if it is given to a district director other than the district director for the internal revenue district in which the sale is to be conducted. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or legal holiday) apply in the case of notices required to be made under this paragraph.

(2) *Postponement of scheduled sale*—(i) *Where notice of sale is given.* In the event that notice of a sale is given in accordance with subparagraph (1) of this paragraph (a), with respect to a scheduled sale which is postponed to a later time or date, the seller of the property is required to give notice of the postponement to the district director in the same manner as is required under local law with respect to other secured creditors. For example, assume that in State M local law requires that in the event of a postponement of a scheduled foreclosure sale of real property, an oral announcement of the postponement at the place and time of the scheduled sale constitutes sufficient notice to secured creditors of the postponement. Accordingly, if at the place and time of a scheduled sale in State M an oral announcement of the postponement is made, the Internal Revenue Service is considered to have notice of the postponement for the purpose of this subparagraph.

(ii) *Where notice of sale is not given.* In the event that—

(A) Notice of a nonjudicial sale would not be required under subparagraph (1) of this paragraph (a), if the sale were held on the originally scheduled date,

(B) Because of a postponement of the scheduled sale, more than 30 days elapse between the originally scheduled date of the sale and the date of the sale, and

(C) A notice of lien with respect to the property to be sold is filed more than 30 days before the date of the sale, notice of the sale is required to be given to the district director in accordance with the provisions of paragraph (a)(1) of this section. In any case in which notice of sale is required to be given with respect to a scheduled sale, and notice of the sale is not given, any postponement of the scheduled sale does not affect the rights of the United States under section 7425(b).

(iii) *Examples*. The provisions of subdivision (ii) of this subparagraph may be illustrated by the following examples:

*Example 1*. A nonjudicial sale of Blackacre, belonging to A, a delinquent taxpayer, is scheduled for December 2, 1968. As no notice of lien is filed applicable to Blackacre more than 30 days before December 2, 1968, no notice of sale is given to the district director. On December 2, 1968, the sale of Blackacre is postponed until January 15, 1969. A notice of lien with respect to Blackacre is properly filed on January 2, 1969. The sale of blackacre is held on January 15, 1969. Even though more than 30 days elapsed between the originally scheduled date of the sale (December 2, 1968) and the date of the sale (January 15, 1969), no notice of sale is required to be given to the district director because the notice of lien was not filed more than 30 days before the date of the sale.

*Example 2*. Assume the same facts as in example 1 except that a notice of lien is filed on November 29, 1968, in accordance with section 6323. Because more than 30 days elapsed between the originally scheduled date of the sale and the date of the sale, and the notice of lien is filed (on November 29, 1968) more than 30 days before the date of the sale (January 15, 1969), notice of the sale, in accordance with the provisions of subparagraph (1) of this paragraph, is required to be given to the distirct director.

*Example 3*. A nonjudicial sale of Whiteacre, belonging to B, a delinquent taxpayer, is scheduled for December 2, 1968. A notice of lien applicable to Whiteacre is filed on November 12, 1968, in accordance with section 6323. As the notice of lien was not filed more than 30 days before December 2, 1968, no notice of sale is given to the district director. On December 2, 1968, the sale of Whiteacre is postponed until December 20, 1968. The sale of Whiteacre is held on December 20, 1968. Even though more than 30 days elapsed between the date notice of lien was filed (November 12, 1968) and the date of the sale (December 20, 1968), no notice of sale is required to be given to the district director because not more than 30 days elapsed between the date of the originally scheduled sale (December 2, 1968) and the date the sale was actually held (December 20, 1968).

(b) *Consent to sale*—(1) *In general*. Notwithstanding the notice of sale provisions of paragraph (a) of this section, a nonjudicial sale of property shall discharge or divest the property of the lien or title of the United States if the district director for the internal revenue district in which the sale occurs consents to the sale of the property free of the lien or title. Pursuant to section 7425(c)(2), where adequate protection is afforded the lien or title of the United States, a district director may, in his discretion, consent with respect to the sale of property in appropriate cases. Such consent shall be effective only if given in writing and shall be subject to such limitations and conditions as the district director may require. However, a district director may not consent to a sale of property under this section after the date of sale, as determined under paragraph (b) of § 301.7425–2. For provisions relating to the authority of the district director to release a lien or discharge property subject to a tax lien, see section 6325 and the regulations thereunder.

(2) *Application for consent*. Any person desiring a district director's consent to sell property free of a tax lien or a title derived from the enforcement of a tax lien of the United States in the property shall submit to the district director for the internal revenue district in which the sale is to occur a written application, in triplicate, declaring that it is made under penalties of perjury, and requesting that such consent be given. The application shall contain the information required in the case of a notice of sale, as set forth in paragraph (d)(1) of this section, and, in addition, shall contain a statement of the reasons why the consent is desired.

(c) *Sale of perishable goods*—(1) *In general.* A notice (as described in paragraph (d) of this section) of a nonjudicial sale of perishable goods (as defined in subparagraph (2) of this paragraph (c)) shall be given in writing, by registered or certified mail or delivered by personal service, at any time before the sale, to the district director (marked for the attention of the chief, special procedures staff) for the internal revenue district in which the sale is to be conducted. Thus, under this section, a notice of sale is not effective if it is given to a district director other than the district director for the internal revenue district in which the sale is to be conducted. If a notice of a nonjudicial sale is timely given in the manner described in this paragraph, the nonjudicial sale shall discharge or divest the tax lien, or a title derived from the enforcement of a tax lien, of the United States in the property. The provisions of sections 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday) apply in the case of notices required to be made under this paragraph. The seller of the perishable goods shall hold the proceeds (exclusive of costs) of the sale as a fund, for not less than 30 days after the date of the sale, subject to the liens and claims of the United States, in the same manner and with the same priority as the liens and claims of the United States had with respect to the property sold. If the seller fails to hold the proceeds of the sale in accordance with the provisions of this paragraph and if the district director asserts a claim to the proceeds within 30 days after the date of sale, the seller shall be personally liable to the United States for an amount equal to the value of the interest of the United States in the fund. However, even if the proceeds of the sale are not so held by the seller, but all the other provisions of this paragraph are satisfied, the buyer of the property at the sale takes the property free of the liens and claims of the United States. In the event of a postponement of the scheduled sale of perishable goods, the seller is not required to notify the district director of the postponement. For provisions relating to the authority of the district director to release a lien or discharge property subject to a tax lien, see section 6325 and the regulations thereunder.

(2) *Definition of perishable goods.* For the purpose of this paragraph, the term ''perishable goods'' means any tangible personal property which, in the reasonable view of the person selling the property, is liable to perish or become greatly reduced in price or value by keeping, or cannot be kept without great expense.

(d) *Content of notice of sale*—(1) *In general.* With respect to a notice of sale described in paragraph (a) or (c) of this section, the notice will be considered adequate if it contains the information described in paragraph (d)(1) (i), (ii), (iii), and (iv) of this section.

(i) The name and address of the person submitting the notice of sale;

(ii) A copy of each notice of Federal Tax Lien (Form 668) affecting the property to be sold, or the following information as shown on each such Notice of Federal Tax Lien—

(A) The internal revenue district named thereon,

(B) The name and address of the taxpayer, and

(C) The date and place of filing of the notice;

(iii) With respect to the property to be sold, the following information—

(A) A detailed description, including location, of the property affected by the notice (in the case of real property, the street address, city, and State and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title),

(B) The date, time, place, and terms of the proposed sale of the property, and

(C) In the case of a sale of perishable property described in paragraph (c) of this section, a statement of the reasons why the property is believed to be perishable; and

(iv) The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.

(2) *Inadequate notice.* Except as otherwise provided in this subparagraph, a notice of sale described in paragraph (a) of this section which does not contain the information described in paragraph (d)(1) of this section shall be considered inadequate by a district director. If a district director determines that the notice is inadequate, he will give written notification of the items of information which are inadequate to the person who submitted the notice. A notice of sale which does not contain the name and address of the person submitting such notice shall be considered to be inadequate for all purposes without notification of any specific inadequacy. In any case where a notice of sale, given after December 31, 1976, does not contain the information required under paragraph (d)(1)(ii) of this section with respect to a Notice of Federal Tax Lien, the district director may give written notification of such omission without specification of any other inadequacy and such notice of sale shall be considered inadequate for all purposes. In the event the district director gives notification that the notice of sale is inadequate, a notice complying with the provisions of this section (including the requirement that the notice be given not less than 25 days prior to the sale in the case of a notice described in paragraph (a) of this section) must be given. However, in accordance with the provisions of paragraph (b)(1) of this section, in such a case the district director may, in his discretion, consent to the sale of the property free of the lien or title of the United States even though notice of the sale is given less than 25 days prior to the sale. In any case where the person who submitted a timely notice which indicates his name and address does not receive, more than 5 days prior to the date of the sale, written notification from the district director that the notice is inadequate, the notice shall be considered adequate for purposes of this section.

(3) *Acknowledgment of notice.* If a notice of sale described in paragraph (a) or (c) of this section is submitted in duplicate to the district director with a written request that receipt of the notice be acknowledged and returned to the person giving the notice, this request will be honored by the district director. The acknowledgement by the district director will indicate the date and time of the receipt of the notice.

(4) *Disclosure of adequacy of notice.* The district director for the internal revenue district in which the sale was held or is to be held is authorized to disclose, to any person who has a proper interest, whether an adequate notice of sale was given under paragraph (d)(1) of this section. Any person desiring this information should submit to the district director a written request which clearly describes the property sold or to be sold, identifies the applicable notice of lien, gives the reasons for requesting the information, and states the name and address of the person making the request.

[T.D. 7430, 41 FR 35180, Aug. 20, 1976]

### § 301.7425–4 Discharge of liens; redemption by United States.

(a) *Right to redeem*—(1) *In general.* In the case of a nonjudicial sale of real property to satisfy a lien prior to the tax lien or a title derived from the enforcement of a tax lien, the district director may redeem the property within the redemption period (as described in paragraph (a)(2) of this section). The right of redemption of the United States exists under section 7425(d) even though the district director has consented to the sale under section 7425(c)(2) and § 301.7425–3(b). For purposes of this section, the term ''nonjudicial sale'' shall have the same meaning as used in paragraph (a) of § 301.7425–2.

(2) *Redemption period.* For purposes of this section, the redemption period shall be—

(i) The period beginning with the date of the sale (as determined under paragraph (b) of § 301.7425–2) and ending with the 120th day after such date, or

(ii) The period for redemption of real property allowable with respect to other secured creditors, under the local law of the place where the real property is located, whichever expires later. Whichever period is applicable, section 7425 and this section shall govern the amount to be paid and the procedure to be followed.

(3) *Limitations.* In the event a sale does not ultimately discharge the property from the tax lien (whether by reason of local law or the provisions of section 7425(b)), the provisions of this section do not apply because the tax lien will continue to attach to the property after the sale. In a case in which the Internal Revenue Service is not entitled to a notice of sale under section 7425(b) and § 301.7425–3, the United States does not have a right of redemption under section 7425(d). However, in such a case, if a tax lien has attached to the property at the time of sale, the United States has the same right of redemption, if any, which is afforded similar creditors under the local law of the place in which the property is situated.

(b) *Amount to be paid*—(1) *In general.* In any case in which a district director exercises the right to redeem real property under section 7425(d), the amount to be paid is the sum of the following amounts—

(i) The actual amount paid for the property (as determined under paragraph (b)(2) of this section) being redeemed (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent legally satisfied by reason of the sale);

(ii) Interest on the amount paid (described in paragraph (b)(1)(i) of this section) at the sale by the purchaser of the real property computed at the rate of 6 percent per annum for the period from the date of the sale (as determined under paragraph (b) of § 301.7425–2) to the date of redemption;

(iii) The amount, if any, equal to the excess of (A) the expenses necessarily incurred to maintain such property (as determined under paragraph (b)(3) of this section) by the purchaser (and his successor in interest, if any) over (B) the income from such property realized by the purchaser (and his successor in interest, if any) plus a reasonable rental value of such property (to the extent the property is used by or with the consent of the purchaser or his successor in interest or is rented at less than its reasonable rental value); and

(iv) With respect to a redemption made after December 31, 1976, the amounts, if any, of a payment made by the purchaser or his successor in interest after the foreclosure sale to a holder of a senior lien (to the extent provided under paragraph (b)(4) of this section).

(2) *Actual amount paid.* (i) The actual amount paid for property by a purchaser, other than holder of the lien being foreclosed, is the amount paid by him at the sale. For purposes of this subdivision, the amount paid by the purchaser at the sale includes deferred payments upon the bid price. The actual amount paid does not include costs and expenses incurred prior to the foreclosure sale by the purchaser except to the extent such expenses are included in the amount bid and paid for the property. For example, the actual amount paid does not normally include the expenses of the purchaser such as title searches, professional fees, or interest on debt incurred to obtain funds to purchase the property.

(ii) In the case of a purchaser who is the holder of the lien being foreclosed, the actual amount paid is the sum of (A) the amount of the obligation secured by such lien to the extent legally satisfied by reason of the sale and (B) any additional amount bid and paid at the sale. For purposes of this section, a purchaser who acquires title as a result of a nonjudicial foreclosure sale is treated as the holder of the lien being foreclosed if a lien (or any interest reserved, created, or conveyed as security for the payment of a debt or fulfillment of other obligation) held by him is partially or fully satisfied by reason of the foreclosure sale. For example, a person whose title is derived from a tax deed issued under local law shall be treated as a purchaser who is the holder of the lien foreclosed in a case where a tax certificate, evidencing a lien on the property arising from the payment of property taxes, ripens into title. The amount paid by a purchaser at the sale includes deferred payments upon any portion of the bid price which is in excess of the amount of the lien being foreclosed. The actual amount paid does not include costs and expenses incurred prior to the foreclosure sale by the purchaser except to the extent such expenses are included in the amount of the lien being foreclosed

which is legally satisfied by reason of the sale or in the amount bid and paid at the sale. Where the lien being foreclosed attaches to other property not subject to the foreclosure sale, the amount legally satisfied by reason of the sale does not include the amount of such lien that attaches to the other property. However, for purposes of the preceding sentence, the amount of the lien that attaches to the other property shall be considered to be equal to the amount by which the value of the other property exceeds the amount of any other senior lien on that property. Where, after the sale, the holder of the lien being foreclosed has the right to the unpaid balance of the amount due him, the amount legally satisfied by reason of the sale does not include the amount of such lien to the extent a deficiency judgment may be obtained therefor. However, for purposes of the preceding sentence, an amount, with respect to which the holder of the lien being foreclosed would otherwise have a right to a deficiency judgment, shall be considered to be legally satisfied by reason of the foreclosure sale to the extent that the holder has waived his right to a deficiency judgment prior to the foreclosure sale. For this purpose, the waiver must be in writing and legally binding upon the foreclosing lienholder as of the time the sale is concluded. If, prior to the foreclosure, payments have been made by the foreclosing lienholder to a holder of a superior lien, the payments are included in the actual amount paid to the extent they give rise to an interest which is legally satisfied by reason of the foreclosure sale.

(3) *Excess expenses incurred by purchaser*. (i) Expenses necessarily incurred in connection with the property after the foreclosure sale and before redemption by the United States are taken into account in determining if there are excess expenses payable under paragraph (b)(1)(iii) of this section. Expenses incurred by the purchaser prior to the foreclosure sale are not considered under this subparagraph. (See paragraph (b)(2)(ii) of this section for circumstances under which such expenses may be included in the amount to be paid.) Expenses necessarily incurred in connection with the property include, for example, rental agent commissions, repair and maintenance expenses, utilities expenses, legal fees incurred after the foreclosure sale and prior to redemption in defending the title acquired through the foreclosure sale, and a proportionate amount of casualty insurance premiums and ad valorem taxes. Improvements made to the property are not considered as an expense unless the amounts incurred for such improvements are necessarily incurred to maintain the property.

(ii) At any time prior to the expiration of the redemption period applicable under paragraph (a)(2) of this section, the district director may, by certified or registered mail or hand delivery, request a written itemized statement of the amount claimed by the purchaser or his successor in interest to be payable under paragraph (b)(1)(iii) of this section. Unless the purchaser or his successor in interest furnishes the written itemized statement within 15 days after the request is made by the district director, it shall be presumed that no amount is payable for expenses in excess of income and the Internal Revenue Service shall tender only the amount otherwise payable under paragraph (b)(1) of this section. If a purchaser or his or her successor in interest has failed to furnish the written itemized statement within 15 days after the request therefor is made by the district director, or there is a disagreement as to the amount properly payable under paragraph (b)(1)(iii) of this section, or if there were additional excess expenses that were not claimed in the original itemized statement, the purchaser or his or her successor in interest may submit a written itemized statement to the district director within 30 days after the date of redemption. If the purchaser or his or her successor in interest fails to timely submit such a written itemized statement, no amount shall be payable for expenses in excess of income.

(4) *Payments made by purchaser or his successor in interest to a senior lienor*. (i) The amount to be paid upon a redemption by the United States made after December 31, 1976, shall include the

amount of a payment made by the purchaser or his successor in interest to a holder of a senior lien to the extent a request for the reimbursement thereof (made in accordance with paragraph (b)(4)(ii) of this section) is approved as provided under paragraph (b)(4)(iii) of this section. This paragraph applies only to a payment made after the foreclosure sale and before the redemption to a holder of a lien that was, immediately prior to the foreclosure sale, superior to the lien foreclosed. A payment of principal or interest to a senior lienor shall be taken into account. Generally, the portion, if any, of a payment which is to be held in escrow for the payment of an expense, such as hazard insurance or real property taxes, is not considered under this paragraph. However, a payment by the escrow agent of a real property tax or special assessment lien, which was senior to the lien foreclosed, shall be considered to be a payment made by the purchaser or his successor in interest for purposes of this paragraph. With respect to real property taxes assessed after the foreclosure sale, see paragraph (b)(3)(i) of this section, relating to excess expenses incurred by the purchaser.

(ii) Before the expiration of the redemption period applicable under paragraph (a)(2) of this section, the district director shall, in any case where a redemption is contemplated, send notice to the purchaser (or his successor in interest of record) by certified or registered mail or hand delivery of his right under this subparagraph to request reimbursement (payable in the event the right to redeem under section 7425(d) is exercised) for a payment made to a senior lienor. No later than 15 days after the notice from the district director is sent, the request for reimbursement shall be mailed or delivered to the office specified in such notice and shall consist of—

(A) A written itemized statement, signed by the claimant, of the amount claimed with respect to a payment made to a senior lienor, together with the supporting evidence requested in the notice from the district director, and

(B) A waiver or other document that will be effective upon redemption by the United States to discharge the property from, or transfer to the United States, any interest in or lien on the property that may arise under local law with respect to the payment made to a senior lienor.

Upon a showing of reasonable cause, a district director may, in his discretion and at any time before the expiration of the applicable period for redemption, grant an extension for a reasonable period of time to submit, amend, or supplement a request for reimbursement. Unless a request for reimbursement is timely submitted (determined with regard to any extension of time granted), no amount shall be payable to the purchaser or his successor in interest on account of a payment made to a senior lienor if the right to redeem under section 7425(d) is exercised. A waiver or other document submitted pursuant to this subdivision shall be treated as effective only to the extent of the amount included in the redemption price under this paragraph. If the right to redeem is not exercised or a request for reimbursement is withdrawn, the district director shall, by certified or registered mail or hand delivery, return to the purchaser or his successor any waiver or other document submitted pursuant to this subdivision as soon as is practicable.

(iii) A request for reimbursement submitted in accordance with paragraph (b)(4)(ii) of this section shall be considered to be approved for the total amount claimed by the purchaser, and payable in the event the right to redeem is exercised, unless the district director sends notice to the claimant, by certified or registered mail or hand delivery, of the denial of the amount claimed within 30 days after receipt of the request or 15 days before expiration of the applicable period for redemption, whichever is later. The notification of denial shall state the grounds for denial. If such notice of denial is given, the request for reimbursement for a payment made to a senior lienor shall be treated as having been withdrawn by the purchaser or his successor and the Internal Revenue Service shall tender only the amount otherwise payable under paragraph (b)(1) of this section. If a request for reimbursement is treated as having been withdrawn under the

preceding sentence, payment for amounts described in this subparagraph may, in the discretion of the district director, be made after the redemption upon the resolution of the disagreement as to the amount properly payable under paragraph (b)(1)(iv) of this section.

(5) *Examples*. The provisions of paragraph (b)(1)(i) of this section may be illustrated by the following examples:

*Example 1*. A, a delinquent taxpayer, owns Blackacre located in State X upon which B holds a mortgage. After the mortgage is properly recorded, a notice of tax lien is filed under section 6323(f) which is applicable to Blackacre. Subsequently, A defaults on the mortgage and B forecloses on the mortgage which has an outstanding obligation in the amount of $1,000. At the foreclosure sale, B bids $50,000 and obtains title to Blackacre as a result of the sale. At the time of the foreclosure sale, Blackacre has a fair market value of $75,000. Under the laws of State X, the mortgage obligation is fully satisfied by operation of the foreclosure sale per se and the mortgagee cannot obtain a deficiency judgment. Under paragraph (b)(1)(i) of this section, the district director must pay $100,000 in order to redeem Blackacre.

*Example 2*. Assume the same facts as in example 1 except that under the laws of State X, the amount bid is the amount of the obligation legally satisfied as a result of the foreclosure sale, and in the case in which the amount of the obligation exceeds the amount bid, the mortgagee has the right to a judgment for the deficiency computed as the difference between the amount of the obligation and the amount bid. B does not waive, prior to the foreclosure sale, his right to a deficiency judgment. In such a case, the district director must, under paragraph (b)(1)(i) of this section, pay $50,000 in order to redeem Blackacre, whether or not B seeks a judgment for the deficiency.

*Example 3*. C, a delinquent taxpayer, owns Greenacre located in State Y upon which D holds a first mortgage and E holds a second mortgage. After the mortgages are properly recorded, a notice of tax lien is filed under section 6323(f) which is applicable to Greenacre. Subsequently, C defaults on both mortgages and E pays $5,000 to D, which is the portion of D's obligation which is in default. The second mortgage held by E is an outstanding obligation in the amount of $100,000. Under the laws of State Y, E may treat the amount paid to D as an addition to his second mortgage upon foreclosure by him. E forecloses upon the security interest held by him. At the foreclosure sale, E bids $50,000 and obtains title to Greenacre subject to D's mortgage as a result of the foreclosure sale. Under the laws of State Y, the mortgage obligation legally satisfied is the amount bid and E has the right to a judgment for a deficiency in the amount of $55,000 ($100,000 plus $5,000 less $50,000). In such a case, the district director must, under paragraph (b)(1)(i) of this section, pay $50,000 in order to redeem Greenacre, whether or not E seeks a judgment for the deficiency.

*Example 4*. The law of State Z contains a procedure which permits a county to collect a delinquent tax assessment with respect to real property by the means of a ''tax sale'' of the property. Pursuant to this procedure, a public auction is conducted on January 15, 1970, to collect the delinquent property taxes assessed against Whiteacre, which is owned by F. At the auction, a bid of $1,000 (representing the tax, costs, and interest due at the time of the auction) is made by G. Subsequently, G pays the amount bid to the county and obtains a tax certificate with respect to Whiteacre. Under this tax sale procedure, the obtaining of the tax certificate does not directly result in the divestment of either F's title or any junior liens on Whiteacre. On January 15, 1973, the period under this tax sale procedure during which F could have redeemed Whiteacre expires. Further, more than 30 days before January 15, 1973, a notice of tax lien affecting Whiteacre is filed under section 6323(f) with respect to F's delinquent Federal income taxes. Under the state tax sale procedure, the amount which would be required to be paid by F to G on January 15, 1973, to redeem Whiteacre is $1,350 (the $1,000 amount bid, interest of $300, and costs of $50). However, Whiteacre is not redeemed by F under the state procedure and, on January 16, 1973, G obtains a tax deed to Whiteacre. Under the law of State Z, the issuance of the tax deed results in the divestment of F's title and junior liens on Whiteacre. Thus, under § 301.7425–2(b), the date of sale is January 16, 1973, for purposes of section 7425(b). The amount legally satisfied by reason of the sale is the amount G is entitled to receive, immediately prior to the expiration of the period for redemption under the law of State Z, if Whiteacre were redeemed at such time. Thus, the district director must, under paragraph (b)(1)(i) of this section, pay $1,350 in order to redeem Whiteacre.

(c) *Certificate of redemption*—(1) *In general*. If a district director exercise the right of redemption of the United States described in paragraph (a) of this section, he shall apply to the officer designated by local law, if any, for the documents necessary to evidence the fact of redemption and to record title to the redeemed property in the name of the United States. If no such officer has been designated by local law or if the officer designated by local law fails to issue the necessary documents,

the district director is authorized to issue a certificate of redemption for the property redeemed by the United States.

(2) *Filing*. The district director shall, without delay, cause either the documents issued by the local officer or the certificate of redemption executed by the district director to be filed with the local office where certificates of redemption are generally filed. If a certificate of redemption is issued by the district director and if the State in which the real property redeemed by the United States is situated has no office with which certificates of redemption may be filed, the district director shall file the certificate of redemption in the office of the clerk of the United States district court for the judicial district in which the redeemed property is situated.

(3) *Effect of certificate of redemption*. A certificate of redemption executed pursuant to paragraph (c)(1) of this section, shall constitute prima facie evidence of the regularity of the redemption. When a certificate of redemption is recorded, it shall transfer to the United States all the rights, title, and interest in and to the redeemed property acquired by the person, from whom the district director redeemed the property, by virtue of the sale of the property. Therefore, if under local law the purchaser takes title free of liens junior to the lien of the foreclosing lienholder, the United States takes title free of such junior liens upon redemption of the property. If a certificate of redemption has been erroneously prepared and filed because the redemption was not effective, the district director shall issue a document revoking such certificate of redemption and such document shall be conclusively binding upon the United States against a purchaser of the property or a holder of a lien upon the property.

(4) *Application for release of right of redemption*. Upon application of a party with a proper interest in the real property sold in a nonjudicial sale described in section 7425(b) and § 301.7425–2 which real property is subject to the right of redemption of the United States described in this section, the district director may, in his discretion, release the right of redemption with respect to the property. The application for the release shall be submitted in writing to a district director and shall contain such information as the district director may require. If the district director determines that the right of redemption of the United States is without value, no amount shall be required to be paid with respect to the release of the right of redemption.

[T.D. 7430, 41 FR 35181, Aug. 20, 1976, as amended by T.D. 8596, 60 FR 28720, June 2, 1995]

### § 301.7426–1 Civil actions by persons other than taxpayers.

(a) *Actions permitted*—(1) *Wrongful levy*—(i) *In general*. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) may bring a civil action against the United States in a district court of the United States based upon such person's claim—

(A) That such person has an interest in, or lien on, such property which is senior to the interest of the United States; and

(B) That such property was wrongfully levied upon.

(ii) *Debt owed by another Federal agency*. Section 7426 and this paragraph (a) apply when a levy is made by the Internal Revenue Service on a debt owed to a taxpayer by another Federal agency. By contrast, section 7426 and this paragraph (a) do not apply if the Internal Revenue Service requests payment from another Federal agency pursuant to a request for setoff.

(2) *Surplus proceeds*. If property has been sold pursuant to levy, any person (other than the person against whom is assessed the tax out of which such levy arose) may bring a civil action against the United States in a district court of the United States based upon such person's claim that he—

(i) Has an interest in or lien on such property junior to that of the United States; and

(ii) Is entitled to the surplus proceeds of such sale.

(3) *Substituted sale proceeds*. Any person who claims to be legally entitled to all or any part of the amount which is

held as a fund from the sale of property pursuant to an agreement described in section 6325(b)(3) may bring a civil action against the United States in a district court of the United States to obtain the relief provided by section 7426 (b)(4). It is not necessary that the claimant be a party to the agreement which provides for the substitution of the sale proceeds for the property subject to the lien.

(b) *Adjudication*—(1) *Wrongful levy*. If the court determines that property has been wrongfully levied upon, the court may—

(i) Grant an injunction to prohibit the enforcement of such levy or to prohibit a sale of such property if such sale would irreparably injure rights in the property which are superior to the rights of the United States in such property; or

(ii) Order the return of specific property if the United States is in possession of such property; or

(iii) Grant a judgment for the amount of money levied upon; or

(iv) Grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property (which, in the case of property declared purchased by the United States at a sale, shall be the greater of the minimum amount determined pursuant to section 6335(e) or the amount received by the United States from the resale of such property).

For purposes of this paragraph, a levy is wrongful against a person (other than the taxpayer against whom the assessment giving rise to the levy is made), if (*a*) the levy is upon property exempt from levy under section 6334, or (*b*) the levy is upon property in which the taxpayer had no interest at the time the lien arose or thereafter, or (*c*) the levy is upon property with respect to which such person is a purchaser against whom the lien is invalid under section 6323 or 6324 (a)(2) or (b), or (*d*) the levy or sale pursuant to levy will or does effectively destroy or otherwise irreparably injure such person's interest in the property which is senior to the Federal tax lien. A levy may be wrongful against a holder of a senior lien upon the taxpayer's property under certain circumstances although legal rights to enforce his interest survive the levy procedure. For example, the levy may be wrongful against such a person if the property is an obligation which is collected pursuant to the levy rather than sold and nothing thereafter remains for the senior lienholder, or the property levied upon is of such a nature that when it is sold at a public sale the property subject to the senior lien is not available for the senior lienholder as a realistic source for the enforcement of his interest. Some of the factors which should be taken into account in determining whether property remains or will remain a realistic source from which the senior lienholder may realize collection are: (*1*) The nature of the property, (*2*) the number of purchasers, (*3*) the value of each unit sold or to be sold, (*4*) whether, as a direct result of the distraint sale, the costs of realizing collection from the security have or will be so substantially increased as to render the security substantially valueless as a source of collection, and (*5*) whether the property subject to the distraint sale constitutes substantially all of the property available as security for the payment of the indebtedness to the senior lienholder.

(2) *Example*. The provisions of subparagraph (1) of this paragraph (b) may be illustrated by the following example:

*Example*. On April 10, 1972, A makes a $10,000 loan to B which is partially secured by a $5,000 obligation owed to B by C. Under local law, A's security interest in the obligation owed to B by C is protected against a subsequent judgment lien arising out of an unsecured obligation. Thus, under section 6323(h)(1), A's security interest exists as of April 10, 1972, for purposes of determining priorities against a tax lien under section 6323. On April 17, 1972, an assessment of $6,000 is made against B with respect to his delinquent Federal tax liability. Thereafter, notice of lien is filed pursuant to section 6323(f) with respect to B's delinquent tax liability. On July 10, 1972, a notice of levy is served upon C to reach the amount owed by him to B. C pays over the $5,000 obligation in satisfaction of the levy and, under local law, the obligation is discharged as to A. Because the levy effectively destroyed A's senior security interest in the obligation owed to B by C, the levy is wrongful as to A for purposes of section 7426. Under these circumstances, the levy is wrongful with respect to A even if, under local law. A may have a cause of action in contract against B for the $10,000 loan

or may have a cause of action in tort against C for the amount of the $5,000 payment which defeated A's security interest in the obligation owed by C to B.

(3) *Surplus proceeds*. If the court determines that the interest or lien of any party to an action under section 7426 was transferred to the proceeds of a sale of the property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale. The term ''surplus proceeds'' means those proceeds realized on a sale of property remaining after application of the provisions of section 6342(a).

(4) *Substituted sale proceeds*. If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) *Effective date*. Paragraph (a)(1) of this section is effective as of December 23, 1993.

[T.D. 7305, 39 FR 9951, Mar. 15, 1974, as amended by T.D. 8541, 59 FR 26601, May 23, 1994]

### § 301.7426–2 Recovery of damages in certain cases.

(a) *In general*. In addition to remedies related to wrongful levy set forth in § 301.7426–1(b), if a district court of the United States finds in any action brought under section 7426 that any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregarded any provision of this title, the United States shall be liable to the plaintiff for damages. The plaintiff has a duty to mitigate damages. The total amount of damages recoverable under this section is the lesser of $1,000,000 ($100,000 in the case of negligence), or the sum of—

(1) Actual, direct economic damages as defined in § 301.7433–1(b) sustained as a proximate result of the reckless, intentional, or negligent actions of the officer or employee, reduced by the amount of any damages awarded under § 301.7426–1(b); and

(2) Costs of the action as defined in § 301.7433–1(c).

(b) *Administrative remedies must be exhausted*. The court may not award a judgment for damages under paragraph (a) of this section unless the court determines that the plaintiff has filed an administrative claim pursuant to paragraph (d) of this section, and has satisfied the requirements of paragraph (c) of this section.

(c) *No request for damages in a district court of the United States prior to filing an administrative claim*. (1) Except as provided in paragraph (c)(2) of this section, no request for damages under paragraph (a) of this section shall be maintained in any district court of the United States before the earlier of the following dates—

(i) The date the decision is rendered on a claim filed in accordance with paragraph (d) of this section; or

(ii) The date that is six months after the date an administrative claim is filed in accordance with paragraph (d) of this section.

(2) If an administrative claim is filed in accordance with paragraph (d) of this section during the last six months of the period of limitations described in paragraph (f) of this section, the claimant may file an action in a district court of the United States any time after the administrative claim is filed and before the expiration of the period of limitations.

(d) *Procedures for an administrative claim*—(1) *Manner*. An administrative claim for the lesser of $1,000,000 ($100,000 in the case of negligence) or actual, direct economic damages as defined in § 301.7433–1(b) shall be sent in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides.

(2) *Form*. The administrative claim shall include—

(i) The name, taxpayer identification number, current address and current home and work telephone numbers (indicating any convenient times to be contacted) of the person making the claim;

(ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the damages incurred by the claimant filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the claimant or duly authorized representative.

(3) *Duly authorized representative.* For purposes of this paragraph (d), a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the claimant before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed to the claimant.

(e) *No liability for damages for any sum in excess of the dollar amount sought in the administrative claim. See* § 301.7433–1(f).

(f) *Period of limitations*—(1) *Time for filing.* A civil action under paragraph (a) of this section must be brought in a district court of the United States within two years after the date the cause of action accrues.

(2) *Right of action accrues.* A cause of action under paragraph (a) of this section accrues when the plaintiff has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(g) *Recovery of costs under section 7430. See* § 301.7433–1(h).

(h) *Effective date.* This section is applicable March 25, 2003.

[T.D. 9050, 68 FR 14319, Mar. 25, 2003]

### § 301.7429–1 Review of jeopardy and termination assessment and jeopardy levy procedures; information to taxpayer.

Not later than 5 days after the day on which an assessment is made under section 6851(a), 6852(a), 6861(a), or 6862, or a levy is made under section 6331(a) without complying with the notice before levy provisions of section 6331(d), the district director shall provide the taxpayer a written statement setting forth the information upon which the district director relies in authorizing such assessment or levy.

[T.D. 8453, 57 FR 58985, Dec. 14, 1992]

### § 301.7429–2 Review of jeopardy and termination assessment and jeopardy levy procedures.

(a) *Request for administrative review.* Any request for the review of a jeopardy or termination assessment or jeopardy levy provided for by section 7429(a)(2) shall be filed with the district director within 30 days after the statement described in § 301.7429–1 is given to the taxpayer. However, if no statement is given within the 5 day period described in § 301.7429–1, any request for review of the jeopardy or termination assessment or jeopardy levy shall be filed within 35 days after the date such assessment or levy is made. Such request shall be in writing, shall state fully the reasons for the request, and shall be supported by such evidence as will enable the district director to make the redetermination described in section 7429(a)(3).

(b) *Administrative review.* In determining whether the assessment is reasonable and the amount assessed is appropriate, or whether the jeopardy levy is reasonable, the district director shall take into account not only information available at the time the assessment or jeopardy levy is made but also information which subsequently becomes available.

(c) *Abatement of assessment.* For rules relating to the abatement of assessments made under sections 6851 and 6861 see §§ 301.6861–1(e), 301.6861–1(f) and 1.6851–1(d) of this chapter.

[T.D. 8453, 57 FR 58985, Dec. 14, 1992]

### § 301.7429–3 Review of jeopardy and termination assessment and jeopardy levy procedures; judicial action.

(a) *Time for bringing judicial action.* An action for judicial review described in section 7429(b) may be instituted by the taxpayer during the period beginning on the earlier of—

(1) The date the district director notifies the taxpayer of the determination described in section 7429(a)(3) and ending on the 90th day thereafter; or

(2) The 16th day after the request described in section 7429(a)(2) was made

by the taxpayer and ending on the 90th day thereafter.

(b) *Extension of period for judicial review*. The United States Government may not by itself seek an extension of the 20 day period described in section 7429(b)(3), but it may join with the taxpayer in seeking such an extension.

(c) *Jurisdiction for determination*.—In general, the United States district court will have exclusive jurisdiction over any civil action for a determination described in section 7429(b). However, if a petition for a redetermination of a deficiency has been timely filed with the Tax Court prior to the making of an assessment or levy that is subject to the section 7429 review procedures, and one or more of the taxes and tax periods before the Tax Court as a result of the petition is also included in the written statement that was provided to the taxpayer, then the Tax Court will have jurisdiction concurrent with the district courts over any civil action for a judicial determination with respect to all the taxes and tax periods included in the written statement. In all other cases, the appropriate United States district court continues to have exclusive jurisdiction over such an action.

[T.D. 8453, 57 FR 58985, Dec. 14, 1992]

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*§ 301.7430–6 Effective date.*

[T.D. 8542, 59 FR 29360, June 7, 1994, as amended by T.D. 8725, 62 FR 39118, July 22, 1997]

## § 301.7430–1 Exhaustion of administrative remedies.

(a) *In general.* Section 7430(b)(1) provides that a court shall not award reasonable litigation costs in any civil tax proceeding under section 7430(a) unless the court determines that the prevailing party has exhausted the administrative remedies available to the party within the Internal Revenue Service. This section sets forth the circumstances in which such administrative remedies shall be deemed to have been exhausted.

(b) *Requirements*—(1) *In general.* A party has not exhausted the administrative remedies available within the Internal Revenue Service with respect to any tax matter for which an Appeals office conference is available under §§ 601.105 and 601.106 of this chapter (other than a tax matter described in paragraph (c) of this section) unless—

(i) The party, prior to filing a petition in the Tax Court or a civil action for refund in a court of the United States (including the Court of Federal Claims), participates, either in person or through a qualified representative described in § 601.502 of this chapter, in an Appeals office conference; or

(ii) If no Appeals office conference is granted, the party, prior to the issuance of a statutory notice in the case of a petition in the Tax Court or the issuance of a notice of disallowance in the case of a civil action for refund in a court of the United States (including the Court of Federal Claims)—

(A) Requests an Appeals office conference in accordance with §§ 601.105 and 601.106 of this chapter; and

(B) Files a written protest if a written protest is required to obtain an Appeals office conference.

(2) *Participates.* For purposes of this section, a party or qualified representative of the party described in § 601.502 of this chapter participates in an Appeals office conference if the party or qualified representative discloses to the Appeals office all relevant information regarding the party's tax matter to the extent such information and its relevance were known or should have been known to the party or qualified representative at the time of such conference.

(3) *Tax matter.* For purposes of this section, ''tax matter'' means a matter in connection with the determination, collection or refund of any tax, interest, penalty, addition to tax or additional amount under the Internal Revenue Code.

(4) *Failure to agree to extension of time for assessments.* Any failure by the prevailing party to agree to an extension of the time for the assessment of any tax will not be taken into account for purposes of determining whether the prevailing party has exhausted the administrative remedies available to the party within the Internal Revenue Service.

(c) *Revocation of a determination that an organization is described in section 501(c)(3).* A party has not exhausted the administrative remedies available within the Internal Revenue Service with respect to a revocation of a determination that it is an organization described in section 501(c)(3) unless, prior to filing a declaratory judgment action under section 7428, the party has exhausted its administrative remedies in accordance with section 7428, and any regulations, rules, and revenue procedures thereunder.

(d) *Actions involving summonses, levies, liens, jeopardy and termination assessments, etc.* (1) A party has not exhausted the administrative remedies available within the Internal Revenue Service with respect to a matter other than one to which paragraph (b) or (c) of this section applies (including summonses, levies, liens, and jeopardy and

termination assessments) unless, prior to filing an action in a court of the United States (including the Tax Court and the Court of Federal Claims)—

(i) The party submits to the district director of the district having jurisdiction over the dispute a written claim for relief reciting facts and circumstances sufficient to show the nature of the relief requested and that the party is entitled to such relief; and

(ii) The district director has denied the claim for relief in writing or failed to act on the claim within a reasonable period after such claim is received by the district director.

(2) For purposes of this paragraph (d)(2), a reasonable period is—

(i) The 5-day period preceding the filing of a petition to quash an administrative summons issued under section 7609;

(ii) The 5-day period preceding the filing of a wrongful levy action in which a demand for the return of property is made;

(iii) The period expressly provided for administrative review of the party's claim by an applicable provision of the Internal Revenue Code that expressly provides for the pursuit of administrative remedies (such as the 16-day period provided under section 7429(b)(1)(B) relating to review of jeopardy assessment procedures); or

(iv) The 60-day period following receipt of the claim for relief in all other cases.

(e) *Actions involving willful violations of the automatic stay under section 362 or the discharge provisions under section 524 of the Bankruptcy Code*—(1) *Section 7433 claims.* A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code or the discharge provisions under section 524 of the Bankruptcy Code unless it files an administrative claim for damages or for relief from a violation of section 362 or 524 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay or discharge violation was filed pursuant to § 301.7433–2(e) and satisfies the other conditions set forth in § 301.7433–2(d) prior to filing a petition under section 7433.

(2) *Section 362(h) claims.* A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code unless it files an administrative claim for relief from a violation of section 362 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay violation was filed pursuant to § 301.7433–2(e) and satisfies the other conditions set forth in § 301.7433–2(d) prior to filing a petition under section 362(h) of the Bankruptcy Code.

(f) *Exception to requirement that party pursue administrative remedies.* If the conditions set forth in paragraph (f)(1), (f)(2), (f)(3), or (f)(4) of this section are satisfied, a party's administrative remedies within the Internal Revenue Service shall be deemed to have been exhausted for purposes of section 7430.

(1) The Internal Revenue Service notifies the party in writing that the pursuit of administrative remedies in accordance with paragraphs (b), (c), and (d) of this section is unnecessary.

(2) In the case of a petition in the Tax Court—

(i) The party did not receive a notice of proposed deficiency (30-day letter) prior to the issuance of the statutory notice and the failure to receive such notice was not due to actions of the party (such as a failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); and

(ii) The party does not refuse to participate in an Appeals office conference while the case is in docketed status.

(3) In the case of a civil action for refund involving a tax matter other than a tax matter described in paragraph (e)(4) of this section, the party—

(i) Participates in an Appeals office conference with respect to the tax matter prior to issuance of a statutory notice of deficiency with respect to such tax matter; or

(ii) Did not receive written notification that an Appeals office conference

was available prior to issuance of a notice of disallowance and the failure to receive such a notification was not due to the actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); or

(iii) Did not receive either written or oral notification that an Appeals office conference had been granted within six months from the date of the filing of the claim for refund and the failure to receive such notice was not due to actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter).

(4) In the case of a civil action for refund involving a tax matter under sections 6703 or 6694—

(i) The party did not receive a notice of proposed disallowance prior to issuance of a notice of disallowance and the failure to receive such notice was not due to actions of the party (such as the failure to supply requested information or a current mailing address to the district director or service center having jurisdiction over the tax matter); or

(ii) During the six-month period following the day on which the party's claim for refund is filed, the party's claim for refund is not denied, and the Internal Revenue Service has failed to process the claim with due diligence.

(g) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* Taxpayer A exchanges property held for investment for similar property and claims that the gain on the exchange is not recognized under section 1031. The Internal Revenue Service conducts a field examination and determines that there has not been a like-kind exchange. No agreement is reached on the matter and a notice of proposed deficiency (30-day letter) is sent to A. A does not file a request for an Appeals office conference. A pays the amount of the proposed deficiency and files a claim for refund. A notice of proposed disallowance is issued by the Internal Revenue Service. A does not request an Appeals office conference and, instead, files a civil action for refund in a United States District Court. A has not exhausted the administrative remedies available within the Internal Revenue Service.

*Example 2.* Assume the same facts as in *Example 1* except that, after receiving the notice of proposed deficiency (30-day letter), A files a request for an Appeals office conference. No agreement is reached at the conference. A pays the amount of the proposed deficiency and files a claim for refund. A notice of proposed disallowance is issued by the Internal Revenue Service. A does not request an Appeals office conference and files a civil action for refund in a United States District Court. A has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 3.* Assume the same facts as in *Example 1* except A first requests an Appeals office conference after A's receipt of the notice of proposed disallowance. A is granted an Appeals office conference and A participates in such conference. A has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 4.* Taxpayer B receives a notice of proposed deficiency (30-day letter) after completion of a field examination. B provided to the Internal Revenue Service during the examination all relevant information under the taxpayer's control and all relevant legal arguments supporting the taxpayer's position. B properly requests an Appeals office conference. The Appeals office, to obtain an additional period of time to consider the tax matter, requests that B sign Form 872 to extend the time for an assessment of tax, but B declines. Appeals then denies the request for a conference and issues a notice of deficiency. B has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 5.* Taxpayer C receives a notice of proposed deficiency (30-day letter) and a written statement that C need not file a written protest or request an Appeals office conference since a conference will not be granted. C files a petition in the Tax Court after receiving the statutory notice of deficiency. C's administrative remedies within the Internal Revenue Service are deemed to have been exhausted.

*Example 6.* On January 2, the Internal Revenue Service serves a summons issued under section 7609 on third-party recordkeeper D to produce records of taxpayer E. On January 5, notice of the summons is given to E. The last day on which E may file a petition in a court of the United States to quash the summons is January 25. Thereafter, E files a written claim for relief with the district director having jurisdiction over the matter together with a copy of the summons. The claim and copy are received by the district director on January 20. On January 25, E files a petition to quash the summons. E has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 7.* A notice of Federal tax lien is filed in County M on March 3, in the name of

F. On April 2, F pays the entire liability thereby satisfying the lien. On May 2, F files a written claim with the district director having jurisdiction over the tax matter demanding a certificate of release of lien. Thereafter, F provides the district director with a copy of the notice of Federal tax lien and a copy of the canceled check in satisfaction of the lien, which are received by the district director on May 15. F's claim is deemed to have been filed on May 15. Accordingly, F must wait until after July 14 (60 days following the filing of the claim for relief on May 15) to commence an action, in order to have exhausted the administrative remedies available within the Internal Revenue Service.

*Example 8*. A revenue officer seizes an automobile to effect collection of G's liability on January 10. On January 22, H submits a written claim to the district director having jurisdiction over the tax matter claiming that H purchased the automobile from G for an adequate consideration before the tax lien against G arose, and demands immediate return of the automobile. A copy of the title certificate and H's canceled check are submitted with the claim. The claim is received by the district director on January 25. On January 30, H brings a wrongful levy action. H has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 9*. The Internal Revenue Service issues a revenue ruling which holds that ear piercing does not affect a function or structure of the body within the meaning of section 213 and therefore is not deductible. Taxpayer I deducts the costs of ear piercing and, following an examination, receives a notice of proposed deficiency (30-day letter) disallowing the treatment of such costs. Because of the revenue ruling, I believes a conference would not aid in the resolution of the tax dispute. Accordingly, I does not request an Appeals office conference. After receiving a statutory notice of deficiency, I files a petition in the Tax Court. I has not exhausted the administrative remedies available within the Internal Revenue Service. The issuance of a revenue ruling covering the same fact situation but taking a contrary position does not constitute notification by the Internal Revenue Service to I that the pursuit of administrative remedies is unnecessary. Similarly, the issuance to I of a private letter ruling or technical advice does not constitute notification by the Internal Revenue Service that the pursuit of administrative remedies is unnecessary.

*Example 10*. Taxpayer J is assessed a penalty under section 6701 for aiding in the understatement of the tax liability of another person. J pays 15% of the penalty in accordance with section 6703 and files a claim for refund on June 15. J is not issued a notice of proposed disallowance and thus cannot participate in an Appeals office conference within six months of the filing of the claim for refund. J brings an action on December 23. J has exhausted the administrative remedies available within the Internal Revenue Service.

*Example 11*. Taxpayer K receives a notice of proposed deficiency (30-day letter) and neither requests nor participates in an Appeals office conference. The Service then issues a statutory notice of deficiency (90-day letter). Upon receiving the statutory notice, and after filing a petition with the Tax Court, K requests an Appeals office conference. K has not exhausted the administrative remedies available within the Internal Revenue Service because the request for an Appeals office conference was made after the issuance of the statutory notice.

(h) *Effective date*. This section applies to court proceedings described in section 7430 filed in a court of the United States (including the Tax Court) after May 7, 1992.

[T.D. 8543, 59 FR 29357, June 7, 1994, as amended by T.D. 8725, 62 FR 39118, July 22, 1997; T.D. 9050, 68 FR 14319, Mar. 25, 2003; T.D. 9050, 68 FR 16351, Apr. 3, 2003]

### § 301.7430–2 Requirements and procedures for recovery of reasonable administrative costs.

(a) *Introduction*. Section 7430(a)(1) provides for the recovery, under certain circumstances, of reasonable administrative costs incurred in connection with an administrative proceeding before the Internal Revenue Service. Paragraph (b) of this section lists the requirements that a taxpayer must meet to be entitled to an award of reasonable administrative costs.

(b) *Requirements for recovery*—(1) *Determination by the Internal Revenue Service*. The Internal Revenue Service will grant a taxpayer's request for recovery of reasonable administrative costs incurred in connection with an administrative proceeding under section 7430 and this section only if—

(i) *Jurisdiction*. The underlying substantive issues or the issue of reasonable administrative costs are not, and have never been, before any court of the United States (including the Tax Court or United States Court of Federal Claims) with jurisdiction over those issues;

(ii) *Administrative proceeding*. The costs were incurred in connection with

an administrative proceeding as defined in § 301.7430–3(a);

(iii) *Administrative proceeding date.* The costs were incurred on or after the administrative proceeding date as defined in § 301.7430–3(c);

(iv) *Reasonable administrative costs.* The costs were reasonable administrative costs as defined in § 301.7430–4;

(v) *Prevailing party.* The taxpayer is a prevailing party as defined in § 301.7430–5;

(vi) *Not unreasonably protracted.* The administrative proceeding was not unreasonably protracted by the taxpayer as discussed in paragraph (d) of this section; and

(vii) *Procedural requirements.* The taxpayer follows the procedures set forth in paragraph (c) of this section.

(2) *Determination by court.* Although the Internal Revenue Service will not grant a request for reasonable administrative costs where the requirements of paragraph (b)(1)(i) of this section are not met, a taxpayer may file a claim for reasonable administrative costs with the court with jurisdiction over the judicial proceeding. The court may award the taxpayer reasonable administrative costs under section 7430(a). Under section 7430(c)(4)(C)(ii), where the final determination with respect to the tax, interest, or penalty at issue is made by a court, the court determines whether the taxpayer qualifies as a prevailing party. Thus, where the requirements of paragraph (b)(1)(i) of this section are not met, the taxpayer's only possibility of obtaining an award of reasonable administrative costs is to obtain an award of such costs from the court. In the event the court awards reasonable administrative costs, it may also award litigation costs for the reasonable costs of pursuing the claim for reasonable administrative costs, provided the requirements under section 7430 regarding an award of reasonable administrative costs are satisfied with respect to such costs. A claim filed with the court should be made in accordance with the rules of the court.

(c) *Procedure for recovering reasonable administrative costs*—(1) *In general.* The Internal Revenue Service will not award administrative costs under section 7430 unless the taxpayer files a written request to recover reasonable administrative costs in accordance with the provisions of this section.

(2) *Where request must be filed.* A request required by paragraph (c)(1) of this section must be filed with the Internal Revenue Service personnel who have jurisdiction over the tax matter underlying the claim for the costs, except that requests with respect to administrative proceedings defined by § 301.7430–8(c) should be made to the Chief, Local Insolvency Unit. However, if those persons are unknown to the taxpayer making the request, the taxpayer may send the request to the Internal Revenue Service office that considered the underlying matter.

(3) *Contents of request.* The request must be in writing and must contain the following statements, affidavits, documentation, and information with regard to the taxpayer's administrative proceeding—

(i) *Statements.* (A) A statement that the underlying substantive issues or the issue of reasonable administrative costs are not, and have never been, before any court of the United States (including the Tax Court or United States Court of Federal Claims) with jurisdiction over those issues;

(B) A clear and concise statement of the reasons why the taxpayer alleges that the position of the Internal Revenue Service in the administrative proceeding was not substantially justified. For administrative proceedings commenced after July 30, 1996, if the taxpayer alleges that the Internal Revenue Service did not follow any applicable published guidance, the statement must identify all applicable published guidance that the taxpayer alleges that the Internal Revenue Service did not follow. For purposes of this paragraph (c)(3)(i)(B), the term applicable published guidance means final or temporary regulations, revenue rulings, revenue procedures, information releases, notices, announcements, and, if issued to the taxpayer, private letter rulings, technical advice memoranda, and determination letters. Also, for purposes of this paragraph (c)(3)(i)(B), the term administrative proceeding includes only those administrative proceedings or portions of administrative proceedings occurring on or after the

administrative proceeding date as defined in § 301.7430–3(c);

(C) A statement sufficient to demonstrate that the taxpayer has substantially prevailed as to the amount in controversy or with respect to the most significant issue or set of issues presented in the proceeding;

(D) A statement that the taxpayer has not unreasonably protracted the portion of the administrative proceeding for which the taxpayer is requesting costs; and

(E) A statement supported by a detailed affidavit executed by the taxpayer or the taxpayer's representative that sets forth the nature and amount of each specific item of reasonable administrative costs for which the taxpayer is seeking recovery.

(ii) *Affidavit or affidavits.* (A) An affidavit executed by the taxpayer stating that the taxpayer meets the net worth and size limitations of § 301.7430–5(f);

(B) An affidavit supporting the statement described in paragraph (c)(3)(i)(E) of this section; and

(C) In the case of administrative proceedings commenced after July 30, 1996, if more than $110 per hour, as adjusted by an increase in the cost of living as set forth in § 301.7430–4(b)(3), is claimed for the fees of a representative in connection with the administrative proceeding, then an affidavit that specialized skills and distinctive knowledge as described in that section were necessary in the representation of the taxpayer in the proceeding and that there is a limited availability of representatives possessing such skills and knowledge as described in that section, or an affidavit that another special factor is applicable.

(iii) *Documentation and information.* (A) A copy of the billing records of the representative for the requested fees; and

(B) An address at which the taxpayer wishes to receive notice of the determination of the Internal Revenue Service with regard to the request for reasonable administrative costs.

(4) *Form of Request.* No specific form is required for the request other than one which satisfies the requirements of paragraph (c)(3) of this section. Where practicable the required statements may be included in a single document. Similarly, where practicable, the required affidavits may be combined in a single affidavit to the extent they are to be executed by the same person.

(5) *Period for requesting costs from the Internal Revenue Service.* To recover reasonable administrative costs pursuant to section 7430 and this section, the taxpayer must file a request for costs no later than 90 days after the date the final decision of the Internal Revenue Service with respect to all tax, additions to tax and penalties at issue in the administrative proceeding is mailed, or otherwise furnished, to the taxpayer. The final decision of the Internal Revenue Service for purposes of this section is the document which resolves the tax liability of the taxpayer with regard to all tax, additions to tax and penalties at issue in the administrative proceeding (such as a Form 870 or closing agreement), or a notice of assessment for that liability (such as the notice and demand under section 6303), whichever is earlier mailed, or otherwise furnished, to the taxpayer. For purposes of this section, if the 90th day falls on a Saturday, Sunday, or a legal holiday, the 90-day period shall end on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. The term legal holiday means a legal holiday in the District of Columbia. If the request for costs is to be filed with the Internal Revenue Service at an office of the Internal Revenue Service located outside the District of Columbia but within an internal revenue district, the term legal holiday also means a Statewide legal holiday in the State where such office is located.

(6) *Notice.* The Internal Revenue Service is authorized, but not required, to notify the taxpayer of its decision to grant or deny (in whole or in part) an award for reasonable administrative costs under section 7430 and this section by certified mail or registered mail. If the Internal Revenue Service does not respond on the merits to a request by the taxpayer for an award of reasonable administrative costs filed under paragraph (c)(1) of this section within 6 months after such request is filed, the Internal Revenue Service's failure to respond may be considered

by the taxpayer as a decision of the Internal Revenue Service denying an award for reasonable administrative costs.

(7) *Appeal to Tax Court.* A taxpayer may appeal a decision by the Internal Revenue Service denying (in whole or in part) a request for reasonable administrative costs under section 7430 and this section by filing a petition for reasonable administrative costs with the Tax Court. The petition must be in accordance with the Tax Court's Rules of Practice and Procedure and must be filed with the Tax Court after the Internal Revenue Service denies (in whole or in part) the taxpayer's request for reasonable administrative costs.

(d) *Unreasonable protraction of administrative proceeding.* An award of reasonable administrative costs will not be made where the taxpayer unreasonably protracted the administrative proceeding. However, a taxpayer that unreasonably protracted only a portion of the administrative proceeding, but not other portions of the administrative proceeding, may recover reasonable administrative costs for the portion(s) of the administrative proceeding that the taxpayer did not unreasonably protract, if the requirements of paragraph (b)(1) of this section are otherwise satisfied.

(e) *Examples.* The provisions of this section are illustrated by the following examples:

*Example 1.* Taxpayer A receives a notice of proposed deficiency (30-day letter). A requests and is granted Appeals office consideration. Appeals requests that A submit certain documents as substantiation for the tax matters at issue. Although A complies with this request, the information is misdirected and not considered by Appeals. Appeals then issues a notice of deficiency. A does not file a petition with the Tax Court. After receiving the notice of deficiency, A convinces Appeals that the notice of deficiency is incorrect and that A owes no tax. Appeals then closes the case showing a zero deficiency and mails A a notice to this effect. Assuming that the other requirements of this section are satisfied, A may recover reasonable administrative costs incurred after the date of the notice of deficiency (the administrative proceeding date). To recover these costs, A must file a request for costs with the Appeals office personnel who settled A's tax matter, or if that person is unknown to A, with the District Director of the district which considered the underlying matter, within 90 days after the date of mailing of the Office of Appeals' final decision that A owes no tax.

*Example 2.* Assume the same facts as in *Example 1,* except that after receipt of the notice of deficiency, A meets with an Appeals officer, but no agreement is reached on the tax matters at issue. A then files a petition with the Tax Court and prevails. Since the underlying tax issues have been determined by a court, the Internal Revenue Service will not grant a request for recovery of the reasonable administrative costs incurred by A. To recover reasonable administrative costs, A must file a claim with the Tax Court as prescribed under the Tax Court's Rules of Practice and Procedure.

[T.D. 8542, 59 FR 29360, June 7, 1994, as amended by T.D. 8725, 62 FR 39118, July 22, 1997; T.D. 9050, 68 FR 14320, Mar. 25, 2003]

### § 301.7430–3 Administrative proceeding and administrative proceeding date.

(a) *Administrative proceeding.* For purposes of section 7430, an administrative proceeding generally means any procedure or other action before the Internal Revenue Service that is commenced after November 10, 1988. However, an administrative proceeding does not include—

(1) Proceedings involving matters of general application, including hearings on regulations, comments on forms, or proceedings involving revenue rulings or revenue procedures;

(2) Proceedings involving requests for private letter rulings or similar determinations;

(3) Proceedings involving technical advice memoranda, except those submitted after the administrative proceeding date (as defined in paragraph (c) of this section); and

(4) Proceedings in connection with collection actions (as defined in paragraph (b) of this section), including proceedings under section 7432 or 7433, except proceedings brought under section 7433(e) and § 301.7433–2 or proceedings otherwise described in § 301.7430–8(c). See § 301.7430–8.

(b) *Collection action.* A collection action generally includes any action taken by the Internal Revenue Service

to collect a tax (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) or any action taken by a taxpayer in response to the Internal Revenue Service's act or failure to act in connection with the collection of a tax (including any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax). For example, a collection action for purposes of section 7430 and this section includes any action taken by the Internal Revenue Service under chapter 64 of subtitle F to collect a tax. Collection actions also include those actions taken by a taxpayer to remedy the Internal Revenue Service's failure to release a lien under section 6325 and to remedy any unauthorized collection action as defined by section 7433, except those collection actions described by section 7433(e). However, an action or procedure directly relating to a claim for refund filed with the Service Center's Collection Branch or District Director's Collection Division after payment of an assessed tax is not a collection action.

(c) *Administrative proceeding date*—(1) *General rule*. For purposes of section 7430 and the regulations thereunder, the term administrative proceeding date means the earlier of—

(i) The date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; or

(ii) The date of the notice of deficiency.

(2) *Notice of the decision of the Internal Revenue Service Office of Appeals*. For purposes of section 7430 and the regulations thereunder, a notice of the decision of the Internal Revenue Service Office of Appeals is the final written document, mailed or delivered to the taxpayer, that is signed by an individual in the Office of Appeals who has been delegated the authority to settle the dispute on behalf of the Commissioner, and states or indicates that the notice is the final determination of the entire case. A notice of claim disallowance issued by the Office of Appeals is a notice of the decision of the Internal Revenue Service Office of Appeals. Solely for purposes of determining the administrative proceeding date, a notice of deficiency issued by the Office of Appeals is not a notice of the decision of the Internal Revenue Service Office of Appeals.

(3) *Notice of deficiency*. A notice of deficiency is a notice described in section 6212(a), including a notice rescinded pursuant to section 6212(d). For purposes of determining reasonable administrative costs under section 7430 and the regulations thereunder, a notice of final partnership administrative adjustment described in section 6223(a)(2) will be treated as a notice of deficiency. A notice of final S corporation administrative adjustment issued pursuant to section 6223(a)(2) as made applicable to subchapter S items by section 6244 will also be treated as a notice of deficiency.

(d) *Examples*. The provisions of this section are illustrated by the following examples:

*Example 1*. Taxpayer A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the conference, an agreement is reached on the tax matters at issue. A cannot recover any costs because they were not incurred on or after the administrative proceeding date, which is the earlier of the date of receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or the date of the notice of deficiency.

*Example 2*. Taxpayer B receives a notice of proposed deficiency (30-day letter). B pays the amount of the proposed deficiency and files a claim for refund. B's claim is disallowed and a notice of proposed disallowance is issued by the District Director. B does not request an Appeals office conference and the District Director issues a notice of claim disallowance. B then files suit in a United States District Court. B cannot recover reasonable administrative costs because, although the District Director issued a notice of claim disallowance, the Internal Revenue Service did not issue either a notice of decision of the Internal Revenue Service Office of Appeals or a notice of deficiency.

*Example 3*. Assume the same facts as in *Example 2*, except that after B files a claim for refund and receives the notice of proposed disallowance, B requests and is granted Appeals office consideration. No agreement is reached with Appeals and the Office of Appeals issues a notice of claim disallowance. B does not file suit in District Court but instead contacts the Appeals office to attempt to reverse the decision. B convinces the Appeals officer that the notice of claim disallowance is in error. The Appeals officer

then abates the assessment. Because a notice of claim disallowance issued by Appeals is a notice of the decision of the Internal Revenue Service Office of Appeals, B may recover reasonable administrative costs incurred on or after the receipt of the notice of claim disallowance (the administrative proceeding date), but only if the other requirements of section 7430 and the regulations thereunder are satisfied. B cannot recover the costs incurred prior to receipt of the notice of claim disallowance because they were incurred before the administrative proceeding date.

*Example 4.* Taxpayer C receives a notice of proposed deficiency (30-day letter). C files a request for and is granted an Appeals office conference. At the Appeals conference no agreement is reached on the tax matters at issue. The Office of Appeals then issues a notice of deficiency. Upon receiving the notice of deficiency C does not file a petition with the Tax Court. Instead, C pays the deficiency and files a claim for refund. The claim for refund is considered by the Internal Revenue Service and the District Director issues a notice of proposed disallowance. C requests and is granted Appeals office consideration. C convinces Appeals that C's claim is correct and Appeals allows C's claim. C may recover reasonable administrative costs incurred on or after the date of the notice of deficiency (the administrative proceeding date), but only if the other requirements of section 7430 and the regulations thereunder are satisfied.

*Example 5.* Taxpayer D receives a District Director's Collection Division (Collection) proposed assessment of trust fund taxes (Trust Fund Recovery Penalty) pursuant to section 6672. D requests and is granted Appeals office consideration. Upon consideration, Appeals upholds D's position. D cannot recover reasonable administrative costs because the costs were not incurred on or after the administrative proceeding date.

*Example 6.* Taxpayer E files an individual income tax return showing a balance due. No payment is made with the return and the Internal Revenue Service assesses the amount shown on the return. The Internal Revenue Service issues a notice and demand for tax pursuant to section 6303. E contacts the Collection Division (Collection) regarding E's outstanding liability. No agreement is reached with respect to the timing of E's payment, and Collection issues a notice of intent to levy pursuant to section 6331(d). Prior to the levy, E enters into an installment agreement with Collection. The costs that E incurred in connection with the notice and demand were not incurred in an administrative proceeding, but rather in a collection action. Accordingly, E may not recover those costs as reasonable administrative costs under section 7430 and the regulations thereunder.

*Example 7.* Taxpayer F receives a District Director's Collection Division (Collection) proposed assessment of trust fund taxes (Trust Fund Recovery Penalty) pursuant to section 6672. F requests and is granted Appeals office consideration. Appeals considers the issues and decides to uphold Collection's recommended assessment. Appeals notifies F of this decision in writing. Collection then assesses the tax. Pursuant to section 6672(b), within 30 days after the notice and demand is made, F pays the minimum amount required to commence a court proceeding, files a claim for refund, and furnishes the required bond. Collection then considers and disallows the claim. Appeals then reconsiders the claim and reverses its original position, thus upholding F's position. Appeals then abates the assessment. F may recover reasonable administrative costs incurred after the receipt of the original decision of Appeals (the administrative proceeding date) that Appeals was upholding Collection's recommended assessment, but only if the other requirements of section 7430 and the regulations thereunder are satisfied. F cannot recover costs that are attributable to any procedure or other action before Collection prior to filing F's administrative claim for refund.

[T.D. 8542, 59 FR 29362, June 7, 1994, as amended by T.D. 9050, 68 FR 14320, Mar. 25, 2003]

### § 301.7430–4 Reasonable administrative costs.

(a) *In general.* For purposes of section 7430 and the regulations thereunder, reasonable administrative costs are any costs described in paragraph (b) of this section that are incurred in connection with an administrative proceeding (as defined in § 301.7430–3(a)) and incurred on or after the administrative proceeding date (as defined in § 301.7430–3(c)).

(b) *Costs described*—(1) *In general.* The costs described in this paragraph are the reasonable and necessary amount of costs incurred by the taxpayer to present the taxpayer's position with respect to the merits of the tax controversy or the recovery of reasonable administrative costs. These costs include—

(i) Any administrative fees or similar charges imposed by the Internal Revenue Service;

(ii) Reasonable expenses of expert witnesses;

(iii) Reasonable costs of any study, analysis, engineering report, test or

project that is necessary for, and incurred in preparation of, the taxpayer's case; and

(iv) Reasonable fees paid or incurred for the services of a representative (as defined in paragraph (b)(2) of this section) in connection with the administrative proceeding.

(2) *Representative and specially qualified representative*—(i) *Representative*. A representative is a person compensated for services rendered in connection with the administrative proceeding, who is authorized to practice before the Internal Revenue Service or the Tax Court.

(ii) *Specially qualified representative*. For purposes of paragraphs (b)(3)(iii) and (c)(2)(ii) of this section, a specially qualified representative is a representative (as defined in paragraph (b)(2)(i) of this section) possessing a distinctive knowledge or a unique and specialized skill that is necessary to adequately represent the taxpayer in the proceeding. Examples of a unique and specialized skill or distinctive knowledge would be an identifiable practice specialty such as patent law or knowledge of a foreign law or language where such specialty or knowledge is necessary to adequately represent the taxpayer in the proceeding. For purposes of this paragraph, neither knowledge of tax law nor experience in representing taxpayers before the Internal Revenue Service is considered distinctive knowledge or a unique and specialized skill. An extraordinary level of general representational knowledge and ability that is useful in all proceedings is not considered, in and of itself, distinctive knowledge or a unique and specialized skill. Specially qualified representatives also do not include those who have a distinctive knowledge of the underlying subject matter of the controversy in circumstances where such distinctive knowledge could reasonably be supplied through the use of an expert, or could readily be obtained through literature pertaining to the subject.

(3) *Limitation on fees for a representative*—(i) *In general*. Except as otherwise provided in this section, fees described in paragraph (b)(1)(iv) of this section that are recoverable under section 7430 and the regulations thereunder as reasonable administrative costs may not exceed, in the case of proceedings commenced after July 30, 1996, $110 per hour increased by a cost of living adjustment (and if appropriate, a special factor adjustment).

(ii) *Cost of living adjustment*. The Internal Revenue Service will make a cost of living adjustment to the $110 per hour limitation for fees incurred in any calendar year beginning after December 31, 1996. The cost of living adjustment will be an amount equal to $110 multiplied by the cost of living adjustment determined under section 1(f)(3) for the calendar year (substituting ''calendar year 1995'' for ''calendar year 1992'' in section 1(f)(3)(B)). If the dollar limitation as adjusted by this cost of living increase is not a multiple of $10, the dollar amount will be rounded to the nearest multiple of $10 (rounding up if the amount is a multiple of $5).

(B) *Percentage adjustment*. For purposes of paragraph (b)(3)(ii)(A) of this section, the base year for determining the cost of living adjustment is the calendar year 1986. The cost of living adjustment for fees incurred in any calendar year subsequent to 1986 is the percentage (if any) by which the yearly average CPI—U for the calendar year immediately prior to the year in which the fees are incurred exceeds the January CPI—U for the calendar year 1986.

(iii) *Special factor adjustment*—(A) *In general*. If the presence of a special factor is demonstrated by the taxpayer, the amount reimbursable is the amount of reasonable fees paid or incurred by the taxpayer in connection with the proceeding for the services of a representative as defined in paragraph (b)(2)(i) of this section.

(B) *Special factor*. A special factor is a factor, other than an increase in the cost of living, which justifies an increase in the $110 per hour limitation of section 7430(c)(1)(B)(iii). The novelty and difficulty of the issues, the undesirability of the case, the work and the ability of counsel, the results obtained, and customary fees and awards in other cases, are factors applicable to a broad spectrum of litigation and do not constitute special factors for the purpose of increasing the $110 per hour limitation. The limited availability of

a specially qualified representative for the proceeding does constitute a special factor justifying an increase in the $110 per hour limitation.

(C) *Limited availability*. Unless disputed by the Internal Revenue Service, limited availability of a specially qualified representative is established by demonstrating that a specially qualified representative for the proceeding is not available at the $110 per hour rate (as adjusted for an increase in the cost of living). Initially, this showing may be made by submission of an affidavit signed by the taxpayer or by the taxpayer's counsel, that in a case similar to the taxpayer's, a specially qualified representative that practices within a reasonable distance from the taxpayer's principal residence or principal office would normally charge a client similar to the taxpayer at a rate in excess of this amount. If the Internal Revenue Service challenges this initial showing, the taxpayer may submit additional evidence to establish the limited availability of a specially qualified representative at the rate specified above.

(D) *Example*. The provisions of this section are illustrated by the following example:

*Example*. Taxpayer A is represented by B, a CPA and attorney with an LL.M. Degree in Taxation with Highest Honors and who regularly handles cases dealing with TEFRA partnership issues. B represents A in an administrative proceeding involving TEFRA partnership issues and subject to the provisions of this section. Assuming the taxpayer qualifies for an award of reasonable administrative costs by meeting the requirements of section 7430, the amount of the award attributable to the fees of B may not exceed the $110 per hour limitation (as adjusted for the cost of living), absent a special factor. Under these facts alone, B is not a specially qualified representative since even extraordinary knowledge of the tax laws does not constitute distinctive knowledge or a unique and specialized skill constituting a special factor.

(c) *Certain costs excluded*—(1) *Costs not incurred in an administrative proceeding*. Costs that are not reasonable administrative costs for purposes of section 7430 include any costs incurred in connection with a proceeding that is not an administrative proceeding within the meaning of § 301.7430–3.

(2) *Costs incurred in an administrative proceeding but not reasonable*—(i) *In general*. Costs incurred in an administrative proceeding that are incurred on or after the administrative proceeding date, and that are otherwise described in paragraph (b) of this section, are not recoverable unless they are reasonable in both nature and amount. For example, costs normally included in the hourly rate of the representative by the custom and usage of the representative's profession, when billed separately, are not recoverable separate and apart from the representative's hourly rate. Such costs typically include costs such as secretarial and overhead expenses. In contrast, costs which are normally billed separately may be reasonable administrative costs that may be recoverable in addition to the representative's hourly rate. Therefore, necessary costs incurred for travel; expedited mail delivery; messenger service; expenses while on travel; long distance telephone calls; and necessary copying fees imposed by the Internal Revenue Service, any court, bank or other third party, when normally billed separately from the representative's hourly rate, may be reasonable administrative costs.

(ii) *Special Rule for Expert Witness' Fees on Issue of Prevailing Market Rates*. Under paragraph (b)(3)(iii)(C) of this section, the taxpayer may initially establish a limited availability of specially qualified representatives for the proceeding by submission of an affidavit signed by the taxpayer or by the taxpayer's representative. The Internal Revenue Service may endeavor to rebut the affidavit submitted on this issue by demonstrating either that a specially qualified representative was not necessary to represent the taxpayer in the proceeding, that the taxpayer's representative is not a specially qualified representative or that the prevailing rate for specially qualified representatives does not exceed $110 per hour (as adjusted for an increase in the cost of living). Unless the Internal Revenue Service endeavors to demonstrate that the prevailing rate for specially qualified representatives does not exceed $110 per hour (as adjusted for an increase in the cost of living), fees for expert witnesses used to

establish prevailing market rates are not included in the term reasonable administrative costs.

(3) *Litigation costs.* Litigation costs are not reasonable administrative costs because they are not incurred in connection with an administrative proceeding. Litigation costs include—

(i) Costs incurred in connection with the preparation and filing of a petition with the United States Tax Court or in connection with the commencement of any other court proceeding; and

(ii) Costs incurred after the filing of a petition with the United States Tax Court or after the commencement of any other court proceeding.

(4) *Examples.* The provisions of this section are illustrated by the following examples:

*Example 1.* Taxpayer A receives a notice of proposed deficiency (30-day letter). A files a request for and is granted an Appeals office conference. At the conference no agreement is reached on the tax matters at issue. The Internal Revenue Service then issues a notice of deficiency. Upon receiving the notice of deficiency, A discontinues A's administrative efforts and files a petition with the Tax Court. A's costs incurred in connection with the preparation and filing of a petition with the Tax Court are litigation costs and not reasonable administrative costs. Furthermore, A's costs incurred before the administrative proceeding date (date of the notice of deficiency as set forth in § 301.7430–3(c)(3)), are not reasonable administrative costs.

*Example 2.* Assume the same facts as in *Example 1* except that after A receives the notice of deficiency, A recontacts Appeals. Again, A's costs incurred before the administrative proceeding date, the date of the notice of deficiency as set forth in § 301.7430–3(c)(3), are not reasonable administrative costs. A's costs incurred in recontacting and working with Appeals after the issuance of the notice of deficiency, and up to and including the time of filing of the petition, are reasonable administrative costs. A's costs incurred in connection with the filing of a petition with the Tax Court are not reasonable administrative costs because those costs are litigation costs. Similarly, A's costs incurred after the filing of the petition are not reasonable administrative costs, as those are litigation costs.

[T.D. 8542, 59 FR 29363, June 7, 1994, as amended by T.D. 8725, 62 FR 39118, July 22, 1997]

### § 301.7430–5 Prevailing party.

(a) *In general.* For purposes of an award of reasonable administrative costs under section 7430 in the case of administrative proceedings commenced after July 30, 1996, a taxpayer is a prevailing party only if—

(1) The position of the Internal Revenue Service was not substantially justified;

(2) The taxpayer substantially prevails as to the amount in controversy or with respect to the most significant issue or set of issues presented; and

(3) The taxpayer satisfies the net worth and size limitations referenced in paragraph (f) of this section.

(b) *Position of the Internal Revenue Service.* The position of the Internal Revenue Service in an administrative proceeding is the position taken by the Internal Revenue Service as of the administrative proceeding date (as defined in § 301.7430–3(c)) or any date thereafter.

(c) *Substantially justified*—(1) *In general.* The position of the Internal Revenue Service is substantially justified if it has a reasonable basis in both fact and law. A significant factor in determining whether the position of the Internal Revenue Service is substantially justified as of a given date is whether, on or before that date, the taxpayer has presented all relevant information under the taxpayer's control and relevant legal arguments supporting the taxpayer's position to the appropriate Internal Revenue Service personnel. The appropriate Internal Revenue Service personnel are personnel responsible for reviewing the information or arguments, or personnel who would transfer the information or arguments in the normal course of procedure and administration to the personnel who are responsible.

(2) *Exception.* If the position of the Internal Revenue Service was substantially justified with respect to some issues in the proceeding and not substantially justified with respect to the remaining issues, any award of reasonable administrative costs to the taxpayer may be limited to only reasonable administrative costs attributable to those issues with respect to which the position of the Internal Revenue Service was not substantially justified. If the position of the Internal Revenue Service was substantially justified for

only a portion of the period of the proceeding and not substantially justified for the remaining portion of the proceeding, any award of reasonable administrative costs to the taxpayer may be limited to only reasonable administrative costs attributable to that portion during which the position of the Internal Revenue Service was not substantially justified. Where an award of reasonable administrative costs is limited to that portion of the administrative proceeding during which the position of the Internal Revenue Service was not substantially justified, whether the position of the Internal Revenue Service was substantially justified is determined as of the date any cost is incurred.

(3) *Presumption*. If the Internal Revenue Service did not follow any applicable published guidance in an administrative proceeding commenced after July 30, 1996, the position of the Internal Revenue Service, on those issues to which the guidance applies and for all periods during which the guidance was not followed, will be presumed not to be substantially justified. This presumption may be rebutted. For purposes of this paragraph (c)(3), the term applicable published guidance means final or temporary regulations, revenue rulings, revenue procedures, information releases, notices, announcements, and, if issued to the taxpayer, private letter rulings, technical advice memoranda, and determination letters (see § 601.601(d)(2) of this chapter). Also, for purposes of this paragraph (c)(3), the term administrative proceeding includes only those administrative proceedings or portions of administrative proceedings occurring on or after the administrative proceeding date as defined in § 301.7430–3(c).

(d) *Amount in controversy*. The amount in controversy shall include the amount in issue as of the administrative proceeding date as increased by any amounts subsequently placed in issue by any party. The amount in controversy is determined without increasing or reducing the amount in controversy for amounts of loss, deduction, or credit carried over from years not in issue.

(e) *Most significant issue or set of issues presented*. Where the taxpayer has not substantially prevailed with respect to the amount in controversy the taxpayer may nonetheless be a prevailing party if the taxpayer substantially prevails with respect to the most significant issue or set of issues presented. The issues presented include those raised as of the administrative proceeding date and those raised subsequently. Only in a multiple issue proceeding can a most significant issue or set of issues presented exist. However, not all multiple issue proceedings contain a most significant issue or set of issues presented. An issue or set of issues constitutes the most significant issue or set of issues presented if, despite involving a lesser dollar amount in the proceeding than the other issue or issues, it objectively represents the most significant issue or set of issues for the taxpayer or the Internal Revenue Service. This may occur because of the effect of the issue or set of issues on other transactions or other taxable years of the taxpayer or related parties.

(f) *Net worth and size limitations*—(1) *Individuals and estates*. An individual taxpayer or an estate meets the net worth and size limitations of this paragraph if, on the administrative proceeding date, the taxpayer's net worth does not exceed two million dollars. For this purpose, individuals filing a joint return shall be treated as 1 taxpayer, except in the case of a spouse relieved of liability under section 6013(e).

(2) *Others*. A taxpayer that is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization (other than an organization described in paragraph (f)(3) of this section) meets the net worth and size limitations of this paragraph if, as of the administrative proceeding date—

(i) The taxpayer's net worth does not exceed seven million dollars; and

(ii) The taxpayer does not have more than 500 employees.

(3) *Special rule for charitable organizations and certain cooperatives*. An organization described in Internal Revenue Code section 501(c)(3) exempt from taxation under Internal Revenue Code section 501(a), or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C.

1141j(a) (as in effect on October 22, 1986), meets the net worth and size limitations of this paragraph if, as of the administrative proceeding date, the organization or cooperative association does not have more than 500 employees.

(g) *Determination of prevailing party*. If the final decision with respect to the tax, interest, or penalty is made at the administrative level, the determination of whether a taxpayer is a prevailing party shall be made by agreement of the parties, or absent such agreement, by the Internal Revenue Service. See § 301.7430–2(c)(7) regarding the right to appeal the decision of the Internal Revenue Service denying (in whole or in part) a request for reasonable administrative costs to the Tax Court.

(h) *Examples*. The provisions of this section are illustrated by the following examples:

*Example 1*. The Internal Revenue Service, in the conduct of a correspondence examination of taxpayer A's individual income tax return, requests substantiation from A of claimed medical expenses. A does not respond to the request and the Service Center issues a notice of deficiency. After receiving the notice of deficiency, A presents sufficient information and arguments to convince a revenue agent that the notice of deficiency is incorrect and that A owes no tax. The revenue agent then closes the case showing no deficiency. Although A incurred costs after the issuance of the notice of deficiency, A is unable to recover these costs because, as of the date these costs were incurred, A had not presented relevant information under A's control and relevant legal arguments supporting A's position to the appropriate Internal Revenue Service personnel. Accordingly, the position of the Internal Revenue Service was substantially justified at the time the costs were incurred.

*Example 2*. In the purchase of an ongoing business, taxpayer B obtains from the previous owner of the business a covenant not to compete for a period of five years. On audit of B's individual income tax return for the year in which the business is acquired, the Internal Revenue Service challenges the basis assigned to the covenant not to compete and a deduction taken as a business expense for a seminar attended by B. Both parties agree that the covenant not to compete is amortizable over a period of five years. However, the Internal Revenue Service asserts that the proper basis of the covenant is $2X while the taxpayer asserts the basis is $4X. Thus, under the Internal Revenue Service's position, B is entitled to a deduction of two-fifths $X in the year under audit and for each of the subsequent four years. B's position, however, would result in a deduction of four-fifths $X for the year under audit and each of the subsequent four years. The deduction for the seminar attended by B was reported on the return in question in the amount of $X. The Internal Revenue Service's position is that the deduction for the seminar should be disallowed entirely. In the notice of deficiency, the Internal Revenue Service determines adjustments of two-fifths $X (the difference between the Internal Revenue Service's position of two-fifths $X and the reported four-fifths $X) regarding the basis of the covenant not to compete, and $X resulting from the disallowance of the seminar expense. Thus, of the two adjustments determined for the year under audit, that attributable to the disallowance of the seminar is larger than that attributable to the covenant not to compete. However, due to the impact on the next succeeding four years, the covenant not to compete adjustment is objectively the most significant issue to both B and the Internal Revenue Service.

*Example 3*. The Collection Branch of a Service Center of the Internal Revenue Service determines in the matching process of various Forms 1099 and W-2 that taxpayer C has not filed an individual income tax return. The Internal Revenue Service sends notices to C requesting that C file an income tax return. C does not file a return, so the Service Center's Collection Branch prepares a substitute for return pursuant to section 6020(b). The calculation is sent to C requesting that C either sign the return pursuant to section 6020(a) or file a tax return prepared by C. C does not respond to the Internal Revenue Service's request and the Service Center's Collection Branch issues a notice of deficiency based on information in its possession. C does not file a petition with the Tax Court and does not pay the asserted deficiency. The Internal Revenue Service then assesses the tax shown on the notice of deficiency and issues a notice and demand for tax pursuant to section 6303. After receiving notice and demand, C contacts the Collection Branch and convinces Collection to stay the collection process because C does not owe any taxes. The Collection Branch recommends that the Examination Division examine the tax liability and make an adjustment to income. The Examination Division then redetermines the tax and abates the assessment due to information and arguments presented by C at that time. The costs C incurred before the Collection Branch are incurred in connection with an action taken by the Internal Revenue Service to collect a tax. Therefore, these costs are incurred with respect to a collection action and not an administrative proceeding. Accordingly, they

are not recoverable as reasonable administrative costs. Costs incurred before the Examination Division are reasonable administrative costs; however, C may not recover any reasonable administrative costs with respect to the proceeding before the Examination Division because, as of the date the costs were incurred, C had not previously presented all relevant information under C's control and all relevant legal arguments supporting C's position to the Collection Branch or Examination Division personnel (the appropriate Internal Revenue Service personnel under § 301.7430–5(c)), and thus, the position of the Internal Revenue Service was substantially justified based upon the information it had.

[T.D. 8542, 59 FR 29364, June 7, 1994, as amended by T.D. 8725, 62 FR 39119, July 22, 1997]

### § 301.7430–6 Effective dates.

Sections 301.7430–2 through 301.7430–6, other than §§ 301.7430–2(b)(2), (c)(3)(i)(B), (c)(3)(ii)(C), and (c)(5); §§ 301.7430–4(b)(3)(i), (b)(3)(ii), (b)(3)(iii)(B), (b)(3)(iii)(C), (b)(3)(iii)(D), and (c)(2)(ii); and §§ 301.7430–5(a) and (c)(3), apply to claims for reasonable administrative costs filed with the Internal Revenue Service after December 23, 1992, with respect to costs incurred in administrative proceedings commenced after November 10, 1988. Section 301.7430–2(c)(5) is applicable March 23, 1993. Sections 301.7430–2(b)(2), (c)(3)(i)(B), and (c)(3)(ii)(C); 301.7430–4(b)(3)(i), (b)(3)(ii), (b)(3)(iii)(B), (b)(3)(iii)(C), (b)(3)(iii)(D), and (c)(2)(ii); and 301.7430–5(a) and (c)(3) are applicable for administrative proceedings commenced after July 30, 1996. Sections 301.7430–1(e), 301.7430–2(c)(2), 7430–3(a)(4) and (b) are applicable with respect to actions taken by the Internal Revenue Service after July 22, 1998.

[T.D. 8725, 62 FR 39119, July 22, 1997, as amended by T.D. 9050, 68 FR 14320, Mar. 25, 2003]

### § 301.7430–7 Qualified offers.

(a) *In general.* Section 7430(c)(4)(E) (the qualified offer rule) provides that a party to a court proceeding satisfying the timely filing and net worth requirements of section 7430(c)(4)(A)(ii) shall be treated as the prevailing party if the liability of the taxpayer pursuant to the judgment in the proceeding (determined without regard to interest) is equal to or less than the liability of the taxpayer which would have been so determined if the United States had accepted the last qualified offer of the party as defined in section 7430(g). For purposes of this section, the term *judgment* means the cumulative determinations of the court concerning the adjustments at issue and litigated to a determination in the court proceeding. In making the comparison between the liability under the qualified offer and the liability under the judgment, the taxpayer's liability under the judgment is further modified by the provisions of paragraph (b)(3) of this section. The provisions of the qualified offer rule do not apply if the taxpayer's liability under the judgment, as modified by the provisions of paragraph (b)(3) of this section, is determined exclusively pursuant to a settlement, or to any proceeding in which the amount of tax liability is not in issue, including any declaratory judgment proceeding, any proceeding to enforce or quash any summons issued pursuant to the Internal Revenue Code (Code), and any action to restrain disclosure under section 6110(f). If the qualified offer rule applies to the court proceeding, the determination of whether the liability under the qualified offer would have equaled or exceeded the liability pursuant to the judgment is made by reference to the last qualified offer made with respect to the tax liability at issue in the administrative or court proceeding. An award of reasonable administrative and litigation costs under the qualified offer rule only includes those costs incurred on or after the date of the last qualified offer and is limited to those costs attributable to the adjustments at issue at the time the last qualified offer was made that were included in the court's judgment other than by reason of settlement. The qualified offer rule is inapplicable to reasonable administrative or litigation costs otherwise awarded to a taxpayer who is a prevailing party under any other provision of section 7430(c)(4). This section sets forth the requirements to be satisfied for a taxpayer to be treated as a prevailing party by reason of the taxpayer making a qualified offer, as well as the circumstances leading to the application of the exceptions, special rules, and coordination provisions of the qualified

offer rule. Furthermore, this section sets forth the elements necessary for an offer to be treated as a qualified offer under section 7430(g).

(b) *Requirements for treatment as a prevailing party based upon having made a qualified offer*—(1) *In general.* In order to be treated as a prevailing party by reason of having made a qualified offer, the liability of the taxpayer for the type or types of tax and the taxable year or years at issue in the proceeding (as calculated pursuant to paragraph (b)(2) of this section), based on the last qualified offer (as defined in paragraph (c) of this section) made by the taxpayer in the court or administrative proceeding, must equal or exceed the liability of the taxpayer pursuant to the judgment by the court for the same type or types of tax and the same taxable year or years (as calculated pursuant to paragraph (b)(3) of this section). Furthermore, the taxpayer must meet the timely filing and net worth requirements of section 7430(c)(4)(A)(ii). If all of the adjustments subject to the last qualified offer are settled prior to the entry of the judgment by the court, the taxpayer is not a prevailing party by reason of having made a qualified offer. The taxpayer may, however, still qualify as a prevailing party if the requirements of section 7430(c)(4)(A) are met. If one or more adjustments covered by a qualified offer (see paragraph (c)(3)) are settled following a ruling by the court that substantially resolves those adjustments, then those adjustments will not be treated as having been settled prior to the entry of the judgment by the court and instead will be treated as amounts included in the judgment as a result of the court's determinations. For purposes of the preceding sentence, rulings relating to discovery, admissibility of evidence, and burden of proof are not rulings that substantially resolve adjustments covered by a qualified offer.

(2) *Liability under the last qualified offer.* For purposes of paragraph (b)(1) of this section, the taxpayer's liability under the last qualified offer is the change in the taxpayer's liability that would have resulted if the United States had accepted the taxpayer's last qualified offer on all of the adjustments that were at issue in the administrative or court proceeding at the time that the offer was made compared to the amount shown on the return or returns (or as previously adjusted). The portion of a taxpayer's liability that is attributable to adjustments raised by either party after the making of the last qualified offer is not included in the calculation of the liability under that offer. The taxpayer's liability under the last qualified offer is calculated without regard to adjustments that the parties have stipulated will be resolved in accordance with the outcome of a separate pending Federal, state, or other judicial or administrative proceeding. For example, the parties may stipulate that the taxpayer's liability will be resolved in accordance with the outcome of an alternative dispute resolution proceeding or a separate court proceeding, such as a probate, tort liability, or trademark action. Furthermore, the taxpayer's liability under the last qualified offer is calculated without regard to interest, unless the taxpayer's liability for, or entitlement to, interest is a contested issue in the administrative or court proceeding and is one of the adjustments included in the last qualified offer.

(3) *Liability pursuant to the judgment.* For purposes of paragraph (b)(1) of this section, the taxpayer's liability pursuant to the judgment is the change in the taxpayer's liability resulting from amounts contained in the judgment as a result of the court's determinations, and amounts contained in settlements not included in the judgment, that are attributable to all adjustments that were included in the last qualified offer compared to the amount shown on the return or returns (or as previously adjusted). This liability includes amounts attributable to adjustments included in the last qualified offer and settled by the parties prior to the entry of judgment regardless of whether those amounts are actually included in the judgment entered by the court. The taxpayer's liability pursuant to the judgment does not include amounts attributable to adjustments that are not included in the last qualified offer, even if those amounts are actually included in the judgment entered by the court. The taxpayer's liability under

the judgment is calculated without regard to adjustments that the parties have stipulated will be resolved in accordance with the outcome of a separate pending Federal, state, or other judicial or administrative proceeding. Furthermore, the taxpayer's liability pursuant to the judgment is calculated without regard to interest, unless the taxpayer's liability for, or entitlement to, interest is a contested issue in the administrative or court proceeding and is one of the adjustments included in the last qualified offer. Where adjustments raised by either party subsequent to the making of the last qualified offer are included in the judgment entered by the court, or are settled prior to the court proceeding, the taxpayer's liability pursuant to the judgment is calculated by treating the subsequently raised adjustments as if they had never been raised.

(c) *Qualified offer*—(1) *In general.* A qualified offer is defined in section 7430(g) to mean a written offer which—

(i) Is made by the taxpayer to the United States during the qualified offer period;

(ii) Specifies the offered amount of the taxpayer's liability (determined without regard to interest, unless interest is a contested issue in the proceeding);

(iii) Is designated at the time it is made as a qualified offer for purposes of section 7430(g); and

(iv) By its terms, remains open during the period beginning on the date it is made and ending on the earliest of the date the offer is rejected, the date the trial begins, or the 90th day after the date the offer is made.

(2) *To the United States.* (i) A qualified offer is made to the United States when it is delivered to the office or personnel within the Internal Revenue Service, Office of Appeals, Office of Chief Counsel (including field personnel) or Department of Justice that has jurisdiction over the tax matter at issue in the administrative or court proceeding. If those offices or persons are unknown to the taxpayer making the qualified offer, the taxpayer may deliver the offer to the appropriate office, as follows:

(A) If the taxpayer's initial pleading in a court proceeding has been answered, the taxpayer may deliver the offer to the office that filed the answer.

(B) If the taxpayer's petition in the Tax Court has not yet been answered, the taxpayer may deliver the offer to the Office of Chief Counsel, 1111 Constitution Avenue, NW., Washington, DC 20224.

(C) If the taxpayer's initial pleading in any Federal court, other than the Tax Court, has not yet been answered, the taxpayer may deliver the offer to the Attorney General of the United States, 950 Pennsylvania Ave., NW., Washington, DC 20530–0001. For a suit brought in a United States district court, a copy of the offer should also be delivered to the United States Attorney for the district in which the suit was brought.

(D) In any other situation, the taxpayer may deliver the offer to the office that sent the taxpayer the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals.

(ii) Until an offer is received by the appropriate personnel or office under this paragraph (c)(2), it is not considered to have been made, with the following exception. If the offer is deposited in the United States mail, in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the appropriate personnel or office under this paragraph (c)(2), the date of the United States postmark stamped on the cover in which the offer is mailed shall be deemed to be the date of receipt of that offer by the addressee. If any offer is deposited with a designated delivery service, as defined in section 7502(f)(2), in lieu of the United States mail, the provisions of section 7502(f)(1) shall apply in determining whether that offer qualifies for this exception.

(3) *Specifies the offered amount.* A qualified offer specifies the offered amount if it clearly specifies the amount for the liability of the taxpayer, calculated as set forth in paragraph (b)(2) of this section. The offer may be a specific dollar amount of the total liability or a percentage of the adjustments at issue in the proceeding at the time the offer is made. This amount must be with respect to all of

the adjustments at issue in the administrative or court proceeding at the time the offer is made and only those adjustments. The specified amount must be an amount, the acceptance of which by the United States will fully resolve the taxpayer's liability, and only that liability (determined without regard to adjustments that the parties have stipulated will be resolved in accordance with the outcome of a separate pending Federal, state, or other judicial or administrative proceeding, or interest, unless interest is a contested issue in the proceeding) for the type or types of tax and the taxable year or years at issue in the proceeding. In cases involving multiple tax years, if adjustments in different tax years arise from separate and distinct issues such that the resolution of issues in one or more tax years will not affect the taxpayer's liability in one or more of the other tax years in the proceeding, then a qualified offer may be made for less than all of the tax years involved. A qualified offer, however, must resolve all of the issues for the tax years covered by the offer and also must cover all tax years in the proceeding affected by those issues. A tax year (affected year) is affected by an issue if the treatment of the issue in another tax year involved in the proceeding necessarily affects the treatment of the issue in the affected year.

(4) *Designated at the time it is made as a qualified offer*. An offer is not a qualified offer unless it designates in writing at the time it is made that it is a qualified offer for purposes of section 7430(g). An offer made at a time when one or more adjustments not included in the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals have been raised by the taxpayer and remain unresolved, is not considered to be a qualified offer unless contemporaneously or prior to the making of the offer, the taxpayer has provided the United States with the substantiation and legal and factual arguments necessary to allow for informed consideration of the merits of those adjustments. For example, a taxpayer will be considered to have provided the United States with the necessary substantiation and legal and factual arguments if the taxpayer (or a recognized representative of the taxpayer described in § 601.502 of this chapter) participates in an Appeals office conference, participates in an Area Counsel conference, or confers with the Department of Justice, and at that time, discloses all relevant information. All relevant information includes, but is not limited to, the legal and factual arguments supporting the taxpayer's position on any adjustments raised by the taxpayer after the issuance of the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals. A taxpayer has disclosed all relevant information if the taxpayer has supplied sufficient information to allow informed consideration of the taxpayer's tax matter to the extent the information and its relevance were known or should have been known to the taxpayer at the time of the conference.

(5) *Remains open*. A qualified offer must, by its terms, remain open for acceptance by the United States from the date it is made, as defined in paragraph (c)(2)(ii) of this section, until the earliest of the date it is rejected in writing by a person with authority to reject the offer, the date the trial begins, or the 90th day after being received by the United States. The offer, by its written terms, may remain open after the occurrence of one or more of the above-referenced events. Once made, the period during which a qualified offer remains open may be extended by the taxpayer prior to its expiration, but an extension cannot be used to make an offer meet the minimum period for remaining open required by this paragraph (c)(5).

(6) *Last qualified offer*. A taxpayer may make multiple qualified offers during the qualified offer period. For purposes of the comparison under paragraph (b) of this section, the making of a qualified offer supersedes any previously made qualified offers. In making the comparison described in paragraph (b) of this section, only the qualified offer made most closely in time to the end of the qualified offer

period is compared to the taxpayer's liability under the judgment.

(7) *Qualified offer period.* To constitute a qualified offer, an offer must be made during the qualified offer period. The qualified offer period begins on the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent to the taxpayer. For this purpose, the date of the notice of claim disallowance will begin the qualified offer period in a refund case. If there has been no notice of claim disallowance in a refund case, the qualified offer period begins on the date on which the answer or other responsive pleading is filed with the court. The qualified offer period ends on the date which is thirty days before the date the case is first set for trial. In determining when the qualified offer period ends for cases in the Tax Court and other Federal courts using calendars for trial, a case will be considered set for trial on the date scheduled for the calendar call. A case may be removed from a trial calendar at any time. Thus, a case may be removed from a trial calendar before the date that precedes by thirty days the date scheduled for that trial calendar. The qualified offer period does not end until the case remains on a trial calendar on the date that precedes by 30 days the scheduled date of the calendar call for that trial session. The qualified offer period may not be extended beyond the periods set forth in this paragraph (c)(7), although the period during which a qualified offer remains open may extend beyond the end of the qualified offer period.

(d) [Reserved]

(e) *Examples.* The following examples illustrate the provisions of this section:

*Example 1. Definition of a judgment.* The Internal Revenue Service (IRS) audits Taxpayer A for year X and issues a notice of proposed deficiency (30-day letter) proposing to disallow deductions 1, 2, 3, and 4. A files a protest and participates in a conference with the Internal Revenue Service Office of Appeals (Appeals). Appeals allows deduction 1, and issues a statutory notice of deficiency for deductions 2, 3, and 4. A's petition to the United States Tax Court for year X never mentions deduction 2. Prior to trial, A concedes deduction 3. After the trial, the Tax Court issues an opinion allowing A to deduct a portion of deduction 4. As used in paragraph (a) of this section, the term judgment means the cumulative determinations of the court concerning the adjustments at issue in the court proceeding. Thus, the term judgment does not include deduction 1 because it was never at issue in the court proceeding. Similarly, the term judgment does not include deduction 2 because it was not placed at issue by A in the court proceeding. Although deduction 3 was at issue in the court proceeding, it is not included in the term judgment because it was not determined by the court, but rather by concession or settlement. For purposes of section 7430(c)(4)(E), the term judgment only includes the portion of deduction 4 disallowed by the Tax Court.

*Example 2. Liability under the offer and liability under the judgment.* Assume the same facts as in *Example 1* except that A makes a qualified offer after the Appeals conference, which is not accepted by the IRS. A's offer is with respect to all adjustments at issue at that time. Those adjustments are deductions 2, 3, and 4. At the conclusion of the litigation, A's entitlement to an award based upon the qualified offer will depend, among other things, on a comparison of the change in A's liability for income tax for year X resulting from the judgment of the Tax Court with the change that would have resulted had the IRS accepted A's qualified offer. In making this comparison, the term judgment (as discussed in *Example 1*) is modified by including the amounts of settled or conceded adjustments that were at issue at the time the qualified offer was made. Any settled or conceded adjustments that were not at issue at the time the qualified offer was made, either because the settlement or concession occurred before the offer or because the adjustment was not raised until after the offer, are not included in the comparison. Thus, A's offer on deductions 2, 3, and 4 is compared with the change in A's liability resulting from the Tax Court's determination of deduction 4, and the concessions of issues 2 and 3 by A.

*Example 3. Offer must resolve full liability.* Assume the same facts as in *Example 2* except that A's offer after the Appeals conference explicitly states that it is only with respect to adjustments 2 and 3 and not with respect to adjustment 4. Even if A's liability pursuant to the judgment, calculated under paragraph (b)(3) of this section as illustrated in *Example 2*, is equal to or less than it would have been had the IRS accepted A's offer after the Appeals conference, A is not a prevailing party under section 7430(c)(4)(E). A qualified offer must include all adjustments at issue at the time the offer is made. Since A's offer excluded adjustment 4, which was an adjustment at issue at the time the offer was made, it does not constitute a qualified

offer pursuant to paragraph (b)(2) of this section.

*Example 4. Offer must resolve full liability.* Assume the same facts as in *Example 1*, except that A makes a qualified offer that is accepted by the IRS. After the offer is accepted, A attempts to reduce the amount A will pay pursuant to the offer by applying net operating loss carryovers to the years in issue. Because the net operating losses were not at issue when the offer was made, A's offer was a qualified offer. Whether A is entitled to apply net operating losses to reduce the amount stated in the offer will depend upon the application of contract principles, local court rules, and, because net operating losses are at issue, section 6511(d) and related provisions.

*Example 5. Qualified offer rule for multiple tax years, partial resolution offer is a qualified offer.* Taxpayer B receives a notice of deficiency for taxable years 2001, 2002, and 2003. For 2001, the statutory notice disallows business deductions. For 2002, the statutory notice increases income for unreported lottery winnings. For 2003, the statutory notice disallows a child care credit. B submits a qualified offer only with respect to 2002. Since the adjustments for the three tax years are separate and distinct, B may submit a qualified offer for a single year. If B's liability under the judgment is equal to or less than the qualified offer with respect to 2002, irrespective of 2001 and 2003, B is a prevailing party for 2002 for purposes of section 7430(g). Assuming B satisfies the remaining requirements of section 7430, B may recover reasonable administrative and litigation costs that are attributable to 2002 from the date of the qualified offer. To qualify for any costs with respect to 2001 or 2003, B must satisfy the requirements of section 7430(c)(4).

*Example 6. Qualified offer rule for multiple tax years, partial resolution offer is not a qualified offer.* Assume the same facts as in *Example 5* except that with respect to 2002, in addition to increasing B's income for the unreported lottery winnings, the statutory notice also disallows a charitable contribution deduction. B submits a settlement offer that purports to be a qualified offer, but only covers the unreported lottery winnings. B's offer is not a qualified offer because it does not address the charitable contribution issue, and thus, does not fully resolve B's liability for 2002.

*Example 7. Qualified offer rule for multiple tax years, partial resolution offer is not a qualified offer.* Taxpayer C receives a notice of deficiency for taxable years 2001, 2002, and 2003 adjusting the amount of a depreciation deduction due to the Internal Revenue Service's increase to the recovery period. C submits a settlement offer relating only to 2003 that purports to be a qualified offer. C's offer is not a qualified offer because the issue in the three tax years is not separable given that the treatment of the issue in one of the years necessarily affects the treatment of the issue in the other years, and C's offer only applies to one of the years in the proceeding. In cases involving multiple tax years with nonseparable tax issues affecting all tax years, an offer is not a qualified offer unless it resolves the liability for all tax years at issue in the administrative or judicial proceeding.

*Example 8. Qualified offer rule inapplicable when all issues settled.* Taxpayer D receives a notice of proposed deficiency (30-day letter) proposing to disallow both a personal interest deduction in the amount of $10,000 (Adjustment 1), and a charitable contribution deduction in the amount of $2,000 (Adjustment 2), and to include in income $4,000 of unreported interest income (Adjustment 3). D timely files a protest with Appeals. At the Appeals conference, D presents substantiation for the charitable contribution and presents arguments that the interest paid was deductible mortgage interest and that the interest received was held in trust for Taxpayer E. At the conference, D also provides the Appeals officer assigned to D's case a written offer to settle the case for a deficiency of $2,000, exclusive of interest. The offer states that it is a qualified offer for purposes of section 7430(g) and that it will remain open for acceptance by the IRS for a period in excess of 90 days. After considering D's substantiation and arguments, the Appeals Officer accepts the $2,000 offer to settle the case in full. Although D's offer is a qualified offer, because all three adjustments contained in the qualified offer were settled, the qualified offer rule is inapplicable.

*Example 9. Qualified offer rule inapplicable when all issues contained in the qualified offer are settled; subsequently raised adjustments ignored.* Assume the same facts as in *Example 8* except that D's qualified offer was for a deficiency of $1,800 and the IRS rejected that offer. Subsequently, the IRS issued a statutory notice of deficiency disallowing the three adjustments contained in *Example 8*, and, in addition, disallowing a home office expense in the amount of $5,000 (Adjustment 4). After petitioning the Tax Court, D presents the field attorney assigned to the case with a written offer, which is not designated as a qualified offer for purposes of section 7430(g), to settle the three adjustments that had been the subject of the qualified offer, plus adjustment 4, for a total deficiency of $2,500. After negotiating with D, a settlement is reached on the three adjustments that were the subject of the rejected qualified offer, for a deficiency of $1,800. Adjustment 4 is litigated in the Tax Court and the court determines that D is entitled to the full $5,000 deduction for that adjustment. Consequently, a decision is entered by the Tax Court reflecting the $1,800 settlement amount, which matches exactly the amount

of D's only qualified offer in the case. Although the determined liability for adjustments 1, 2, and 3 equals that of the rejected qualified offer, because all three adjustments contained in the qualified offer were settled, the qualified offer rule is inapplicable.

*Example 10. Exclusion of adjustments made after the qualified offer is made.* Assume the same facts as in *Example 9* except the settlement is reached only on adjustments 1 and 2, for a liability of $1,500. Adjustments 3 and 4 are tried in the Tax Court and in accordance with the court's opinion, the taxpayer has a $300 deficiency attributable to adjustment 3, and a $1,550 deficiency attributable to adjustment 4. Consequently, a decision is entered reflecting the $1,500 settled amount, the $300 liability on adjustment 3, and the $1,550 liability on adjustment 4. The $3,350 deficiency reflected in the Tax Court's decision exceeds the last (and only) qualified offer made by D. For purposes of determining whether D is a prevailing party as a result of having made a qualified offer in the proceeding, the liability attributable to adjustment 4, which was raised after the last qualified offer was made, is not included in the comparison of D's liability under the judgment with D's offered liability under the last qualified offer. Thus, D's $1,800 liability under the judgment, as modified for purposes of the qualified offer rule comparison, is equal to D's offered liability under the last qualified offer. Because D's liability under the last qualified offer equals or exceeds D's liability under the judgment, as calculated under paragraph (b)(3) of this section, D is a prevailing party for purposes of section 7430. Assuming D satisfies the remaining requirements of section 7430, D may recover those reasonable administrative and litigation costs attributable to adjustment 3. To qualify for any further award of reasonable administrative and litigation costs, D must satisfy the requirements of section 7430(c)(4)(A).

*Example 11. Qualified offer in a refund case.* Taxpayer E timely files an amended return claiming a refund of $1,000. This refund claim results from several omitted deductions which, if allowed, would reduce E's tax liability from $10,000 to $9,000. E receives a notice of claim disallowance and files a complaint with the appropriate United States District Court. Subsequently, E makes a qualified offer for a refund of $500. The offer is rejected and after trial the court finds E is entitled to a refund of $700. The change in E's liability from the tax shown on the return that would have resulted from the acceptance of E's qualified offer is a reduction in that liability of $500. The change in E's liability from the tax shown on the return resulting from the judgment of the court is a reduction in that liability of $700. Because E's liability under the qualified offer exceeds E's liability under the judgment, E is a prevailing party for purposes of section 7430. Assuming E satisfies the remaining requirements of section 7430, E may recover those reasonable litigation costs incurred on or after the date of the qualified offer. To qualify for any further award of reasonable administrative and litigation costs E must satisfy the requirements of section 7430(c)(4)(A).

*Example 12. End of qualified offer period when case is removed from Tax Court trial calendar more than 30 days before scheduled trial calendar.* Taxpayer F has petitioned the Tax Court in response to the issuance of a notice of deficiency. F receives notice that the case will be heard on the July trial session in F's city of residence. The scheduled date for the calendar call for that trial session is July 1st. On May 15th, F's motion to remove the case from the July trial session and place it on the October trial session for that city is granted. The scheduled date for the calendar call for the October trial session is October 1st. On May 31st, F delivers a qualified offer to the field attorney assigned to the case. On August 31st, F delivers a revised qualified offer to the field attorney assigned to the case. Neither offer is accepted. The case is tried during the October trial session, and at some time thereafter, a decision is entered by the court. Assume the judgment in the case, as calculated under paragraph (b)(3) of this section, is greater than the amount offered, as calculated under paragraph (b)(2) of this section, in the qualified offer delivered on May 31st, but less than the amount offered, as similarly calculated, in the qualified offer delivered on August 31st. Because the qualified offer period did not end until September 1st, and the offer of August 31st otherwise satisfied the requirements of paragraph (c) of this section, the offer delivered on August 31st is a qualified offer. Furthermore, because the August 31st qualified offer is closer in time to the end of the qualified offer period than the May 31st qualified offer, the August 31st qualified offer is the last qualified offer made by F. Consequently, the August 31st offer is the qualified offer that is compared to the judgment for purposes of determining whether F is a prevailing party under section 7430(c)(4)(E). Because F's liability under the August 31st qualified offer equals or exceeds F's liability under the judgment as calculated under paragraph (b)(3) of this section, F is a prevailing party for purposes of section 7430.

*Example 13. End of qualified offer period when case is removed from Tax Court trial calendar less than 30 days before scheduled trial calendar.* Assume the same facts as in *Example 12* except that F's motion was granted on June 15th. Because the qualified offer period ended on June 1st when the case remained on the July trial session on the date that preceded by 30 days the scheduled date of the calendar call for that trial session, the offer delivered on May 31st was F's last qualified offer. The August 31st offer is not a qualified

offer for purposes of this rule. Consequently, F is not a prevailing party under the qualified offer rule. Therefore, F must satisfy the requirements of section 7430(c)(4)(A) to qualify for any award of reasonable administrative and litigation costs.

*Example 14. When a qualified offer can be made and to whom it must be made.* During the examination of Taxpayer G's return, the IRS issues a notice of deficiency without having first issued a 30-day letter. After receiving the notice of deficiency G timely petitions the Tax Court. The next day G mails an offer to the office that issued the notice of deficiency, which offer satisfies the requirements of paragraphs (c)(3) through (6) of this section. This is the only written offer made by G during the administrative or court proceeding, and by its terms it is to remain open for a period in excess of 90 days after the date of mailing to the office issuing the notice of deficiency. The office that issued the notice of deficiency transmitted the offer to the field attorney with jurisdiction over the Tax Court case. After answering the case, the field attorney refers the case to Appeals pursuant to Rev. Proc. 87–24 (1987–1 C.B. 720). See § 601.601(d)(2)(ii)(*b*) of this chapter. After careful consideration, Appeals rejects the offer and holds a conference with G during which some adjustments are settled. The remainder of the adjustments are tried in the Tax Court and G's liability resulting from the Tax Court's determinations, when added to G's liability resulting from the settled adjustments, is less than G's liability would have been under the offer rejected by Appeals. Because the Tax Court case had not yet been answered when the offer was sent, G properly mailed the offer to the office that issued the notice of deficiency. Thus, G's offer satisfied the requirements of paragraph (c)(2) of this section. Furthermore, even though G did not receive a 30-day letter, G's offer was made after the beginning of the qualified offer period, satisfying the requirements of paragraph (c)(7) of this section, because the issuance of the statutory notice provided G with notice of the IRS's determination of a deficiency, and the docketing of the case provided G with an opportunity for administrative review in the Internal Revenue Service Office of Appeals under Rev. Proc. 87–24. See § 601.601(d)(2)(ii)(*b*) of this chapter. Because G's offer satisfied all of the requirements of paragraph (c) of this section, the offer was a qualified offer and G is a prevailing party.

*Example 15. Substitution of parties permitted under last qualified offer.* Taxpayer H receives a 30-day letter and participates in a conference with the Office of Appeals but no agreement is reached. Subsequently, H receives a notice of deficiency and petitions the Tax Court. Upon receiving the Internal Revenue Service's answer to the petition, H sends a qualified offer to the field attorney who signed the answer, by United States mail. The qualified offer stated that it would remain open for more than 90 days. Thirty days after making the offer, H dies and, on motion under Rule 63(a) of the Tax Court's Rules of Practice and Procedure by H's personal representative, I is substituted for H as a party in the Tax Court proceeding. I makes no qualified offers to settle the case and the case proceeds to trial, with the Tax Court issuing an opinion partially in favor of I. Even though I was not a party when the qualified offer was made by H, that offer constitutes a qualified offer because by its terms, when made, it was to remain open until at least the earlier of the date it is rejected, the date of trial, or 90 days. If the liability of I under the qualified offer, as determined under paragraph (b)(2) of this section, equals or exceeds the liability under the judgment of the Tax Court, as determined under paragraph (b)(3) of this section, I will be a prevailing party for purposes of an award of reasonable litigation costs under section 7430.

(f) *Effective date.* This section is applicable with respect to qualified offers made in administrative or court proceedings described in section 7430 after December 24, 2003.

[T.D. 9106, 68 FR 74850, Dec. 29, 2003; T.D. 9106, 69 FR 4059, Jan. 28, 2004]

### § 301.7430–8 Administrative costs incurred in damage actions for violations of section 362 or 524 of the Bankruptcy Code.

(a) *In general.* The Internal Revenue Service may grant a taxpayer's request for recovery of reasonable administrative costs incurred in connection with the administrative proceeding before the Internal Revenue Service relating to the willful violation of section 362 or 524 of the Bankruptcy Code only if the taxpayer is a prevailing party.

(b) *Prevailing party.* A taxpayer is a prevailing party for purposes of this section only if—

(1) The taxpayer satisfies the net worth and size limitations in paragraph (f) of § 301.7430–5;

(2) The taxpayer establishes that in connection with the collection of his or her federal tax an officer or employee of the Internal Revenue Service has willfully violated a provision of section 362 or 524 of the Bankruptcy Code; and

(3) The position of the Internal Revenue Service in the proceeding was not substantially justified.

(c) *Administrative proceeding.* For purposes of this section, an administrative proceeding is a proceeding related to an administrative claim presented to the Internal Revenue Service seeking relief from a violation of section 362 or 524 of the Bankruptcy Code by the Internal Revenue Service or recovery of damages from the Internal Revenue Service under § 301.7433–2(e).

(d) *Costs incurred after filing of bankruptcy petition.* Administrative costs may be recovered only if incurred on or after the date of filing of the bankruptcy petition that formed the basis for the stay on collection under Bankruptcy Code section 362 or the discharge injunction under Bankruptcy Code section 524, as the case might be.

(e) *Time for filing claim for administrative costs.* (1) For purposes of this section, the taxpayer must file a claim for administrative costs before the Internal Revenue Service not later than 90 days after the date the Internal Revenue Service mails to the taxpayer, or otherwise notifies the taxpayer of, the decision regarding the claim for relief from or damages relating to a violation of the collection stay or the discharge injunction.

(2) If the Internal Revenue Service denies the claim for administrative costs in whole or in part, the taxpayer must file a petition with the Bankruptcy Court for administrative costs no later than 90 days after the date on which the denial of the claim for administrative costs is mailed, or otherwise furnished, to the taxpayer. If the Internal Revenue Service does not respond on the merits to a request by the taxpayer for an award of reasonable administrative costs within six months after such request is filed, the Internal Revenue Service's failure to respond may be considered by the taxpayer as a denial of an award of reasonable administrative costs.

(3) For purposes of paragraphs (e)(1) and (2) of this section, if the 90th day falls on a Saturday, Sunday, or a legal holiday, the 90-day period shall end on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. The term legal holiday means a legal holiday in the District of Columbia. If the request for costs is to be filed with the Internal Revenue Service at an office of the Internal Revenue Service located outside the District of Columbia, the term legal holiday also means a statewide legal holiday in the state where such office is located.

(f) *Effective date.* This section is applicable with respect to actions taken by the Internal Revenue Service after July 22, 1998.

[T.D. 9050, 68 FR 14320, Mar. 25, 2003]

### § 301.7432–1 Civil cause of action for failure to release a lien.

(a) *In general.* If any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien on property of the taxpayer in accordance with section 6325 of the Internal Revenue Code, such taxpayer may bring a civil action for damages against the United States in federal district court. The total amount of damages recoverable is the sum of:

(1) The actual, direct economic damages sustained by the taxpayer which, but for the officer's or the employee's knowing or negligent failure to release the lien under section 6325, would not have been sustained; and

(2) Costs of the action.

The amount of actual, direct economic damages that are recoverable is reduced to the extent such damages reasonably could have been mitigated by the plaintiff. An action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim pursuant to paragraph (f) of this section and has waited the period required under paragraph (e) of this section.

(b) *Finding of satisfaction or unenforceability.* For purposes of this section, a finding under section 6325(a)(1) that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable is treated as made on the earlier of:

(1) The date on which the district director of the district in which the taxpayer currently resides or the district in which the lien was filed finds full satisfaction or legal unenforceability; or

(2) The date on which such district director receives a request for a certificate of release of lien in accordance with § 401.6325–1(f), together with any

information which is reasonably necessary for the district director to conclude that the lien has been fully satisfied or is legally unenforceable.

(c) *Actual, direct economic damages*—(1) *Definition*. Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer that would not have been sustained but for an officer's or an employee's failure to release a lien in accordance with section 6325 of the Internal Revenue Code. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.

(2) *Litigation costs and administrative costs not recoverable*. Litigation costs and administrative costs described in this paragraph are not recoverable as actual, direct economic damages. Litigation costs may be recoverable under section 7430 (*see* paragraph (j) of this section) or, solely to the extent described in paragraph (d) of this section, as costs of the action.

(i) *Litigation costs*. For purposes of this paragraph, litigation costs are any costs incurred pursuing litigation for relief from the failure to release a lien, including costs incurred pursuing a civil action in federal district court under paragraph (a) of this section. Litigation costs include the following:

(A) Court costs;

(B) Expenses of expert witnesses in connection with a court proceeding;

(C) Cost of any study, analysis, engineering report, test, or project prepared for a court proceeding; and

(D) Fees paid or incurred for the services of attorneys, or other individuals authorized to practice before the court, in connection with a court proceeding.

(ii) *Administrative costs*. For purposes of this section, administrative costs are any costs incurred pursuing administrative relief from the failure to release a lien, including costs incurred pursuing an administrative claim for damages under paragraph (f) of this section. The term administrative costs includes:

(A) Any administrative fees or similar charges imposed by the Internal Revenue Service; and

(B) Expenses, costs, and fees described in paragraph (c)(2)(i) of this section incurred in pursuing administrative relief.

(d) *Costs of the action*. Costs of the action recoverable as damages under this section are limited to the following costs:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of paper necessarily obtained for use in the case;

(5) Docket fees; and

(6) Compensation of court appointed experts and interpreters.

(e) *No civil action in federal district court prior to filing an administrative claim*—(1) Except as provided in paragraph (e)(2) of this section, no action under paragraph (a) of this section shall be maintained in any federal district court before the earlier of the following dates:

(i) The date a decision is rendered on a claim filed in accordance with paragraph (f) of this section; or

(ii) The date 30 days after the date an administrative claim is filed in accordance with paragraph (f) of this section.

(2) If an administrative claim is filed in accordance with paragraph (f) of this section during the last 30 days of the period of limitations described in paragraph (i) of this section, the taxpayer may file an action in federal district court anytime after the administrative claim is filed and before the expiration of the period of limitations, without waiting for 30 days to expire or for a decision to be rendered on the claim.

(f) *Procedures for an administrative claim*—(1) *Manner*. An administrative claim for actual, direct economic damages as defined in paragraph (c) of this section shall be sent in writing to the district director (marked for the attention of the Chief, Special Procedures Function) in the district in which the taxpayer currently resides or the district in which the notice of federal tax lien was filed.

(2) *Form*. The administrative claim shall include:

(i) The name, current address, current home and work telephone numbers

and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;

(ii) A copy of the notice of federal tax lien affecting the taxpayer's property, if available;

(iii) A copy of the request for release of lien made in accordance with § 401.6325–1(f) of the Code of Federal Regulations, if applicable;

(iv) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(v) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(vi) The dollar amount of the claim, including any damages that have not yet been incurred but that are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(vii) The signature of the taxpayer or duly authorized representative.

For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(g) *Notice of failure to release lien*—An administrative claim under paragraph (f) of this section shall be considered a notice of failure to release a lien.

(h) *No action in federal district court for any sum in excess of the dollar amount sought in the administrative claim*—No action for actual, direct economic damages under paragraph (a) of this section shall be instituted in federal district court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (f) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(i) *Period of limitations*—(1) *Time of filing.* A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.

(2) *Cause of action accrues.* A cause of action accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(j) *Recovery of costs under section 7430*—Reasonable litigation costs, including attorney's fees, not recoverable under this section may be recoverable under section 7430. If following the Internal Revenue Service's denial of an administrative claim on the grounds that the Internal Revenue Service did not violate section 7432(a), a taxpayer brings a civil action for damages in a district court of the United States, and establishes entitlement to damages under this section, substantially prevails with respect to the amount of damages in controversy, and meets the requirements of section 7430(c)(4)(A)(iii) (relating to notice and net worth requirements), the taxpayer will be considered a ''prevailing party'' for purposes of section 7430. Such taxpayer, therefore, will generally be entitled to attorney's fees and other reasonable litigation costs not recoverable under this section. For purposes of the paragraph, if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within 30 days after the claim is filed, the Internal Revenue Service's failure to respond shall be considered a denial of the administrative claim on the grounds that the Internal Revenue Service did not violate section 7432(a). Administrative costs, including attorney's fees incurred pursuing an administrative claim under paragraph (f) of this section, are not recoverable under section 7430.

(k) *Effective date*—This section applies with respect to civil actions under section 7432 filed in federal district court after January 30, 1992.

[T.D. 8393, 57 FR 3539, Jan. 30, 1992; 57 FR 6061, Feb. 19, 1992]

**§ 301.7433–1 Civil cause of action for certain unauthorized collection actions.**

(a) *In general*. If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or an employee of the Internal Revenue Service recklessly or intentionally , or by reason of negligence, disregards any provision of the Internal Revenue Code or any regulation promulgated under the Internal Revenue Code, such taxpayer may bring a civil action for damages against the United States in federal district court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable is the lesser of $1,000,000 ($100,000 in the case of negligence), or the sum of:

(1) The actual, direct economic damages sustained as a proximate result of the reckless or international actions of the officer or employee; and

(2) Costs of the action.

An action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim pursuant to paragraph (e) of this section, and has waited for the period required under paragraph (d) of this section.

(b) *Actual, direct economic damages*—(1) *Definition*. Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer as the proximate result of the reckless or intentional, or negligent, actions of an officer or an employee of the Internal Revenue Service. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.

(2) *Litigation costs and administrative costs not recoverable*. Litigation costs and administrative costs are not recoverable as actual, direct economic damages. Litigation costs may be recoverable under section 7430 (*see* paragraph (h) of this section) or, solely to the extent described in paragraph (c) of this section, as costs of the action.

(i) *Litigation costs*. For purposes of this paragraph, litigation costs are any costs incurred pursuing litigation for relief from the action taken by the officer or employee of the Internal Revenue Service, including costs incurred pursuing a civil action in federal district court under paragraph (a) of this section. The term litigation costs includes the following:

(A) Court costs;

(B) Expenses of expert witnesses in connection with a court proceeding;

(C) Cost of any study, analysis, engineering report, test, or project prepared for a court proceeding; and

(D) Fees paid or incurred for the services of attorneys, or other individuals authorized to practice before the court, in connection with a court proceeding.

(ii) *Administrative costs*. For purposes of this section, administrative costs are any costs incurred pursuing administrative relief from the action taken by an officer or employee of the Internal Revenue Service, including costs incurred pursuing an administrative claim for damages under paragraph (e) of this section. The term administrative costs includes:

(A) Any administrative fees or similar charges imposed by the Internal Revenue Service; and

(B) Expenses, costs, and fees described in paragraph (b)(2)(i) of this section incurred pursuing administrative relief.

(c) *Costs of the action*. Costs of the action recoverable as damages under this section are limited to the following costs:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of paper necessarily obtained for use in the case;

(5) Docket fees; and

(6) Compensation of court appointed experts and interpreters.

(d) *No civil action in federal district court prior to filing an administrative claim*—(1) Except as provided in paragraph (d)(2) of this section, no action under paragraph (a) of this section shall be maintained in any federal district court before the earlier of the following dates:

(i) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or

(ii) The date six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.

(2) If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.

(e) *Procedures for an administrative claim*—(1) *Manner*. An administrative claim for the lesser of $1,000,000 ($100,000 in the case of negligence) or actual, direct economic damages as defined in paragraph (b) of this section shall be sent in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides.

(2) *Form*. The administrative claim shall include:

(i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;

(ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the taxpayer or duly authorized representative.

For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpaper.

(f) *No action in federal district court for any sum in excess of the dollar amount sought in the administrative claim*. No action for actual, direct economic damages under paragraph (a) of this section shall be instituted in federal district court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (e) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(g) *Period of limitations*—(1) *Time for filing*. A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.

(2) *Right of action accrues*. A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(h) *Recovery of costs under section 7430*. Reasonable litigation costs, including attorney's fees, not recoverable under this section may be recoverable under section 7430. If following the Internal Revenue Service's denial of an administrative claim on the grounds that the Internal Revenue Service did not violate section 7433(a), a taxpayer brings a civil action for damages in a district court of the United States, and establishes entitlement to damages under this section, substantially prevails with respect to the amount of damages in controversy and meets the requirements of section 7430(c)(4)(A)(iii) (relating to notice and net worth requirements), the taxpayer will be considered a ''prevailing party'' for purposes of section 7430. Such taxpayer, therefore, will generally be entitled to attorney's fees and other reasonable litigation costs not recoverable under this section. For purposes of this paragraph, if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within six

months after the claim is filed, the Internal Revenue Service's failure to respond shall be considered a denial of the claim on the grounds that the Internal Revenue Service did not violate section 7433(a). Administrative costs, including attorney's fees incurred pursuing an administrative claim under paragraph (e) of this section, are not recoverable under section 7430.

(i) *Effective dates*. The portions of this section relating to reckless or intentional acts are applicable to actions taken by Internal Revenue Service officials after July 30, 1996. The portions of this section relating to negligent acts are applicable to actions taken by the Internal Revenue Service officials after July 22, 1998.

[T.D. 8392, 57 FR 3536, Jan. 30, 1992; 57 FR 5931, Feb. 18, 1992, as amended by T.D. 9050, 68 FR 14320, Mar. 25, 2003]

### § 301.7433–2 Civil cause of action for violation of section 362 or 524 of the Bankruptcy Code.

(a) *In general*. (1) If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to the automatic stay) or section 524 (relating to discharge) of title 11, United States Code, or any regulation promulgated under such provision, the taxpayer may file a petition for damages against the United States in Federal bankruptcy court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable under this section is the lesser of $1,000,000, or the sum of—

(i) Actual, direct economic damages sustained as a proximate result of the willful actions of the officer or employee; and

(ii) Costs of the action.

(2) An action under this section constitutes the exclusive remedy under the Internal Revenue Code for violations of sections 362 and 524 of the Bankruptcy Code. In addition, taxpayers injured by violations of section 362 of the Bankruptcy Code may maintain actions under section 362(h) of the Bankruptcy Code (relating to an individual injured by a willful violation of the stay). However, any administrative or litigation costs in connection with an action under section 362(h) may be awarded, if at all, only under section 7430 of the Internal Revenue Code.

(b) *Actual, direct economic damages*—(1) *Definition*. See § 301.7433–1(b)(1).

(2) *Litigation costs and administrative costs not recoverable as actual, direct economic damages*. Litigation costs and administrative costs are not recoverable as actual, direct economic damages. These costs may be recoverable under section 7430 (see paragraph (h) of this section), or, solely to the extent described in paragraph (c) of this section, as costs of the action.

(c) *Costs of the action*. Costs of the action recoverable as damages under this section are limited to the costs set forth in § 301.7433–1(c).

(d) *No civil action in federal bankruptcy court prior to filing an administrative claim*—(1) *In general*. Except as provided in paragraph (d)(2) of this section, no action under paragraph (a)(1) of this section shall be maintained in any bankruptcy court before the earlier of the following dates—

(i) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or

(ii) The date that is six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.

(2) *When administrative claim filed in last six months of period of limitations*. If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may petition the bankruptcy court any time after the administrative claim is filed and before the expiration of the period of limitations.

(e) *Procedures for an administrative claim*—(1) *Manner*. An administrative claim for the lesser of $1,000,000 or actual, direct economic damages as defined in paragraph (b) of this section shall be sent in writing to the Chief, Local Insolvency Unit, for the judicial district in which the taxpayer filed the underlying bankruptcy case giving rise to the alleged violation.

(2) *Form*. The administrative claim shall include—

(i) The name, taxpayer identification number, current address, and current home and work telephone numbers (with an identification of any convenient times to be contacted) of the taxpayer making the claim;

(ii) The location of the bankruptcy court in which the underlying bankruptcy case was filed and the case number of the case in which the violation occurred;

(iii) A description, in reasonable detail, of the violation (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iv) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(v) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available documentation or evidence); and

(vi) The signature of the taxpayer or duly authorized representative.

(3) *Duly authorized representative defined.* For purposes of this paragraph (e), a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(f) *No action in bankruptcy court for any sum in excess of the dollar amount sought in the administrative claim.* No action for actual, direct economic damages under paragraph (a) of this section may be instituted in federal bankruptcy court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (e) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(g) *Period of limitations*—(1) *Time for filing.* A petition for damages under paragraph (a) of this section must be filed in bankruptcy court within two years after the date the cause of action accrues.

(2) *Right of action accrues.* A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(h) *Recovery of litigation costs and administrative costs under section 7430*—(1) *In general.* Litigation costs, as defined in § 301.7433–1(b)(2)(i), including attorneys fees, not recoverable under this section may be recoverable under section 7430 if a taxpayer challenges in whole or in part an Internal Revenue Service denial of an administrative claim for damages by filing a petition in the bankruptcy court. If, following the Internal Revenue Service's denial of an administrative claim for damages, a taxpayer files a petition in the bankruptcy court challenging that denial in whole or in part, substantially prevails with respect to the amount of damages in controversy, and meets the requirements of section 7430(c)(4)(A)(ii) (relating to net worth and size requirements), the taxpayer will be considered a prevailing party for purposes of section 7430, unless the Internal Revenue Service establishes that the position of the Internal Revenue Service in the proceeding was substantially justified. Such taxpayer will generally be entitled to attorneys' fees and other reasonable litigation costs not recoverable under this section. For purposes of this paragraph (h), if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within six months after the claim is filed, the Internal Revenue Service's failure to respond will be considered a denial of the claim on the grounds that the Internal Revenue Service did not willfully violate Bankruptcy Code section 362 or 524.

(2) *Administrative costs*—(i) *In general.* Administrative costs, as defined in § 301.7433–1(b)(2)(ii), including attorneys' fees, not recoverable under this section may be recoverable under section 7430. *See* § 301.7430–8.

(ii) *Limitation regarding recoverable administrative costs.* Administrative costs may be awarded only if incurred on or after the date of filing of the bankruptcy petition that formed the basis for the stay on collection under Bankruptcy Code section 362 or the discharge injunction under Bankruptcy Code section 524, as the case might be.

(i) *Effective date.* This section is applicable to actions taken by the Internal Revenue Service officials after July 22, 1998.

[T.D. 9050, 68 FR 14321, Mar. 25, 2003]

THE TAX COURT

PROCEDURE

### § 301.7452–1 Representation of parties.

The Commissioner shall be represented by the Chief Counsel for the Internal Revenue Service in the same manner before the Tax Court as he has heretofore been represented in proceedings before such Court. The taxpayer shall continue to be represented in accordance with the rules of practice prescribed by the Court.

### § 301.7454–1 Burden of proof in fraud and transferee cases.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

### § 301.7454–2 Burden of proof in foundation manager, etc. cases.

(a) *Foundation manager.* In any proceeding involving the issue whether a foundation manager as defined in section 4946(b) has ''knowingly'' participated in an act of self-dealing within the meaning of section 4941, participated in an investment which jeopardizes the carrying out of exempt purposes within the meaning of section 4944, or agreed to the making of a taxable expenditure within the meaning of section 4945 or whether an organization manager (as defined in section 4958(f)(2)) has ''knowingly'' participated in an excess benefit transaction (as defined in section 4958(c)), the burden of proof in respect of such issue shall be upon the Commissioner.

(b) *Trustee of a black lung benefit trust.* In any proceeding involving the issue whether a trustee of a trust described in section 501(c)(21) has ''knowingly'' participated in an act of self-dealing within the meaning of section 4951 or agreed to the making of a taxable expenditure within the meaning of section 4952, the burden of proof in respect of such issue shall be upon the Commissioner.

[T.D. 7838, 47 FR 44253, Oct. 7, 1982, as amended by T.D. 8920, 66 FR 2171, Jan. 10, 2001]

### § 301.7456–1 Administration of oaths and procurement of testimony; production of records of foreign corporations, foreign trusts or estates and nonresident alien individuals.

Upon motion and notice by the Commissioner and upon good cause shown therefor, the Tax Court or any division thereof shall order any foreign corporation, foreign trust or estate, or nonresident alien individual, who has filed a petition with the Tax Court, to produce, or, upon satisfactory proof to the Tax Court or any of its divisions that the petitioner is unable to produce, to make available to the Commissioner, and, in either case, to permit the inspection, copying, or photographing of, such books, records, documents, memoranda, correspondence and other papers, wherever situated, as the Tax Court or any of its divisions may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control.

### § 301.7457–1 Witness fees.

Any witness summoned for the Commissioner or whose deposition is taken under section 7456 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expense of taking any such deposition shall be paid by the Commissioner out of any moneys appropriated for the collection of internal revenue taxes, and may be paid in advance.

### § 301.7458–1 Hearings.

Notice and opportunity to be heard upon any proceeding instituted before the Tax Court shall be given to the taxpayer and the Commissioner. If an opportunity to be heard upon the proceeding is given before a division of the Tax Court, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Tax Court upon review, except upon a specific order of the chief judge.

### § 301.7461–1 Publicity of proceedings.

All reports of the Tax Court and all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Tax Court in any proceeding has become final the Tax Court may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of the originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Tax Court or any of its divisions; or the Tax Court may, on its own action, make such other disposition thereof as it deems advisable.

DECLARATORY JUDGMENTS RELATING TO QUALIFICATION OF CERTAIN RETIREMENT PLANS

### § 301.7476–1 Declaratory judgments.

See the regulations under section 7476 contained in part 1 of this chapter (Income Tax Regulations) for provisions relating to declaratory judgments, for provisions relating to the qualification of an employee as an ''interested party'', and for a requirement that the applicant for an advance determination by the Internal Revenue Service of the qualification of certain retirement plans give notice of such application to interested parties.

[T.D. 7421, 41 FR 20878, May 21, 1976]

### § 301.7477–1 Declaratory judgments relating to transfers of property from the United States.

(a) *Petition*—(1) *General rule*. A transferor or transferee of stock, securities of property transferred in an exchange described in section 367(a)(1) may petition the Tax Court for a declaratory judgment with respect to the exchange if—

(i) The pleading is timely filed; and

(ii) The exchange has begun before the pleading is filed.

(2) *Pleading timely filed*. The pleading is timely filed if it is filed before the 92d day after the day on which notice of the determination of the Commissioner is sent to the petitioner by certified or registered mail. In the absence of such notice, neither section 7477 nor this section imposes any time limit on the filing of the pleading.

(3) *Beginning of exchange*. An exchange generally shall be considered to begin upon the beginning of the first transfer of property pursuant to the plan under which the exchange is to be made. For rules determining the beginning of a transfer, see § 1.367(a)–1(c)(4).

A transfer shall not be considered to begin with a decision of a board of directors or similar action. A transfer shall be deemed to have begun even though it is made subject to a condition that, if there is a failure to obtain a determination that the exchange is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes, the transaction will not be consummated and to the extent possible the assets transferred will be returned.

(b) *Judgment*—(1) *General rule*. The Tax Court may issue a declaratory judgment or decree within the scope described in section 7477(a)(2) if—

(i) There is a case of actual controversy, and

(ii) The petitioner has exhausted the administrative remedies available to it within the Internal Revenue Service,

with respect to a determination or a failure to make a determination.

(2) *Exhaustion of administrative remedies*. The petitioner shall be deemed to have exhausted the administrative remedies available to it within the Internal Revenue Service if—

(i) The petitioner has completed all applicable procedures published in regulations, the statement of procedural rules (26 CFR part 601) or revenue procedures relating to the filing of a request for a ruling under section 367(a)(1) and, if such a ruling has been

issued, to the filing of a protest to such a ruling;

(ii) The petitioner has submitted prompt and complete responses to any requests by the Internal Revenue Service for further information; and

(iii) The Internal Revenue Service has had a reasonable time to act upon the request for the ruling, any protest thereto and any additional information submitted in response to any request made therefor by the Internal Revenue Service. If there has been a failure to make a determination, the Internal Revenue Service shall be deemed not to have had a reasonable time to act before the expiration of 270 days after the day on which petitioner properly filed the request for a ruling. In no event shall the Internal Revenue Service be deemed to have had a reasonable time to act if a failure to act has occurred because the petitioner did not proceed with due diligence or because the petitioner has not provided all available information or materials reasonably requested by the Internal Revenue Service.

(3) *Effect of judgment*. The declaratory judgment or decree of the Tax Court, when final under section 7481, shall be binding on the parties to the case for purposes of section 367(a)(1). However, if the facts of the exchange differ from those presented to the Court, the judgment shall be binding only to the extent appropriate under the legal doctrines of estoppel and stare decisis.

(c) *Definitions*—(1) *Exchange described to section 367(a)(1)*. For purposes of this section, an ''exchange described in section 367(a)(1)'' is an exchange in connection with which the petitioner has filed a ruling request pursuant to section 367(a)(1) and the regulations thereunder without regard to whether or not section 332, 351, 354, 355, 356 or 361 applies to the exchange.

(2) *Determination*. For purposes of this section, a ''determination'' is the Commissioner's determination for purposes of section 367(a)(1), made in response to the petitioner's protest to a ruling issued under section 367(a)(1)—

(i) That an exchange described in section 367(a)(1) is in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes, or

(ii) Of the terms and conditions pursuant to which such an exchange will be determined not to be in pursuance of such a plan.

(d) *Effective date*. The provisions of this section shall apply with respect to pleadings filed after October 4, 1976, but only with respect to exchanges beginning after October 9, 1975.

(Approved by the Office of Management and Budget under control number 1545–0719)

(Sec. 367(a)(1), 90 Stat. 1634, 26 U.S.C. 367(a)(1) and 7805, 68A Stat. 917, 26 U.S.C. 7805, Internal Revenue Code of 1954)

[T.D. 7596, 44 FR 10707, Feb. 23, 1979, as amended by T.D. 7954, 49 FR 19466, May 8, 1984]

COURT REVIEW OF TAX COURT DECISIONS

### § 301.7481–1 Date when Tax Court decision becomes final; decision modified or reversed.

(a) *Upon mandate of Supreme Court*. Under section 7481(3)(A) of the Code, if the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(b) *Upon mandate of the Court of Appeals*. Under section 7481(3)(B) of the Code, if the decision of the Tax Court is modified or reversed by the U.S. Court of Appeals, and if—

(i) The time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(ii) The petition for certiorari has been denied, or

(iii) The decision of the U.S. Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the U.S. Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the

Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

### § 301.7482–1 Courts of review; venue.

Under section 7482(b)(2) of the Code, decisions of the Tax Court may be reviewed by any U.S. Court of Appeals which may be designated by the Commissioner and the taxpayer by stipulation in writing.

### § 301.7483–1 Petition for review.

The decision of the Tax Court may be reviewed by a U.S. Court of Appeals as provided in section 7482 of the Code if a petition for such review is filed by either the Commissioner or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

### § 301.7484–1 Change of incumbent in office.

When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court.

MISCELLANEOUS PROVISIONS

### § 301.7502–1 Timely mailing of documents and payments treated as timely filing and paying.

(a) *General rule.* Section 7502 provides that, if the requirements of that section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope or other appropriate wrapper (envelope) in which the document or payment was mailed. Thus, if the envelope that contains the document or payment has a timely postmark, the document or payment is considered timely filed or paid even if it is received after the last date, or the last day of the period, prescribed for filing the document or making the payment. Section 7502 does not apply in determining whether a failure to file a return or pay a tax has continued for an additional month or fraction thereof for purposes of computing the penalties and additions to tax imposed by section 6651. Except as provided in section 7502(e) and § 301.7502–2, relating to the timely mailing of deposits, and paragraph (d) of this section, relating to electronically filed documents, section 7502 is applicable only to those documents or payments as defined in paragraph (b) of this section and only if the document or payment is mailed in accordance with paragraph (c) of this section and is delivered in accordance with paragraph (e) of this section.

(b) *Definitions*—(1) *Document defined.* (i) The term *document*, as used in this section, means any return, claim, statement, or other document required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws, except as provided in paragraph (b)(1)(ii), (iii), or (iv) of this section.

(ii) The term does not include returns, claims, statements, or other documents that are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing.

(iii) The term does not include any document filed in any court other than the Tax Court, but the term does include any document filed with the Tax Court, including a petition and a notice of appeal of a decision of the Tax Court.

(iv) The term does not include any document that is mailed to an authorized financial institution under section 6302. However, see § 301.7502–2 for special rules relating to the timeliness of deposits and documents required to be filed with deposits.

(2) *Claims for refund.* In the case of certain taxes, a return may constitute a claim for credit or refund. In such a case, section 7502 is applicable to the claim for credit or refund if the conditions of such section are met, irrespective of whether the claim is also a return. For rules regarding claims for refund on late filed tax returns, see paragraph (f) of this section.

(3) *Payment defined.* (i) The term *payment*, as used in this section, means any payment required to be made within a prescribed period or on or before a prescribed date under the authority of any provision of the internal revenue laws, except as provided in paragraph (b)(3)(ii), (iii), (iv), or (v) of this section.

(ii) The term does not include any payment that is required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing. See, for example, section 6302(h) and the regulations thereunder regarding electronic funds transfer.

(iii) The term does not include any payment, whether it is made in the form of currency or other medium of payment, unless it is actually received and accounted for. For example, if a check is used as the form of payment, this section does not apply unless the check is honored upon presentation.

(iv) The term does not include any payment to any court other than the Tax Court.

(v) The term does not include any deposit that is required to be made with an authorized financial institution under section 6302. However, see § 301.7502–2 for rules relating to the timeliness of deposits.

(4) *Last date or last day prescribed.* As used in this section, the term *the last date, or the last day of the period, prescribed for filing the document or making the payment* includes any extension of time granted for that action. When the last date, or the last day of the period, prescribed for filing the document or making the payment falls on a Saturday, Sunday or legal holiday, section 7503 applies. Therefore, in applying the rules of this paragraph (b)(4), the next succeeding day that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment. Also, when the last date, or the last day of the period, prescribed for filing the document or making the payment falls within a period disregarded under section 7508 or section 7508A, the next succeeding day after the expiration of the section 7508 period or section 7508A period that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment.

(c) *Mailing requirements*—(1) *In general.* Section 7502 does not apply unless the document or payment is mailed in accordance with the following requirements:

(i) *Envelope and address.* The document or payment must be contained in an envelope, properly addressed to the agency, officer, or office with which the document is required to be filed or to which the payment is required to be made.

(ii) *Timely deposited in U.S. mail.* The document or payment must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual as incorporated by reference in the postal regulations, includes mail transmitted within, among, and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Section 7502 does not apply to any document or payment that is deposited with the mail service of any other country.

(iii) *Postmark*—(A) *U.S. Postal Service postmark.* If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day

of the period, prescribed for filing the document or making the payment. See, however, paragraph (c)(2) of this section with respect to the use of registered mail or certified mail to avoid this risk. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made. Furthermore, if the envelope that contains a document or payment has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

(B) *Postmark made by other than U.S. Postal Service*—(*1*) *In general.* If the postmark on the envelope is made other than by the U.S. Postal Service—

(*i*) The postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and

(*ii*) The document or payment must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

(*2*) *Document or payment received late.* If a document or payment described in paragraph (c)(1)(iii)(B)(*1*) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes—

(*i*) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

(*ii*) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(*iii*) The cause of the delay.

(*3*) *U.S. and non-U.S. postmarks.* If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

(2) *Registered or certified mail.* If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

(d) *Electronically filed documents*—(1) *In general.* A document filed electronically with an electronic return transmitter (as defined in paragraph (d)(3)(i) of this section and authorized pursuant to paragraph (d)(2) of this section) in the manner and time prescribed by the Commissioner is deemed to be filed on the date of the electronic postmark (as defined in paragraph (d)(3)(ii) of this section) given by the authorized electronic return transmitter. Thus, if the electronic postmark is timely, the document is considered filed timely although it is received by the agency, officer, or office after the last date, or the last day of the period, prescribed for filing such document.

(2) *Authorized electronic return transmitters.* The Commissioner may enter into an agreement with an electronic

return transmitter or prescribe in forms, instructions, or other appropriate guidance the procedures under which the electronic return transmitter is authorized to provide taxpayers with an electronic postmark to acknowledge the date and time that the electronic return transmitter received the electronically filed document.

(3) *Definitions*—(i) *Electronic return transmitter*. For purposes of this paragraph (d), the term *electronic return transmitter* has the same meaning as contained in section 3.01(4) of Rev. Proc. 2000–31 (2000–31 I.R.B. 146 (July 31, 2000))(see § 601.601(d)(2) of this chapter) or in procedures prescribed by the Commissioner.

(ii) *Electronic postmark*. For purposes of this paragraph (d), the term *electronic postmark* means a record of the date and time (in a particular time zone) that an authorized electronic return transmitter receives the transmission of a taxpayer's electronically filed document on its host system. However, if the taxpayer and the electronic return transmitter are located in different time zones, it is the taxpayer's time zone that controls the timeliness of the electronically filed document.

(e) *Delivery*—(1) Except as provided in section 7502(f) and paragraph (d) of this section, section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made. However, in the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office.

(2) Section 7502 is applicable to the determination of whether a claim for credit or refund is timely filed for purposes of section 6511(a), assuming all the requirements of section 7502 are satisfied. Section 7502 is also applicable when a claim for credit or refund is delivered after the last day of the period specified in section 6511(b)(2)(A) or in any other corresponding provision of law relating to the limit on the amount of credit or refund that is allowable.

(3) *Example*. The rules of paragraph (e)(2) of this section are illustrated by the following example:

*Example*. (i) Taxpayer A, an individual, mailed his 1998 Form 1040, ''U.S. Individual Income Tax Return,'' on May 10, 1999, but no tax was paid at that time because the tax liability disclosed by the return had been completely satisfied by the income tax that had been withheld on A's wages. On April 15, 2002, A mails in accordance with the requirements of this section, a Form 1040X, ''U.S. Amended Individual Income Tax Return,'' claiming a refund of a portion of the tax that had been paid through withholding during 1998. The date of the postmark on the envelope containing the claim for refund is April 15, 2002. The claim is received by the Internal Revenue Service (IRS) on April 18, 2002.

(ii) Under section 6511(a), A's claim for refund is timely if filed within three years from May 10, 1999, the date on which A's 1998 return was filed. However, as a result of the limitations of section 6511(b)(2)(A), if his claim is not filed within three years after April 15, 1999, the date on which he is deemed under section 6513 to have paid his 1998 tax, he is not entitled to any refund. Thus, because A's claim for refund is postmarked and mailed in accordance with the requirements of this section and is delivered after the last day of the period specified in section 6511(b)(2)(A), section 7502 is applicable and the claim is deemed to have been filed on April 15, 2002.

(f) *Claim for credit or refund on late filed tax return*—(1) *In general*. Generally, an original income tax return may constitute a claim for credit or refund of income tax. See § 301.6402–3(a)(5). Other original tax returns can also be considered claims for credit or refund if the liability disclosed on the return is less than the amount of tax that has been paid. If section 7502 would not apply to a return (but for the operation of paragraph (f)(2) of this section) that is also considered a claim for credit or refund because the envelope that contains the return does not have a postmark dated on or before the due date of the return, section 7502 will apply separately to the claim for credit or refund if—

(i) The date of the postmark on the envelope is within the period that is

three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid (see section 6513), and the claim for credit or refund is delivered after this three-year period; and

(ii) The conditions of section 7502 are otherwise met.

(2) *Filing date of late filed return.* If the conditions of paragraph (f)(1) of this section are met, the late filed return will be deemed filed on the postmark date.

(3) *Example.* The rules of this paragraph (f) are illustrated by the following example:

*Example.* (i) Taxpayer A, an individual, mailed his 2001 Form 1040, ''U.S. Individual Income Tax Return,'' on April 15, 2005, claiming a refund of amounts paid through withholding during 2001. The date of the postmark on the envelope containing the return and claim for refund is April 15, 2005. The return and claim for refund are received by the Internal Revenue Service (IRS) on April 18, 2005. Amounts withheld in 2001 exceeded A's tax liability for 2001 and are treated as paid on April 15, 2002, pursuant to section 6513.

(ii) Even though the date of the postmark on the envelope is after the due date of the return, the claim for refund and the late filed return are treated as filed on the postmark date for purposes of this paragraph (f). Accordingly, the return will be treated as filed on April 15, 2005. In addition, the claim for refund will be treated as timely filed on April 15, 2005. Further, the entire amount of the refund attributable to withholding is allowable as a refund under section 6511(b)(2)(A).

(g) *Effective date*—(1) *In general.* Except as provided in paragraphs (g)(2) and (3) of this section, the rules of this section apply to any payment or document mailed and delivered in accordance with the requirements of this section in an envelope bearing a postmark dated after January 11, 2001.

(2) *Claim for credit or refund on late filed tax return.* Paragraph (f) of this section applies to any claim for credit or refund on a late filed tax return described in paragraph (f)(1) of this section except for those claims for credit or refund which (without regard to paragraph (f) of this section) were barred by the operation of section 6532(a) or any other law or rule of law (including res judicata) as of January 11, 2001.

(3) *Electronically filed documents.* This section applies to any electronically filed return, claim, statement, or other document transmitted to an electronic return transmitter that is authorized to provide an electronic postmark pursuant to paragraph (d)(2) of this section after January 11, 2001.

[T.D. 8932, 66 FR 2258, Jan. 11, 2001]

## § 301.7502–2 Timely mailing of deposits.

(a) *General rule*—(1) *Two day rule.* Section 7502(e) provides that, if the requirements of that section are met, a deposit is deemed to be received on the date the deposit was mailed even though it is received after the date prescribed for making the deposit. The requirements of the section are met if the person required to make the deposit establishes that the date of mailing was on or before the second day preceding the date prescribed for making the deposit. If the date of mailing was not established to be on or before the second day preceding the date prescribed for making the deposit, the deposit will not be considered timely received unless it is actually received on or before the date prescribed for making the deposit. Section 7502(e) only applies to a deposit mailed to the financial institution authorized to receive that deposit. Thus, section 7502(e) does not apply to any remittance mailed to an internal revenue service center.

(2) *Deposits of $20,000 or more.* Paragraph (a)(1) of this section does not apply with respect to any deposit of $20,000 or more by any person required to deposit any tax more than once a month. Any such deposit must be made by the due date for such deposit, regardless of the method of delivery.

(b) *Deposit defined.* The term *deposit*, as used in this section, means any deposit of tax required to be made on or before a prescribed date at an authorized financial institution pursuant to regulations prescribed under section 6302.

(c) *Mailing requirements*—(1) *In general.* Section 7502(e) does not apply unless the deposit is mailed in accordance with the requirements of paragraph (c)(2) of this section.

(2) *Requirements.* The date of mailing must fall on or before the second day

preceding the prescribed date for making a deposit (including any extension of time granted for making the deposit). For example, if a deposit is due on or before January 15, the date of mailing must fall on or before January 13. The deposit must be contained in an envelope or other appropriate wrapper approved for use in the mails by the U.S. Postal Service, properly addressed to the financial institution authorized to receive the deposit. The deposit must be deposited with sufficient postage prepaid in the mail in the United States within the meaning of § 301.7502–1 on or before the second day preceding the prescribed date for making a deposit.

(3) *Registered and certified mail.* The provisions of § 301.7502–1(c)(2) apply to a deposit sent by U.S. registered mail or U.S. certified mail as if the deposit were a payment, except that the date of registration or the date of the postmark on the sender's receipt is considered the date of mailing of such deposit.

(d) *Delivery.* Section 7502(e) does not apply unless a deposit is actually delivered by U.S. mail to the authorized financial institution with which the deposit is required to be made and is accepted by that financial institution. For rules relating to the acceptance of deposits by authorized financial institutions see 31 CFR 203.18. The fact that a deposit is sent by U.S. registered or U.S. certified mail does not constitute prima facie evidence that the deposit was delivered to the financial institution authorized to receive the deposit. Section 7502(e) does not apply unless the deposit is delivered after the date prescribed for making the deposit.

(e) *Effective date.* This section applies to all deposits required to be made after January 11, 2001.

[T.D. 8932, 66 FR 2261, Jan. 11, 2001]

### § 301.7503–1 Time for performance of acts where last day falls on Saturday, Sunday, or legal holiday.

(a) *In general.* Section 7503 provides that when the last day prescribed under authority of any internal revenue law for the performance of any act falls on a Saturday, Sunday, or legal holiday, such act shall be considered performed timely if performed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For this purpose, any authorized extension of time shall be included in determining the last day for performance of any act. Section 7503 is applicable only in case an act is required under authority of any internal revenue law to be performed on or before a prescribed date or within a prescribed period. For example, if the 2-year period allowed by section 6532(a)(1) to bring a suit for refund of any internal revenue tax expires on Thursday, November 23, 1995 (Thanksgiving Day), the suit will be timely if filed on Friday, November 24, 1995, in the Court of Federal Claims, or in a district court. Section 7503 applies to acts to be performed by the taxpayer (such as, the filing of any return of, and the payment of, any income, estate, or gift tax; the filing of a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by such Court; the filing of a claim for credit or refund of any tax) and acts to be performed by the Commissioner, a district director, or the director of a regional service center (such as, the giving of any notice with respect to, or making any demand for the payment of, any tax; the assessment or collection of any tax).

(b) *Legal holidays.* For the purpose of section 7503, the term *legal holiday* includes the legal holidays in the District of Columbia as found in D.C. Code Ann. 28–2701. In the case of any return, statement, or other document required to be filed, or any other act required under the authority of the internal revenue laws to be performed, at an office of the Internal Revenue Service, or any other office or agency of the United States, located outside the District of Columbia but within an internal revenue district, the term *legal holiday* includes, in addition to the legal holidays in the District of Columbia, any statewide legal holiday of the state where the act is required to be performed. If the act is performed in accordance with law at an office of the Internal Revenue Service or any other office or agency of the United States located in a territory or possession of the United States, the term *legal holiday* includes, in addition to the legal holidays in the District of Columbia, any legal holiday

that is recognized throughout the territory or possession in which the office is located.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7309, 39 FR 11537, Mar. 29, 1974; T.D. 8681, 61 FR 42179, Aug. 14, 1996]

### § 301.7505–1 Sale of personal property acquired by the United States.

(a) *Sale*—(1) *In general*. Any personal property (except bonds, notes, checks, and other securities) acquired by the United States in payment of or as security for debts arising under the internal revenue laws may be sold by the district director who acquired such property for the United States. United States savings bonds shall not be sold by the district director but shall be transferred to the appropriate office of the Treasury Department for redemption. Other bonds, notes, checks, and other securities shall be disposed of in accordance with instructions issued by the Commissioner.

(2) *Time, place, manner, and terms of sale*. The time, place, manner, and terms of sale of personal property acquired for the United States shall be as follows:

(i) *Time, notice, and place of sale*. The property may be sold at any time after it has been acquired by the United States. A public notice of sale shall be posted at the post office nearest the place of sale and in at least two other public places. The notice shall specify the property to be sold and the time, place, manner, and conditions of sale. In addition, the district director may use such other methods of advertising as he believes will result in obtaining the highest price for the property. The place of sale shall be within the internal revenue district where the property was originally acquired by the United States. However, if the district director believes that a substantially higher price may be obtained, the sale may be held outside his district.

(ii) *Rejection of bids and adjournment of sale*. The internal revenue officer conducting the sale reserves the right to reject any and all bids and withdraw the property from the sale. When it appears to the internal revenue officer conducting the sale that an adjournment of the sale will best serve the interest of the United States, he may order the sale adjourned from time to time. If the sale is adjourned for more than 30 days in the aggregate, public notice of the sale must again be given in accordance with subdivision (i) of this subparagraph.

(iii) *Liquidated damages*. The notice shall state whether, in the case of default in payment of the bid price, any amount deposited with the United States will be retained as liquidated damages. In case liquidated damages are provided, the amount thereof shall not exceed $200.

(3) *Agreement to bid*. The district director may, before giving notice of sale, solicit offers from prospective bidders and enter into agreements with such persons that they will bid at least a specified amount in case the property is offered for sale. In such cases, the district director may also require such persons to make deposits to secure the performance of their agreements. Any such deposit, but not more than $200, shall be retained as liquidated damages in case such person fails to bid the specified amount and the property is not sold for as much as the amount specified in such agreement.

(4) *Terms of payment*. The property shall be offered for sale upon whichever of the following terms is fixed by the district director in the public notice of sale—

(i) Payment in full upon acceptance of the highest bid, without regard to the amount of such bid, or

(ii) If the aggregate price of all property purchased by a successful bidder at the sale is more than $200, an initial payment of $200 or 20 percent of the purchase price, whichever is the greater, and payment of the balance (including all costs incurred for the protection or preservation of the property subsequent to the sale and prior to final payment) within a specified period, not to exceed one month from the date of the sale.

(5) *Method of sale*. The property may be sold either—

(i) At public auction, at which open competitive bids shall be received, or

(ii) At public sale under sealed bids.

(6) *Sales under sealed bids*. The following rules, in addition to the other rules provided in this paragraph, shall

be applicable to public sales under sealed bids.

(i) *Invitation to bidders.* Bids shall be solicited through a public notice of sale.

(ii) *Form for use by bidders.* A bid shall be submitted on a form which will be furnished by the district director upon request. The form shall be completed in accordance with the instructions thereon.

(iii) *Remittance with bid.* If the total bid is $200 or less, the full amount of the bid shall be submitted therewith. If the total bid is more than $200, 20 percent of such bid or $200, whichever is greater, shall be submitted therewith. Such remittance shall be by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order.

(iv) *Time for receiving and opening bids.* Each bid shall be submitted in a securely sealed envelope. The bidder shall indicate in the upper left hand corner of the envelope his name and address and the time and place of sale as announced in the public notice of sale. A bid will not be considered unless it is received by the internal revenue officer conducting the sale prior to the opening of the bids. The bids will be opened at the time and place stated in the notice of sale, or at the time fixed in the announcement of the adjournment of the sale.

(v) *Consideration of bids.* The internal revenue officer conducting the sale shall have the right to waive any technical defects in a bid. After the opening, examination, and consideration of all bids, the internal revenue officer conducting the sale shall announce the amount of the highest bid or bids and the name of the successful bidder or bidders, unless in the opinion of the officer a higher price can be obtained for the property than has been bid. In the event the highest bids are equal in amount (and unless in the opinion of the internal revenue officer conducting the sale a higher price can be obtained for the property than has been bid), the officer shall determine the successful bidder by drawing lots. Any remittance submitted in connection with an unsuccessful bid shall be returned to the bidder at the conclusion of the sale.

(vi) *Withdrawal of bids.* A bid may be withdrawn on written or telegraphic request received from the bidder prior to the time fixed for opening the bids. A technical defect in a bid confers no right on the bidder for the withdrawal of his bid after it has been opened.

(7) *Payment of bid price.* All payments for property sold pursuant to this section shall be made by cash or by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order. If payment in full is required upon acceptance of the highest bid, the payment shall be made at such time. If payment in full is not made at such time, the internal revenue officer conducting the sale may forthwith proceed again to sell the property in the manner provided in subparagraph (5) of this paragraph (a). If deferred payment is permitted, the initial payment shall be made upon acceptance of the bid, and the balance shall be paid on or before the date fixed for payment thereof. Any remittance submitted with a successful sealed bid shall be applied toward the purchase price.

(8) *Delivery and removal of personal property.* The risk of loss is on the purchaser of the property upon acceptance of his bid. Possession of any property shall not be delivered to the purchaser until the purchase price has been paid in full. If payment of part of the purchase price for the property is deferred, the United States will retain possession of such property as security for the payment of the balance of the purchase price and, as agent for the purchaser, will cause the property to be cared for until the purchase price has been paid in full or the sale is declared null and void for failure to make full payment of the purchase price. In such case, all charges and expenses incurred in caring for the property after acceptance of the bid shall be borne by the purchaser.

(9) *Certificate of sale.* The internal revenue officer conducting the sale shall

issue a certificate of sale to the purchaser upon payment in full of the purchase price.

(b) *Accounting*. In case of the resale of such property, the proceeds of the sale shall be paid into the Treasury as internal revenue collections, and there shall be rendered by the district director a distinct account of all charges incurred in such sale. For additional accounting rules, see section 7809 and the instructions thereunder.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7305, 39 FR 9952, Mar. 15, 1974]

### § 301.7506–1 Administration of real estate acquired by the United States.

(a) *Persons charged with*. The district director for the internal revenue district in which the property is situated shall have charge of all real estate which is or shall become the property of the United States by judgment of forfeiture under the internal revenue laws, or which has been or shall be assigned, set off, or conveyed by purchase or otherwise to the United States in payment of debts or penalties arising under the laws relating to internal revenue or which has been or shall be vested in the United States by mortgage, or other security for payment of such debts, or which has been redeemed by the United States, or which has been or shall be acquired by the United States in payment of or as security for debts arising under the internal revenue laws, and of all trusts created for the use of the United States in payment of such debts due the United States.

(b) *Sale*. The district director for the internal revenue district in which the property is situated may sell any real estate owned or held by the United States as aforesaid, subject to the following rules—

(1) *Property purchased at sale under levy*. If the property was acquired as a result of being declared purchased for the United States at a sale under section 6335, relating to sale of seized property, the property shall not be sold until after the expiration of 120 days (or 1 year in the case of such sale under levy before November 3, 1966) after such sale under levy.

(2) *Notice of sale*. A notice of sale shall be published in some newspaper published or generally circulated within the county where the property is situated, or a notice shall be posted at the post office nearest the place where the property is situated and in at least two other public places. The notice shall specify the property to be sold and the time, place, manner, and conditions of sale. In addition, the district director may use other methods of advertising and of giving notice of sale if he believes such methods will enhance the possibility of obtaining a higher price for the property.

(3) *Time and place of sale*. The time of the sale shall be not less than 20 days from the date of giving public notice of sale under subparagraph (2) of this paragraph (b). The place of sale shall be within the county where the property is situated. However, if the district director believes a substantially better price may be obtained, he may hold the sale outside such county.

(4) *Rejection of bids and adjournment of sale*. The internal revenue officer conducting the sale reserves the right to reject any and all bids and withdraw the property from the sale. When it appears to the internal revenue officer conducting the sale that an adjournment of the sale will best serve the interest of the United States, he may order the sale adjourned from time to time. If the sale is adjourned for more than 30 days in the aggregate, public notice of the sale must be given again in accordance with subparagraph (2) of this paragraph (b).

(5) *Liquidated damages*. The notice shall state whether, in the case of default in payment of the bid price, any amount deposited with the United States will be retained as liquidated damages. In case liquidated damages are provided, the amount thereof shall not exceed $200.

(6) *Agreement to bid*. The district director may, before giving notice of sale, solicit offers from prospective bidders and enter into agreements with such persons that they will bid at least a specified amount in case the property is offered for sale. In such cases, the district director may also require such persons to make deposits to secure the performance of their agreements. Any such deposit, but not more than $200, shall be retained as liquidated damages in case such person fails to bid the

specified amount and the property is not sold for as much as the amount specified in such agreement.

(7) *Terms*. The property shall be offered for sale upon whichever of the following terms is fixed by the district director in the public notice of sale:

(i) Payments in full upon acceptance of the highest bid, or

(ii) If the price of the property purchased by a successful bidder at the sale is more than $200, an initial payment of $200 or 20 percent of the purchase price, whichever is the greater, and payment of the balance within a specified period, not to exceed one month from the date of the sale.

(8) *Method of sale*. The property may be sold either—

(i) At public auction, at which open competitive bids shall be received, or

(ii) At public sale under sealed bids.

(9) *Sales under sealed bids*. The following rules, in addition to the other rules provided in this paragraph (b), shall be applicable at public sales under sealed bids:

(i) *Invitation to bidders*. Bids shall be solicited through a public notice of sale.

(ii) *Form for use by bidders*. A bid shall be submitted on a form which will be furnished by the district director upon request. The form shall be completed in accordance with the instructions thereon.

(iii) *Remittance with bid*. If the total bid is $200 or less, the full amount of the bid shall be submitted therewith. If the total bid is more than $200, 20 percent of such bid or $200, whichever is greater, shall be submitted therewith. Such remittance shall be by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a U.S. postal, bank, express, or telegraph money order.

(iv) *Time for receiving and opening bids*. Each bid shall be submitted in a securely sealed envelope. The bidder shall indicate in the upper left hand corner of the envelope his name and address and the time and place of sale as announced in the public notice of sale. A bid shall not be considered unless it is received by the internal revenue officer conducting the sale prior to the opening of the bids. The bids will be opened at the time and place stated in the notice of sale, or at the time fixed in the announcement of the adjournment of the sale.

(v) *Consideration of bids*. The internal revenue officer conducting the sale shall have the right to waive any technical defects in a bid. After the opening, examination, and consideration of all bids, the internal revenue officer conducting the sale shall announce the amount of the highest bid or bids and the name of the successful bidder or bidders, unless in the opinion of the officer a higher price can be obtained for the property that has been bid. In the event the highest bids are equal in amount (and unless in the opinion of the internal revenue officer conducting the sale a higher price can be obtained for the property than has been bid), the officer shall determine the successful bidder by drawing lots. Any remittance submitted in connection with an unsuccessful bid shall be returned to the bidder at the conclusion of the sale.

(vi) *Withdrawal of bids*. A bid may be withdrawn on written or telegraphic request received from the bidder prior to the time fixed for opening the bids. A technical defect in a bid confers no right on the bidder for the withdrawal of his bid after it has been opened.

(10) *Payment of bid price*. All payments for property sold pursuant to this section shall be made by cash or by a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by U.S. postal, bank, express, or telegraph money order. If payment in full is required upon acceptance of the highest bid, the payment shall be made at such time. If payment in full is not made at such time, the internal revenue officer conducting the sale may forthwith proceed again to sell the property in the manner provided in subparagraph (8) of this paragraph (b). If deferred payment is permitted, the initial payment shall be made upon acceptance of the bid, and the balance shall be paid on or before the date fixed for payment thereof.

Any remittance submitted with a successful sealed bid shall be applied toward the purchase price.

(11) *Deed*. Upon payment in full of the purchase price, the district director shall execute a quitclaim deed to the purchaser.

(c) *Lease*. Until real estate is sold, the district director for the internal revenue district in which the property is situated may, in accordance with instructions issued by the Commissioner, lease such property.

(d) *Release to debtor*. In cases where real estate has or may become the property of the United States by conveyance or otherwise, in payment of or as security for a debt arising under the laws relating to internal revenue, and such debt shall have been paid, together with the interest thereon (at the rate of 1 percent per month), to the United States within 2 years from the date of the acquisition of such real estate, the district director for the internal revenue district in which the property is located may release by deed or otherwise convey such real estate to the debtor from whom it was taken, or to his heirs or other legal representatives. If property is declared purchased by the United States under section 6335, then, for the purpose of this paragraph, the date of such declaration shall be deemed to be the date of acquisition of such real estate.

(e) *Accounting*. The district director for the internal revenue district in which the property is situated shall, in accordance with section 7809 and the instructions thereunder, account for the proceeds of all sales or leases of the property and all expenses connected with the maintenance, sale, or lease of the property.

(f) *Authority of Commissioner*. Notwithstanding the other paragraphs of this section, the Commissioner may, when he deems it advisable, take charge of and assume responsibility for any real estate to which this section is applicable. In such case, the Commissioner will notify in writing the district director for the internal revenue district in which the property is situated. In any case where a single parcel of real estate is situated in more than one internal revenue district, the Commissioner may designate in writing a district director who shall have charge of and be responsible for the entire property.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7027, 35 FR 3806, Feb. 27, 1970; T.D. 7305, 39 FR 9953, Mar. 15, 1974]

### § 301.7507–1 Banks and trust companies covered.

(a) Section 7507 applies to any national bank, or bank or trust company organized under State law, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, and which has—

(1) Ceased to do business by reason of insolvency or bankruptcy, or

(2) Been released or discharged from its liability to its depositors for any part of their deposit claims, and the depositors have accepted in lieu thereof a lien upon its subsequent earnings or claims against its assets either (i) segregated and held by it for benefit of the depositors or (ii) transferred to an individual or corporate trustee or agent who liquidates, holds or operates the assets for the benefit of the depositors.

(b) As used in this section and §§ 301.7507–2 to 301.7507–11, inclusive:

(1) The term *bank*, unless otherwise indicated by the context, means any national bank, or bank or trust company organized under State law, within the scope of section 7507.

(2) The terms *statute of limitations* and *limitations* mean all applicable provisions of law (including section 7507) which impose, change, or affect the limitations, conditions, or requirements relative to the allowance of refunds and abatements or the assessment or collection of tax, as the case may be.

(3) The term *segregated assets* includes transferred or trusteed assets, or assets set aside or earmarked, to all or a portion of which, or the proceeds of which, the depositors are absolutely or conditionally entitled.

(4) The term *ceased to do business* means the bank no longer accepts deposits or makes loans and discounts, and is winding up its affairs and is in the process of liquidating its assets to pay depositors. A bank will not be considered to have ceased to do business

on account of a transaction in which the bank—

(i) Transfers assets and liabilities to a Bridge Bank in a transfer described in § 1.597–4 of this chapter;

(ii) Transfers assets and liabilities to any person in a transaction to which section 381(a) applies or in which the transferee receives property with a transferred basis;

(iii) Transfers assets or liabilities to any person in a transaction in which Federal Financial Assistance (as defined in section 597) is provided to any party to the transaction, unless all the Federal Financial Assistance is deposit insurance under § 301.7507–9(d); or

(iv) Transfers assets or liabilities to any person in a transaction similar to any transaction described in paragraphs (b)(4)(i) through (iii) of this section. This paragraph (b)(4) applies to taxable years ending on or after April 22, 1992.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8641, 60 FR 66105, Dec. 21, 1995]

### § 301.7507–2 Scope of section generally.

(a) *Purpose.* Section 7507 is intended to assist depositors of a bank which had ceased to do business by reason of insolvency to recover their deposits, by prohibiting collection of taxes of the bank which would diminish the assets necessary for payment of its depositors and also assist depositors of banks which are in financial difficulties but which, in certain conditions, continue in business.

(b) *Requisites of application.* In order that section 7507 shall operate in a case where the bank continues business it is necessary that the depositors shall agree to accept, in lieu of all or a part of their deposit claims as such, claims against segregated assets, or a lien upon subsequent earnings of the bank, or both. When such an agreement exists, no tax diminishing such assets or earnings, or both, otherwise available and necessary for payment of depositors, may be collected therefrom. If, under such an agreement, the depositors have the right also to look to the unsegregated assets of the bank for recovery, in whole or in part, the unsegregated assets are likewise, until they exceed the amount of the depositors' claims chargeable thereto, unavailable for tax collection. Any tax of such a bank, or part of any tax, which is once uncollectible under section 7507, cannot thereafter be collected except from any residue of segregated assets remaining after claims of depositors against such assets have been paid.

(c) *Interest.* For the purposes of section 7507, depositors' claims include bona fide interest, either on the deposits as such, or on the claims accepted in lieu of deposits as such.

(d) *Limitations on immunity.* Section 7507 is not primarily intended for the relief of banks as such. It does not prevent tax collection, from assets not necessary, or not available, for payment of depositors, from a bank within section 7507(a), at any time within the statute of limitations. In other words, the immunity of such a bank is not complete, but ceases whenever, within the statutory period for collection, it becomes possible to make collection without diminishing assets necessary for payment of depositors. In the case of a bank within section 7507(b), any immunity to which the bank is entitled is absolute except as to segregated assets. Any tax coming within such immunity may never be collected. With respect to segregated assets, such a bank is subject to the same rule as a bank within section 7507(a), that is to say, after claims of depositors against segregated assets have been paid, any surplus is subject, within the statute of limitations, to collection of any tax, due at any time, the collection of which was suspended by the section. The section is not for the relief of creditors other than depositors, although it may incidentally operate for their benefit. See § 301.7507–4 and paragraph (b) of § 301.7507–9.

### § 301.7507–3 Segregated or transferred assets.

(a) *In general.* In a case involving segregated or transferred assets, it is not necessary, for application of section 7507, that the assets shall technically constitute a trust fund. It is sufficient that segregated assets be definitely separated from other assets of the bank and that transferred assets be definitely separated both from other assets of the bank and from other assets held or owned by the trustee or agent to

whom assets of the bank have been transferred; that the bank be wholly or partially released from liability for repayment of deposits as such; and that the depositors have claims against the separated assets. Any excess of separated assets over the amount necessary for payment of such depositors will be available for tax collection after full payment of depositors' claims under the agreement against such assets. But see paragraph (a) of § 301.7507–9.

(b) *Corporate transferees.* Where the segregated assets are transferred to a separate corporate trustee or corporate agent, the assets and earnings therefrom are within the protection of the section, until full payment of depositors' claims against such assets and earnings, no matter by whom the stock of such corporation is held, and no matter whether the assets be liquidated or operated or held for benefit of the depositors.

**§ 301.7507–4 Unsegregated assets.**

(a) *Depositors' claims against assets.* (1) Claims of depositors, to the extent that they are to be satisfied out of segregated assets, will not be considered in determining the availability of unsegregated assets for tax collection. If depositors have agreed to accept payment out of segregated assets only, collection of tax from unsegregated assets will not diminish the assets available and necessary for payment of the depositors' claims. Thus, it may be possible to collect taxes from the unsegregated assets of a bank although the segregated assets are immune under the section.

(2) If the unsegregated assets of the bank are subject to any portion of the depositors' claims, such unsegregated assets will be within the immunity of the section only to the extent necessary to satisfy the claims to which such assets are subject. Taxes will still be collectible from the unsegregated assets to the extent of the amount by which the total value of such assets exceeds the liability to depositors to be satisfied therefrom. Therefore, if, for example, in the case of a bank having a tax liability, not previously immune under the section, of $50,000, the deposit claims against the bank are in the amount of $75,000, and the assets available for satisfaction of deposit claims amount to $100,000, the $50,000 tax is collectible to the extent of the $25,000 excess of assets over deposit claims. Collection is not to be postponed until the full amount of the tax is collectible.

(b) *Depositors' claims against earnings.* Even though under a bona fide agreement a bank has been released from depositors' claims as to unsegregated assets, if all or a portion of its earnings are subject to depositors' claims, all assets the earnings from which, in whole or part, are charged with the payment of depositors' claims, will be immune from tax collection. But see paragraph (a) of § 301.7507–5.

**§ 301.7507–5 Earnings.**

(a) *Availability for tax collection.* Earnings of a bank within section 7507(b), whether from segregated or unsegregated assets, which are necessary for, applicable to, and actually used for, payment of depositors' claims under an agreement, are within the immunity of the section. If only a portion or percentage of income from segregated or unsegregated assets is available and necessary for payment of depositors' claims, the remaining income is available for tax collection. Earnings of the bank's first fiscal year ending after the making of the agreement not applicable to payment of depositors will be assumed to be applicable for collection of any tax due prior or subsequent to execution of the agreement. Earnings of subsequent fiscal periods from unsegregated assets not applicable to depositors' claims will be assumed to be applicable to payment of taxes as to which immunity under the section has not previously attached. Earnings from segregated assets are available for collection of tax, whether previously uncollectible under the section or not, after depositors' claims against such assets have been paid in full. See paragraph (a) of § 301.7507–3 and paragraph (a) of § 301.7507–9.

(b) *Tax computation.* The fact that earnings of a given year may be wholly or partly unavailable under section 7507 for collection of taxes does not exempt the income for that year, or any part thereof, from tax liability. The section affects collectibility only, and

is not concerned with taxability. Accordingly, the taxpayer's income tax return shall correctly compute the tax liability, even though in the opinion of the taxpayer it is immune from tax collection under the section. The tax shall be determined with respect to the entire gross income and not merely with respect to the portion of the earnings out of which tax may be collected. As to establishment of immunity from tax collection see § 301.7507–7.

*Example.* (1) An agreement, executed in the year 1954 between a bank and its depositors, provides (i) that certain assets are to be segregated for the benefit of the depositors who have waived (as claims against unsegregated assets of the bank) a percentage of the deposits; (ii) that 40 percent of the bank's net earnings, for years beginning with 1954, from unsegregated assets, shall be paid to the depositors until the portion of their claims waived with respect to unsegregated assets of the bank has been paid; and (iii) that the unsegregated assets shall not be subject to depositors' claims. The net income of the bank for the calendar year 1954 is $10,000, $4,000 produced by the segregated, and $6,000 produced by the unsegregated assets. Such amount shall be considered the net earnings for the purpose of section 7507 in computing the portion of the earnings to be paid to depositors. The bank has an outstanding tax liability for prior years of $7,000. The income tax liability of the bank for 1954 is 30 percent of $10,000, or $3,000, making a total outstanding tax liability of $10,000. The portion of the earnings of the bank for 1954 remaining after provision for depositors is $3,600 ($6,000 less 40 percent thereof, or $2,400). It will be assumed that of the total outstanding tax liability of $10,000, $3,600 may be assessed and collected, leaving $6,400 to be collected from any excess of the segregated assets after claims of depositors against such segregated assets have been paid in full. No part of the $6,400 immune from collection from 1954 earnings may be collected thereafter from unsegregated assets of the bank or earnings therefrom, so that except for any possible surplus of the segregated assets the $6,400 is uncollectible.

(2) In the year 1955, the earnings are again $10,000, $4,000 from segregated and $6,000 from unsegregated assets, as in 1954. However, the return filed shows income of $5,000 and a tax liability of $1,500. An investigation shows the true income to be $10,000, on which the tax is $3,000. The full $3,000 will be assumed to be collectible. The $600 difference between $3,600 (the excess of earnings from unsegregated assets over the amount going to the depositors), and the $3,000 tax for 1955, is not available for collection of the tax for prior years, which became immune as described above, but may be available for collection of tax for subsequent years.

(c) No significance attaches to the selection of the years 1954 and 1955 in the example set forth in paragraph (b) of this section. The rules indicated by the example are equally applicable to subsequent or prior years not excluded by limitations.

### § 301.7507–6 Abatement and refund.

(a) An assessment or collection, no matter when made, if contrary to section 7507, is subject to abatement or refund within the applicable statutory period of limitations.

(b) Collection from a bank within section 7507(b) which diminishes assets necessary for payment of depositors, if made prior to agreement with depositors, is not contrary to the section, and affords no ground for refund.

(c) Any abatement or refund is subject to existing statutory periods of limitation, which periods are not suspended or extended by section 7507. In order to secure a refund of any taxes paid for any taxable year during the period of immunity the bank must file claim therefor.

### § 301.7507–7 Establishment of immunity.

(a) The mere allegation of insolvency, or that depositors have claims against segregated or other assets or earnings, will not of itself secure immunity from tax collection. It must be affirmatively established to the satisfaction of the district director that collection of tax will be contrary to section 7507. See also § 301.7507–8.

(b) Any claim, by a bank, of immunity under section 7507(b), shall be supported by a statement, under oath or affirmation, which shall show: (1) The total of depositors' claims outstanding, and (2) separately and in detail, the amount of each of the following, and the amount of depositors' claims properly chargeable against each: (i) Segregated or transferred assets; (ii) unsegregated assets; (iii) estimated future average annual earnings and profits; (iv) amount collectible from shareholders; and (v) any other resources available for payment of depositors' claims. The detail shall show the full

amount of depositors' claims chargeable against each of the items in subdivisions (i) to (v), inclusive, of this subparagraph even though part or all of the amount chargeable against a particular item is also chargeable against some other item or items. There shall also be filed a copy of any agreement between the bank and its depositors, and any other agreement or document bearing on the claim of immunity. The statement shall show the basis, as ''book,'' ''market,'' etc., of valuation of the assets.

**§ 301.7507–8 Procedure during immunity.**

(a) *Statements to be filed.* As long as complete or partial immunity is claimed, a bank within section 7507(b) shall file with each income tax return a statement as required by § 301.7507–7, in duplicate, and shall also file such additional statements as the district director may require. Whether or not additional statements shall be required, and the frequency thereof, will depend on the circumstances, including the financial status and apparent prospects of the bank, and the time which is available for assessment and collection. If a copy of an agreement or document has once been filed, a copy of the same agreement or document need not again be filed with a subsequent statement, if it is shown by the subsequent statement, when and where and with what return the copy was filed. In case of amendment a copy of the amendment must be filed with the return for the taxable year in which the amendment is made.

(b) *Failure to file.* Failure of a bank to file any required statement will be treated as indicating that the bank is not entitled to immunity.

**§ 301.7507–9 Termination of immunity.**

(a) *In general.* (1) In the case of a bank within section 7507(a), immunity will end whenever, and to the extent that, taxes may be assessed and collected, within the applicable limitation periods as extended by section 7507, without diminishing the assets available and necessary for payment of depositors. Immunity of a bank within section 7507 (b) is terminated, as to segregated assets, whenever claims of depositors against such assets have been paid in full. See § 301.7507–3. As to segregated assets, the termination of immunity is complete, and any balance remaining after payment of depositors is available, within statutory limitations, for collection of tax due at any time. However, taxes of the bank will be collectible from segregated assets only to the extent that the bank has a legal or equitable interest therein. Assets as to which there has been a complete conveyance for benefit of depositors, and the bank has bonafide been divested of all legal and equitable interest, are not available for collection of the bank's tax liability.

(2) As to unsegregated assets of a bank within section 7507(b), immunity terminates only as to taxes thereafter becoming due. When taxes are once immune from collection, the immunity as to unsegregated assets is absolute. But see paragraph (a) of § 301.7507–4.

(b) *General creditors.* While the immunity from tax collection is for protection of depositors, and not for benefit of general creditors, in some cases the immunity will not end until the assets are sufficient to cover indebtedness of creditors generally. This situation will exist where under applicable law the claims of general creditors are on a parity with those of depositors, so that to pay depositors in full it is necessary to pay all creditors in full.

(c) *Shareholder liability.* In determining the sufficiency of the assets to satisfy the depositors' claims, shareholders' liability to the extent collectible shall be treated as available assets. See § 301.7507–7.

(d) *Deposit insurance.* Deposit insurance payable to depositors shall not be treated as an asset of the bank and shall be disregarded in determining the sufficiency of the assets to meet the claims of depositors. For taxable years ending on or after April 22, 1992, deposit insurance does not include Federal Financial Assistance (as defined in section 597) and other payments described in section 597(a) prior to its amendment by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and, therefore, such payments must be taken into account to determine whether a bank's assets

are sufficient to meet claims of depositors.

(e) *Notice by bank.* A bank within section 7507(b), upon termination of immunity with respect to (1) earnings, (2) segregated or transferred assets, or (3) unsegregated assets, shall immediately notify the district director for the internal revenue district in which the taxpayer's returns were filed of such termination of immunity. See paragraph (b) of § 301.7507–8.

(f) *Payment by bank.* As immunity terminates with respect to any assets, it will be the duty of the bank, without notice from the district director, to make payment of taxes collectible from such assets.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8641, 60 FR 66105, Dec. 21, 1995]

### § 301.7507–10 Collection of tax after termination of immunity.

If, in the case of a bank within section 7507(b), segregated assets (including earnings therefrom), in excess of those necessary for payment of outstanding deposits become available, such excess of segregated assets shall be applied toward satisfaction of accumulated outstanding taxes previously immune under the section, and not barred by the statute of limitations. But see § 301.7507–3. Where sufficient segregated or unsegregated assets are available, statutory interest shall be collected with the tax. When unsegregated assets or earnings therefrom previously immune become available for tax collection, they will be available only for collection of taxes (including interest and other additions) becoming due after immunity ceases. See the example in paragraph (b) of § 301.7507–5.

### § 301.7507–11 Exception of employment taxes.

The immunity granted by section 7507 does not apply to taxes imposed by chapter 21 or chapter 23 of the Code.

### § 301.7508–1 Time for performing certain acts postponed by reason of service in a combat zone.

(a) *General rule.* The period of time that may be disregarded for performing certain acts under section 7508 applies to acts described in section 7508(a)(1) and to other acts specified in a revenue ruling, revenue procedure, notice, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(b) *Effective date.* This section applies to any period for performing an act that has not expired before December 30, 1999.

[T.D. 8911, 65 FR 78411, Dec. 15, 2000]

### § 301.7508A-1 Postponement of certain tax-related deadlines by reason of Presidentially declared disaster.

(a) *Scope.* This section provides rules by which the Internal Revenue Service (IRS) may postpone deadlines for performing certain acts with respect to taxes other than taxes not administered by the IRS such as firearms tax (chapter 32, section 4181); harbor maintenance tax (chapter 36, section 4461); and alcohol and tobacco taxes (subtitle E).

(b) *Postponed deadlines.* For any tax, penalty, additional amount, or addition to the tax of an affected taxpayer (as defined in paragraph (d)(1) of this section), the IRS may disregard a period of up to 90 days in determining, under the internal revenue laws—

(1) Whether any or all of the acts described in paragraph (c) of this section were performed within the time prescribed; and

(2) The amount of any credit or refund.

(c) *Acts for which a period may be disregarded*—(1) *Acts performed by taxpayers.* Paragraph (b) of this section applies to the following acts performed by affected taxpayers (as defined in paragraph (d)(1) of this section)—

(i) Filing any return of income tax, estate tax, gift tax, generation-skipping transfer tax, excise tax (other than firearms tax (chapter 32, section 4181); harbor maintenance tax (chapter 36, section 4461); and alcohol and tobacco taxes (subtitle E)), or employment tax (including income tax withheld at source and income tax imposed by subtitle C or any law superseded thereby);

(ii) Paying any income tax, estate tax, gift tax, generation-skipping transfer tax, excise tax (other than firearms tax (chapter 32, section 4181); harbor maintenance tax (chapter 36, section 4461); and alcohol and tobacco

taxes (subtitle E)), employment tax (including income tax withheld at source and income tax imposed by subtitle C or any law superseded thereby), any installment of those taxes (including payment under section 6159 relating to installment agreements), or of any other liability to the United States in respect thereof, but not including deposits of taxes pursuant to section 6302 and the regulations under section 6302;

(iii) Making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2); making distributions under section 408(d)(4); recharacterizing contributions under section 408A(d)(6); or making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3);

(iv) Filing a petition with the Tax Court, or for review of a decision rendered by the Tax Court;

(v) Filing a claim for credit or refund of any tax;

(vi) Bringing suit upon a claim for credit or refund of any tax; and

(vii) Any other act specified in a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(2) *Acts performed by the government.* Paragraph (b) of this section applies to the following acts performed by the government—

(i) Assessing any tax;

(ii) Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;

(iii) Collecting by the Secretary, by levy or otherwise, of the amount of any liability in respect of any tax;

(iv) Bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax;

(v) Allowing a credit or refund of any tax; and

(vi) Any other act specified in a revenue ruling, revenue procedure, notice, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(d) *Definitions*—(1) *Affected taxpayer* means—

(i) Any individual whose principal residence (for purposes of section 1033(h)(4)) is located in a covered disaster area;

(ii) Any business entity or sole proprietor whose principal place of business is located in a covered disaster area;

(iii) Any individual who is a relief worker affiliated with a recognized government or philanthropic organization and who is assisting in a covered disaster area;

(iv) Any individual whose principal residence (for purposes of section 1033(h)(4)), or any business entity or sole proprietor whose principal place of business is not located in a covered disaster area, but whose records necessary to meet a deadline for an act specified in paragraph (c) of this section are maintained in a covered disaster area;

(v) Any estate or trust that has tax records necessary to meet a deadline for an act specified in paragraph (c) of this section and that are maintained in a covered disaster area;

(vi) The spouse of an affected taxpayer, solely with regard to a joint return of the husband and wife; or

(vii) Any other person determined by the IRS to be affected by a Presidentially declared disaster (within the meaning of section 1033(h)(3)).

(2) *Covered disaster area* means an area of a Presidentially declared disaster (within the meaning of section 1033(h)(3)) to which the IRS has determined paragraph (b) of this section applies.

(e) *Notice of postponement of certain acts.* If any tax-related deadline is postponed under section 7508A and this section, the IRS will publish a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) describing the acts postponed, the number of days disregarded with respect to each act, the time period to which the postponement applies, and the location of the covered disaster area. Guidance under this paragraph (e) will be published as soon as practicable after the declaration of a Presidentially declared disaster.

(f) *Abatement of interest under section 6404(h).* In the case of a Presidentially

declared disaster, if there is an extension of time to file income tax returns under section 6081 and to pay income tax with respect to such returns under section 6161, and, in addition, a postponement of tax-related deadlines under section 7508A, interest on an underpayment of income tax that arises during such period will be abated under section 6404(h) for the period of time disregarded under section 7508A in addition to the period of time covered by the extension of time to file and the extension of time to pay.

(g) *Examples*. The rules of this section are illustrated by the following examples:

*Example 1*. (i) Corporation M, a calendar year taxpayer, has its principal place of business in County A in State X. Pursuant to a timely filed request for extension of time to file, Corporation M's 1999 Form 1120, ''U.S. Corporation Income Tax Return,'' is due on September 15, 2000. Also due on September 15, 2000, is Corporation M's third quarter estimated tax payment for 2000. Corporation M's 2000 third quarter Form 720, ''Quarterly Federal Excise Tax Return,'' and third quarter Form 941, ''Employer's Quarterly Federal Tax Return,'' are due on October 31, 2000. In addition, Corporation M has an employment tax deposit due on September 15, 2000.

(ii) On September 1, 2000, a hurricane strikes County A. On September 6, 2000, the President declares a disaster within the meaning of section 1033(h)(3). The IRS determines that County A in State X is a covered disaster area and publishes guidance informing taxpayers that for acts described in paragraph (c) of this section that are required to be performed within the period beginning on September 1, 2000, and ending on November 6, 2000, 90 days will be disregarded in determining whether the acts are performed timely.

(iii) Because Corporation M's principal place of business is in County A, Corporation M is an affected taxpayer. Accordingly, Corporation M's 1999 Form 1120 will be filed timely if filed on or before December 14, 2000. Corporation M's 2000 third quarter estimated tax payment will be made timely if paid on or before December 14, 2000. In addition, because excise and employment tax returns are described in paragraph (c) of this section, Corporation M's 2000 third quarter Form 720 and third quarter Form 941 will be filed timely if filed on or before January 29, 2001. However, because deposits of taxes are excluded from the scope of paragraph (c) of this section, Corporation M's employment tax deposit is due on September 15, 2000. In addition, Corporation M's deposits relating to the third quarter Form 720 are due without extension.

*Example 2*. The facts are the same as in *Example 1*, except that during 2000, Corporation M's 1996 Form 1120 is being examined by the IRS. Pursuant to a timely filed request for extension of time to file, Corporation M timely filed its 1996 Form 1120 on September 15, 1997. Without application of this section, the statute of limitations on assessment for 1996 income tax will expire on September 15, 2000. However, pursuant to paragraph (c) of this section, assessment of tax is one of the government acts for which up to 90 days may be disregarded. The IRS determines that an extension of the statute of limitations is necessary and appropriate under these circumstances. Because the September 15, 2000, expiration date of the statute of limitations on assessment falls within the period of the disaster as described in the IRS's published guidance, the 90-day period disregarded under paragraph (b) of this section begins on September 16, 2000, and ends on December 14, 2000. Accordingly, the statute of limitations on assessment for Corporation M's 1996 income tax will expire on December 14, 2000.

*Example 3*. The facts are the same as in *Example 2*, except that the examination of the 1996 taxable year was completed earlier in 2000, and on July 28, 2000, the IRS mailed a statutory notice of deficiency to Corporation M. Without application of this section, Corporation M has 90 days (or until October 26, 2000) to file a petition with the Tax Court. However, pursuant to paragraph (c) of this section, filing a petition with the Tax Court is one of the taxpayer acts for which up to 90 days may be disregarded. Because Corporation M is an affected taxpayer, Corporation M's petition to the Tax Court will be filed timely if filed on or before January 24, 2001.

*Example 4*. (i) H and W, individual calendar year taxpayers, intend to file a joint Form 1040, ''U.S. Individual Income Tax Return,'' for the 2001 taxable year and are required to file a Schedule H, ''Household Employment Taxes.'' The joint return is due on April 15, 2002. H and W fully and timely paid all taxes for the 2001 taxable year, including domestic service employment taxes, through withholding and estimated tax payments. H's and W's principal residence is in County B in State Y.

(ii) On April 2, 2002, a severe ice storm strikes County B. On April 5, 2002, the President declares a disaster within the meaning of section 1033(h)(3). The IRS determines that County B in State Y is a covered disaster area and publishes guidance informing taxpayers that for acts described in paragraph (c) of this section that are required to be performed within the period beginning on April 2, 2002, and ending on April 19, 2002, 90 days will be disregarded in determining whether the acts are performed timely.

(iii) Because H's and W's principal residence is in County B, H and W are affected taxpayers. Because April 15, 2002, the due date of H's and W's 2001 Form 1040 and Schedule H, falls within the period of the disaster as described in the IRS published guidance, the 90 day period disregarded under paragraph (b) of this section begins on April 16, 2002, and ends on July 14, 2002, a Sunday. Pursuant to section 7503, if the last day for performing an act falls on Saturday, Sunday, or a legal holiday, the performance of the act shall be considered timely if it is performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. Accordingly, H's and W's 2001 Form 1040 and Schedule H will be filed timely if filed on or before July 15, 2002.

*Example 5.* (i) H and W, residents of County C in State Z, want to file an amended return to request a refund of 2001 taxes. H and W timely filed their 2001 income tax return on April 15, 2002. Without application of section 7508A, under section 6511(a), H's and W's amended 2001 tax return must be filed on or before April 15, 2005.

(ii) On April 1, 2005, an earthquake strikes County C. On April 5, 2005, the President declares a disaster within the meaning of section 1033(h)(3). The IRS determines that County C in State Z is a covered disaster area and publishes guidance informing taxpayers that for acts described in paragraph (c) of this section that are required to be performed within the period beginning on April 1, 2005, and ending on April 19, 2005, 90 days will be disregarded in determining whether the acts are performed timely.

(iii) Under paragraph (c) of this section, filing a claim for refund of tax is one of the taxpayer acts for which up to 90 days may be disregarded. Ninety days are disregarded under paragraph (b)(1) of this section beginning on April 16, 2005, and ending on July 14, 2005. Accordingly, H's and W's claim for refund for 2001 taxes will be timely if filed on or before July 14, 2005. Moreover, in applying the lookback period in section 6511(b)(2)(A), which limits the amount of the allowable refund, the period from July 14, 2005, back to April 16, 2005, is disregarded under paragraph (b)(2) of this section. Thus, if the claim is filed on or before July 14, 2005, amounts deemed paid on April 15, 2002, under section 6513(b), such as estimated tax and tax withheld from wages, will have been paid within the lookback period of section 6511(b)(2)(A).

*Example 6.* (i) L is an unmarried, calendar year taxpayer whose principal residence is located in County R in State T. L does not timely file a 2001 Form 1040, ''U.S. Individual Income Tax Return,'' which is due on April 15, 2002, and does not timely pay tax owed on that return. Absent reasonable cause, L is subject to the failure to file and failure to pay penalties under section 6651 beginning on April 16, 2002.

(ii) On May 10, 2002, a tornado strikes County R. On May 14, 2002, the President declares a disaster within the meaning of section 1033(h)(3). The IRS determines that County R in State T is a covered disaster area and publishes guidance informing taxpayers that for acts described in paragraph (c) of this section that are required to be performed within the period beginning on May 10, 2002, and ending on June 27, 2002, 90 days will be disregarded in determining whether the acts are timely.

(iii) On May 31, 2002, L files a 2001 Form 1040, ''U.S. Individual Income Tax Return,'' and pays the tax owed for 2001.

(iv) Because L's principal residence is in County R, L is an affected taxpayer. For purposes of penalties under section 6651, 90 days are disregarded under paragraph (b) of this section beginning on May 10, 2002. Because L files the return on May 31, 2002, the penalties under section 6651 will run from April 16, 2002, until May 10, 2002. Because there is no extension of time to file returns under section 6081 and no extension of time to pay under section 6161, interest is not abated under section 6404(h), and L is liable for the underpayment interest for the entire period of April 16, 2002, through May 31, 2002.

*Example 7.* The facts are the same as in *Example 6*, except L does not file the 2001 Form 1040 until November 25, 2002. Ninety days are disregarded under paragraph (b) of this section beginning on May 10, 2002, and ending on August 8, 2002. Therefore, the section 6651 penalties will run from April 16, 2002, until May 10, 2002, and from August 9, 2002, until November 25, 2002. Because there is no extension of time to file returns under section 6081 and no extension of time to pay under section 6161, interest is not abated under section 6404(h), and L will remain liable for underpayment interest for the entire period of April 16, 2002, through November 25, 2002.

*Example 8.* (i) H and W, individual calendar year taxpayers, intend to file a joint Form 1040, ''U.S. Individual Income Tax Return,'' for the 2001 taxable year. The joint return is due on April 15, 2002. After credits for withholding under section 31 and estimated tax payments, H and W owe tax for the 2001 taxable year. H's and W's principal residence is in County D in State Q.

(ii) On March 1, 2002, severe flooding strikes County D. On March 5, 2002, the President declares a disaster within the meaning of section 1033(h)(3). The IRS determines that County D in State Q is a covered disaster area and publishes guidance informing taxpayers that for acts described in paragraph (c) of this section that are required to be performed within the period beginning on March 1, 2002, and ending on April 25, 2002, 90 days will be disregarded in determining whether the acts are performed timely. The guidance also grants affected taxpayers an additional 6-month extension of time to file

returns under section 6081 and an additional 6-month extension of time to pay under section 6161.

(iii) Because H's and W's principal residence is in County D, H and W are affected taxpayers. Pursuant to the published guidance, H and W have until January 13, 2003, to file their return and pay the tax. This date is computed as follows: Under sections 6081 and 6161, H and W will have an additional 6 months, until October 15, 2002, to file and pay the tax. Further, under paragraph (f) of this section, 90 days are disregarded in determining the period of the extension. Therefore, H's and W's return and payment of tax will be timely if filed and paid on or before January 13, 2003. In addition, under section 6404(h), underpayment interest under section 6601 is abated for the entire period, from April 16, 2002, until January 13, 2003.

(h) *Effective date*. This section applies to disasters declared after December 30, 1999.

[T.D. 8911, 65 FR 78411, Dec. 15, 2000; 66 FR 10365, Feb. 15, 2001]

### § 301.7510–1 Exemption from tax of domestic goods purchased for the United States.

For any regulations under section 7510, see the applicable regulations with respect to the various taxes.

### § 301.7512–1 Separate accounting for certain collected taxes.

(a) *Scope*. The provisions of section 7512 and this section apply to—

(1) The following taxes imposed by subtitle C of the Code in respect of wages or compensation paid after February 11, 1958, for pay periods beginning after such date:

(i) The employee tax imposed by section 3101 of chapter 21 (Federal Insurance Contributions Act),

(ii) The employee tax imposed by section 3201 of chapter 22 (Railroad Retirement Tax Act), and

(iii) The income tax required to be withheld on wages by section 3402 of chapter 24 (Collection of Income Tax at Source on Wages); and

(2) The following taxes imposed by chapter 33 of the Code in respect of taxable payments made, except as otherwise specifically provided in this subparagraph, after February 11, 1958:

(i) The taxes imposed by section 4231 (1), (2), and (3) on amounts paid for admissions, and the tax imposed by section 4231(6) on amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place, to the extent that such tax on amounts paid on or after January 1, 1959, is required to be collected by the proprietor of the roof garden, cabaret, or similar place from a concessionaire in such establishment,

(ii) The taxes imposed by section 4241 on amounts paid as club dues,

(iii) The taxes imposed by section 4251 on amounts paid for communications services or facilities,

(iv) The tax imposed by section 4261 on amounts paid for transportation of persons and the tax imposed by section 4271 on amounts paid before August 1, 1958, for the transportation of property, and

(v) The tax imposed by section 4286 on amounts collected for the use of safe deposit boxes.

(b) *Requirement*. If the district director determines that any person required to collect, account for, and pay over any tax described in paragraph (a) of this section has, at the time and in the manner prescribed by law or regulations, failed to collect, truthfully account for, or pay over any such tax, or make deposits, payments, or returns of any such tax, such person, if notified to do so by the district director in accordance with section 7512 and paragraph (d) of this section, shall—

(1) Collect, at the times and in the manner provided by the law and the regulations in respect of the various taxes described in paragraph (a) of this section, all of the taxes described in such paragraph which become collectible by him after receipt of such notice;

(2) Deposit the taxes so collected, not later than the end of the second banking day after collection, with a bank, as defined in section 581, in a separate account established in accordance with paragraph (c) of this section; and

(3) Keep in such account the taxes so deposited until payment thereof is made to the United States as required by the law and the regulations in respect of such taxes.

The separate accounting requirements contained in subparagraphs (1), (2), and (3) of this paragraph (b), are applicable, in the case of the taxes described in paragraph (a)(1) of this section, to

taxes with respect to wages or compensation paid after receipt of the notice from the district director, irrespective of whether such wages or compensation was earned prior to or after receipt of the notice; and, in the case of the taxes described in paragraph (a)(2) of this section, to taxes with respect to taxable payments made after receipt of the notice from the district director, irrespective of whether the transactions with respect to which such payments were made occurred prior to or after receipt of the notice.

(c) *Trust fund account.* The separate bank account referred to in paragraph (b) of this section shall be established under the designation, ''(Name of person required to establish account), Trustee, Special Fund in Trust for U.S. under section 7512, I.R.C.''. The taxes deposited in such account shall constitute a fund in trust for the United States payable only to the Internal Revenue Service on demand by the trustee.

(d) *Notice.* Notice to any person requiring his compliance with the provisions of section 7512(b) and this section shall be in writing and shall be delivered in hand to such person by an internal revenue officer or employee. In the case of a trade or business carried on other than as a sole proprietorship, such as a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee shall be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(e) *Cancellation of notice.* The district director may relieve a person to whom notice requiring separate accounting has been given pursuant to section 7512 and this section from further compliance with such separate accounting requirements whenever he is satisfied that such person will comply with all requirements of the Code and the regulations applicable, in respect of the taxes to which the notice relates, in the case of persons not required to comply with the provisions of section 7512(b). Notice of cancellation of the requirement for separate accounting shall be made in writing and shall take effect at such time as is specified in the notice of cancellation.

(f) *Penalties.* For criminal penalty for failure to comply with any provision of section 7512, see section 7215. For criminal penalties for failure to file return, supply information, or pay tax, for failure to collect or pay over tax, and for attempt to evade or defeat tax, see sections 7203, 7202, and 7201, respectively.

**§ 301.7513–1 Reproduction of returns and other documents.**

(a) *In general.* The Commissioner, district directors, and other authorized officers and employees of the Internal Revenue Service may contract with any Federal agency or any person to have such agency or person process films and other photoimpressions of any return, statement, document, or of any card, record, or other matter, and make reproductions from such films and photoimpressions.

(b) *Safeguards*—(1) *By private contractor.* Any person entering into a contract with the Internal Revenue Service for the performance of any of the services described in paragraph (a) of this section shall agree to comply, and to assume responsibility for compliance by his employees, with the following requirements:

(i) The films or photoimpressions, and reproductions made therefrom, shall be used only for the purpose of carrying out the provisions of the contract, and information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of the contract;

(ii) All the services shall be performed under the supervision of the person with whom the contract is made or his responsible employees;

(iii) All material received for processing and all processed and reproduced material shall be kept in a locked and fireproof compartment in a secure place when not being worked upon;

(iv) All spoilage of reproductions made from the film or photoimpressions supplied to the contractor shall be destroyed, and a statement under the penalties of perjury shall be submitted to the Internal Revenue Service that such destruction has been accomplished; and

(v) All film, photoimpressions, and reproductions made therefrom, shall be transmitted to the Internal Revenue Service by personal delivery, first-class mail, parcel post, or express.

(2) *By Federal agency*. Any Federal agency entering into a contract with the Internal Revenue Service for the performance of any services described in paragraph (a) of this section, shall treat as confidential all material processed or reproduced pursuant to such contract.

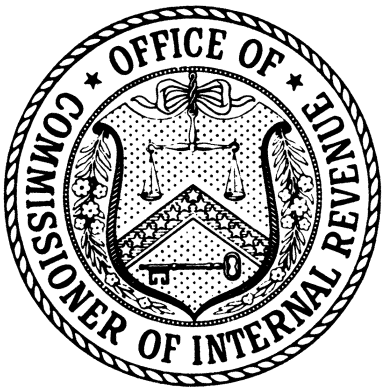
(3) *Inspection*. The Internal Revenue Service shall have the right to send its officers and employees into the offices and plants of Federal agencies and other contractors for inspection of the facilities and operations provided for the performance of any work contracted or to be contracted for under this section.

(4) *Criminal sanctions*. For penalty provisions relating to the unauthorized use and disclosure of information in violation of the provisions of this section, see section 7213(c).

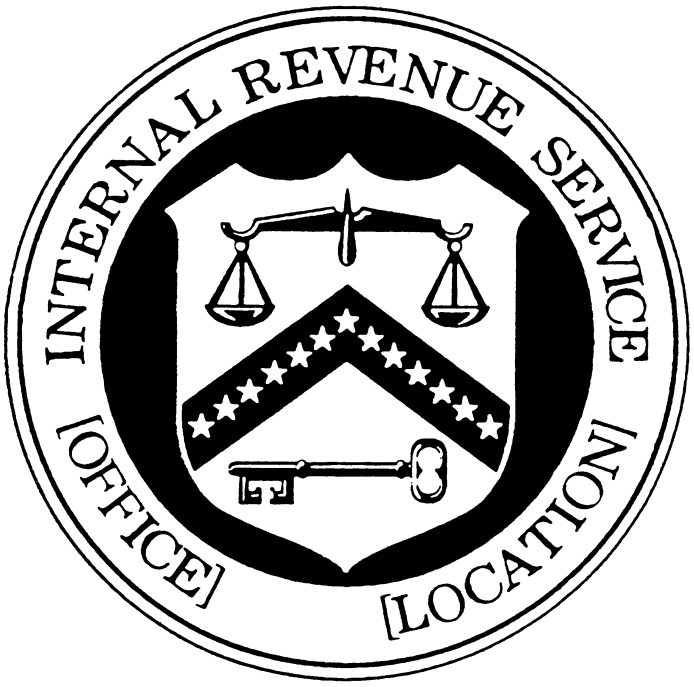
(c) *Legal status of reproductions*. Section 7513 provides that any reproduction made in accordance with such section of any return, document, or other matter shall have the same legal status as the original and requires that any such reproduction shall, if properly authenticated, be admissible in evidence in any judicial or administrative proceeding, as if it were the original, whether or not the original is in existence.

**§ 301.7514–1 Seals of office.**

(a) *Establishment of seals*—(1) *Commissioner of Internal Revenue*. There is hereby established in and for the office of the Commissioner of Internal Revenue an official seal. The seal is described as follows, and illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''Office of'' and in the lower part the words ''Commissioner of Internal Revenue.''




(2) *Establishment of uniform seal*. (i) In addition to the seals of office prescribed for those offices set forth in paragraphs (a)(3) through (8) of this section, a uniform seal for use by any office of internal revenue is established. The uniform seal is described as follows, and is illustrated in this paragraph (a)(2)(i). A circle within which shall appear that part of the seal of the Treasury Department represented by the shield with a dark background. Exterior to this circle and within a circumscribed circle forming the exterior of the seal shall appear words describing the specific office of internal revenue authorized to use the seal under this section. This paragraph (a)(2) is effective on October 27, 1995. The uniform seal is as follows:




(ii) The uniform seal may be used by any office of internal revenue set forth in paragraphs (a) (3) through (8) of this section, and any other office designated by the Commissioner to use a seal, including the following internal revenue offices resulting from a reorganization of the IRS that will be implemented beginning October 1, 1995:

Office of Regional Commissioner for:
- Midstates Region (Dallas)
- Northeast Region (Manhattan)
- Southeast Region (Atlanta)
- Western Region (San Francisco)

Office of District Director for:
- Arkansas-Oklahoma District (Oklahoma City)
- Brooklyn District
- Central California District (San Jose)
- Connecticut-Rhode Island District (Hartford)
- Delaware-Maryland District (Baltimore)
- Georgia District (Atlanta)
- Gulf Coast District (New Orleans)
- Houston District
- Illinois District (Chicago)
- Indiana District (Indianapolis)
- Kansas-Missouri District (St. Louis)
- Kentucky-Tennessee District (Nashville)
- Los Angeles District
- Manhattan District
- Michigan District (Detroit)
- Midwest District (Milwaukee)
- New Jersey District (Newark)
- New England District (Boston)
- North Central District (St. Paul)
- North Florida District (Jacksonville)
- North-South Carolina District (Greensboro)
- North Texas District (Dallas)
- Northern California District (Oakland)
- Ohio District (Cincinnati)
- Pacific-Northwest District (Seattle)
- Pennsylvania District (Philadelphia)
- Rocky Mountain District (Denver)
- South Florida District (Fort Lauderdale)
- South Texas District (Austin)
- Southern California District (Laguna Niguel)
- Southwest District (Phoenix)
- Upstate New York District (Buffalo)
- Virginia-West Virginia District (Richmond)

Office of Director of Computing Centers in:
- Detroit
- Memphis
- Martinsburg

Office of Director of Submission Processing Centers in:
- Austin
- Cincinnati
- Memphis

Kansas City
Ogden

Office of Director of Customer Service Centers in:

| | |
|---|---|
| Andover | Jacksonville |
| Atlanta | Kansas City |
| Austin | Memphis |
| Baltimore | Nashville |
| Brookhaven | Ogden |
| Buffalo | Philadelphia |
| Cincinnati | Pittsburgh |
| Cleveland | Portland, OR |
| Dallas | Richmond |
| Denver | St. Louis |
| Fresno | Seattle. |
| Indianapolis | |

(3) *District Directors of Internal Revenue.* (i) There is hereby established an official seal in and for each of the offices of District Director of Internal Revenue listed in subdivision (ii) of this subparagraph. The seal is described as follows, and one such seal is illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''District Director of Internal Revenue'' and in the lower part the location of the office for which the seal is established.

(ii) The offices of District Director of Internal Revenue for which seals are established in subdivision (i) of this subparagraph are as follows:

District Director of Internal Revenue, Birmingham, Ala.
District Director of Internal Revenue, Anchorage, Alaska.
District Director of Internal Revenue, Phoenix, Ariz.
District Director of Internal Revenue, Little Rock, Ark.
District Director of Internal Revenue, Los Angeles, Calif.
District Director of Internal Revenue, San Francisco, Calif.
District Director of Internal Revenue, Denver, Colo.
District Director of Internal Revenue, Hartford, Conn.
District Director of Internal Revenue, Wilmington, Del.
District Director of Internal Revenue, Ft. Lauderdale, Fla.
District Director of Internal Revenue, Jacksonville, Fla.
District Director of Internal Revenue, Atlanta, Ga.
District Director of Internal Revenue, Honolulu, Hawaii.
District Director of Internal Revenue, Boise, Idaho.
District Director of Internal Revenue, Chicago, Ill.
District Director of Internal Revenue, Springfield, Ill.
District Director of Internal Revenue, Indianapolis, Ind.
District Director of Internal Revenue, Des Moines, Iowa.
District Director of Internal Revenue, Wichita, Kans.
District Director of Internal Revenue, Louisville, Ky.
District Director of Internal Revenue, New Orleans, La.
District Director of Internal Revenue, Augusta, Maine.
District Director of Internal Revenue, Baltimore, Md.
District Director of Internal Revenue, Boston, Mass.
District Director of Internal Revenue, Detroit, Mich.
District Director of Internal Revenue, St. Paul, Minn.
District Director of Internal Revenue, Jackson, Miss.
District Director of Internal Revenue, St. Louis, Mo.
District Director of Internal Revenue, Helena, Mont.
District Director of Internal Revenue, Omaha, Nebr.
District Director of Internal Revenue, Portsmouth, N.H.
District Director of Internal Revenue, Newark, N.J.
District Director of Internal Revenue, Albuquerque, N. Mex.
District Director of Internal Revenue, Albany, N.Y.
District Director of Internal Revenue, Brooklyn, N.Y.
District Director of Internal Revenue, Buffalo, N.Y.

District Director of Internal Revenue, Manhattan, New York, N.Y.
District Director of Internal Revenue, Greensboro, N.C.
District Director of Internal Revenue, Fargo, N. Dak.
District Director of Internal Revenue, Cincinnati, Ohio.
District Director of Internal Revenue, Cleveland, Ohio.
District Director of Internal Revenue, Oklahoma City, Okla.
District Director of Internal Revenue, Portland, Oreg.
District Director of Internal Revenue, Philadelphia, Pa.
District Director of Internal Revenue, Pittsburgh, Pa.
District Director of Internal Revenue, Providence, R.I.
District Director of Internal Revenue, Columbia, S.C.
District Director of Internal Revenue, Aberdeen, S. Dak.
District Director of Internal Revenue, Nashville, Tenn.
District Director of Internal Revenue, Austin, Tex.
District Director of Internal Revenue, Dallas, Tex.
District Director of Internal Revenue, Houston, Tex.
District Director of Internal Revenue, Salt Lake City, Utah.
District Director of Internal Revenue, Richmond, Va.
District Director of Internal Revenue, Burlington, Vt.
District Director of Internal Revenue, Seattle, Wash.
District Director of Internal Revenue, Parkersburg, W. Va.
District Director of Internal Revenue, Milwaukee, Wis.
District Director of Internal Revenue, Cheyenne, Wyo.

(iii) There is hereby established an official seal in and for each of the offices of district director of internal revenue listed in paragraph (a)(2)(iv) of this section. The seal is described as follows, and one such seal is illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''DISTRICT DIRECTOR OF INTERNAL REVENUE'' and in the lower part the location of the office for which the seal is established.

(iv) The offices of district director of internal revenue for which seals are established in paragraph (a)(2)(iii) of this section are as follows:

District Director of Internal Revenue, Laguna Niguel, CA.,
District Director of Internal Revenue, Sacramento, CA.,
District Director of Internal Revenue, San Jose Dist.

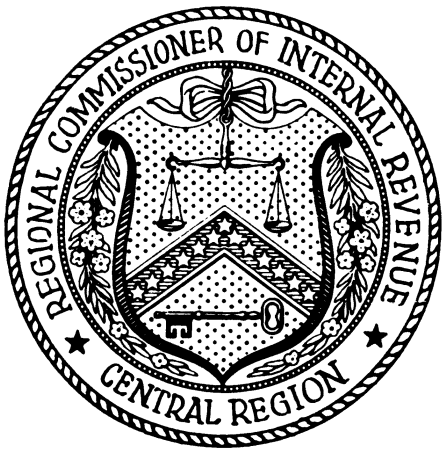
(v) There is hereby established an official seal in and for the office of district director of internal revenue listed in paragraph (a)(2)(vi) of this section. The seal is described as follows, and illustrated below: A circle within which shall appear the Internal Revenue emblem. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''DISTRICT DIRECTOR OF INTERNAL REVENUE'' and in the lower part the location of the office for which the seal is established.

(vi) The office of district director of internal revenue for which the seal is established in paragraph (a)(2)(v) of this section is as follows:

District Director of Internal Revenue, Las Vegas, Nevada.

(4) *Assistant Commissioner (International).* There is hereby established in and for the office of the Assistant Commissioner (International) an official seal. The seal is described as follows, and illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''ASSISTANT COMMISSIONER (INTERNATIONAL)'' and in the lower part ''Washington, D.C. Internal Revenue Service''.

(5) *Regional Commissioners of Internal Revenue.* (i) There is hereby established an official seal in and for each of the offices of Regional Commissioner of Internal Revenue listed in subdivision (ii) of this subparagraph. The seal is described as follows, and one such seal is illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''Regional Commissioner of Internal Revenue'' and in the lower part the title of the region for which the seal is established.




(ii) The offices of the Regional Commissioner of Internal Revenue for

which seals are established in subdivision (i) of this subparagraph are as follows:

Regional Commissioner of Internal Revenue, Central Region.
Regional Commissioner of Internal Revenue, Mid-Atlantic Region.
Regional Commissioner of Internal Revenue, Midwest Region.
Regional Commissioner of Internal Revenue, North-Atlantic Region.
Regional Commissioner of Internal Revenue, Southeast Region.
Regional Commissioner of Internal Revenue, Southwest Region.
Regional Commissioner of Internal Revenue, Western Region.

(6) *Directors of Internal Revenue Service Centers*. (i) There is hereby established an official seal in and for each of the offices of Director of Internal Revenue Service Center listed in subdivision (ii) of this subparagraph. The seal is described as follows, and one such seal is illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''Director, Internal Revenue Service Center'' and in the lower part the name of the region and the name of the principal city in or near which the service center is located.

(ii) The offices of Director of Internal Revenue Service Center for which seals are established in subdivision (i) of this subparagraph are as follows:

Director, Internal Revenue Service Center, Central Region, Covington, Ky.
Director, Internal Revenue Service Center, Mid-Atlantic Region, Philadelphia, Pa.
Director, Internal Revenue Service Center, Midwest Region, Kansas City, Mo.
Director, Internal Revenue Service Center, North-Atlantic Region, Andover, Mass.
Director, Internal Revenue Service Center, North-Atlantic Region, Brookhaven, N.Y.
Director, Internal Revenue Service Center, Southeast Region, Chamblee, Ga.
Director, Internal Revenue Service Center, Southeast Region, Memphis, Tenn.
Director, Internal Revenue Service Center, Southwest Region, Austin, Tex.
Director, Internal Revenue Service Center, Southwest Region, Ogden, Utah
Director, Internal Revenue Service Center, Western Region, Fresno, Calif.

(7) *Director of Internal Revenue Computing Center*. There is hereby established in and for the office of the Director of the Internal Revenue Computing Center an official seal. The seal is described as follows, and illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''DIRECTOR, INTERNAL REVENUE SERVICE'' and in the lower part ''Detroit Computing Center Detroit, Michigan''.

(8) *Director of Internal Revenue Compliance Center*. There is hereby established in and for the office of the Director of

the Internal Revenue Compliance Center an official seal. The seal is described as follows, and illustrated below: A circle within which shall appear that part of the seal of the Treasury Department represented by the shield and side wreaths. Exterior to this circle and within a circumscribed circle in the form of a rope shall appear in the upper part the words ''DIRECTOR, INTERNAL REVENUE COMPLIANCE CENTER'' and in the lower part ''Southwest Region Austin, Tex''.

(b) *Custody of seal.* Each seal established by this section shall be in the custody of the officer for whose office such seal is established.

(c) *Use of official seal.* Each seal of office established by this section may be affixed in lieu of the seal of the Treasury Department to any certificate or attestation required to be made by the officer for whose office such seal is established in authentication of originals and copies of books, records, papers, writings, and documents of the Internal Revenue Service in the custody of such officer, for all purposes, including the purposes of 28 U.S.C. 1733 (b), Rule 44 of the Federal Rules of Civil Procedure, and Rule 27 of the Federal Rules of Criminal Procedure, except that—

(1) No such seal shall be affixed to material to be published in the FEDERAL REGISTER, and

(2) The seal of the office of a District Director of Internal Revenue or the Director of International Operations shall not be affixed to the certification of copies of books, records, papers, writings, or documents in his custody in any case in which, pursuant to Executive order, Treasury decision, or part 601 of this chapter (Statement of Procedural Rules), such copies may be furnished to applicants only by the Commissioner.

(d) *Judicial notice.* In accordance with the provisions of section 7514, judicial notice shall be taken of the seals established under this section.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 6933, 32 FR 15483, Nov. 7, 1967; T.D. 6974, 33 FR 14779, Oct. 3, 1968; T.D. 7147, 36 FR 20510, Oct. 23, 1971; T.D. 8414, 57 FR 15015, Apr. 24, 1992; T.D. 8625, 60 FR 54945, Oct. 27, 1995]

### § 301.7515–1 Special statistical studies and compilations on request.

The Commissioner is authorized within his discretion, upon written request of any person and payment by such person of the cost of the work to be performed, to make special statistical studies and compilations involving data from returns, declarations, statements, or other documents required by the Code or regulations or from records established or maintained in connection with the administration and enforcement of the Code; to engage in any such special study or compilation jointly with the party or parties requesting it; and to furnish transcripts of any such study or compilation. The requests for services should be addressed to the Commissioner of Internal Revenue, Attention: PR, Washington, D.C. 20224. The requests should describe fully the nature of the study or compilation desired, giving detailed specifications for all tables to be prepared, and should include a general statement regarding the use to be made of the data requested.

### § 301.7516–1 Training and training aids on request.

The Commissioner is authorized, within his discretion, upon written request, to admit employees and officials of any State, the Commonwealth of Puerto Rico, any possession of the United States, any political subdivision or instrumentality of any of the foregoing, the District of Columbia, or any foreign government to training

courses conducted by the Internal Revenue Service, and to supply them with texts and other training aids. Requests for such training or training aids should be addressed to the Commissioner of Internal Revenue, Washington, D.C. 20224, Attention: A: T, except that requests involving officials or visitors of foreign governments should be addressed to the Commissioner of Internal Revenue, Washington, D.C. 20224. Attention: C: FA. The Commissioner may require payment from the party or parties making the request of a reasonable fee not to exceed the cost of the training and training aids supplied pursuant to such request.

### § 301.7517–1 Furnishing on request of statement explaining estate or gift valuation.

(a) *In general.* Section 7517 requires the Service to furnish to a taxpayer, at the request of that taxpayer, a statement explaining the estate, gift or generation-skipping transfer valuation of any item contained on a return filed by the taxpayer as to which a determination or proposed determination of value has been made. The request must be filed no later than the latest time to file a claim for refund of the tax which is dependent on the value with respect to which the determination has been made. The request should be filed with the district director's office that has jurisdiction over the return of the taxpayer.

(b) *Effective date*—(1) *Estates of decedents.* Section 7517 applies to estates of decedents dying after December 31, 1976.

(2) *Gifts.* Section 7517 applies to gifts made after December 31, 1976.

(3) *Generation-skipping transfer.* Section 7517 applies to any generation-skipping transfer subject to chapter 13.

[T.D. 7757, 46 FR 6930, Jan. 22, 1981]

## Discovery of Liability and Enforcement of Title

EXAMINATION AND INSPECTION

### § 301.7601–1 Canvass of districts for taxable persons and objects.

Each district director shall, to the extent he deems it practicable, cause officers or employees under his supervision and control to proceed, from time to time, through his district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

[T.D. 7297, 38 FR 34803, Dec. 19, 1973]

### § 301.7602–1 Examination of books and witnesses.

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax (including any interest, additional amount, addition to the tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, collecting any such liability or inquiring into any offense connected with the administration or enforcement of the internal revenue laws, any authorized officer or employee of the Internal Revenue Service may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

(b) *Summons*—(1) *In general.* For the purposes described in § 301.7602–1(a), the Commissioner is authorized to summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of accounts containing entries relating to the business of the person liable for tax or required to perform the act, or any other person deemed proper, to appear before one or more officers or employees of the Internal Revenue Service at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. This summons power may be used in an investigation of either civil or criminal tax-related

liability. The Commissioner may designate one or more officers or employees of the IRS as the individuals before whom a person summoned pursuant to section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall appear. Any such officer or employee is authorized to take testimony under oath of the person summoned and to receive and examine books, papers, records, or other data produced in compliance with the summons.

(2) *Officer or employee of the IRS.* For purposes of this paragraph (b), officer or employee of the IRS means all officers and employees of the United States, who are engaged in the administration and enforcement of the internal revenue laws or any other laws administered by the IRS, and who are appointed or employed by, or subject to the directions, instructions, or orders of the Secretary of the Treasury or the Secretary's delegate. An officer or employee of the IRS, for purposes of this paragraph (b), shall include an officer or employee of the Office of Chief Counsel.

(c) *Proscription on issuing of administrative summons when a Justice Department referral is in effect*—(1) *In general.* The Commissioner may neither issue a summons under this title nor initiate a proceeding to enforce a previously issued summons by way of section 7604 with respect to any person whose tax liability is in issue, if a Justice Department referral is in effect with respect to that person for that liability.

(2) *Justice Department referral in effect.* A Justice Department referral is in effect with respect to any person when:

(i) The Secretary recommends, within the meaning of this paragraph, that the Attorney General either commence a grand jury investigation of or criminal prosecution of such person for any alleged offense connected with the administration or enforcement of the internal revenue laws, or

(ii) The Attorney General (or Deputy Attorney General or Assistant Attorney General) under section 6103(h)(3)(B) requests in writing that the Secretary disclose a return of, or return information relating to, such person. The request must set forth that the need for disclosure is for the purpose of a grand jury investigation of or potential or pending criminal prosecution of such person for any alleged offense connected with the administration or enforcement of the internal revenue laws.

The referral is effective at the time the document recommending criminal prosecution or grand jury investigation is signed by the Secretary or upon the Secretary's receipt of the section 6103(h)(3)(B) request.

(3) *Cessation of Justice Department referral.* A Justice Department referral ceases to be in effect with respect to a person:

(i) When the Secretary receives written notification from the Attorney General that the Justice Department:

(A) Will not prosecute that person for any offense connected with the administration or enforcement of the internal revenue laws that gave rise to the referral under paragraph (2)(i) of this section, or

(B) Will not authorize a grand jury investigation of that person with respect to such offense, or

(C) Will discontinue any grand jury investigation of that person with respect to such offense;

(ii) When a final disposition with respect to a criminal proceeding brought against that person has been made; or

(iii) When the Secretary receives written notification from the Attorney General, Deputy Attorney General, or an Assistant Attorney General, that the Justice Department will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws, based upon a previous request for disclosure under section 6103(h)(3)(B).

(4) *Taxable years and taxes imposed by separate chapters of the Code treated separately*—(i) *In general.* For purposes of this section, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of the Code is treated separately.

(ii) *Examples.* The following examples illustrate the application of this paragraph (c)(4):

*Example 1.* A Justice Department referral is in effect for D's criminal evasion of income tax for the taxable year 1979. The Commission may issue a summons respecting D's 1980 criminal and/or civil tax liability. The

Commissioner may not issue a summons respecting D's 1979 income tax liability.

*Example 2.* A referral has been made to the Department of Justice for the criminal prosecution of F with regard to F's income tax liability for the taxable year 1978. The Commissioner may issue a summons respecting F's gift tax liability for the taxable year 1978.

*Example 3.* A referral has been made to the Department of Justice for a grand jury investigation respecting G's 1980 income tax liability. The Commissioner may issue a summons related to an investigation of G's liability for Federal Insurance Contribution Act (FICA) taxes for the taxable year 1980.

*Example 4.* A referral has been made to the Department of Justice respecting J's criminal evasion of windfall profit tax for all quarters of the calendar year 1982. The Commissioner may issue a summons respecting J's liability for highway motor vehicle use tax covering the same periods.

*Example 5.* A referral has been made to the Department of Justice for a grand jury investigation respecting L's 1983 income tax liability. The Commissioner may issue a summons related to the investigation of L's liability under sections 6700 (abusive tax shelter promoter penalty) and 7408 of the Code for his conduct during 1983.

(d) *Effective dates.* This section is applicable after September 3, 1982, except for paragraph (b), which is applicable on and after April 1, 2005. For rules under paragraph (b) that are applicable to summonses issued on or after September 10, 2002, see 26 CFR 301.7602–1T. For rules applicable on or before September 3, 1982, see 26 CFR 301.7602–1 (revised as of April 1, 1984).

[T.D. 8091, 51 FR 23053, June 25, 1986, as amended by T.D. 9015, 67 FR 57331, Sept. 10, 2002; T.D. 9195, 70 FR 16711, Apr. 1, 2005]

### § 301.7602–2 Third party contacts.

(a) *In general.* Subject to the exceptions in paragraph (f) of this section, no officer or employee of the Internal Revenue Service (IRS) may contact any person other than the taxpayer with respect to the determination or collection of such taxpayer's tax liability without giving the taxpayer reasonable notice in advance that such contacts may be made. A record of persons so contacted must be made and given to the taxpayer upon the taxpayer's request.

(b) *Third-party contact defined.* Contacts subject to section 7602(c) and this regulation shall be called ''third-party contacts.'' A third-party contact is a communication which—

(1) Is initiated by an IRS employee;

(2) Is made to a person other than the taxpayer;

(3) Is made with respect to the determination or collection of the tax liability of such taxpayer;

(4) Discloses the identity of the taxpayer being investigated; and

(5) Discloses the association of the IRS employee with the IRS.

(c) *Elements of third-party contact explained*—(1) *Initiation by an IRS employee*—(i) *Explanation*—(A) *Initiation.* An IRS employee initiates a communication whenever it is the employee who first tries to communicate with a person other than the taxpayer. Returning unsolicited telephone calls or speaking with persons other than the taxpayer as part of an attempt to speak to the taxpayer are not initiations of third-party contacts.

(B) *IRS employee.* For purposes of this section, an IRS employee includes all officers and employees of the IRS, the Chief Counsel of the IRS and the National Taxpayer Advocate, as well as a person described in section 6103(n), an officer or employee of such person, or a person who is subject to disclosure restrictions pursuant to a written agreement in connection with the solicitation of an agreement described in section 6103(n) and its implementing regulations. No inference about the employment or contractual relationship of such other persons with the IRS may be drawn from this regulation for any purpose other than the requirements of section 7602(c).

(ii) *Examples.* The following examples illustrate this paragraph (c)(1):

*Example 1.* An IRS employee receives a message to return an unsolicited call. The employee returns the call and speaks with a person who reports information about a taxpayer who is not meeting his tax responsibilities. Later, the employee makes a second call to the person and asks for more information. The first call is not a contact initiated by an IRS employee. Just because the employee must return the call does not change the fact that it is the other person, and not the employee, who initiated the contact. The second call, however, is initiated by the employee and so meets the first element.

*Example 2.* An IRS employee wants to hire an appraiser to help determine the value of a

taxpayer's oil and gas business. At the initial interview, the appraiser signs an agreement that prohibits him from disclosing return information of the taxpayer except as allowed by the agreement. Once hired, the appraiser initiates a contact by calling an industry expert in Houston and discusses the taxpayer's business. The IRS employee's contact with the appraiser does not meet the first element of a third-party contact because the appraiser is treated, for section 7602(c) purposes only, as an employee of the IRS. For the same reason, however, the appraiser's call to the industry expert does meet the first element of a third-party contact.

*Example 3.* A revenue agent trying to contact the taxpayer to discuss the taxpayer's pending examination twice calls the taxpayer's place of business. The first call is answered by a receptionist who states that the taxpayer is not available. The IRS employee leaves a message with the receptionist stating only his name and telephone number, and asks that the taxpayer call him. The second call is answered by the office answering machine, on which the IRS employee leaves the same message. Neither of these phone calls meets the first element of a third-party contact because the IRS employee is trying to initiate a communication with the taxpayer and not a person other than the taxpayer. The fact that the IRS employee must either speak with a third party (the receptionist) or leave a message on the answering machine, which may be heard by a third party, does not mean that the employee is initiating a communication with a person other than the taxpayer. Both the receptionist and the answering machine are only intermediaries in the process of reaching the taxpayer.

(2) *Person other than the taxpayer*—(i) *Explanation.* The phrases ''person other than the taxpayer'' and ''third party'' are used interchangeably in this section, and do not include—

(A) An officer or employee of the IRS, as defined in paragraph (c)(1)(i)(B) of this section, acting within the scope of his or her employment;

(B) Any computer database or website regardless of where located and by whom maintained, including databases or web sites maintained on the Internet or in county courthouses, libraries, or any other real or virtual site; or

(C) A current employee, officer, or fiduciary of a taxpayer when acting within the scope of his or her employment or relationship with the taxpayer. Such employee, officer, or fiduciary shall be conclusively presumed to be acting within the scope of his or her employment or relationship during business hours on business premises.

(ii) *Examples:* The following examples illustrate this paragraph (c)(2):

*Example 1.* A revenue agent examining a taxpayer's return speaks with another revenue agent who has previously examined the same taxpayer about a recurring issue. The revenue agent has not contacted a ''person other than the taxpayer'' within the meaning of section 7602(c).

*Example 2.* A revenue agent examining a taxpayer's return speaks with one of the taxpayer's employees on business premises during business hours. The employee is conclusively presumed to be acting within the scope of his employment and is therefore not a ''person other than the taxpayer'' for section 7602(c) purposes.

*Example 3.* A revenue agent examining a corporate taxpayer's return uses a commercial online research service to research the corporate structure of the taxpayer. The revenue agent uses an IRS account, logs on with her IRS user name and password, and uses the name of the corporate taxpayer in her search terms. The revenue agent later explores several Internet web sites that may have information relevant to the examination. The searches on the commercial online research service and Internet websites are not contacts with ''persons other than the taxpayer.''

(3) *With respect to the determination or collection of the tax liability of such taxpayer*—(i) *Explanation*—(A) *With respect to.* A contact is ''with respect to'' the determination or collection of the tax liability of such taxpayer when made for the purpose of either determining or collecting a particular tax liability and when directly connected to that purpose. While a contact made for the purpose of determining a particular taxpayer's tax liability may also affect the tax liability of one or more other taxpayers, such contact is not for that reason alone a contact ''with respect to'' the determination or collection of those other taxpayers' tax liabilities. Contacts to determine the tax status of a pension plan under chapter 1, subchapter D (Deferred Compensation) of the Internal Revenue Code, are not ''with respect to'' the determination of plan participants'' tax liabilities. Contacts to determine the tax status of a bond issue under chapter 1, subchapter

B, Part IV (Tax Exemption Requirements for State and Local Bonds) of the Internal Revenue Code, are not ''with respect to'' the determination of the bondholders' tax liabilities. Contacts to determine the tax status of an organization under chapter 1, subchapter F (Exempt Organizations) of the Internal Revenue Code, are not ''with respect to'' the determination of the contributors' liabilities, nor are any similar determinations ''with respect to'' any persons with similar relationships to the taxpayer whose tax liability is being determined or collected.

(B) *Determination or collection*. A contact is with respect to the ''determination or collection'' of the tax liability of such taxpayer when made during the administrative determination or collection process. For purposes of this paragraph (c) only, the administrative determination or collection process may include any administrative action to ascertain the correctness of a return, make a return when none has been filed, or determine or collect the tax liability of any person as a transferee or fiduciary under chapter 71 of Title 26.

(C) *Tax liability*. A *tax liability* means the liability for any tax imposed by Title 26 of the United States Code (including any interest, additional amount, addition to the tax, or penalty) and does not include the liability for any tax imposed by any other jurisdiction nor any liability imposed by other Federal statutes.

(D) *Such taxpayer*. A contact is with respect to the determination or collection of the tax liability of ''such taxpayer'' when made while determining or collecting the tax liability of a particular, identified taxpayer. Contacts made during an investigation of a particular, identified taxpayer are third-party contacts only as to the particular, identified taxpayer under investigation and not as to any other taxpayer whose tax liabilities might be affected by such contacts.

(ii) *Examples*. The following examples illustrate the operation of this paragraph (c)(3):

*Example 1*. As part of a compliance check on a return preparer, an IRS employee visits the preparer's office and reviews the preparer's client files to ensure that the proper forms and records have been created and maintained. This contact is not a third-party contact ''with respect to'' the preparer's clients because it is not for the purpose of determining the tax liability of the preparer's clients, even though the agent might discover information that would lead the agent to recommend an examination of one or more of the preparer's clients.

*Example 2*. A revenue agent is assigned to examine a taxpayer's return, which was prepared by a return preparer. As in all such examinations, the revenue agent asks the taxpayer routine questions about what information the taxpayer gave the preparer and what advice the preparer gave the taxpayer. As a result of the examination, the revenue agent recommends that the preparer be investigated for penalties under section 6694 or 6695. Neither the examination of the taxpayer's return nor the questions asked of the taxpayer are ''with respect to'' the determination of the preparer's tax liabilities within the meaning of section 7602(c) because the purpose of the contacts was to determine the taxpayer's tax liability, even though the agent discovered information that may result in a later investigation of the preparer.

*Example 3*. To help identify taxpayers in the florist industry who may not have filed proper returns, an IRS employee contacts a company that supplies equipment to florists and asks for a list of its customers in the past year in order to cross-check the list against filed returns. The employee later contacts the supplier for more information about one particular florist who the employee believes did not file a proper return. The first contact is not a contact with respect to the determination of the tax liability of ''such taxpayer'' because no particular taxpayer has been identified for investigation at the time the contact is made. The later contact, however, is with respect to the determination of the tax liability of ''such taxpayer'' because a particular taxpayer has been identified. The later contact is also ''with respect to'' the determination of that taxpayer's liability because, even though no examination has been opened on the taxpayer, the information sought could lead to an examination.

*Example 4*. A revenue officer, trying to collect the trust fund portion of unpaid employment taxes of a corporation, begins to investigate the liability of two corporate officers for the section 6672 Trust Fund Recovery Penalty (TFRP). The revenue officer obtains the signature cards for the corporation's bank accounts from the corporation's bank. The contact with the bank to obtain the signature cards is a contact with respect to the determination of the two identified corporate officers' tax liabilities because it is

directly connected to the purpose of determining a tax liability of two identified taxpayers. It is not, however, a contact with respect to any other person not already under investigation for TFRP liability, even though the signature cards might identify other potentially liable persons.

*Example 5.* The IRS is asked to rule on whether a certain pension plan qualifies under section 401 so that contributions to the pension plan are excludable from the employees' incomes under section 402 and are also deductible from the employer's income under section 404. Contacts made with the plan sponsor (and with persons other than the plan sponsor) are not contacts ''with respect to'' the determination of the tax liabilities of the pension plan participants because the purpose of the contacts is to determine the status of the plan, even though that determination may affect the participants' tax liabilities.

*Example 6(a).* The IRS audits a TEFRA partnership at the partnership (entity) level pursuant to sections 6221 through 6233. The tax treatment of partnership items is at issue, but the respective tax liabilities of the partners may be affected by the results of the TEFRA partnership audit. With respect to the TEFRA partnership, contacts made with employees of the partnership acting within the scope of their duties or any partner are not section 7602(c) contacts because they are considered the equivalent of contacting the partnership. Contacts relating to the tax treatment of partnership items made with persons other than the employees of the partnership who are acting within the scope of their duties or the partners are section 7602(c) contacts with respect to the TEFRA partnership, and reasonable advance notice should be provided by sending the appropriate Letter 3164 to the partnership's tax matters partner (TMP). Individual partners who are merely affected by the partnership audit but who are not identified as subject to examination with respect to their individual tax liabilities need not be sent Letters 3164.

*Example 6(b).* In the course of an audit of a TEFRA partnership at the partnership (entity) level, the IRS intends to contact third parties regarding transactions between the TEFRA partnership and specific, identified partners. In addition to the partnership's TMP, the specific, identified partners should also be provided advance notice of any third-party contacts relating to such transactions.

(4) *Discloses the identity of the taxpayer being investigated*—(i) *Explanation.* An IRS employee discloses the taxpayer's identity whenever the employee knows or should know that the person being contacted can readily ascertain the taxpayer's identity from the information given by the employee.

(ii) *Examples.* The following examples illustrate this paragraph (c)(4):

*Example 1.* A revenue agent seeking to value the taxpayer's condominium calls a real estate agent and asks for a market analysis of the taxpayer's condominium, giving the unit number of the taxpayer's condominium. The revenue agent has revealed the identity of the taxpayer, regardless of whether the revenue agent discloses the name of the taxpayer, because the real estate agent can readily ascertain the taxpayer's identity from the address given.

*Example 2.* A revenue officer seeking to value the taxpayer's condominium calls a real estate agent and, without identifying the taxpayer's unit, asks for the sales prices of similar units recently sold and listing prices of similar units currently on the market. The revenue officer has not revealed the identity of the taxpayer because the revenue officer has not given any information from which the real estate agent can readily ascertain the taxpayer's identity.

(5) *Discloses the association of the IRS employee with the IRS.* An IRS employee discloses his association with the IRS whenever the employee knows or should know that the person being contacted can readily ascertain the association from the information given by the employee.

(d) *Pre-contact notice*—(1) *In general.* An officer or employee of the IRS may not make third-party contacts without providing reasonable notice in advance to the taxpayer that contacts may be made. The pre-contact notice may be given either orally or in writing. If written notice is given, it may be given in any manner that the IRS employee responsible for giving the notice reasonably believes will be received by the taxpayer in advance of the third-party contact. Written notice is deemed reasonable if it is—

(i) Mailed to the taxpayer's last known address;

(ii) Given in person;

(iii) Left at the taxpayer's dwelling or usual place of business; or

(iv) Actually received by the taxpayer.

(2) *Pre-contact notice not required.* Pre-contact notice under this section need not be provided to a taxpayer for third-party contacts of which advance notice has otherwise been provided to the taxpayer pursuant to another statute, regulation or administrative procedure. For example, Collection Due Process

notices sent to taxpayers pursuant to section 6330 and its regulations constitute reasonable advance notice that contacts with third parties may be made in order to effectuate a levy.

(e) *Post-contact reports*—(1) *Requested reports.* A taxpayer may request a record of persons contacted in any manner that the Commissioner reasonably permits. The Commissioner may set reasonable limits on how frequently taxpayer requests need be honored. The requested report may be mailed either to the taxpayer's last known address or such other address as the taxpayer specifies in the request.

(2) *Contents of record*—(i) *In general.* The record of persons contacted should contain information, if known to the IRS employee making the contact, which reasonably identifies the person contacted. Providing the name of the person contacted fully satisfies the requirements of this section, but this section does not require IRS employees to solicit identifying information from a person solely for the purpose of the post-contact report. The record need not contain any other information, such as the nature of the inquiry or the content of the third party's response. The record need not report multiple contacts made with the same person during a reporting period.

(ii) *Special rule for employees.* For contacts with the employees, officers, or fiduciaries of any entity who are acting within the scope of their employment or relationship, it is sufficient to record the entity as the person contacted. A fiduciary, officer or employee shall be conclusively presumed to be acting within the scope of his employment or relationship during business hours on business premises. For purposes of this paragraph (e)(2)(ii), the term *entity* means any business (whether operated as a sole proprietorship, disregarded entity under § 301.7701–2 of the regulations, or otherwise), trust, estate, partnership, association, company, corporation, or similar organization.

(3) *Post-contact record not required.* A post-contact record under this section need not be made, or provided to a taxpayer, for third-party contacts of which the taxpayer has already been given a similar record pursuant to another statute, regulation, or administrative procedure.

(4) *Examples.* The following examples illustrate this paragraph (e):

*Example 1.* An IRS employee trying to find a specific taxpayer's assets in order to collect unpaid taxes talks to the owner of a marina. The employee asks whether the taxpayer has a boat at the marina. The owner gives his name as John Doe. The employee may record the contact as being with John Doe and is not required by this regulation to collect or record any other identifying information.

*Example 2.* An IRS employee trying to find a specific taxpayer and his assets in order to collect unpaid taxes talks to a person at 502 Fernwood. The employee asks whether the taxpayer lives next door at 500 Fernwood, as well as where the taxpayer works, what kind of car the taxpayer drives and whether the camper parked in front of 500 Fernwood belongs to the taxpayer. The person does not disclose his name. The employee may record the contact as being with a person at 502 Fernwood. If the employee then makes the same inquiries of another person on the street in front of 500 Fernwood, and does not learn that person's name, the latter contact may be reported as being with a person on the street in front of 500 Fernwood.

*Example 3.* An IRS employee examining a return obtains loan documents from a bank where the taxpayer applied for a loan. After reviewing the documents, the employee talks with the loan officer at the bank who handled the application. The employee has contacted only one ''person other than the taxpayer.'' The bank and not the loan officer is the ''person other than the taxpayer'' for section 7602(c) purposes. The contact with the loan officer is treated as a contact with the bank because the loan officer was an employee of the bank and was acting within the scope of her employment with the bank.

*Example 4.* An IRS employee issues a summons to a third party with respect to the determination of a taxpayer's liability and properly follows the procedures for such summonses under section 7609, which requires that a copy of the summons be given to the taxpayer. This third-party contact need not be maintained in a record of contacts available to the taxpayer because providing a copy of the third-party summons to the taxpayer pursuant to section 7609 satisfies the post-contact recording and reporting requirement of this section.

*Example 5.* An IRS employee serves a levy on a third party with respect to the collection of a taxpayer's liability. The employee provides the taxpayer with a copy of the notice of levy form that shows the identity of the third party. This third-party contact

need not be maintained in a record of contacts available to the taxpayer because providing a copy of the notice of levy to the taxpayer satisfies the post-contact recording and reporting requirement of this section.

(f) *Exceptions*—(1) *Authorized by taxpayer*—(i) *Explanation*. Section 7602(c) does not apply to contacts authorized by the taxpayer. A contact is ''authorized'' within the meaning of this section if—

(A) The contact is with the taxpayer's authorized representative, that is, a person who is authorized to speak or act on behalf of the taxpayer, such as a person holding a power of attorney, a corporate officer, a personal representative, an executor or executrix, or an attorney representing the taxpayer; or

(B) The taxpayer or the taxpayer's authorized representative requests or approves the contact.

(ii) *No prevention or delay of contact*. This section does not entitle any person to prevent or delay an IRS employee from contacting any individual or entity.

(2) *Jeopardy*—(i) *Explanation*. Section 7602(c) does not apply when the IRS employee making a contact has good cause to believe that providing the taxpayer with either a general pre-contact notice or a record of the specific person contacted may jeopardize the collection of any tax. For purposes of this section only, good cause includes a reasonable belief that providing the notice or record will lead to—

(A) Attempts by any person to conceal, remove, destroy, or alter records or assets that may be relevant to any tax examination or collection activity;

(B) Attempts by any person to prevent other persons, through intimidation, bribery, or collusion, from communicating any information that may be relevant to any tax examination or collection activity; or

(C) Attempts by any person to flee, or otherwise avoid testifying or producing records that may be relevant to any tax examination or collection activity.

(ii) *Record of contact*. If the circumstances described in this paragraph (f)(2) exist, the IRS employee must still make a record of the person contacted, but the taxpayer need not be provided the record until it is no longer reasonable to believe that providing the record would cause the jeopardy described.

(3) *Reprisal*—(i) *In general*. Section 7602(c) does not apply when the IRS employee making a contact has good cause to believe that providing the taxpayer with either a general pre-contact notice or a specific record of the person being contacted may cause any person to harm any other person in any way, whether the harm is physical, economic, emotional or otherwise. A statement by the person contacted that harm may occur against any person is sufficient to constitute good cause for the IRS employee to believe that reprisal may occur. The IRS employee is not required to further question the contacted person about reprisal or otherwise make further inquiries regarding the statement.

(ii) *Examples*. The following examples illustrate this paragraph (f)(3):

*Example 1*. An IRS employee seeking to collect unpaid taxes is told by the taxpayer that all the money in his and his brother's joint bank account belongs to the brother. The IRS employee contacts the brother to verify this information. The brother refuses to confirm or deny the taxpayer's statement. He states that he does not believe that reporting the contact to the taxpayer would result in harm to anyone but further states that he does not want his name reported to the taxpayer because it would appear that he gave information. This contact is not excepted from the statute merely because the brother asks that his name be left off the list of contacts.

*Example 2*. Assume the same facts as in *Example 1*, except that the brother states that he fears harm from the taxpayer should the taxpayer learn of the contact, even though the brother gave no information. This contact is excepted from the statute because the third party has expressed a fear of reprisal. The IRS employee is not required to make further inquiry into the nature of the brothers' relationship or otherwise question the brother's fear of reprisal.

*Example 3*. An IRS employee is examining a joint return of a husband and wife, who recently divorced. From reading the court divorce file, the IRS employee learns that the divorce was acrimonious and that the ex-husband once violated a restraining order issued to protect the ex-wife. This information provides good cause for the IRS employee to believe that reporting contacts which might disclose the ex-wife's location may cause reprisal against any person.

Therefore, when the IRS employee contacts the ex-wife's new employer to verify salary information provided by the ex-wife, the IRS employee has good cause not to report that contact to the ex-husband, regardless of whether the new employer expresses concern about reprisal against it or its employees.

(4) *Pending criminal investigations*—(i) *IRS criminal investigations*. Section 7602(c) does not apply to contacts made during an investigation, or inquiry to determine whether to open an investigation, when the investigation or inquiry is—

(A) Made against a particular, identified taxpayer for the primary purpose of evaluating the potential for criminal prosecution of that taxpayer; and

(B) Made by an IRS employee whose primary duties include either identifying or investigating criminal violations of the law.

(ii) *Other criminal investigations*. Section 7602(c) does not apply to contacts which, if reported to the taxpayer, could interfere with a known pending criminal investigation being conducted by law enforcement personnel of any local, state, Federal, foreign or other governmental entity.

(5) *Governmental entities*. Section 7602(c) does not apply to any contact with any office of any local, state, Federal or foreign governmental entity except for contacts concerning the taxpayer's business with the government office contacted, such as the taxpayer's contracts with or employment by the office. The term *office* includes any agent or contractor of the office acting in such capacity.

(6) *Confidential informants*. Section 7602(c) does not apply when the employee making the contact has good cause to believe that providing either the pre-contact notice or the record of the person contacted would identify a confidential informant whose identity would be protected under section 6103(h)(4).

(7) *Nonadministrative contacts*—(i) *Explanation*. Section 7602(c) does not apply to contacts made in the course of a pending court proceeding.

(ii) *Examples*. The following examples illustrate this paragraph (f)(7):

*Example 1*. An attorney for the Office of Chief Counsel needs to contact a potential witness for an upcoming Tax Court proceeding involving the 1997 and 1998 taxable years of the taxpayer. Section 7602(c) does not apply because the contact is being made in the course of a pending court proceeding.

*Example 2*. While a Tax Court case is pending with respect to a taxpayer's 1997 and 1998 income tax liabilities, a revenue agent is conducting an examination of the taxpayer's excise tax liabilities for the fiscal year ending 1999. Any third-party contacts made by the revenue agent with respect to the excise tax liabilities would be subject to the requirements of section 7602(c) because the Tax Court proceeding does not involve the excise tax liabilities.

*Example 3*. A taxpayer files a Chapter 7 bankruptcy petition and receives a discharge. A revenue officer contacts a third party in order to determine whether the taxpayer has any exempt assets against which the IRS may take collection action to enforce its federal tax lien. At the time of the contact, the bankruptcy case has not been closed. Although the bankruptcy proceeding remains pending, the purpose of this contact relates to potential collection action by the IRS, a matter not before or related to the bankruptcy court proceeding.

(g) *Effective Date*. This section is applicable on December 18, 2002.

[T.D. 9028, 67 FR 77421, Dec. 18, 2002]

### § 301.7603–1 Service of summons.

(a) *In general*. A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(b) *Persons who may serve a summons*. The officers and employees of the Internal Revenue Service whom the Commissioner has designated to carry out the authority given him by § 301.7602–1(b) to issue a summons are authorized to serve a summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602.

[T.D. 7188, 37 FR 12796, June 29, 1972, as amended by T.D. 7297, 38 FR 34803, Dec. 19, 1973]

**§ 301.7604–1 Enforcement of summons.**

(a) *In general.* Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, application may be made to the judge of the district court or to a U.S. commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt.

(b) *Persons who may apply for an attachment.* The officers and employees of the Internal Revenue Service whom the Commissioner has designated to carry out the authority given him by § 301.7602–1(b) to issue a summons are authorized to apply for an attachment as provided in paragraph (a) of this section.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7297, 38 FR 34803, Dec. 19, 1973]

**§ 301.7605–1 Time and place of examination.**

(a) *Time and place of examination to be reasonable*—(1) *In general.* The time and place of examination pursuant to the provisions of sections 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 of the Internal Revenue Code are to be fixed by an officer or employee of the Internal Revenue Service, and officers and employees are to endeavor to schedule a time and place that are reasonable under the circumstances. This section sets forth general criteria for the Service to apply in determining whether a particular time and place for an examination are reasonable under the circumstances. Officers and employees should exercise sound judgment in applying these criteria to the circumstances at hand and should balance convenience of the taxpayer with the requirements of sound and efficient tax administration.

(2) *International examinations.* Except for the provisions of paragraph (b)(2) of this section, this section does not apply to examinations that fall under the jurisdiction of the Office of the Assistant Commissioner (International).

(3) *Criminal investigations.* Except for the provisions of paragraph (b)(2) of this section, this section does not apply to criminal investigations.

(b) *Time of examination*—(1) *Date and time of examination.* It is reasonable for the Service to schedule the day (or days) for an examination during a normally scheduled workday (or workdays) of the Service, during the Service's normal business hours. It is reasonable for the Service to schedule examinations throughout the year, without regard to seasonal fluctuations in the businesses of particular taxpayers or their representatives. However, the Service will work with taxpayers or their representatives to try to minimize any adverse effects in scheduling the date and time of an examination.

(2) *Date of appearance when summons is used.* If a summons is issued under authority of section 7602(a)(2) of the Internal Revenue Code, or under the corresponding authority of sections 6420(e)(2), 6421(g)(2), or 6427(j)(2), the date fixed for appearance before an officer or employee of the Service must be no less than 10 days from the date of the summons.

(c) *Type of examination*—(1) *In general.* The Service will determine whether an examination will be an office examination (*i.e.,* an examination conducted at a Service office) or a field examination (*i.e.,* an examination conducted at the taxpayer's residence or place of business, or some other location that is not a Service office), based upon the complexity of the return and which form of examination will be more conducive to effective and efficient tax administration.

(2) *Office examination held in location other than Service office in case of clear need.* The Service will grant a request to hold an office examination at a location other than a Service office in a case of clear need, such as when it would be unreasonably difficult for the taxpayer to travel to a Service office because of the taxpayer's advanced age or infirm physical condition, or when the taxpayer's books, records, and source documents are too cumbersome for the taxpayer to bring to a Service office.

(d) *Place of examination*—(1) *In general.* The Service generally will make an initial determination of the place

for an examination, including the Internal Revenue Service district to which an examination will be assigned, based upon the address shown on the return for the period selected for examination. Requests by taxpayers to transfer the place of examination will be resolved on a case-by-case basis, using the criteria set forth in paragraph (e) of this section.

(2) *Office examinations*—(i) *In general.* An office examination of an individual or sole proprietorship generally is based on the residence of the individual taxpayer. An office examination of a taxpayer that is an entity generally is based on the location where the taxpayer entity's original books, records, and source documents are maintained. An office examination generally will take place at the closest Service office within the district encompassing the taxpayer's residence or at the closest Service office within the district where the taxpayer entity's books, records, and source documents are maintained. It generally is not reasonable for the Service to require a taxpayer to attend an examination at an office within an assigned district other than the closest Service office.

(ii) *Exception.* If the office within the assigned district closest to an individual taxpayer's residence or the location where a taxpayer entity's books, records and source documents are maintained does not have an examination group or the appropriate personnel to conduct the examination, it generally is reasonable for the Service to require the taxpayer to attend an examination at the closest Service office within the assigned district that has an examination group or the appropriate personnel.

(iii) *Travel considerations.* In scheduling office examinations, the Service in appropriate circumstances will take into account the distance a taxpayer would have to travel.

(3) *Field examinations*—(i) *In general.* A field examination will generally take place at the location where the taxpayer's original books, records, and source documents pertinent to the examination are maintained. In the case of a sole proprietorship or taxpayer entity, this will usually be the taxpayer's principal place of business.

(ii) *Exception for certain small businesses.* If an examination is scheduled by the Service at the taxpayer's place of business and the taxpayer represents to the Service in writing that conducting the examination at the place of business would essentially require the business to close or would unduly disrupt business operations, the Service, upon verification, will change the place of examination to a Service office within the district where the taxpayer's books, records, and source documents are maintained.

(iii) *Site visitations.* Regardless of where an examination takes place, the Service may visit the taxpayer's place of business or residence to establish facts that can only be established by direct visit, such as inventory or asset verification. The Service generally will visit for these purposes on a normal workday of the Service during the Service's normal duty hours.

(e) *Requests by taxpayers to change place of examination*—(1) *In general.* The Service will consider, on a case-by-case basis, written requests by taxpayers or their representatives to change the place that the Service has set for an examination. In considering these requests, the Service will take into account the following factors—

(i) The location of the taxpayer's current residence;

(ii) The location of the taxpayer's current principal place of business;

(iii) The location at which the taxpayer's books, records, and source documents are maintained;

(iv) The location at which the Service can perform the examination most efficiently;

(v) The Service resources available at the location to which the taxpayer has requested a transfer; and

(vi) Other factors that indicate that conducting the examination at a particular location could pose undue inconvenience to the taxpayer.

(2) *Circumstances in which the Service normally will permit transfers.* A request by a taxpayer to transfer the place of examination will generally be granted under the following circumstances:

(i) *Office examination*—(A) If the current residence of the taxpayer, in the

case of an individual or sole proprietorship, or the location where the taxpayer's books, records, and source documents are maintained, in the case of a taxpayer entity, is closer to a different Service office in the same district as the office where the examination has been scheduled, the Service normally will agree to transfer the examination to the closer Service office.

(B) If the current residence of a taxpayer, in the case of an individual or sole proprietorship, or the location where a taxpayer entity's books, records, and source documents are maintained, is in a district other than the district where the examination has been scheduled, the Service normally will agree to transfer the examination to the closest Service office in the other district.

(ii) *Field examinations*—(A) If a taxpayer does not reside at the residence where an examination has been scheduled, the Service will agree to transfer the examination to the taxpayer's current residence.

(B) If, in the case of an individual, a sole proprietorship, or a taxpayer entity, the taxpayer's books, records, and source documents are maintained at a location other than the location where the examination has been scheduled, the Service will agree to transfer the examination to the location where the taxpayer's books, records, and source documents are maintained.

(3) *Transfer for convenience of taxpayer's representative*. The location of the place of business of a taxpayer's representative will generally not be considered in determining the place for an examination. However, the Service in its sole discretion may determine, based on the factors described in paragraph (e)(1) of this section, to transfer the place of examination to the representative's office.

(4) *Transfer within thirteen months of expiration of limitations period*. If any applicable period of limitations on assessment or collection provided in the Internal Revenue Code will expire within thirteen months from the date of a taxpayer's request to transfer the place of an examination, the Service may require, as a condition for an otherwise permissible transfer, that the taxpayer first agree in writing to extend the limitations period for up to one year.

(5) *Transfer to office with insufficient resources*. The Service is not required to transfer an examination to an office or district that does not have adequate resources to conduct the examination.

(f) *Safety of Service officers and employees*. Notwithstanding any other provision of this regulation, officers and employees of the Service may decline to conduct an examination at a particular location if it appears that the possibility of physical danger may exist at that location. In these circumstances, the Service may transfer an examination to a Service office and take any other steps necessary to protect its officers and employees.

(g) *Transfers initiated by Service*. Nothing in this section shall be interpreted as precluding the Service from initiating the transfer of an examination if the transfer would promote the effective and efficient conduct of the examination. Should a taxpayer request that such a transfer not be made, the Service will consider the request according to the principles and criteria set forth in paragraph (e) of this section.

(h) *Restrictions on examination of taxpayer*. No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless an authorized internal revenue officer, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. The inspection of a taxpayer's books of account pursuant to the procedures of § 1.1441–4(b) (3) and (4) is not an inspection of a taxpayer's books of account for purposes of section 7605(b) and this section.

(i) *Restriction on examination of churches*—(1) *In general*. This section imposes certain restrictions upon the examination of the books of account and religious activities of a church or convention or association of churches for the purpose of determining whether such organization may be engaged in activities the income from which is subject to tax under section 511 as unrelated business taxable income. The purposes of these restrictions are to

protect such organizations from undue interference in their internal financial affairs through unnecessary examinations to determine the existence of unrelated business taxable income, and to limit the scope of examination for this purpose to matters directly relevant to a determination of the existence or amount of such income. This section also imposes additional restrictions upon other examinations of such organizations.

(2) *Books of account.* No examination of the books of account of an organization which claims to be a church or a convention or association of churches shall be made except after the giving of notice as provided in this subparagraph and except to the extent necessary (i) to determine the initial or continuing qualification of the organization under section 501(c)(3); (ii) to determine whether the organization qualifies as one, contributions to which are deductible under section 170, 545, 556, 642, 2055, 2106, or 2522; (iii) to obtain information for the purpose of ascertaining or verifying payments made by the organization to another person in determining the tax liability of the recipient, such as payments of salaries, wages, or other forms of compensation; or (iv) to determine the amount of tax, if any, imposed by the Code upon such organization. No examination of the books of account of a church or convention or association of churches shall be made unless the Regional Commissioner believes that such examination is necessary and so notifies the organization in writing at least 30 days in advance of examination. The Regional Commissioner will conclude that such examination is necessary only after reasonable attempts have been made to obtain information from the books of account by written request and the Regional Commissioner has determined that the information cannot be fully or satisfactorily obtained in that manner. In any examination of a church or convention or association of churches for the purpose of determining unrelated business income tax liability pursuant to such notice, no examination of the books of account of the organization shall be made except to the extent necessary to determine such liability.

(3) *Religious activities.* No examination of the religious activities of an organization which claims to be a church or convention or association of churches shall be made except (i) to the extent necessary to determine the initial or continuing qualification of the organization under section 501(c)(3); (ii) to determine whether the organization qualifies as one, contributions to which are deductible under section 170, 545, 556, 642, 2055, 2106, or 2522; or (iii) to determine whether the organization is a church or convention or association of churches subject to the provisions of part III of subchapter F of chapter 1. The requirements of subparagraph (2) of this paragraph that the Regional Commissioner give notice prior to examination of the books of account of an organization do not apply to an examination of the religious activities of the organization for any purpose described in this subparagraph. Once it has been determined that the organization is a church or convention or association of churches, no further examination of its religious activities may be made in connection with determining its liability, if any, for unrelated business income tax.

(4) *Effective date.* The provisions of this paragraph shall apply to audits and examinations of taxable years beginning after December 31, 1969.

(j) *Effective date.* Paragraphs (a) through (g) of this section, inclusive, are effective for examinations scheduled after April 2, 1993.

(Secs. 1441(c)(4) (80 Stat. 1553; 26 U.S.C. 1441(c)(4)), 3401(a)(6) (80 Stat. 1554; 26 U.S.C. 3401(a)(6)), and 7805 (68A Stat. 917; 26 U.S.C. 7805), Internal Revenue Code of 1954)

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7146, 36 FR 20599, Oct. 27, 1971; T.D. 7977, 49 FR 36836, Sept. 20, 1984; T.D. 8297, 55 FR 12346, Apr. 3, 1990; T.D. 8469, 58 FR 17519, Apr. 5, 1993]

### § 301.7606–1 Entry of premises for examination of taxable objects.

Any officer or employee of the Internal Revenue Service may, in the performance of his duty, enter in the daytime any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects and

also enter at night any such building or place, while open, for a similar purpose.

[T.D. 7297, 38 FR 34804, Dec. 19, 1973]

### § 301.7609–1 Special procedures for third-party summonses.

(a) *In general*. Section 7609 requires the Internal Revenue Service to follow special procedures when summoning the records of persons defined by section 7609(a)(3) as ''third-party recordkeepers.'' Under these special procedures, the person about whom information is being gathered must be notified in advance in many cases. If the person about whom information is being gathered has been given notice, that person has the right to institute, until and including the 20th day following the day such notice was served on or mailed to such notified person, a proceeding to quash the summons. During the time the validity of the summons is being litigated, the statutes of limitations are suspended under section 7609(e). Section 7609 does not restrict the authority under section 7602 (or under any other provision of law) to examine records and witnesses without serving a summons and without giving notice of an examination. Sections 301.7609–1 through 301.7609–5 relate to section 7609; § 301.7609–2, discusses matters under sections 7609(a)(3) and 7609(i) relating to third-party recordkeepers; § 301.7609–3 discusses matters under section 7609(b), relating to intervention rights; § 301.7609–4 and the institution of a proceeding to quash; § 301.7609–4 discusses matters under section 7609(c), relating to summonses excepted from the section 7609 procedures; and § 301.7609–5 discusses matters under section 7609(e), relating to the suspension of the statute of limitations.

(b) *Effective dates*. This section applies to summonses served after December 31, 1982. For the rules applicable to summonses issued on or after March 1, 1977 and served before January 1, 1983, see 26 CFR 301.7609–1 (revised as of April 1, 1984).

[T.D. 8091, 51 FR 23054, June 25, 1986]

### § 301.7609–2 Third-party recordkeepers.

(a) *Definitions*—(1) *Accountant*. A person is an ''accountant'' under section 7609(a)(3)(F) for purposes of determining whether that person is a third-party recordkeeper if the person is registered, licensed, or certified under State law as an accountant.

(2) *Attorney*. A person is an ''attorney'' under section 7609(a)(3)(E) for purposes of determining whether that person is a third-party recordkeeper if the person is admitted to the bar of a State.

(3) *Credit cards*—(i) *Person extending credit through credit cards*. The term ''person extending credit through the use of credit cards or similar devices'' under section 7609(a)(3)(C) generally includes any person who issues a credit card. It does not include a seller of goods or services that honors credit cards issued by other parties but does not extend credit on the basis of credit cards or similar devices issued by itself.

(ii) *Similar devices to credit cards*. An object is a ''similar device'' to a credit card under section 7609(a)(3)(C) only if it is physical in nature, such as a coupon book, a charge plate, or a letter of credit. Thus, a person who extends credit by requiring credit customers to sign sales slips without requiring use of physical objects issued by that person is not a third-party recordkeeping under section 7609(a)(3)(C).

(b) *When third-party recordkeeper status arises*—(1) *In general*. A person is a ''third-party recordkeeper'' with respect to a given set of records only if the person made or kept the records in the person's capacity as a third-party recordkeeper. Thus, for instance, an accountant is not a third-party recordkeeper (by reason of being an accountant) with respect to the accountant's records of a sale of property by the accountant to another person. Similarly, a credit card issuer is not a third-party recordkeeper (by reason of being a person extending credit through the use of credit cards or similar devices) with respect to—

(i) Records relating to noncredit card transactions, such as a cash sale by the issuer to a holder of the issuer's credit card; or

(ii) Records relating to transactions involving the use of another issuer's credit card.

(2) *Examples*. The rules of paragraph (b)(1) of this section may be illustrated by the following examples:

*Example 1*. V issues a credit card (the V card) that is honored by R, a retailer. When using the V card, C signs a sales slip in triplicate. C, R, and V each retain one copy. Only the copy held by V is held by a third-party recordkeeper under section 7609 (a)(3), even though R may issue its own credit card.

*Example 2*. Assume the same facts as in example 1, except R does issue its own credit card to C (the R card). When C makes a credit purchase from R using the R card, C signs a sales slip in duplicate. C and R each retain one copy. Because R keeps the copy in its capacity as credit card issuer, as well as in its capacity as seller, it is a third-party recordkeeper under section 7609 (a)(3) with respect to that copy.

(c) *Duty of third-party recordkeeper*—(1) *In general*. Upon receipt of a summons, the third-party recordkeeper (''recordkeeper'') must begin to assemble the summoned records. The recordkeeper must be prepared to produce the summoned records on the date which the summons states the records are to be examined regardless of the institution of anticipated institution of a proceeding to quash or the recordkeeper's intervention (as allowed under section 7609(b)(2)(C)) into a proceeding to quash.

(2) *Disclosing recordkeepers not liable*—(i) *In general*. A recordkeeper, or an agent or employee thereof, who makes a disclosure of records as required by this section, in good faith reliance on the certificate of the Secretary (as defined in paragraph (c)(2)(ii) of this section) or an order of a court requiring production of records, will not be liable for such disclosure to any customer, or to any party with respect to whose tax liability the summons was issued, or to any other person.

(ii) *Certificate of the Secretary*. The Secretary may issue to the recordkeeper a certificate stating both:

(A) That the 20-day period, within which a notified person may institute a proceeding to quash the summons, has expired; and

(B) That no proceeding has been properly instituted within that period. The Secretary may also issue a certificate to the recordkeeper if the taxpayer, with respect to whose tax liability the summons was issued, expressly consents to the examination of the records summoned.

(3) *Reimbursement of costs*. Recordkeepers may be entitled to reimbursement of their costs of assembling and preparing to produce summoned records, to the extent allowed by section 7610, even if the summons ultimately is not enforced.

(d) *Effective dates*. This section, with the exception of paragraph (c), applies generally to all summonses issued on or after March 1, 1977. Paragraph (c) applies only to summonses served after December 31, 1982.

(Secs. 7610(a) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 7610(a) and 7805))

[T.D. 7899, 48 FR 32772, July 19, 1983, as amended by T.D. 8091, 51 FR 23054, June 25, 1986]

### § 301.7609–3 Right to intervene; right to institute a proceeding to quash.

(a) *Notified person*. Under section 7609(a), the Internal Revenue Service must give a notice of summons to any person, other than the person summoned, who is identified in the description of the books and records contained in the summons in order that such person may contest the right of the Service to examne the summoned records by instituting a proceeding to quash the summons. Thus, if the Service issues a summons to a bank requesting checking account records of more than one person all of whom are identified in the description of the records contained in the summons, then all such persons are notified persons entitled to notice under section 7609(a). Therefore, if the Service requests the records of a joint bank account of A and B both of whom are named in the summons, then both A and B are notified persons entitled to notice under section 7609(a).

(b) *Right to institute a proceeding to quash*—(1) *In general*. Section 7609(b) grants a notified person the right to institute a proceeding to quash the summons in the United States district court for the district within which the person summoned resides or is found. Jurisdiction of the court is based on

section 7609(h). The act of filing a petition in district court does not in and of itself institute a proceeding to quash under section 7609(b)(2). Rather, the filing of the petition must be coupled with notice as required by section 7609(b)(2)(B).

(2) *Elements of institution of a proceeding to quash.* In order to institute a proceeding to quash a summons the notified person (or the notified person's agent, nominee, or other person acting under the direction or control of the notified person) must, not later than the 20th day following the day the notice of the summons was served on or mailed to such notified person:

(i) File a petition to quash in the name of the notified person in a district court having jurisdiction,

(ii) Notify the Service by sending a copy of that petition by registered or certified mail to the Service employee and office designated to receive the copy in the notice of summons that was given to the notified person, and

(iii) Notify the recordkeeper by sending to that recordkeeper by registered or certified mail a copy of the petition.

Failure to give timely notice to either the summoned party or the Service in the manner described in this paragraph means that the notified person has failed to institute a proceeding to quash and the district court has no jurisdiction to hear the proceeding. Thus, for example, if the notified person mails a copy of the petition to the summoned person but not to the designated Service employee and office, the notified person has failed to institute a proceeding to quash. Similarly, if the notified person mails a copy of such petition to the summoned person but, instead of sending a copy of the petition by registered or certified mail to the designated employee and office, the notified person gives the designated employee and office the petition by some other means, the notified person has failed to institute a proceeding to quash.

(3) *Failure to institute a proceeding to quash.* If the notified person fails to institute a proceeding to quash within 20 days following the day the notice of the summons was served on or mailed to such notified person, the Service may examine the summoned records following the 23rd day after notice of the summons was served on or mailed to the notified person (see section 7609(d)(1)).

(c) *Presumption no notice has been mailed.* Section 7609(b)(2)(B) permits a notified person to institute a proceeding to quash by filing a petition in district court and notifying both the Service and the summoned person. Unless the notified person has notified both the Service and the summoned person in the appropriate manner, the notified person has failed to institute a proceeding to quash. If the copy of the petition has not been delivered to the summoned person or the person and office designated to receive the notice on behalf of the Service within 3 days from the close of the 20-day period allowed to institute a proceeding to quash, it is presumed that the notification has not been timely mailed.

(d) *Effective date.* This section applies to summonses served after December 31, 1982. For the rules applicable to summonses issued on or after March 1, 1977 and served before January 1, 1983, see 26 CFR 301.7609–3 (revised as of April 1, 1984).

[T.D. 8091, 51 FR 23055, June 25, 1986]

### § 301.7609–4 Summonses excepted from section 7609 procedures.

(a) *In aid of the collection of certain liabilities*—(1) *In general.* Section 7609(c)(2)(B) contains an exception to the general notice requirement when a summons is issued to a third-party recordkeeper. That section excepts summonses issued in aid of the collection of the liability of any person against whom an assessment has been made or judgment rendered or the liability at law or in equity of any transferee or fiduciary of such a person.

(2) *Examples.* Examples of summonses referred to in paragraph (a)(1) of this section are—

(i) Summonses issued to determine the amount held in a bank in the name of a person against whom an assessment has been made or judgment rendered;

(ii) Summonses issued for the purpose of ascertaining responsible corporate employees or officers for the 100 percent panalty under section 6672, so as to assist in collecting the amount of

withheld taxes which have been assessed against the corporation; and

(iii) Summonses issued to enforce transferee or fiduciary liability for a tax which has been assessed.

(b) *Numbered account (or similar arrangement).* Under section 7609(c)(2), a summons solely to determine the identity of a person having a numbered account (or similar arrangement) with a bank or other institution is excepted from the requirements of section 7609. A ''numbered account (or similar arrangement)'' under section 7609(c)(2) is an account through which a person may authorize transactions solely through the use of a number, symbol, code name, or other device not involving the disclosure of the person's identity. A ''person having a numbered account (or similar arrangement)'' includes the person who opened the account and any person authorized to use the account or to receive records or statements concerning it.

(c) *Effective date.* This section applies to all summonses issued after February 28, 1977.

(Secs. 7610(a) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 7610(a) and 7805))

[T.D. 7899, 48 FR 32772, July 19, 1983, as amended by T.D. 8091, 51 FR 23055, June 25, 1986]

### § 301.7609–5 Suspension of statutes of limitations.

(a) *Agent, nominee, etc.* Under section 7609(e), statutes of limitations are suspended if a notified person with respect to whose liability a summons is issued, or the notified person's agent, nominee, or other person acting under the direction or control of the notified person, takes any action as provided in section 7609(b). A person is a notified person's agent, nominee, or other person acting under the direction or control of a notified person for purposes of section 7609(e) if the person with respect to whose liability the summons is issued has the ability in fact or at law to cause the agent, etc., to take the actions permitted under section 7609(b). Thus, in the case of a corporation, direction or control by the notified person may exist even though less than 50 percent of the voting power of the corporation is held by the notified person.

(b) *Period during which a proceeding, etc., is pending.* Under section 7609(e), the statute of limitations may be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending. This period begins on the date the petition to quash the summons is filed in district court. The period continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and noncompliance have no effect on the suspension provisions. Of course, if the notified person takes no action provided in subsection (b) of section 7609, no suspension of the statutes of limitations takes place. The periods of limitations which are suspended under section 7609(e) are those which apply to the taxable periods to which the summons relates.

(c) *Taking of action as provided in section 7609(b).* Section 7609(b) allows intervention by a notified person as a matter of right upon compliance with the Federal Rules of Civil Procedure. The phrase ''takes any action as provided in subsection (b)'', found in section 7609(e), includes any intervention, whether or not section 7609(b) is specifically mentioned in the order of the court allowing intervention. The phrase also includes the fulfilling of only part of the requirements of section 7609(b)(2), relating to the right of a person to institute a proceeding to quash. Thus, for instance, if a notified person notifies a person who has been summoned by sending a copy of the petition by registered or certified mail but does not mail a copy of that notice to the appropriate person and office under section 7609(b)(2)(B), the notified person has taken an action under section 7609(e).

(d) *Effective dates.* This section applies to summonses served after December 31, 1982. For the rules applicable to summonses issued on or after March 1, 1977, and before January 1,

1983, see 26 CFR 301.7609–5 (revised as of April 1, 1984).

(Secs. 7610(a) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 7610(a) and 7805))

[T.D. 7899, 48 FR 32773, July 19, 1983, as amended by T.D. 8091, 51 FR 23055, June 25, 1986]

### § 301.7610–1 Fees and costs for witnesses.

(a) *Introduction*. Section 7610 provides that the Internal Revenue Service may make payments to certain persons who are asked to give information to the Service. Under section 7610 witnesses generally will not be reimbursed for actual expenses incurred but instead will be paid in accordance with the payment rates established by regulations. Paragraph (b) of this section contains elaborations of certain terms found in section 7610 and definitions of other terms used in the regulations under section 7610(a)(b); and paragraphs (c) and (d) contain rules and rates applicable to payments under section 7610. Section 7610 and its regulations are effective for summonses issued after February 28, 1977, except as otherwise provided.

(b) *Definitions*—(1) Directly incurred costs. Directly incurred costs are costs incurred solely, immediately, and necessarily as a consequence of searching for, reproducing, or transporting records in order to comply with a summons. They do not include a proportionate allocation of fixed costs, such as overhead, equipment depreciation, etc. However, where a third party's records are stored at an independent storage facility that charges the third party a search fee to search for, reproduce, or transport particular records requested, these fees are considered to be directly incurred by the summoned third party.

(2) *Reproduction cost*. Reproduction costs are costs incurred in making copies or duplicates of summoned documents, transcripts, and other similar material.

(3) *Search costs*. Search costs include only the total-cost of personnel time directly incurred in searching for records or information and the cost of retrieving information stored by computer. Salaries of persons locating and retrieving summoned material are not includible in search costs. Also, search costs do not include salaries, fees, or similar expenditures for analysis of material or for managerial or legal advice, expertise, or research, or time spent for these activities.

(4) *Third party*. A third party is any person served with a summons, other than a person with respect to whose liability a summons is issued, or an officer, employee, agent, accountant, or attorney of that person.

(5) *Third party records*. Third party records are books, papers, records, or other data in which the person with respect to whose liability a summons is issued does not have a proprietary interest at the time the summons is served.

(6) *Transportation costs*. Transportation costs include only costs incurred to transport personnel to search for records or information requested and costs incurred solely by the need to transport the summoned material to the place of examination. These costs do not include the cost of transporting the summoned witness for appearance at the place of examination. See paragraph (c)(2) of this section for payment of travel expenses.

(c) *Conditions and rates of payments*—(1) *Basis for payment*. Payment for search, reproduction, and transportation costs will be made only to third parties served with a summons to produce third party records or information and only for material requested by the summons. Payment will be made only for these costs that are both directly incurred and reasonably necessary. Search, reproduction, and transportation costs must be considered separately in determining whether costs are reasonably necessary. No payment will be made until the third party has satisfactorily complied with the summons and has submitted an itemized bill or invoice showing specific details concerning the costs to the Internal Revenue Service employee before whom the third party was summoned. If a third party charges any other person for any cost for which the third party is seeking payment from the Service, the amount charged to the other person must be subtracted from the amount the Internal Revenue Service must pay.

(2) *Payment rates.* The following rates are established.

(i) *Search costs.* (A) For the total amount of personnel time required to locate records or information, $8.50 per person hour for summonses issued after July 19, 1983. For summonses issued on or before such date, $5.00 per person hour.

(B) For retrieval of information stored by computer in the format in which it is normally produced, actual costs, based on computer time and necessary supplies, except that personnel time for computer search is payable only under subparagraph (2)(i)(A) of this paragraph.

(ii) *Reproductions costs.* (A) For copies of documents $.20 per page for summonses issued after July 19, 1983. For copies of documents issued on or before such date, $.10 per page.

(B) For photographers, films and other materials, actual cost, except that personnel time is payable only under subparagraph (2)(i)(A) of this paragraph.

(iii) *Transportation costs.* For transportation costs, actual cost, except that personnel time is payable only under subparagraph (2)(i)(A) of this paragraph.

(d) *Appearance fees and allowances*—(1) In general. Under section 7610(a)(1) and this paragraph, the Service shall pay a summoned person certain fees and allowances. No payments will be made until after the party summoned appears and has submitted any necessary receipts or other evidence of costs to the Service employee before whom the person was summoned. This paragraph is effective with respect to appearances made after October 26, 1978.

(2) *Attendance fees.* A summoned person shall be paid an attendance fee for each day's attendance. A summoned person shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of the attendance or at any time during the attendance. The attendance fee is the higher of $30 per day or the amount paid under 28 U.S.C. 1821(b) to witnesses in attendance at courts of the United States at the time of the summoned person's appearance.

(3) *Travel allowances.* A summoned person who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from the summoned person's residence by the shortest pratical route in going to and returning from the place of attendance. Such a summoned person shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished. A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, under 5 U.S.C. 5704, for offical travel of employees of the Federal Government shall be paid to each summoned person who travels by privately owned vehicle. That rate is $.20 per mile as of April 20, 1980. Computation of mileage under this paragraph shall be made on the basis of a uniform table of distances adopted by the Administrator of General Services. Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt) shall be paid in full to a summoned person incurring those expenses.

(4) *Subsistence allowances.* A subsistence allowance shall be paid to a summoned person (other than a summoned person who is incarcerated) when an overnight stay is required at the place of attendance because the place is so far removed from the residence of the summoned person as to prohibit return thereto from day to day. A subsistence allowance for a summoned person shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, under 5 U.S.C. 5702(a), for official travel in the area of attendance by employees of the Federal Government. As of April 30, 1979, that maximum per diem allowance is $35 per day. A subsistence allowance for a summoned person attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence

allowance prescribed by the Administrator, under 5, U.S.C. 5702(c)(B), for official travel in that area by employees of the Federal Goverment. As of April 30, 1979, maximum rates of up to $50 per day have been prescribed by the Administrator for certain areas. An alien who has been paroled into the United States for prosecution, under section 212 (d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined under section 242(b) of that Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided for under section 7610(a)(1).

(Secs. 7610(a) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 7610(a) and 7805))

[T.D. 7899, 48 FR 32773, July 19, 1983; 48 FR 36449, Aug. 11, 1983]

### § 301.7611–1 Questions and answers relating to church tax inquiries and examinations.

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CHURCH TAX INQUIRY

Q-1: When may the Internal Revenue Service begin an inquiry of a church's tax liability?

A-1: Under section 7611 of the Internal Revenue Code, the Internal Revenue Service may begin a church tax inquiry only when the appropriate Regional Commissioner (or higher Treasury official) reasonably believes, on the basis of facts and circumstances recorded in writing, that the organization (1) may not qualify for tax exemption as a church; (2) may be carrying on an unrelated trade or business (within the meaning of section 513); or (3) may be otherwise engaged in activities subject to tax. Information received by the Internal Revenue Service at its request may not be used to form the basis of a reasonable belief to begin a church tax inquiry, unless the Service's request is made within the procedures of section 7611, is a request permitted by these questions and answers to be made without application of the procedures of section 7611, or is a request to which the procedures of section 7611 do not apply.

Q-2: What is a church tax inquiry within the meaning of section 7611?

A-2: A church tax inquiry is any inquiry to a church (other than a routine request described in Q and A-4, an inquiry described in Q and A-5, an investigation described in Q and A-6 or an examination described in Qs and As 10 and 14), to serve as a basis for determining whether the organization qualifies for tax exemption as a church or whether it is carrying on an unrelated trade or business or is otherwise engaged in activities subject to tax. An inquiry is considered to commence when the Internal Revenue Service requests information or materials from a church of a type contained in church records. The term ''church tax inquiry'' does not include routine requests for information or inquiries regarding matters which do not primarily concern the tax status or liability of the church itself. See Q and A-4 with respect to routine requests regarding, among other things, withholding responsibilities for income tax or FICA (social security) tax liabilities. See Q and A-6 with respect to the types of investigations, other than routine requests, that are outside the scope of the procedures of section 7611. See Q and A-5 with respect to requests for third party records that are outside the scope of the procedures of section 7611.

Q-3: What is a ''church'' for purposes of the church tax inquiry and examination procedures of section 7611?

A-3: Solely for purposes of applying the procedures of section 7611, and as used in these questions and answers,

the term ''church'' includes any organization claiming to be a church and any convention or association of churches. For purposes of the procedures of section 7611 and these questions and answers a church does not include separately incorporated church-supported schools or other organizations incorporated separately from the church.

ROUTINE REQUESTS

Q-4: What is a routine request to a church that is outside the scope of and does not necessitate application of the procedures set forth in section 7611?

A-4: Routine requests to a church will not be considered to commence a church tax inquiry and will not necessitate application of the procedures set forth in section 7611. Routine requests for this purpose include (but are not limited to) questions regarding (1) the filing or failure to file any tax return or information return by the church; (2) compliance with income tax or FICA (social security) tax withholding responsibilities by the church; (3) any supplemental information needed to complete the mechanical processing of any incomplete or incorrect return filed by the church; (4) information necessary to process applications for exempt status and letter ruling requests; (5) information necessary to process and update periodically a church's (i) registrations for tax-free transactions (excise tax), (ii) elections for exemption from windfall profit tax, or (iii) employment tax exemption requests; (6) information identifying a church that is used to update the Cumulative List of Tax Exempt Organizations (Publication No. 78) and other computer files; and (7) confirmation that a specific business is or is not owned or operated by a church.

THIRD PARTY RECORDS

Q-5: To what extent may the Internal Revenue Service gain access to third party records?

A-5: The Internal Revenue Service may request a church to provide information necessary to locate third-party records (for instance, bank records), including information regarding the church's chartered name, state and year of incorporation, and location of checking and savings accounts, without application of the procedures of section 7611.

Records (for instance, cancelled checks or other records in the possession of a bank) held by third party recordkeepers, as defined in section 7609, are not considered church records. Thus, subject to the provisions set forth in section 7609 regarding third party summonses, access is permitted to such records without regard to the requirements of the procedures set forth in section 7611. The Internal Revenue Service is generally required, under other rules, to inform a church of any Internal Revenue Service requests for materials.

Third party materials may be acquired without application of the procedures of section 7611; however, a determination that a church is not entitled to an exemption, or an assessment of tax for unrelated business income against a church, may not be made solely on the basis of third party records, without first complying with the requirements of two notices and offering of a conference (see Qs and As 9 and 10) pursuant to the procedures set forth in section 7611. This limitation does not apply to assessments of tax other than income tax resulting from loss of exemption or for unrelated business income (for instance, assessments of social security or other employment taxes). Third party bank records will not be used in a manner inconsistent with the procedures set forth in section 7611 or in these questions and answers.

SCOPE OF SECTION 7611

Q-6: What types of investigations, other than routine requests and requests for information necessary to locate and examine third party records, and examination of those records, are outside the scope of the procedures of section 7611?

A-6: The church inquiry and examination procedures described in section 7611 do not apply to (1) any inquiry or examination relating to the tax liability of any person other than a church; (2) any termination assessment under section 6851 or 6852, or jeopardy assessment under section 6861; or (3) any case involving a knowing failure to file a return or a willful attempt to defeat or

evade tax (including but not limited to any case involving a failure by the church to withhold or pay social security or other employment taxes or income tax required to be withheld from wages). Additionally, the church inquiry and examination procedures do not apply to any criminal investigations.

The church tax inquiry and examination procedures also do not apply to inquiries or examinations which relate primarily to the tax status (including, but not limited to, social security or self-employment tax or income tax required to be withheld from wages) or liability of persons other than the church (including, but not limited to, the tax status or liability of a contributor or contributors to the church), rather than the tax status or liability of the church itself. These may include, but are not limited to: (1) inquiries or examinations regarding the inurement of church funds to a particular individual or individuals or to another organization, which may result in the denial of all or part of such individual's or organization's deduction for charitable contributions to a church; (2) inquiries or examinations regarding the assignment of income or services or contributions to a church; and (3) inquiries or examinations regarding a vow of poverty by an individual or individuals followed by a transfer of property or an assignment of income or services to a church. Inquiries may be made to a church regarding these matters without being considered to have commenced a church tax inquiry under section 7611, and an examination of church records may be made relating to these issues (including enforcement of a summons for access to such records) without application of the requirements contained in section 7611 applicable to church tax inquiries and examinations. Such examinations are subject to the general rules regarding examinations of taxpayer books and records.

Q-7: What action may be taken if the church or its agents fail to respond to routine requests, or questions regarding other individuals' or organizations' tax liabilities?

A-7: Repeated (two or more) failures by a church or its agents to reply to routine requests (see Q and A-4) will be considered by the appropriate Internal Revenue Service Regional Commissioner to be a reasonable basis for commencement of a church tax inquiry under the church tax inquiry and examination procedures of section 7611. The failure of a church to respond to repeated requests for information regarding individuals' or other organizations' tax liabilities (see Q and A-6) will be considered a reasonable basis for commencement of a church tax inquiry. Failure by a church to provide information necessary to locate third-party records (see Q and A-5) will be a factor, but not a conclusive factor, in determining if there is reasonable cause for commencing a church tax inquiry. For this purpose, a failure to respond to a request means either that no response has been made or that the response does not make a reasonable attempt to submit the information called for by the specific language of the request.

Q-8: Where an inquiry or examination is outside the scope of and does not necessitate application of the procedures of section 7611, what are the limitations on the Internal Revenue Service's actions?

A-8: Inquiries or examinations which are outside the scope of the procedures of section 7611 and therefore are conducted without application of the procedures of section 7611 (for instance, those addressed in Q and A-6) will be limited to the determination of facts and circumstances specifically relating to the tax liabilities of the individuals or other organizations in question. For example, in a case against an individual or other organization, information may be requested or church records examined, if pertinent, regarding amounts of money, property, or services transferred to the individual or individuals in question (including, but not limited to wages, loans, or noncontractual transfers), the use of church funds for personal expenses, or other similar matters, without having to follow the church tax inquiry and examination procedures. As one example, in an assignment of income case against an individual or other organization, information could be requested or church records examined if relevant

to an individual's assignment of particular income, donation of property, or transfer of a business to a church. However, without following the church tax inquiry and examination procedures, no examination of a contributor or membership list in the possession of the church will be made, other than under the applicable procedures of section 7611, for the purpose of determining the overall financial structure of the church, merely because such structure was relevant to the church's qualification as a tax-exempt entity and therefore indirectly relevant to the validity of contributors' deductions in general. Inquiries or examinations regarding individuals' or other organizations' tax liabilities will not be used in a manner inconsistent with the procedures set forth in section 7611 or in these questions and answers.

NOTICE REQUIREMENTS

Q-9: What satisfies the inquiry notice requirement (first notice) upon commencement of a church tax inquiry?

A-9: Upon commencing a church tax inquiry, the appropriate Regional Commissioner is required to provide written notice to the church of the beginning of the inquiry. This notice will include (1) an explanation of the concerns which gave rise to the inquiry and the general subject matter of the inquiry, which is sufficiently specific to allow the church to understand the particular area of church activities or behavior which is at issue; (2) a general explanation of the provisions of the Internal Revenue Code which authorize the inquiry or which may otherwise be involved in the inquiry; and (3) a general explanation of applicable administrative and constitutional provisions with respect to the inquiry, including the right to a conference with the Internal Revenue Service before an examination of church records is commenced. The inquiry notice (first notice) will generally request information in an effort to alleviate the concerns which gave rise to the inquiry.

However, the Internal Revenue Service is not precluded from expanding its inquiry beyond the concerns expressed in the inquiry notice (first notice) as a result of facts and circumstances which subsequently comes to its attention (including, where appropriate, an expansion of an unrelated business income inquiry to include questions of tax-exempt status, and vice-versa).

The inquiry notice requirement (first notice) does not require the Internal Revenue Service to share particular items of evidence with the church, or to identify its sources of information regarding church activities, if providing such information would be damaging to the inquiry or to the sources of information. For example, in an inquiry regarding unrelated business income, the Internal Revenue Service might state that its inquiry was prompted by a local newspaper advertisement regarding a church-owned business. However, the Internal Revenue Service would not be required to reveal the existence or identity of any so-called ''informers'' within a church (including present or former employees).

Q-10: What must be done to satisfy the examination notice requirement (second notice) before commencing an examination of church records or religious activities with respect to an examination conducted under section 7611?

A-10: Where an examination is conducted under section 7611, church records or religious activities of a church may be examined only if, at least 15 days prior to the examination, written notice of the proposed examination is provided to the church and to the appropriate Regional Counsel. This notice is in addition to the notice of commencement of inquiry (first notice) previously provided to the church.

The notice of examination (second notice) is required to include (1) a copy of the church tax inquiry notice (first notice) previously provided to the church; (2) a description of the church records and activities sought to be examined; and (3) a copy of all documents which were collected or prepared by the Internal Revenue Service for use in the examination, and which are required to be disclosed under the Freedom of Information Act (5 U.S.C. 552) as supplemented by section 6103 of the Code (relating to disclosure and confidentiality of tax return information). The documents to be supplied under

this provision will be limited to documents specifically concerning the church whose records are to be examined and will not include documents relating to other inquiries or examinations or to Internal Revenue Service practices and procedures in general. Disclosure to the church will be subject to restrictions regarding the disclosure of the existence or identity of informants. Although a description of materials to be examined will be provided in the notice of examination (second notice), the description does not restrict the ability of the Internal Revenue Service to examine church records or religious activities which are not specifically mentioned in the notice of examination (second notice) but which are properly within the scope of the examination. Thus, the Internal Revenue Service is not precluded from expanding its inquiry beyond the concerns expressed in the examination notice (second notice) as a result of facts and circumstances which subsequently come to its attention (including, where appropriate, an expansion of an unrelated business income examination to include questions of tax—exempt status, and vice versa).

At the time the notice of examination (second notice) is provided to the church, a copy of the same notice will be provided to the appropriate Regional Counsel. The Regional Counsel is then allowed 15 days from issuance of the second notice in which to file an advisory objection to the examination. (This is concurrent with the 15-day period during which an examination of church records is prohibited pending a request for a conference.)

As part of the notice of examination (second notice), the church will be offered an opportunity to meet with an Internal Revenue Service official to discuss the concerns which gave rise to the inquiry and the general subject matter of the inquiry. An examination will not begin until 15 days after the mailing of the notice of examination (second notice). The organization may request a conference at any time prior to beginning of the examination and a conference so requested will be scheduled within a reasonable time after the request is made.

The purpose of the conference is to remind the church, in general terms, of the stages of the church tax inquiry and examination procedures and to discuss the relevant issues that may arise as part of the inquiry, in an effort to resolve the issues of tax exemption or liability without the necessity of an examination of church records or activities. Information properly excludable from a written notice of examination (second notice) (including information regarding the identity of third-party witnesses or evidence provided by such witnesses) is not a subject for discussion at, and will not be revealed during, a conference.

Once a conference request is timely made, an examination will begin only following the conference. The conference requirement may not be utilized to delay an examination beyond the time reasonably necessary to prepare for and hold the conference. The holding of one conference with the church will be sufficient to satisfy the requirements of section 7611 and these questions and answers.

ACTION AFTER ISSUANCE OF NOTICE

Q-11: What action may be taken after issuance of the examination notice (second notice)?

A-11: After the examination notice (second notice) is issued, the organization may request a conference as described in Q and A-10 (see Q and A-12 with respect to time for issuance of examination notice). If the matters of concern which gave rise to the issuance of the examination notice (second notice) are resolved at the conference, it may be determined that an examination is not necessary. If the matters of concern are not resolved at the conference, or if the organization does not request a conference, the examination will ordinarily begin.

The examination will be conducted under the Internal Revenue Service's general examination procedures and the procedures of section 7611. The outcome of such an examination will ordinarily be: (1) No change in tax-exempt status or tax liability; (2) no change in such status or liability, conditioned on compliance with a request to modify in

future tax periods matters such as internal accounting practices and procedures or coupled with a caution to refrain from increasing certain activities limited by the Internal Revenue Code, such as lobbying programs aimed at influencing legislation; (3) a proposal to revoke tax-exempt status; (4) a proposal asserting unrelated business income tax liability; or (5) a proposal asserting liability for other taxes.

In certain exceptional circumstances the Internal Revenue Service may, in lieu of an examination, propose to revoke the organization's exemption based upon the facts and circumstances which form the basis for a reasonable belief to commence an inquiry under section 7611 and any other appropriate information that becomes apparent as a result of the inquiry, the conference, or both.

Pursuant to section 7611(d), the Regional Counsel is required to approve, in writing, certain final determinations that are within the scope of section 7611 and adversely affect tax-exempt status or increase any tax liability. The Regional Counsel will review and approve (1) a determination that an organization is not entitled to tax-exempt status; (2) a determination that an organization is not entitled to receive tax-deductible contributions; or (3) the issuance of a notice of tax deficiency to a church arising out of an inquiry or examination or, in cases where deficiency procedures are inapplicable, the assessment of any underpayment of tax by the church arising out of an inquiry or examination. The Regional Counsel will also state in writing that there has been substantial compliance with section 7611, when applicable.

PROCEDURAL TIME LIMITATIONS

Q-12: When may the notice of examination (second notice) be sent?

A-12. The notice of examination (second notice) may be mailed to a church not less than 15 days after the notice of commencement of a church tax inquiry (first notice). Thus, at least 30 days must pass between the first notice and the actual examination of church records since an examination may not begin until 15 days after the notice of examination (second notice). For example, if notice of commencement of an inquiry is mailed to a church on March 1st, the notice of proposed examination may be mailed to the church no earlier than the 15th day after the date of the inquiry notice, or March 16th. If the notice of examination (second notice) was mailed March 16th, no examination of church records may be made prior to day 30; thus, the earliest date the examination may commence is March 31st. If an organization does not request a conference prior to day 30, the Internal Revenue Service may proceed to examine church records and complete its investigation or make a determination based on the information already in its possession.

Q-13: What is the limitation on the amount of time the Internal Revenue Service has to complete inquiries and examinations?

A-13: The Internal Revenue Service is required to complete any church inquiry or examination, and to make a final determination with respect thereto, not later than two years after the date on which the notice of examination (second notice) is mailed to the church. The running of this two-year period is suspended for any period during which (1) a judicial proceeding brought by the church or its officials or agents against the Internal Revenue Service with respect to the church tax inquiry or examination is pending or being appealed (even though section 7611(e)(2) describes the exclusive remedy for a violation of the church tax inquiry and examination procedures; see Q and A-17); (2) a judicial proceeding brought by the Internal Revenue Service against the church (or any official or agent thereof) to compel compliance with any reasonable request for examination of church records or religious activities is pending or being appealed; or (3) the Internal Revenue Service is unable to take actions with respect to the church tax inquiry or examination by reason of an order issued in a suit under section 7609 involving access to records held by third-party recordkeepers. The two-year period is also suspended for any period in excess of 20 days (but not in excess of 6 months) in which the church or its agents fail to comply with any reasonable request for church records or other information. The two-year period may be extended

by mutual agreement of the church and the Internal Revenue Service.

In cases where the inquiry is not followed by an examination notice (second notice), the inquiry must be concluded and a final determination made within 90 days of the date of the notice of inquiry (first notice). This 90-day period is suspended during any period for which the two year period for duration of a church examination would be suspended; except that the 90-day period will not be suspended because of the church's failure to comply with requests for information made prior to the notice of examination (second notice).

Q-13a: When do the church tax inquiry and church tax examination periods commence and conclude?

A-13a: A church tax inquiry commences when the church tax inquiry notice (first notice) is mailed. A church tax inquiry must be concluded not later than 90 days after the church tax inquiry notice (first notice) date. The period is counted from the day after the inquiry notice (first notice) is mailed. A church tax inquiry is concluded when the results of the inquiry or the notice of examination, as appropriate, is mailed. For example, if the inquiry notice (first notice) is mailed on November 1, 1985, the church tax inquiry must be concluded, in the absence of a permissible suspension of the period (see Q and A-13), on or before January 30, 1986.

A church tax examination commences when the church tax examination notice (second notice) is mailed. A church tax examination must be concluded not later than the date which is 2 years after the examination notice (second notice) date. The period is counted from the day after the examination notice (second notice) is mailed. A church tax examination is concluded when the final determination is mailed. For example, if the examination notice is mailed November 16, 1985, the final determination must be made, in the absence of a permissible suspension of the period (see Q and A-13), on or before November 16, 1987.

EXAMINATION OF RECORDS OR RELIGIOUS ACTIVITIES

Q-14: To what extent may church records or religious activities of a church be examined?

A-14: In cases conducted under section 7611, an examination of church records may be made only after complying with the notice provisions of section 7611 (see Qs and As 9, 10 and 12) unless the church files a written waiver of the provisions of section 7611 or a part thereof. In cases conducted under section 7611 where no written waiver has been filed, church records may be examined only to the extent necessary to determine the liability for, and the amount of, any Federal tax. This includes examinations (1) to determine the initial or continuing qualification of the organization whose records are being examined as a tax-exempt church under section 501(c)(3); (2) to determine whether the organization qualifies to receive tax-deductible contributions under section 170(c); or (3) to determine the amount of tax (including unrelated business income tax), if any, which is to be imposed on the organization.

Church records include all regularly kept church corporate and financial records including (but not limited to) corporate minute books, contributor or membership lists, and any materials which qualified as church books of account under section 7605(c), as in effect on December 31, 1984. Church records include private correspondence between a church and its members that is in the possession of the church. However, church records do not include records previously filed with a public official or newspapers or newsletters distributed generally to church members.

The religious activities of an organization claiming to be a church (see Q and A-3 for a definition of the term ''church'' as used in section 7611 and in these questions and answers) may be examined only to the extent necessary to determine if the organization actually is a church exempt from tax. This includes a determination of the organization's qualification as a church for any period.

LIMITATIONS ON PERIOD OF ASSESSMENT OR PROCEEDINGS FOR COLLECTION WITHOUT ASSESSMENT

Q-15: What are the special limitations on the period of assessment or proceedings for collection without assessment?

A-15: The special limitation periods for church tax liabilities are described below and are not be to construed to increase an otherwise applicable limitation period. Thus, a three-year limitation period would apply where a church filed a tax return before an examination was held and did not substantially understate income. No limitation period is to apply in any case of fraud, willful tax evasion, or knowing failure to file a return which should have been filed.

In the case of any church tax examination with respect to the revocation of tax-exempt status under section 501(a), any tax imposed by chapter 1 (other than section 511) may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, only for the three most recently completed taxable years preceding the examination notice date (*i.e.*, the date the notice of examination is mailed to the church). If an organization is not a church exempt from tax under section 501(a) for any of the three years described in the preceding sentence, then the period of assessment will apply to the six most recently completed taxable years ending before the examination notice date.

For examinations concerning qualification for tax-exempt status, the examination is limited initially to an examination of church records which are relevant to a determination of tax status or liability for the three most recently completed taxable years ending before the examination notice date. If it is determined that an organization is not a church exempt from tax for one or more of the three most recently completed taxable years and no return has been filed for the three years ending before the three most recently completed taxable years, an examination of relevant records may be made, as part of the same examination, for the six most recently completed taxable years ending before the examination notice date. (This assumes that no returns were filed for any of the three years to which the examination is to be extended. If a return was timely filed for any such year, the filing of that return determines the applicable statute of limitations for that year in the absence of other factors, for example, fraud, willful tax evasion or substantial understatement, which ordinarily would extend the statute of limitations.)

For purposes of section 7611(d)(2)(A) and this question and answer, an organization is determined not to be a church exempt from tax for one or more of the three most recently completed taxable years ending before the examination notice date, when the appropriate Regional Commissioner approves, in writing, the completed findings of the examining agent that the organization is not a church exempt from tax for one or more of such years. Such approval may not be delegated by the Regional Commissioner to a subordinate official. The completed findings of the examining agent, as approved by the appropriate Regional Commissioner for this purpose, do not constitute a final revenue agent's report under section 7611(g).

Church records of a year earlier than the third or sixth completed taxable year, as applicable, may be examined if material to a determination of tax-exempt status during the applicable three or six year period.

For examinations concerning unrelated business taxable income, where no return has been filed by the church, tax may be assessed or collected for the six most recently completed taxable years ending before the examination notice date. Church records of a year earlier than the sixth year may be examined if material to a determination of unrelated business income tax liability during the six year period.

For examinations involving issues other than revocation of exempt status or unrelated business income (*e.g.*, examinations relating to social security or other employment taxes), no limitation period is to apply if no return has been filed.

The applicable limitation period may be extended by mutual agreement of the church and the Internal Revenue Service.

MULTIPLE EXAMINATIONS

Q-16: What are the special multiple examination rules applicable to churches?

A-16: The Assistant Commissioner (Employee Plans and Exempt Organizations) is required to approve, in writing, any second inquiry or examination of a church, if the second inquiry or examination is to be undertaken within five years of an earlier inquiry or examination and if the earlier inquiry or examination did not result in either (1) revocation of tax exemption, notice of deficiency or an assessment of tax, or (2) a request for any significant changes in church operational practices (including the adequacy or sufficiency of records maintained to reflect income). The Assistant Commissioner's approval is required only if the second inquiry or examination involves the same or similar issues as the earlier inquiry or examination. The 5-year period is counted from the examination notice date of the earlier examination or, if no notice of examination was mailed, the inquiry notice date of the earlier examination. This 5-year period is to be suspended for periods during which the two-year period for completion of an examination is suspended (as described in Q and A-13) unless the prior examination was actually concluded within 2 years of the notice of examination.

In determining whether the second church tax inquiry or examination involves the same or similar issues as the preceding inquiry or examination, the substantive factual issues involved in the two examinations, rather than legal classifications, will govern. For example, where a prior examination and a current examination of unrelated business income involve income from different sources, the current examination involves different issues than the prior examination and the approval of the Assistant Commissioner (Employee Plans and Exempt Organizations) is not necessary.

REMEDY FOR VIOLATIONS OF SECTION 7611

Q-17: What remedy is available for a violation of the church inquiry and examination procedures?

A-17: The exclusive remedy for any Internal Revenue Service violation of the church tax inquiry and examination procedures is as follows: Failure to comply substantially with the requirements that (1) two notices be sent to the church; (2) the Regional Commissioner approve the commencement of a church tax inquiry; or (3) an offer of a conference with the church be made (and a conference held if timely requested), will result in a stay of proceedings in a summons proceeding to gain access to church records (but not in dismissal of such proceeding), until these requirements are satisfied. The two-year limitation on duration of a church tax examination will not be suspended during stays of summons proceedings resulting from violations described above; however, violations may be corrected without regard to the otherwise applicable time limits prescribed under the procedures of section 7611. In determining whether a stay is necessary, a court must consider the good faith effort of the Internal Revenue Service and the effect of any violation of the proper examination procedures.

Section 7611(e)(2) provides that no suit may be maintained and no defense may be raised, other than a stay in a summons enforcement proceeding, by reason of any noncompliance with the requirements of section 7611. Thus, failure to comply with any of these requirements may not be raised as a defense or affirmative ground for relief in any judicial proceeding including, but not limited to, a summons proceeding to gain access to church records; a declaratory judgment proceeding involving a determination of tax-exempt status under section 7428; a proceeding to collect unpaid tax; or a deficiency or refund proceeding. Additionally, failure to substantially comply with the requirements that two notices be sent, that the Regional Commissioner approve an inquiry, and that a conference be offered (and the conference held if requested) may not be raised as a defense or as an affirmative ground for relief in a summons proceeding or any other judicial proceeding other than as specifically set forth above. Therefore, a church or its representatives will not

be able to litigate the issue of the reasonableness of the appropriate Regional Commissioner's belief in approving the commencement of a church tax inquiry (*i.e.*, that the church may not be tax-exempt or may be engaged in taxable activities) in a summons proceeding or any other judicial proceeding. The church retains the right to raise any substantive or procedural argument which would be available to taxpayers generally in an appropriate proceeding.

EFFECTIVE DATE

Q-18: What is the effective date of the church examination procedures?

A-18: The procedures set forth in section 7611 apply to all tax inquiries and examinations beginning after December 31, 1984. The procedures of section 7605 will apply to any examination commenced before January 1, 1985. Any activities commenced after December 31, 1984, that would constitute a new inquiry or new examination must comply with the procedures of section 7611.

APPLICATION TO SECTION 4958

Q-19: When do the church tax inquiry and examination procedures described in section 7611 apply to a determination of whether there was an excess benefit transaction described in section 4958?

A-19: See § 53.4958–8(b) of this chapter for rules governing the interaction between section 4958 excise taxes on excess benefit transactions and section 7611 church tax inquiry and examination procedures.

[T.D. 8013, 50 FR 9615, Mar. 11, 1985. Redesignated and amended by T.D. 8077, 51 FR 6220, Feb. 21, 1986; T.D. 8628, 60 FR 62213, Dec. 5, 1995; T.D. 8920, 66 FR 2171, Jan. 10, 2001; 66 FR 13013, Mar. 2, 2001; T.D. 8978, 67 FR 3099, Jan. 23, 2002; 67 FR 12472, Mar. 19, 2002]

GENERAL POWERS AND DUTIES

### § 301.7621–1 Internal revenue districts.

For delegation to the Secretary of authority to prescribe internal revenue districts for the purpose of administering the internal revenue laws, see Executive Order No. 10289, dated September 17, 1951 (16 FR 9499), as made applicable to the Code by Executive Order No. 10574, dated November 5, 1954 (19 FR 7249).

### § 301.7622–1 Authority to administer oaths and certify.

The officers and employees of the Internal Revenue Service whom the Commissioner has designated are authorized to administer such oaths or affirmations and to certify to such papers as may be necessary under the internal revenue laws or regulations issued thereunder, except that the authority to certify shall not be construed as applying to those papers or documents the certification of which is authorized by separate order or directive.

(Sec. 7805, Internal Revenue Code of 1954, 68A Stat. 917; 26 U.S.C. 7805)

[T.D. 7359, 40 FR 23743, June 2, 1975]

### § 301.7623–1 Rewards for information relating to violations of internal revenue laws.

(a) *In general.* In cases where rewards are not otherwise provided for by law, a district or service center director may approve a reward, in a suitable amount, for information that leads to the detection of underpayments of tax, or the detection and bringing to trial and punishment of persons guilty of violating the internal revenue laws or conniving at the same. The rewards provided for by section 7623 and this section will be paid from the proceeds of amounts (other than interest) collected by reason of the information provided. For purposes of section 7623 and this section, proceeds of amounts (other than interest) collected by reason of the information provided include both additional amounts collected because of the information provided and amounts collected prior to receipt of the information if the information leads to the denial of a claim for refund that otherwise would have been paid.

(b) *Eligibility to file claim for reward*—(1) *In general.* Any person, other than certain present or former federal employees described in paragraph (b)(2) of this section, that submits, in the manner described in paragraph (d) of this section, information relating to the violation of an internal revenue law is eligible to file a claim for reward under section 7623 and this section.

(2) *Federal employees.* No person who was an officer or employee of the Department of the Treasury at the time the individual came into possession of information relating to violations of the internal revenue laws, or at the time the individual divulged such information, is eligible for a reward under section 7623 and this section. Any other current or former federal employee is eligible to file a claim for reward if the information provided came to the individual's knowledge other than in the course of the individual's official duties.

(3) *Deceased informants.* A claim for reward may be filed by an executor, administrator, or other legal representative on behalf of a deceased informant if, prior to the informant's death, the informant was eligible to file a claim for such reward under section 7623 and this section. Certified copies of the letters testamentary, letters of administration, or other similar evidence must be attached to the claim for reward on behalf of a deceased informant in order to show the authority of the legal representative to file the claim.

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account by a district or service center director in determining whether a reward will be paid, and, if so, the amount of the reward. The amount of a reward will represent what the district or service center director deems to be adequate compensation in the particular case, generally not to exceed fifteen percent of the amounts (other than interest) collected by reason of the information. Payment of a reward will be made as promptly as the circumstances of the case permit, but not until the taxes, penalties, or fines involved have been collected. However, if the informant waives any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, the claim may be immediately processed. Partial reward payments, without waiver of the uncollected portion of the taxes, penalties, or fines involved, may be made when a criminal fine has been collected prior to completion of the civil aspects of a case, and also when there are multiple tax years involved and the deficiency for one or more of the years has been paid in full. No person is authorized under this section to make any offer, or promise, or otherwise to bind a district or service center director with respect to the payment of any reward or the amount of the reward.

(d) *Submission of information.* A person that desires to claim a reward under section 7623 and this section may submit information relating to violations of the internal revenue laws, in person, to the office of a district director, preferably to a representative of the Criminal Investigation Division. Such information may also be submitted in writing to the Commissioner of Internal Revenue, Attention: Assistant Commissioner (Criminal Investigation), 1111 Constitution Avenue, NW., Washington, DC 20224, to any district director, Attention: Chief, Criminal Investigation Division, or to any service center director. If the information is submitted in person, either orally or in writing, the name and official title of the person to whom it is submitted and the date on which it is submitted must be included in the formal claim for reward.

(e) *Identification of informant.* No unauthorized person will be advised of the identity of an informant.

(f) *Filing claim for reward.* An informant that intends to claim a reward under section 7623 and this section should notify the person to whom the information is submitted of such intention, and must file a formal claim on Form 211, Application for Reward for Original Information, signed by the informant in the informant's true name, as soon as practicable after the submission of the information. If other than the informant's true name was used in furnishing the information, satisfactory proof of identity as that of the informant must be included with the claim for reward.

(g) *Effective date.* This section is applicable with respect to rewards paid after January 29, 1997.

[T.D. 8780, 63 FR 44778, Aug. 21, 1998]

**§ 301.7624–1 Reimbursement to State and local law enforcement agencies.**

(a) *In general.* The Internal Revenue Service may reimburse a State or local law enforcement agency for expenses, such as salaries, overtime pay, per diem, and similar reasonable expenses, incurred in an investigation in which information is furnished to the Service that substantially contributes to the recovery of Federal taxes imposed with respect to illegal drug or related money laundering activities. The amount of reimbursement that may be paid shall not exceed the limits specified in paragraphs (e)(2) and (e)(3) of this section.

(b) *Information that substantially contributes to recovery of taxes*—(1) *Definition.* The Service generally will consider that information furnished by a State or local law enforcement agency substantially contributed to the recovery of taxes with respect to illegal drug or related money laundering activities provided the information was not already in the possession of the Service at the time the information is furnished by the State or local law enforcement agency, and

(i) Concerns a taxpayer who is not under examination or investigation by the Service at the time the information is furnished or has not already been selected by the Service for examination or investigation in the near future, or

(ii) Concerns a taxpayer who is under examination or has been selected for examination at the time the information is furnished but the information furnished would not normally have been discovered in the course of an ordinary investigation or examination by the Service. Also, information will generally be considered as substantially contributing to the recovery of taxes if it leads to the discovery of hidden assets owned by the taxpayer which are used to satisfy the taxpayer's assessed but otherwise uncollectable Federal tax liability with respect to illegal drug or related money laundering activities.

For purposes of this paragraph (b), information includes, but is not limited to, tax years of violations, aliases, addresses, social security numbers and/or employer identification numbers, financial data (bank accounts, assets, etc.) and their location, and any documentation that substantiates allegations concerning tax liability (books and records) and its location.

(2) Examples:

*Example 1.* A local police department's narcotics division has been gathering information on a suspected local drug dealer for approximately six months. Because this person is very cautious when handling narcotics, the local police have been unsuccessful in catching this person in possession of drugs. Rather than drop the case, the narcotics detective turns over to the local IRS Criminal Investigation Division (CID) office information concerning this person. At the time the information is furnished, the Service is unaware of this person's suspected involvement in drugs and has no reason to suspect that this person's Federal income tax returns are incorrect. Upon examination of this person's returns for three open years, the Service determines that additional Federal income taxes and civil penalties of approximately $20,000 per year are due because of unreported income from drug dealing. Because the taxpayer was not under examination and was not reasonably anticipated to have been examined prior to receipt of the information, the Service will consider that the information furnished by the local police department substantially contributed to the recovery of approximately $60,000 in taxes with respect to illegal drug activities.

*Example 2.* Assume the same facts as example 1 except that at the time the information is turned over to the Service, the Service was already aware of the extent of this person's involvement in drug dealing, either through information developed in the course of examinations of other taxpayers or through information received from other sources, and had already selected this person's returns for examination although the person had not yet been contacted by the Service. In this case, the information provided by the local police department did not substantially contribute to the recovery of taxes from this person because the information was already known to the Service.

*Example 3.* A state or local police officer is conducting ordinary traffic patrol. The officer stops a vehicle for speeding and reckless driving. The officer recognizes the driver as a known narcotics dealer. In the vehicle is a brief case containing $75,000 in cash, but no trace of narcotics is found. The driver claims the cash was won in a high stakes poker game. The officer arrests the driver for traffic violations and takes the briefcase into custody for safe keeping. The local police department cannot seize the money because they cannot tie it to a narcotics transaction. Instead, they immediately inform the local

CID office of their find. At the time this information is furnished to the Service, there is an unpaid assessed liability of $300,000 in Federal taxes and penalties owed by the dealer with respect to illegal drug activities that the Service has been unable to collect. Therefore, the Service immediately seizes the $75,000 in cash in partial payment of the tax liability. The Service will consider that the information furnished by the police department substantially contributed to the recovery of $75,000 in taxes with respect to drug related activities.

*Example 4.* Through information furnished by a reliable informant, a local police department learns that a known racketeer and suspected drug dealer maintains a second set of books and records in a safe at home. The local police obtain a search warrant and find a set of books revealing that this person has been using a legitimate business operation to launder money derived from both prostitution and drug dealing. At the time these records are turned over to the local CID office, the taxpayer is already under examination for tax evasion. However, based on the information contained in this second set of books, the Service is able to collect additional taxes and civil penalties in the amount of $1 million in connection with these illegal activities. The Service will consider that this information substantially contributed to the recovery of $1 million in taxes with respect to money laundering in connection with illegal drug activities because, even though the taxpayer was already under examination, the information provided by the local police would normally not have been discovered by the Service in the course of an ordinary investigation.

(c) *Application for reimbursement.* An agency that intends to apply for reimbursement under the provisions of this section must indicate this intent to the Service at the time the information is first provided to the Service. A final application for reimbursement of expenses must be submitted on Form 211A, State or Local Law Enforcement Application for Reimbursement, to the Chief, Criminal Investigation Division of the Internal Revenue Service district in which the taxpayer is located. Copies of Forms 9061, DAG–71, or other claim for an equitable share of asset forfeitures in the case must also be furnished with Form 211A.

(d) *Time for filing application for reimbursement.* An application for reimbursement may be filed by an agency at the time the information is first provided or as soon as practicable after submitting information to the Service. However, it must be filed not later than 30 days after the Service notifies the agency pursuant to section 7624(b) of the amount of taxes collected as a result of the information provided. If an application for reimbursement is filed by more than one agency with respect to taxes recovered from a taxpayer, the Service will use discretion in determining an equitable amount of reimbursement allocated to each agency based on all relevant factors. In no event, however, shall the aggregate of the amounts paid by the Service to two or more agencies exceed the amount specified in paragraph (e)(3) of this section.

(e) *Amount and payment of reimbursement*—(1) *De minimis rule.* No reimbursement shall be paid under section 7624 or this section to a State or local law enforcement agency in any case where the taxes recovered total less than $50,000.

(2) *Taxes recovered.* For purposes of section 7624 and this section, the terms ''taxes'' recovered and ''sum'' recovered mean additional Federal taxes, civil penalties, and additions to tax collected (less any subsequent refund to the taxpayer) with respect to illegal drug or related money laundering activities, but not additional interest or criminal fines that may be collected.

(3) *Limitation on reimbursement.* The amount of reimbursement payable under section 7624 and this section shall not exceed 10 percent of any taxes recovered.

(4) *No duplicate reimbursement.* A State or local law emforcement agency shall not receive reimbursement under section 7624 or this section for any expenses incurred in the investigation of a taxpayer which have been or will be reimbursed under any other program or arrangement including, but not limited to, Federal or State forfeiture programs, State revenue laws, or Federal and State equitable sharing arrangements.

(5) *Time of payment.* No payment of any reimbursement under this section will be made to a State or local law enforcement agency before the later of final expiration of the applicable period of limitations for filing a claim for refund by the taxpayer of the taxes recovered as provided in subchapter B of

chapter 66 of the Code or the determination of the taxpayer's tax liability, as defined in section 1313(a). However, reimbursement may be made earlier but only if the agency provides adequate indemnification against loss by the Service due to a refund to the taxpayer of Federal taxes recovered.

(6) *Applicability*. The provisions of section 7624 apply only to State and local law enforcement agencies within the United States and the District of Columbia.

(f) *Effective date*. This section applies with respect to information first provided to the Service by a State or local law enforcement agency after February 16, 1989.

[T.D. 8255, 54 FR 21054, May 16, 1989, as amended by 57 FR 2840, Jan. 24, 1992. Redesignated by T.D. 8415, 57 FR 15017, Apr. 24, 1992]

SUPERVISION OF OPERATIONS OF CERTAIN MANUFACTURERS

### § 301.7641–1 Supervision of operations of certain manufacturers.

For regulations under section 7641, except the provisions thereof relating to the manufacture of opium suitable for smoking purposes, see subparts E, F, G, and H or part 45 of this chapter (Miscellaneous Stamp Tax Regulations). For regulations relating to the manufacture of opium suitable for smoking purposes, see 26 CFR (1939) 150 (Narcotics Regulations 3, 3 FR 1402) as made applicable to section 7641 by Treasury Decision 6091, approved August 16, 1954 (19 FR 5167).

POSSESSIONS

### § 301.7654–1 Coordination of U.S. and Guam individual income taxes.

(a) *Application of section*—(1) *Scope*. Section 7654 and this section set forth the general procedures to be followed by the Government of the United States and the Government of Guam in the division between the two governments of revenue derived from collections of the income taxes imposed for any taxable year beginning after December 31, 1972, with respect to any individual described in subparagraph (2) of this paragraph (a), and paragraph (e) of this section. To the extent that section 7654 and this section are inconsistent with the provisions of section 30 of the Organic Act of Guam (48 U.S.C. 1421h), relating to duties and taxes to be covered into the treasury of Guam and held in account for the Government of Guam, such section 30 is superseded.

(2) *Individuals covered*. Paragraph (b) of this section applies only to an individual who, for a taxable year, is described in paragraph (a)(2) of § 1.935–1 of this chapter (Income Tax Regulations) and has (or in the case of a joint return, such individual and his spouse have)—

(i) Adjusted gross income of $50,000 or more, and

(ii) Gross income of $5,000 or more from sources within the jurisdiction (either the United States or Guam) other than the jurisdiction with which the individual is required to file his income tax return under paragraph (b) of § 1.935–1 of this chapter.

For the determination of gross income and adjusted gross income see sections 61 and 62, and the regulations thereunder, or, when applicable, the corresponding provisions as made applicable in Guam by the Guam Territorial income tax (48 U.S.C. 1421i). For purposes of this paragraph, gross income consisting of compensation for military or naval service shall be taken into account notwithstanding section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 App. U.S.C. 574). However, see paragraph (e) of this section.

(b) *Allocation of tax*. (1) Net collections of income taxes imposed for each taxable year beginning after December 31, 1972, with respect to each individual described in paragraph (a)(2) of this section for such year shall be divided between the United States and Guam by the Commissioner of Internal Revenue and the Commissioner of Revenue and Taxation of Guam as follows:

(i) Net collections attributable to income from sources within the United States shall be covered into the Treasury of the United States.

(ii) Net collections attributable to income from sources within Guam shall be covered into the treasury of Guam, and

(iii) Net collections not described in subdivision (i) or (ii) of this subparagraph (i.e., net collections attributable to income from sources other than within the United States or Guam) shall be covered into the treasury of the jurisdiction (either the United States or Guam) with which the individual is required to file his return under paragraph (b) of § 1.935–1 of this chapter for such year.

(2) The amount of tax of any individual for a taxable year which shall be allocated to Guam for purposes of determining the portion of the net collections from such individual which shall be covered into the treasury of Guam by the United States for such year shall be that amount which bears the same ratio to such amount of tax as the adjusted gross income of that individual for such year which is allocable to sources in Guam bears to the total adjusted gross income of such individual for such year. For purposes of such allocation by the United States, the adjusted gross income of the taxpayer shall be determined by taking into account any compensation of any member of the Armed Forces for services performed in Guam the withheld tax on which is paid into the treasury of Guam pursuant to paragraph (e) of this section. The amount of tax of any individual for any taxable year which shall be allocated to the United States for purposes of determining the portion of the net collections from such individual which shall be covered into the Treasury of the United States by Guam for such year shall be that amount which bears the same ratio to such amount of tax as the adjusted gross income of that individual for such year which is allocable to sources in the United States bears to the total adjusted gross income of such individual for such year.

(c) *Definitions and special rules.* For purposes of this section—

(1) *Net collections.* (i) In determining net collections for a taxable year, appropriate adjustment between the two jurisdictions shall be made on a proportionate basis for underpayments of income taxes for such taxable year, credits allowed against the income tax for such taxable year (other than the credit for taxes withheld under section 3402 on wages), and refunds made of income taxes paid with respect to such taxable year. Thus, if a net operating loss results in a carryback to an earlier taxable year which gives rise to a refund for that earlier year, an adjustment must be made based upon the proportion which the amount of tax covered by one jurisdiction into the treasury of the other jurisdiction for that earlier year bears to the total amount of tax paid for that earlier year, even though the loss may have resulted from activities in one jurisdiction and the income, against which the loss was offset, was earned in the other jurisdiction. Similar adjustments must be made for foreign tax credit carrybacks even though different jurisdictions are involved. If, for example, an individual pays income tax of $30,000 to the United States for 1974 and $10,000 of such tax is covered into the treasury of Guam, and if for 1975 such individual has a net operating loss attributable to a trade or business carried on in the United States which loss is carried back to 1974 and gives rise to a refund of $15,000 by the United States, Guam must cover into the Treasury of the United States the amount of $5,000 which is the adjustment based upon the refund ($15,000×$10,000/$30,000=$5,000).

(ii) Tax withheld from the compensation of any member of the Armed Forces described in paragraph (a)(2) of this section which is paid to Guam pursuant to section 7654(d) and paragraph (e) of this section shall be taken into account in determining the amount required to be covered into the treasury of Guam under paragraph (b)(1)(ii) of this section.

(iii) For purposes of this subparagraph, any underpayment of tax is treated as attributable on a pro rata basis to income from sources within the United States, Guam, and sources other than within the United States or Guam, respectively, and is divided between the United States and Guam under the rules in paragraph (b) of this section.

(2) *Income taxes.* The term ''income taxes'' means—

(i) With respect to taxes imposed by the United States, the income taxes imposed by chapter 1 of the Code, and

(ii) With respect to taxes imposed by Guam, the Guam Territorial income tax (48 U.S.C. 1421i).

(3) *Source rules.* The determination of the source of income shall be based on the principles contained in sections 861 through 863, and the regulations thereunder, or, when applicable, in those sections as made applicable in Guam by the Guam Territorial income tax. For such purposes the provisions of section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 App. U.S.C. 574) relating to the determination of the source of income of members of the Armed Forces shall not be taken into account. For purposes of this subparagraph, the provisions in section 935(c) treating Guam as part of the United States, and vice versa, do not apply. For definition of the terms ''United States'' and ''Guam'' (see section 7701(a)(9) of the Code and section 2 of the Organic Act of Guam (48 U.S.C. 1421).

(d) *Information return.* Each individual described in paragraph (a)(2) of this section for a taxable year who is required by paragraph (b)(1) of § 1.935–1 of this chapter to file his return of income for such year with the United States shall timely file a properly executed Form 5074 (Allocation of Individual Income Tax to Guam) by attaching such form to his income tax return. Each individual described in paragraph (a)(2) of this section for a taxable year who is required by paragraph (b)(1) of § 1.935–1 of this chapter to file his return of income for such year with Guam shall timely file such information as may be required by the Commissioner of Revenue and Taxation with respect to his income derived from sources within the United States. See section 6688 and § 301.6688–1 for the penalty for failure to comply with this paragraph.

(e) *Military personnel in Guam.* The Commissioner of Internal Revenue shall arrange to pay to Guam the amount of the taxes deducted and withheld by the United States under section 3402 from wages paid to members of the Armed Forces who are stationed in Guam but who have no income tax liability to Guam with respect to such wages by reason of section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 App. U.S.C. 574). Section 514 of that Act provides in effect that for purposes of the taxation of income by Guam a person shall not be deemed to have lost a residence or domicile in the United States solely by reason of being absent therefrom in compliance with military or naval orders and the compensation for military or naval service of such a person who is not a resident of, or domiciled in, Guam shall not be deemed income for services performed within, or from sources within, Guam. Any amount paid to Guam under this paragraph in respect of a member of the Armed Forces described in paragraph (a)(2) of this section shall be taken into account in determining the amount required to be covered into the treasury of Guam under paragraph (b)(1)(ii) of this section. For purposes of this paragraph, the term ''Armed Forces of the United States'' has the meaning provided by § 301.7701–8 of this chapter. This paragraph does not apply to wages for services performed in Guam by members of the Armed Forces of the United States which are not compensation for military or naval service. In determining the amount of tax to be covered into the treasury of Guam under this paragraph with respect to remuneration for services performed in Guam by members of the Armed Forces of the United States, the special procedure agreed upon with the Department of Defense in 1951 shall not apply to remuneration paid after December 31, 1974. Under that procedure the tax withheld under section 3402 upon such remuneration for services performed in Guam during April and October of each year was to be projected for the appropriate six-month period of which the base month is a part, thereby arriving at an estimated figure for semiannual withholding tax to be covered over.

(f) *Transfers of funds.* The transfers of funds between the United States and Guam required to effectuate the provisions of this section shall be made when convenient for the two governments, but not less frequently than once in each calendar year. In complying with paragraph (b) of this section, only net balances will be transferred between the two governments. Further, amounts transferred pursuant

to paragraph (b) of this section may be determined on the basis of estimates rather than the actual amounts derived from information furnished by taxpayers, except that the net collections for 1973 and every third calendar year thereafter are to be transferred on the basis of the information furnished by taxpayers pursuant to paragraph (d) of this section. In order to facilitate the transfer of funds pursuant to this section, the Commissioner of Internal Revenue and the Commissioner of Revenue and Taxation of Guam shall exchange such information, including copies of income tax returns, as will ensure that the provisions of section 7654 and this section are being properly implemented.

[T.D. 7385, 40 FR 50265, Oct. 29, 1975]

## Definitions

### § 301.7701–1 Classification of organizations for federal tax purposes.

(a) *Organizations for federal tax purposes*—(1) *In general.* The Internal Revenue Code prescribes the classification of various organizations for federal tax purposes. Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law.

(2) *Certain joint undertakings give rise to entities for federal tax purposes.* A joint venture or other contractual arrangement may create a separate entity for federal tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom. For example, a separate entity exists for federal tax purposes if co- owners of an apartment building lease space and in addition provide services to the occupants either directly or through an agent. Nevertheless, a joint undertaking merely to share expenses does not create a separate entity for federal tax purposes. For example, if two or more persons jointly construct a ditch merely to drain surface water from their properties, they have not created a separate entity for federal tax purposes. Similarly, mere co-ownership of property that is maintained, kept in repair, and rented or leased does not constitute a separate entity for federal tax purposes. For example, if an individual owner, or tenants in common, of farm property lease it to a farmer for a cash rental or a share of the crops, they do not necessarily create a separate entity for federal tax purposes.

(3) *Certain local law entities not recognized.* An entity formed under local law is not always recognized as a separate entity for federal tax purposes. For example, an organization wholly owned by a State is not recognized as a separate entity for federal tax purposes if it is an integral part of the State. Similarly, tribes incorporated under section 17 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. 477, or under section 3 of the Oklahoma Indian Welfare Act, as amended, 25 U.S.C. 503, are not recognized as separate entities for federal tax purposes.

(4) *Single owner organizations.* Under §§ 301.7701–2 and 301.7701–3, certain organizations that have a single owner can choose to be recognized or disregarded as entities separate from their owners.

(b) *Classification of organizations.* The classification of organizations that are recognized as separate entities is determined under §§ 301.7701–2, 301.7701–3, and 301.7701–4 unless a provision of the Internal Revenue Code (such as section 860A addressing Real Estate Mortgage Investment Conduits (REMICs)) provides for special treatment of that organization. For the classification of organizations as trusts, see § 301.7701–4. That section provides that trusts generally do not have associates or an objective to carry on business for profit. Sections 301.7701–2 and 301.7701–3 provide rules for classifying organizations that are not classified as trusts.

(c) *Qualified cost sharing arrangements.* A qualified cost sharing arrangement that is described in § 1.482–7 of this chapter and any arrangement that is treated by the Commissioner as a qualified cost sharing arrangement under § 1.482–7 of this chapter is not recognized as a separate entity for purposes of the Internal Revenue Code. See § 1.482–7 of this chapter for the proper treatment of qualified cost sharing arrangements.

(d) *Domestic and foreign business entities.* See § 301.7701–5 for the rules that

determine whether a business entity is domestic or foreign.

(e) *State*. For purposes of this section and § 301.7701–2, the term *State* includes the District of Columbia.

(f) *Effective date*. The rules of this section are effective as of January 1, 1997.

[T.D. 8697, 61 FR 66588, Dec. 18, 1996, as amended by T.D. 9153, 69 FR 49810, Aug. 12, 2004; T.D. 9246, 71 FR 4816, Jan. 30, 2006]

**§ 301.7701–2 Business entities; definitions.**

(a) *Business entities*. For purposes of this section and § 301.7701–3, a *business entity* is any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under § 301.7701–3) that is not properly classified as a trust under § 301.7701–4 or otherwise subject to special treatment under the Internal Revenue Code. A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership. A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

(b) *Corporations*. For federal tax purposes, the term *corporation* means—

(1) A business entity organized under a Federal or State statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic;

(2) An association (as determined under § 301.7701–3);

(3) A business entity organized under a State statute, if the statute describes or refers to the entity as a joint-stock company or joint-stock association;

(4) An insurance company;

(5) A State-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1811 *et seq.*, or a similar federal statute;

(6) A business entity wholly owned by a State or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in § 1.892–2T;

(7) A business entity that is taxable as a corporation under a provision of the Internal Revenue Code other than section 7701(a)(3); and

(8) *Certain foreign entities*—(i) *In general*. Except as provided in paragraphs (b)(8)(ii) and (d) of this section, the following business entities formed in the following jurisdictions:

American Samoa, Corporation
Argentina, Sociedad Anonima
Australia, Public Limited Company
Austria, Aktiengesellschaft
Barbados, Limited Company
Belgium, Societe Anonyme
Belize, Public Limited Company
Bolivia, Sociedad Anonima
Brazil, Sociedade Anonima
Canada, Corporation and Company
Chile, Sociedad Anonima
People's Republic of China, Gufen Youxian Gongsi
Republic of China (Taiwan), Ku-fen Yu-hsien Kung-szu
Colombia, Sociedad Anonima
Costa Rica, Sociedad Anonima
Cyprus, Public Limited Company
Czech Republic, Akciova Spolecnost
Denmark, Aktieselskab
Ecuador, Sociedad Anonima or Compania Anonima
Egypt, Sharikat Al-Mossahamah
El Salvador, Sociedad Anonima
Estonia, Aktsiaselts
European Economic Area/European Union, Societas Europaea
Finland, Julkinen Osakeyhtio/Publikt Aktiebolag
France, Societe Anonyme
Germany, Aktiengesellschaft
Greece, Anonymos Etairia
Guam, Corporation
Guatemala, Sociedad Anonima
Guyana, Public Limited Company
Honduras, Sociedad Anonima
Hong Kong, Public Limited Company
Hungary, Reszvenytarsasag
Iceland, Hlutafelag
India, Public Limited Company
Indonesia, Perseroan Terbuka
Ireland, Public Limited Company
Israel, Public Limited Company
Italy, Societa per Azioni
Jamaica, Public Limited Company
Japan, Kabushiki Kaisha
Kazakstan, Ashyk Aktsionerlik Kogham
Republic of Korea, Chusik Hoesa
Latvia, Akciju Sabiedriba
Liberia, Corporation
Liechtenstein, Aktiengesellschaft
Lithuania, Akcine Bendroves
Luxembourg, Societe Anonyme
Malaysia, Berhad

Malta, Public Limited Company
Mexico, Sociedad Anonima
Morocco, Societe Anonyme
Netherlands, Naamloze Vennootschap
New Zealand, Limited Company
Nicaragua, Compania Anonima
Nigeria, Public Limited Company
Northern Mariana Islands, Corporation
Norway, Allment Aksjeselskap
Pakistan, Public Limited Company
Panama, Sociedad Anonima
Paraguay, Sociedad Anonima
Peru, Sociedad Anonima
Philippines, Stock Corporation
Poland, Spolka Akcyjna
Portugal, Sociedade Anonima
Puerto Rico, Corporation
Romania, Societe pe Actiuni
Russia, Otkrytoye Aktsionernoy Obshchestvo
Saudi Arabia, Sharikat Al-Mossahamah
Singapore, Public Limited Company
Slovak Republic, Akciova Spolocnost
Slovenia, Delniska Druzba
South Africa, Public Limited Company
Spain, Sociedad Anonima
Surinam, Naamloze Vennootschap
Sweden, Publika Aktiebolag
Switzerland, Aktiengesellschaft
Thailand, Borisat Chamkad (Mahachon)
Trinidad and Tobago, Limited Company
Tunisia, Societe Anonyme
Turkey, Anonim Sirket
Ukraine, Aktsionerne Tovaristvo Vidkritogo Tipu
United Kingdom, Public Limited Company
United States Virgin Islands, Corporation
Uruguay, Sociedad Anonima
Venezuela, Sociedad Anonima or Compania Anonima

(ii) *Clarification of list of corporations in paragraph (b)(8)(i) of this section—(A) Exceptions in certain cases.* The following entities will not be treated as corporations under paragraph (b)(8)(i) of this section:

(*1*) With regard to Canada, a Nova Scotia Unlimited Liability Company (or any other company or corporation all of whose owners have unlimited liability pursuant to federal or provincial law).

(*2*) With regard to India, a company deemed to be a public limited company solely by operation of section 43A(1) (relating to corporate ownership of the company), section 43A(1A) (relating to annual average turnover), or section 43A(1B) (relating to ownership interests in other companies) of the Companies Act, 1956 (or any combination of these), provided that the organizational documents of such deemed public limited company continue to meet the requirements of section 3(1)(iii) of the Companies Act, 1956.

(*3*) With regard to Malaysia, a Sendirian Berhad.

(B) *Inclusions in certain cases.* With regard to Mexico, the term Sociedad Anonima includes a Sociedad Anonima that chooses to apply the variable capital provision of Mexican corporate law (Sociedad Anonima de Capital Variable).

(iii) *Public companies.* For purposes of paragraph (b)(8)(i) of this section, with regard to Cyprus, Hong Kong, and Jamaica, the term Public Limited Company includes any Limited Company that is not defined as a private company under the corporate laws of those jurisdictions. In all other cases, where the term Public Limited Company is not defined, that term shall include any Limited Company defined as a public company under the corporate laws of the relevant jurisdiction.

(iv) *Limited companies.* For purposes of this paragraph (b)(8), any reference to a Limited Company includes, as the case may be, companies limited by shares and companies limited by guarantee.

(v) *Multilingual countries.* Different linguistic renderings of the name of an entity listed in paragraph (b)(8)(i) of this section shall be disregarded. For example, an entity formed under the laws of Switzerland as a Societe Anonyme will be a corporation and treated in the same manner as an Aktiengesellschaft.

(b)(9) *Business entities with multiple charters.* (i) An entity created or organized under the laws of more than one jurisdiction if the rules of this section would treat it as a corporation with reference to any one of the jurisdictions in which it is created or organized. Such an entity may elect its classification under § 301.7701–3, subject to the limitations of those provisions, only if it is created or organized in each jurisdiction in a manner that meets the definition of an eligible entity in § 301.7701–3(a). The determination of a business entity's corporate or noncorporate classification is made independently from the determination of whether the entity is domestic or foreign. See § 301.7701–5 for the rules that

determine whether a business entity is domestic or foreign.

(ii) *Examples*. The following examples illustrate the rule of this paragraph (b)(9):

*Example 1*. (i) *Facts*. X is an entity with a single owner organized under the laws of Country A as an entity that is listed in paragraph (b)(8)(i) of this section. Under the rules of this section, such an entity is a corporation for Federal tax purposes and under § 301.7701–3(a) is unable to elect its classification. Several years after its formation, X files a certificate of domestication in State B as a limited liability company (LLC). Under the laws of State B, X is considered to be created or organized in State B as an LLC upon the filing of the certificate of domestication and is therefore subject to the laws of State B. Under the rules of this section and § 301.7701–3, an LLC with a single owner organized only in State B is disregarded as an entity separate from its owner for Federal tax purposes (absent an election to be treated as an association). Neither Country A nor State B law requires X to terminate its charter in Country A as a result of the domestication, and in fact X does not terminate its Country A charter. Consequently, X is now organized in more than one jurisdiction.

(ii) *Result*. X remains organized under the laws of Country A as an entity that is listed in paragraph (b)(8)(i) of this section, and as such, it is an entity that is treated as a corporation under the rules of this section. Therefore, X is a corporation for Federal tax purposes because the rules of this section would treat X as a corporation with reference to one of the jurisdictions in which it is created or organized. Because X is organized in Country A in a manner that does not meet the definition of an eligible entity in § 301.7701–3(a), it is unable to elect its classification.

*Example 2*. (i) *Facts*. Y is an entity that is incorporated under the laws of State A and has two shareholders. Under the rules of this section, an entity incorporated under the laws of State A is a corporation for Federal tax purposes and under § 301.7701–3(a) is unable to elect its classification. Several years after its formation, Y files a certificate of continuance in Country B as an unlimited company. Under the laws of Country B, upon filing a certificate of continuance, Y is treated as organized in Country B. Under the rules of this section and § 301.7701–3, an unlimited company organized only in Country B that has more than one owner is treated as a partnership for Federal tax purposes (absent an election to be treated as an association). Neither State A nor Country B law requires Y to terminate its charter in State A as a result of the continuance, and in fact Y does not terminate its State A charter. Consequently, Y is now organized in more than one jurisdiction.

(ii) *Result*. Y remains organized in State A as a corporation, an entity that is treated as a corporation under the rules of this section. Therefore, Y is a corporation for Federal tax purposes because the rules of this section would treat Y as a corporation with reference to one of the jurisdictions in which it is created or organized. Because Y is organized in State A in a manner that does not meet the definition of an eligible entity in § 301.7701–3(a), it is unable to elect its classification.

*Example 3*. (i) *Facts*. Z is an entity that has more than one owner and that is recognized under the laws of Country A as an unlimited company organized in Country A. Z is organized in Country A in a manner that meets the definition of an eligible entity in § 301.7701–3(a). Under the rules of this section and § 301.7701–3, an unlimited company organized only in Country A with more than one owner is treated as a partnership for Federal tax purposes (absent an election to be treated as an association). At the time Z was formed, it was also organized as a private limited company under the laws of Country B. Z is organized in Country B in a manner that meets the definition of an eligible entity in § 301.7701–3(a). Under the rules of this section and § 301.7701–3, a private limited company organized only in Country B is treated as a corporation for Federal tax purposes (absent an election to be treated as a partnership). Thus, Z is organized in more than one jurisdiction. Z has not made any entity classification elections under § 301.7701–3.

(ii) *Result*. Z is organized in Country B as a private limited company, an entity that is treated (absent an election to the contrary) as a corporation under the rules of this section. However, because Z is organized in each jurisdiction in a manner that meets the definition of an eligible entity in § 301.7701–3(a), it may elect its classification under § 301.7701–3, subject to the limitations of those provisions.

*Example 4*. (i) *Facts*. P is an entity with more than one owner organized in Country A as a general partnership. Under the rules of this section and § 301.7701–3, an eligible entity with more than one owner in Country A is treated as a partnership for federal tax purposes (absent an election to be treated as an association). P files a certificate of continuance in Country B as an unlimited company. Under the rules of this section and § 301.7701–3, an unlimited company in Country B with more than one owner is treated as a partnership for federal tax purposes (absent an election to be treated as an association). P is not required under either the laws of Country A or Country B to terminate the general partnership in Country A, and in fact P does not terminate its Country A partnership. P is

now organized in more than one jurisdiction. P has not made any entity classification elections under § 301.7701–3.

(ii) *Result.* P's organization in both Country A and Country B would result in P being classified as a partnership. Therefore, since the rules of this section would not treat P as a corporation with reference to any jurisdiction in which it is created or organized, it is not a corporation for federal tax purposes.

(c) *Other business entities.* For federal tax purposes—

(1) The term *partnership* means a business entity that is not a corporation under paragraph (b) of this section and that has at least two members.

(2) *Wholly owned entities*—(i) *In general.* A business entity that has a single owner and is not a corporation under paragraph (b) of this section is disregarded as an entity separate from its owner.

(ii) *Special rule for certain business entities.* If the single owner of a business entity is a bank (as defined in section 581, or, in the case of a foreign bank, as defined in section 585(a)(2)(B) without regard to the second sentence thereof), then the special rules applicable to banks under the Internal Revenue Code will continue to apply to the single owner as if the wholly owned entity were a separate entity. For this purpose, the special rules applicable to banks under the Internal Revenue Code do not include the rules under sections 864(c), 882(c), and 884.

(iii) *Tax liabilities of certain disregarded entities*—(A) *In general.* An entity that is otherwise disregarded as separate from its owner is treated as an entity separate from its owner for purposes of:

(*1*) Federal tax liabilities of the entity with respect to any taxable period for which the entity was not disregarded.

(*2*) Federal tax liabilities of any other entity for which the entity is liable.

(*3*) Refunds or credits of Federal tax.

(B) *Examples.* The following examples illustrate the application of paragraph (c)(2)(iii)(A) of this section:

*Example 1.* In 2001, X, a domestic corporation that reports its taxes on a calendar year basis, merges into Z, a domestic LLC wholly owned by Y that is disregarded as an entity separate from Y, in a state law merger. X was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, Z is the successor to X and is liable for all of X's debts. In 2004, the Internal Revenue Service (IRS) seeks to extend the period of limitations on assessment for X's 2000 taxable year. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, Z is the proper party to sign the consent to extend the period of limitations.

*Example 2.* The facts are the same as in *Example 1,* except that in 2002, the IRS determines that X miscalculated and underreported its income tax liability for 2000. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, the deficiency may be assessed against Z and, in the event that Z fails to pay the liability after notice and demand, a general tax lien will arise against all of Z's property and rights to property.

(d) *Special rule for certain foreign business entities*—(1) *In general.* Except as provided in paragraph (d)(3) of this section, a foreign business entity described in paragraph (b)(8)(i) of this section will not be treated as a corporation under paragraph (b)(8)(i) of this section if—

(i) The entity was in existence on May 8, 1996;

(ii) The entity's classification was relevant (as defined in § 301.7701–3(d)) on May 8, 1996;

(iii) No person (including the entity) for whom the entity's classification was relevant on May 8, 1996, treats the entity as a corporation for purposes of filing such person's federal income tax returns, information returns, and withholding documents for the taxable year including May 8, 1996;

(iv) Any change in the entity's claimed classification within the sixty months prior to May 8, 1996, occurred solely as a result of a change in the organizational documents of the entity, and the entity and all members of the entity recognized the federal tax consequences of any change in the entity's classification within the sixty months prior to May 8, 1996;

(v) A reasonable basis (within the meaning of section 6662) existed on May 8, 1996, for treating the entity as other than a corporation; and

(vi) Neither the entity nor any member was notified in writing on or before May 8, 1996, that the classification of the entity was under examination (in which case the entity's classification

will be determined in the examination).

(2) *Binding contract rule.* If a foreign business entity described in paragraph (b)(8)(i) of this section is formed after May 8, 1996, pursuant to a written binding contract (including an accepted bid to develop a project) in effect on May 8, 1996, and all times thereafter, in which the parties agreed to engage (directly or indirectly) in an active and substantial business operation in the jurisdiction in which the entity is formed, paragraph (d)(1) of this section will be applied to that entity by substituting the date of the entity's formation for May 8, 1996.

(3) *Termination of grandfather status*—(i) *In general.* An entity that is not treated as a corporation under paragraph (b)(8)(i) of this section by reason of paragraph (d)(1) or (d)(2) of this section will be treated permanently as a corporation under paragraph (b)(8)(i) of this section from the earliest of:

(A) The effective date of an election to be treated as an association under § 301.7701–3;

(B) A termination of the partnership under section 708(b)(1)(B) (regarding sale or exchange of 50 percent or more of the total interest in an entity's capital or profits within a twelve month period);

(C) A division of the partnership under section 708(b)(2)(B); or

(D) The date any person or persons, who were not owners of the entity as of November 29, 1999, own in the aggregate a 50 percent or greater interest in the entity.

(ii) *Special rule for certain entities.* For purposes of paragraph (d)(2) of this section, paragraph (d)(3)(i)(B) of this section shall not apply if the sale or exchange of interests in the entity is to a related person (within the meaning of sections 267(b) and 707(b)) and occurs no later than twelve months after the date of the formation of the entity.

(e) *Effective date.* (1) Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) of this section applies on or after January 14, 2002, to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. The reference to the Finnish, Maltese, and Norwegian entities in paragraph (b)(8)(i) of this section is applicable on November 29, 1999. The reference to the Trinidadian entity in paragraph (b)(8)(i) of this section applies to entities formed on or after November 29, 1999. Any Maltese or Norwegian entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including January 1, 1997. Any Finnish entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including September 1, 1997. However, paragraph (d)(3)(i)(D) of this section applies on or after October 22, 2003.

(2) Paragraph (c)(2)(iii) of this section applies on or after April 1, 2004.

(3)(i) *General rule.* Except as provided in paragraph (e)(3)(ii) of this section, the rules of paragraph (b)(9) of this section apply as of August 12, 2004, to all business entities existing on or after that date.

(ii) *Transition rule.* For business entities created or organized under the laws of more than one jurisdiction as of August 12, 2004, the rules of paragraph (b)(9) of this section apply as of May 1, 2006. These entities, however, may rely on the rules of paragraph (b)(9) of this section as of August 12, 2004.

(4) The reference to the Estonian, Latvian, Liechtenstein, Lithuanian, and Slovenian entities in paragraph (b)(8)(i) of this section applies to such entities formed on or after October 7, 2004, and to any such entity formed before such date from the date any person or persons, who were not owners of the entity as of October 7, 2004, own in the aggregate a 50 percent or greater interest in the entity. The reference to the European Economic Area/European Union entity in paragraph (b)(8)(i) of

this section applies to such entities formed on or after October 8, 2004.

[T.D. 8697, 61 FR 66589, Dec. 18, 1996, as amended by T.D. 8844, 64 FR 66583, Nov. 29, 1999; T.D. 9012, 67 FR 49864, Aug. 1, 2002; T.D. 9093, 68 FR 60298, Oct. 22, 2003; T.D. 9153, 69 FR 49810, Aug. 12, 2004; T.D. 9183, 70 FR 9221, Feb. 25, 2005; T.D. 9197, 70 FR 19698, Apr. 14, 2005; T.D. 9235, 70 FR 74658, Dec. 16, 2005; T.D. 9246, 71 FR 4817, Jan. 30, 2006]

### § 301.7701–3 Classification of certain business entities.

(a) *In general*. A business entity that is not classified as a corporation under § 301.7701–2(b) (1), (3), (4), (5), (6), (7), or (8) (an *eligible entity*) can elect its classification for federal tax purposes as provided in this section. An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under § 301.7701–2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner. Paragraph (b) of this section provides a default classification for an eligible entity that does not make an election. Thus, elections are necessary only when an eligible entity chooses to be classified initially as other than the default classification or when an eligible entity chooses to change its classification. An entity whose classification is determined under the default classification retains that classification (regardless of any changes in the members' liability that occurs at any time during the time that the entity's classification is relevant as defined in paragraph (d) of this section) until the entity makes an election to change that classification under paragraph (c)(1) of this section. Paragraph (c) of this section provides rules for making express elections. Paragraph (d) of this section provides special rules for foreign eligible entities. Paragraph (e) of this section provides special rules for classifying entities resulting from partnership terminations and divisions under section 708(b). Paragraph (f) of this section sets forth the effective date of this section and a special rule relating to prior periods.

(b) *Classification of eligible entities that do not file an election*—(1) *Domestic eligible entities*. Except as provided in paragraph (b)(3) of this section, unless the entity elects otherwise, a domestic eligible entity is—

(i) A partnership if it has two or more members; or

(ii) Disregarded as an entity separate from its owner if it has a single owner.

(2) *Foreign eligible entities*—(i) *In general*. Except as provided in paragraph (b)(3) of this section, unless the entity elects otherwise, a foreign eligible entity is—

(A) A partnership if it has two or more members and at least one member does not have limited liability;

(B) An association if all members have limited liability; or

(C) Disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

(ii) *Definition of limited liability*. For purposes of paragraph (b)(2)(i) of this section, a member of a foreign eligible entity has limited liability if the member has no personal liability for the debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law pursuant to which the entity is organized, except that if the underlying statute or law allows the entity to specify in its organizational documents whether the members will have limited liability, the organizational documents may also be relevant. For purposes of this section, a member has personal liability if the creditors of the entity may seek satisfaction of all or any portion of the debts or claims against the entity from the member as such. A member has personal liability for purposes of this paragraph even if the member makes an agreement under which another person (whether or not a member of the entity) assumes such liability or agrees to indemnify that member for any such liability.

(3) *Existing eligible entities*—(i) *In general*. Unless the entity elects otherwise, an eligible entity in existence prior to the effective date of this section will have the same classification that the entity claimed under §§ 301.7701–1 through 301.7701–3 as in effect on the date prior to the effective date of this section; except that if an eligible entity with a single owner claimed to be a partnership under those regulations,

the entity will be disregarded as an entity separate from its owner under this paragraph (b)(3)(i). For special rules regarding the classification of such entities prior to the effective date of this section, see paragraph (h)(2) of this section.

(ii) *Special rules.* For purposes of paragraph (b)(3)(i) of this section, a foreign eligible entity is treated as being in existence prior to the effective date of this section only if the entity's classification was relevant (as defined in paragraph (d) of this section) at any time during the sixty months prior to the effective date of this section. If an entity claimed different classifications prior to the effective date of this section, the entity's classification for purposes of paragraph (b)(3)(i) of this section is the last classification claimed by the entity. If a foreign eligible entity's classification is relevant prior to the effective date of this section, but no federal tax or information return is filed or the federal tax or information return does not indicate the classification of the entity, the entity's classification for the period prior to the effective date of this section is determined under the regulations in effect on the date prior to the effective date of this section.

(c) *Elections*—(1) *Time and place for filing*—(i) *In general.* Except as provided in paragraphs (c)(1) (iv) and (v) of this section, an eligible entity may elect to be classified other than as provided under paragraph (b) of this section, or to change its classification, by filing Form 8832, Entity Classification Election, with the service center designated on Form 8832. An election will not be accepted unless all of the information required by the form and instructions, including the taxpayer identifying number of the entity, is provided on Form 8832. See § 301.6109–1 for rules on applying for and displaying Employer Identification Numbers.

(ii) *Further notification of elections.* An eligible entity required to file a Federal tax or information return for the taxable year for which an election is made under § 301.7701–3(c)(1)(i) must attach a copy of its Form 8832 to its Federal tax or information return for that year. If the entity is not required to file a return for that year, a copy of its Form 8832 (''Entity Classification Election'') must be attached to the Federal income tax or information return of any direct or indirect owner of the entity for the taxable year of the owner that includes the date on which the election was effective. An indirect owner of the entity does not have to attach a copy of the Form 8832 to its return if an entity in which it has an interest is already filing a copy of the Form 8832 with its return. If an entity, or one of its direct or indirect owners, fails to attach a copy of a Form 8832 to its return as directed in this section, an otherwise valid election under § 301.7701–3(c)(1)(i) will not be invalidated, but the non-filing party may be subject to penalties, including any applicable penalties if the Federal tax or information returns are inconsistent with the entity's election under § 301.7701–3(c)(1)(i). In the case of returns for taxable years beginning after December 31, 2002, the copy of Form 8832 attached to a return pursuant to this paragraph (c)(1)(ii) is not required to be a signed copy.

(iii) *Effective date of election.* An election made under paragraph (c)(1)(i) of this section will be effective on the date specified by the entity on Form 8832 or on the date filed if no such date is specified on the election form. The effective date specified on Form 8832 can not be more than 75 days prior to the date on which the election is filed and can not be more than 12 months after the date on which the election is filed. If an election specifies an effective date more than 75 days prior to the date on which the election is filed, it will be effective 75 days prior to the date it was filed. If an election specifies an effective date more than 12 months from the date on which the election is filed, it will be effective 12 months after the date it was filed. If an election specifies an effective date before January 1, 1997, it will be effective as of January 1, 1997. If a purchasing corporation makes an election under section 338 regarding an acquired subsidiary, an election under paragraph (c)(1)(i) of this section for the acquired subsidiary can be effective no earlier than the day after the acquisition date (within the meaning of section 338(h)(2)).

(iv) *Limitation.* If an eligible entity makes an election under paragraph (c)(1)(i) of this section to change its classification (other than an election made by an existing entity to change its classification as of the effective date of this section), the entity cannot change its classification by election again during the sixty months succeeding the effective date of the election. However, the Commissioner may permit the entity to change its classification by election within the sixty months if more than fifty percent of the ownership interests in the entity as of the effective date of the subsequent election are owned by persons that did not own any interests in the entity on the filing date or on the effective date of the entity's prior election. An election by a newly formed eligible entity that is effective on the date of formation is not considered a change for purposes of this paragraph (c)(1)(iv).

(v) *Deemed elections*—(A) *Exempt organizations.* An eligible entity that has been determined to be, or claims to be, exempt from taxation under section 501(a) is treated as having made an election under this section to be classified as an association. Such election will be effective as of the first day for which exemption is claimed or determined to apply, regardless of when the claim or determination is made, and will remain in effect unless an election is made under paragraph (c)(1)(i) of this section after the date the claim for exempt status is withdrawn or rejected or the date the determination of exempt status is revoked.

(B) *Real estate investment trusts.* An eligible entity that files an election under section 856(c)(1) to be treated as a real estate investment trust is treated as having made an election under this section to be classified as an association. Such election will be effective as of the first day the entity is treated as a real estate investment trust.

(C) *S corporations.* An eligible entity that timely elects to be an S corporation under section 1362(a)(1) is treated as having made an election under this section to be classified as an association, provided that (as of the effective date of the election under section 1362(a)(1)) the entity meets all other requirements to qualify as a small business corporation under section 1361(b). Subject to § 301.7701–3(c)(1)(iv), the deemed election to be classified as an association will apply as of the effective date of the S corporation election and will remain in effect until the entity makes a valid election, under § 301.7701–3(c)(1)(i), to be classified as other than an association.

(vi) *Examples.* The following examples illustrate the rules of this paragraph (c)(1):

*Example 1.* On July 1, 1998, X, a domestic corporation, purchases a 10% interest in Y, an eligible entity formed under Country A law in 1990. The entity's classification was not relevant to any person for federal tax or information purposes prior to X's acquisition of an interest in Y. Thus, Y is not considered to be in existence on the effective date of this section for purposes of paragraph (b)(3) of this section. Under the applicable Country A statute, all members of Y have limited liability as defined in paragraph (b)(2)(ii) of this section. Accordingly, Y is classified as an association under paragraph (b)(2)(i)(B) of this section unless it elects under this paragraph (c) to be classified as a partnership. To be classified as a partnership as of July 1, 1998, Y must file a Form 8832 by September 14, 1998. See paragraph (c)(1)(i) of this section. Because an election cannot be effective more than 75 days prior to the date on which it is filed, if Y files its Form 8832 after September 14, 1998, it will be classified as an association from July 1, 1998, until the effective date of the election. In that case, it could not change its classification by election under this paragraph (c) during the sixty months succeeding the effective date of the election.

*Example 2.* (i) Z is an eligible entity formed under Country B law and is in existence on the effective date of this section within the meaning of paragraph (b)(3) of this section. Prior to the effective date of this section, Z claimed to be classified as an association. Unless Z files an election under this paragraph (c), it will continue to be classified as an association under paragraph (b)(3) of this section.

(ii) Z files a Form 8832 pursuant to this paragraph (c) to be classified as a partnership, effective as of the effective date of this section. Z can file an election to be classified as an association at any time thereafter, but then would not be permitted to change its classification by election during the sixty months succeeding the effective date of that subsequent election.

(2) *Authorized signatures*—(i) *In general.* An election made under paragraph (c)(1)(i) of this section must be signed by—

(A) Each member of the electing entity who is an owner at the time the election is filed; or

(B) Any officer, manager, or member of the electing entity who is authorized (under local law or the entity's organizational documents) to make the election and who represents to having such authorization under penalties of perjury.

(ii) *Retroactive elections.* For purposes of paragraph (c)(2)(i) of this section, if an election under paragraph (c)(1)(i) of this section is to be effective for any period prior to the time that it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must also sign the election.

(iii) *Changes in classification.* For paragraph (c)(2)(i) of this section, if an election under paragraph (c)(1)(i) of this section is made to change the classification of an entity, each person who was an owner on the date that any transactions under paragraph (g) of this section are deemed to occur, and who is not an owner at the time the election is filed, must also sign the election. This paragraph (c)(2)(iii) applies to elections filed on or after November 29, 1999.

(d) *Special rules for foreign eligible entities*—(1) *Definition of relevance*—(i) *General rule.* For purposes of this section, a foreign eligible entity's classification is relevant when its classification affects the liability of any person for federal tax or information purposes. For example, a foreign entity's classification would be relevant if U.S. income was paid to the entity and the determination by the withholding agent of the amount to be withheld under chapter 3 of the Internal Revenue Code (if any) would vary depending upon whether the entity is classified as a partnership or as an association. Thus, the classification might affect the documentation that the withholding agent must receive from the entity, the type of tax or information return to file, or how the return must be prepared. The date that the classification of a foreign eligible entity is relevant is the date an event occurs that creates an obligation to file a federal tax return, information return, or statement for which the classification of the entity must be determined. Thus, the classification of a foreign entity is relevant, for example, on the date that an interest in the entity is acquired which will require a U.S. person to file an information return on Form 5471.

(ii) *Deemed relevance*—(A) *General rule.* For purposes of this section, except as provided in paragraph (d)(1)(ii)(B) of this section, the classification for Federal tax purposes of a foreign eligible entity that files Form 8832, ''Entity Classification Election'', shall be deemed to be relevant only on the date the entity classification election is effective.

(B) *Exception.* If the classification of a foreign eligible entity is relevant within the meaning of paragraph (d)(1)(i) of this section, then the rule in paragraph (d)(1)(ii)(A) of this section shall not apply.

(2) *Entities the classification of which has never been relevant.* If the classification of a foreign eligible entity has never been relevant (as defined in paragraph (d)(1) of this section), then the entity's classification will initially be determined pursuant to the provisions of paragraph (b)(2) of this section when the classification of the entity first becomes relevant (as defined in paragraph (d)(1)(i) of this section).

(3) *Special rule when classification is no longer relevant.* If the classification of a foreign eligible entity is not relevant (as defined in paragraph (d)(1) of this section) for 60 consecutive months, then the entity's classification will initially be determined pursuant to the provisions of paragraph (b)(2) of this section when the classification of the foreign eligible entity becomes relevant (as defined in paragraph (d)(1)(i) of this section). The date that the classification of a foreign entity is not relevant is the date an event occurs that causes the classification to no longer be relevant, or, if no event occurs in a taxable year that causes the classification to be relevant, then the date is the first day of that taxable year.

(4) *Effective date.* Paragraphs (d)(1)(ii), (d)(2), and (d)(3) of this section apply on or after October 22, 2003.

(e) *Coordination with section 708(b).* Except as provided in § 301.7701–2(d)(3)

(regarding termination of grandfather status for certain foreign business entities), an entity resulting from a transaction described in section 708(b)(1)(B) (partnership termination due to sales or exchanges) or section 708(b)(2)(B) (partnership division) is a partnership.

(f) *Changes in number of members of an entity*—(1) *Associations*. The classification of an eligible entity as an association is not affected by any change in the number of members of the entity.

(2) *Partnerships and single member entities*. An eligible entity classified as a partnership becomes disregarded as an entity separate from its owner when the entity's membership is reduced to one member. A single member entity disregarded as an entity separate from its owner is classified as a partnership when the entity has more than one member. If an elective classification change under paragraph (c) of this section is effective at the same time as a membership change described in this paragraph (f)(2), the deemed transactions in paragraph (g) of this section resulting from the elective change preempt the transactions that would result from the change in membership.

(3) *Effect on sixty month limitation*. A change in the number of members of an entity does not result in the creation of a new entity for purposes of the sixty month limitation on elections under paragraph (c)(1)(iv) of this section.

(4) *Examples*. The following examples illustrate the application of this paragraph (f):

*Example 1*. *A*, a U.S. person, owns a domestic eligible entity that is disregarded as an entity separate from its owner. On January 1, 1998, *B*, a U.S. person, buys a 50 percent interest in the entity from *A*. Under this paragraph (f), the entity is classified as a partnership when *B* acquires an interest in the entity. However, *A* and *B* elect to have the entity classified as an association effective on January 1, 1998. Thus, *B* is treated as buying shares of stock on January 1, 1998. (Under paragraph (c)(1)(iv) of this section, this election is treated as a change in classification so that the entity generally cannot change its classification by election again during the sixty months succeeding the effective date of the election.) Under paragraph (g)(1) of this section, *A* is treated as contributing the assets and liabilities of the entity to the newly formed association immediately before the close of December 31, 1997. Because *A* does not retain control of the association as required by section 351, *A*'s contribution will be a taxable event. Therefore, under section 1012, the association will take a fair market value basis in the assets contributed by *A*, and *A* will have a fair market value basis in the stock received. *A* will have no additional gain upon the sale of stock to *B*, and *B* will have a cost basis in the stock purchased from *A*.

*Example 2*. (i) On April 1, 1998, *A* and *B*, U.S. persons, form *X*, a foreign eligible entity. *X* is treated as an association under the default provisions of paragraph (b)(2)(i) of this section, and *X* does not make an election to be classified as a partnership. *A* subsequently purchases all of *B*'s interest in *X*.

(ii) Under paragraph (f)(1) of this section, *X* continues to be classified as an association. *X*, however, can subsequently elect to be disregarded as an entity separate from *A*. The sixty month limitation of paragraph (c)(1)(iv) of this section does not prevent *X* from making an election because *X* has not made a prior election under paragraph (c)(1)(i) of this section.

*Example 3*. (i) On April 1, 1998, *A* and *B*, U.S. persons, form *X*, a foreign eligible entity. *X* is treated as an association under the default provisions of paragraph (b)(2)(i) of this section, and *X* does not make an election to be classified as a partnership. On January 1, 1999, *X* elects to be classified as a partnership effective on that date. Under the sixty month limitation of paragraph (c)(1)(iv) of this section, *X* cannot elect to be classified as an association until January 1, 2004 (i.e., sixty months after the effective date of the election to be classified as a partnership).

(ii) On June 1, 2000, *A* purchases all of *B*'s interest in *X*. After *A*'s purchase of *B*'s interest, *X* can no longer be classified as a partnership because *X* has only one member. Under paragraph (f)(2) of this section, *X* is disregarded as an entity separate from *A* when *A* becomes the only member of *X*. *X*, however, is not treated as a new entity for purposes of paragraph (c)(1)(iv) of this section. As a result, the sixty month limitation of paragraph (c)(1)(iv) of this section continues to apply to *X*, and *X* cannot elect to be classified as an association until January 1, 2004 (i.e., sixty months after January 1, 1999, the effective date of the election by *X* to be classified as a partnership).

(5) *Effective date*. This paragraph (f) applies as of November 29, 1999.

(g) *Elective changes in classification*—(1) *Deemed treatment of elective change*—(i) *Partnership to association*. If an eligible entity classified as a partnership elects under paragraph (c)(1)(i) of this section to be classified as an association, the following is deemed to occur: The partnership contributes all of its

assets and liabilities to the association in exchange for stock in the association, and immediately thereafter, the partnership liquidates by distributing the stock of the association to its partners.

(ii) *Association to partnership.* If an eligible entity classified as an association elects under paragraph (c)(1)(i) of this section to be classified as a partnership, the following is deemed to occur: The association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership.

(iii) *Association to disregarded entity.* If an eligible entity classified as an association elects under paragraph (c)(1)(i) of this section to be disregarded as an entity separate from its owner, the following is deemed to occur: The association distributes all of its assets and liabilities to its single owner in liquidation of the association.

(iv) *Disregarded entity to an association.* If an eligible entity that is disregarded as an entity separate from its owner elects under paragraph (c)(1)(i) of this section to be classified as an association, the following is deemed to occur: The owner of the eligible entity contributes all of the assets and liabilities of the entity to the association in exchange for stock of the association.

(2) *Effect of elective changes*—(i) *In general.* The tax treatment of a change in the classification of an entity for federal tax purposes by election under paragraph (c)(1)(i) of this section is determined under all relevant provisions of the Internal Revenue Code and general principles of tax law, including the step transaction doctrine.

(ii) *Adoption of plan of liquidation.* For purposes of satisfying the requirement of adoption of a plan of liquidation under section 332, unless a formal plan of liquidation that contemplates the election to be classified as a partnership or to be disregarded as an entity separate from its owner is adopted on an earlier date, the making, by an association, of an election under paragraph (c)(1)(i) of this section to be classified as a partnership or to be disregarded as an entity separate from its owner is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation described in paragraph (g)(1)(ii) or (iii) of this section. This paragraph (g)(2)(ii) applies to elections filed on or after December 17, 2001. Taxpayers may apply this paragraph (g)(2)(ii) retroactively to elections filed before December 17, 2001, if the corporate owner claiming treatment under section 332 and its subsidiary making the election take consistent positions with respect to the federal tax consequences of the election.

(3) *Timing of election*—(i) *In general.* An election under paragraph (c)(1)(i) of this section that changes the classification of an eligible entity for federal tax purposes is treated as occurring at the start of the day for which the election is effective. Any transactions that are deemed to occur under this paragraph (g) as a result of a change in classification are treated as occurring immediately before the close of the day before the election is effective. For example, if an election is made to change the classification of an entity from an association to a partnership effective on January 1, the deemed transactions specified in paragraph (g)(1)(ii) of this section (including the liquidation of the association) are treated as occurring immediately before the close of December 31 and must be reported by the owners of the entity on December 31. Thus, the last day of the association's taxable year will be December 31 and the first day of the partnership's taxable year will be January 1.

(ii) *Coordination with section 338 election.* A purchasing corporation that makes a qualified stock purchase of an eligible entity taxed as a corporation may make an election under section 338 regarding the acquisition if it satisfies the requirements for the election, and may also make an election to change the classification of the target corporation. If a taxpayer makes an election under section 338 regarding its acquisition of another entity taxable as a corporation and makes an election under paragraph (c) of this section for the acquired corporation (effective at the earliest possible date as provided by paragraph (c)(1)(iii) of this section), the transactions under paragraph (g) of

this section are deemed to occur immediately after the deemed asset purchase by the new target corporation under section 338.

(iii) *Application to successive elections in tiered situations.* When elections under paragraph (c)(1)(i) of this section for a series of tiered entities are effective on the same date, the eligible entities may specify the order of the elections on Form 8832. If no order is specified for the elections, any transactions that are deemed to occur in this paragraph (g) as a result of the classification change will be treated as occurring first for the highest tier entity's classification change, then for the next highest tier entity's classification change, and so forth down the chain of entities until all the transactions under this paragraph (g) have occurred. For example, Parent, a corporation, wholly owns all of the interest of an eligible entity classified as an association (S1), which wholly owns another eligible entity classified as an association (S2), which wholly owns another eligible entity classified as an association (S3). Elections under paragraph (c)(1)(i) of this section are filed to classify S1, S2, and S3 each as disregarded as an entity separate from its owner effective on the same day. If no order is specified for the elections, the following transactions are deemed to occur under this paragraph (g) as a result of the elections, with each successive transaction occurring on the same day immediately after the preceding transaction S1 is treated as liquidating into Parent, then S2 is treated as liquidating into Parent, and finally S3 is treated as liquidating into Parent.

(4) *Effective date.* Except as otherwise provided in paragraph (g)(2)(ii) of this section, this paragraph (g) applies to elections that are filed on or after November 29, 1999. Taxpayers may apply this paragraph (g) retroactively to elections filed before November 29, 1999 if all taxpayers affected by the deemed transactions file consistently with this paragraph (g).

(h) *Effective date*—(1) *In general.* Except as otherwise provided in this section, the rules of this section are applicable as of January 1, 1997.

(2) *Prior treatment of existing entities.* In the case of a business entity that is not described in § 301.7701–2(b) (1), (3), (4), (5), (6), or (7), and that was in existence prior to January 1, 1997, the entity's claimed classification(s) will be respected for all peri0ods prior to January 1, 1997, if—

(i) The entity had a reasonable basis (within the meaning of section 6662) for its claimed classification;

(ii) The entity and all members of the entity recognized the federal tax consequences of any change in the entity's classification within the sixty months prior to January 1, 1997; and

(iii) Neither the entity nor any member was notified in writing on or before May 8, 1996, that the classification of the entity was under examination (in which case the entity's classification will be determined in the examination).

(3) *Deemed elections for S corporations.* Paragraph (c)(1)(v)(C) of this section applies to timely S corporation elections under section 1362(a) filed on or after July 20, 2004. Eligible entities that filed timely S elections before July 20, 2004 may also rely on the provisions of the regulation.

[T.D. 8697, 61 FR 66590, Dec. 18, 1996; 62 FR 11769, Mar. 13, 1997, as amended by T.D. 8767, 63 FR 14619, Mar. 26, 1998; T.D. 8827, 64 FR 37678, July 13, 1999; 64 FR 58782, Nov. 1, 1999; T.D. 8844, 64 FR 66583, Nov. 29, 1999; T.D. 8970, 66 FR 64912, Dec. 17, 2001; T.D. 9093, 68 FR 60298, Oct. 22, 2003; T.D. 9100, 68 FR 70709, Dec. 19, 2003; T.D. 9139, 69 FR 43318, July 20, 2004; T.D. 9153, 69 FR 49811, Aug. 12, 2004; T.D. 9203, 70 FR 29453, May 23, 2005; T.D. 9300, 71 FR 71045, Dec. 8, 2006]

## § 301.7701–4 Trusts.

(a) *Ordinary trusts.* In general, the term ''trust'' as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Usually the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Internal Revenue Code

if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

(b) *Business trusts*. There are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for purposes of the Internal Revenue Code because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Internal Revenue Code. However, the fact that the corpus of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association or partnership. The fact that any organization is technically cast in the trust form, by conveying title to property to trustees for the benefit of persons designated as beneficiaries, will not change the real character of the organization if the organization is more properly classified as a business entity under § 301.7701–2.

(c) *Certain investment trusts*—(1) An ''investment'' trust will not be classified as a trust if there is a power under the trust agreement to vary the investment of the certificate holders. *See Commissioner v. North American Bond Trust*, 122 F. 2d 545 (2d Cir. 1941), *cert. denied*, 314 U.S. 701 (1942). An investment trust with a single class of ownership interests, representing undivided beneficial interests in the assets of the trust, will be classified as a trust if there is no power under the trust agreement to vary the investment of the certificate holders. An investment trust with multiple classes of ownership interests ordinarily will be classified as a business entity under § 301.7701–2; however, an investment trust with multiple classes of ownership interests, in which there is no power under the trust agreement to vary the investment of the certificate holders, will be classified as a trust if the trust is formed to facilitate direct investment in the assets of the trust and the existence of multiple classes of ownership interests is incidental to that purpose.

(2) The provisions of paragraph (c)(1) of this section may be illustated by the following examples:

*Example 1*. A corporation purchases a portfolio of residential mortgages and transfers the mortgages to a bank under a trust agreement. At the same time, the bank as trustee delivers to the corporation certificates evidencing rights to payments from the pooled mortgages; the corporation sells the certificates to the public. The trustee holds legal title to the mortgages in the pool for the benefit of the certificate holders but has no power to reinvest proceeds attributable to the mortgages in the pool or to vary investments in the pool in any other manner. There are two classes of certificates. Holders of class A certificates are entitled to all payments of mortgage principal, both scheduled and prepaid, until their certificates are retired; holders of class B certificates receive payments of principal only after all class A certificates have been retired. The different rights of the class A and class B certificates serve to shift to the holders of the class A certificates, in addition to the earlier scheduled payments of principal, the risk that mortgages in the pool will be prepaid so that the holders of the class B certificates will have ''call protection'' (freedom from premature termination of their interests on account of prepayments). The trust thus serves to create investment interests with respect to the mortgages held by the trust that differ significantly from direct investment in the mortgages. As a consequence, the existence of multiple classes of trust ownership is not incidental to any purpose of the trust to facilitate direct investment, and, accordingly, the trust is classified as a business entity under § 301.7701–2.

*Example 2*. Corporation M is the originator of a portfolio of residential mortgages and transfers the mortgages to a bank under a trust agreement. At the same time, the bank

as trustee delivers to M certificates evidencing rights to payments from the pooled mortgages. The trustee holds legal title to the mortgages in the pool for the benefit of the certificate holders, but has no power to reinvest proceeds attributable to the mortgages in the pool or to vary investments in the pool in any other manner. There are two classes of certificates. Holders of class C certificates are entitled to receive 90 percent of the payments of principal and interest on the mortgages; class D certificate holders are entitled to receive the other ten percent. The two classes of certificates are identical except that, in the event of a default on the underlying mortgages, the payment rights of class D certificate holders are subordinated to the rights of class C certificate holders. M sells the class C certificates to investors and retains the class D certificates. The trust has multiple classes of ownership interests, given the greater security provided to holders of class C certificates. The interests of certificate holders, however, are substantially equivalent to undivided interests in the pool of mortgages, coupled with a limited recourse guarantee running from M to the holders of class C certificates. In such circumstances, the existence of multiple classes of ownership interests is incidental to the trust's purpose of facilitating direct investment in the assets of the trust. Accordingly, the trust is classified as a trust.

*Example 3.* A promoter forms a trust in which shareholders of a publicly traded corporation can deposit their stock. For each share of stock deposited with the trust, the participant receives two certificates that are initially attached, but may be separated and traded independently of each other. One certificate represents the right to dividends and the value of the underlying stock up to a specified amount; the other certificate represents the right to appreciation in the stock's value above the specified amount. The separate certificates represent two different classes of ownership interest in the trust, which effectively separate dividend rights on the stock held by the trust from a portion of the right to appreciation in the value of such stock. The multiple classes of ownership interests are designed to permit investors, by transferring one of the certificates and retaining the other, to fulfill their varying investment objectives of seeking primarily either dividend income or capital appreciation from the stock held by the trust. Given that the trust serves to create investment interests with respect to the stock held by the trust that differ significantly from direct investment in such stock, the trust is not formed to facilitate direct investment in the assets of the trust. Accordingly, the trust is classified as a business entity under § 301.7701–2.

*Example 4.* Corporation N purchases a portfolio of bonds and transfers the bonds to a bank under a trust agreement. At the same time, the trustee delivers to N certificates evidencing interests in the bonds. These certificates are sold to public investors. Each certificate represents the right to receive a particular payment with respect to a specific bond. Under section 1286, stripped coupons and stripped bonds are treated as separate bonds for federal income tax purposes. Although the interest of each certificate holder is different from that of each other certificate holder, and the trust thus has multiple classes of ownership, the multiple classes simply provide each certificate holder with a direct interest in what is treated under section 1286 as a separate bond. Given the similarity of the interests acquired by the certificate holders to the interests that could be acquired by direct investment, the multiple classes of trust interests merely facilitate direct investment in the assets held by the trust. Accordingly, the trust is classified as a trust.

(d) *Liquidating trusts.* Certain organizations which are commonly known as liquidating trusts are treated as trusts for purposes of the Internal Revenue Code. An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose. A liquidating trust is treated as a trust for purposes of the Internal Revenue Code because it is formed with the objective of liquidating particular assets and not as an organization having as its purpose the carrying on of a profit-making business which normally would be conducted through business organizations classified as corporations or partnerships. However, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscured by business activities that the declared purpose of liquidation can be said to be lost or abandoned, the status of the organization will no longer be that of a liquidating trust. Bondholders' protective committees, voting trusts, and other agencies formed to protect the interests of security holders during insolvency, bankruptcy, or corporate reorganization proceedings are analogous to liquidating trusts but if subsequently utilized to further the control or profitable operation of a going business on a permanent continuing basis,

they will lose their classification as trusts for purposes of the Internal Revenue Code.

(e) *Environmental remediation trusts.* (1) An environmental remediation trust is considered a trust for purposes of the Internal Revenue Code. For purposes of this paragraph (e), an organization is an environmental remediation trust if the organization is organized under state law as a trust; the primary purpose of the trust is collecting and disbursing amounts for environmental remediation of an existing waste site to resolve, satisfy, mitigate, address, or prevent the liability or potential liability of persons imposed by federal, state, or local environmental laws; all contributors to the trust have (at the time of contribution and thereafter) actual or potential liability or a reasonable expectation of liability under federal, state, or local environmental laws for environmental remediation of the waste site; and the trust is not a qualified settlement fund within the meaning of §1.468B–1(a) of this chapter. An environmental remediation trust is classified as a trust because its primary purpose is environmental remediation of an existing waste site and not the carrying on of a profit-making business that normally would be conducted through business organizations classified as corporations or partnerships. However, if the remedial purpose is altered or becomes so obscured by business or investment activities that the declared remedial purpose is no longer controlling, the organization will no longer be classified as a trust. For purposes of this paragraph (e), environmental remediation includes the costs of assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, and collecting amounts from persons liable or potentially liable for the costs of these activities. For purposes of this paragraph (e), persons have potential liability or a reasonable expectation of liability under federal, state, or local environmental laws for remediation of the existing waste site if there is authority under a federal, state, or local law that requires or could reasonably be expected to require such persons to satisfy all or a portion of the costs of the environmental remediation.

(2) Each contributor (grantor) to the trust is treated as the owner of the portion of the trust contributed by that grantor under rules provided in section 677 and §1.677(a)–1(d) of this chapter. Section 677 and §1.677(a)–1(d) of this chapter provide rules regarding the treatment of a grantor as the owner of a portion of a trust applied in discharge of the grantor's legal obligation. Items of income, deduction, and credit attributable to an environmental remediation trust are not reported by the trust on Form 1041, but are shown on a separate statement to be attached to that form. See §1.671–4(a) of this chapter. The trustee must also furnish to each grantor a statement that shows all items of income, deduction, and credit of the trust for the grantor's taxable year attributable to the portion of the trust treated as owned by the grantor. The statement must provide the grantor with the information necessary to take the items into account in computing the grantor's taxable income, including information necessary to determine the federal tax treatment of the items (for example, whether an item is a deductible expense under section 162(a) or a capital expenditure under section 263(a)) and how the item should be taken into account under the economic performance rules of section 461(h) and the regulations thereunder. See §1.461–4 of this chapter for rules relating to economic performance.

(3) All amounts contributed to an environmental remediation trust by a grantor (cash-out grantor) who, pursuant to an agreement with the other grantors, contributes a fixed amount to the trust and is relieved by the other grantors of any further obligation to make contributions to the trust, but remains liable or potentially liable under the applicable environmental laws, will be considered amounts contributed for remediation. An environmental remediation trust agreement may direct the trustee to expend amounts contributed by a cash-out grantor (and the earnings thereon) before expending amounts contributed by

other grantors (and the earnings thereon). A cash-out grantor will cease to be treated as an owner of a portion of the trust when the grantor's portion is fully expended by the trust.

(4) The provisions of this paragraph (e) may be illustrated by the following example:

*Example.* (a) *X*, *Y*, and *Z* are calendar year corporations that are liable for the remediation of an existing waste site under applicable federal environmental laws. On June 1, 1996, pursuant to an agreement with the governing federal agency, *X*, *Y*, and *Z* create an environmental remediation trust within the meaning of paragraph (e)(1) of this section to collect funds contributed to the trust by *X*, *Y*, and *Z* and to carry out the remediation of the waste site to the satisfaction of the federal agency. *X*, *Y*, and *Z* are jointly and severally liable under the federal environmental laws for the remediation of the waste site, and the federal agency will not release *X*, *Y*, or *Z* from liability until the waste site is remediated to the satisfaction of the agency.

(b) The estimated cost of the remediation is $20,000,000. *X*, *Y*, and *Z* agree that, if *Z* contributes $1,000,000 to the trust, *Z* will not be required to make any additional contributions to the trust, and *X* and *Y* will complete the remediation of the waste site and make additional contributions if necessary.

(c) On June 1, 1996, *X*, *Y*, and *Z* each contribute $1,000,000 to the trust. The trust agreement directs the trustee to spend *Z*'s contributions to the trust and the income allocable to *Z*'s portion before spending *X*'s and *Y*'s portions. On November 30, 1996, the trustee disburses $2,000,000 for remediation work performed from June 1, 1996, through September 30, 1996. For the six-month period ending November 30, 1996, the interest earned on the funds in the trust was $75,000, which is allocated in equal shares of $25,000 to *X*'s, *Y*'s, and *Z*'s portions of the trust.

(d) *Z* made no further contributions to the trust. Pursuant to the trust agreement, the trustee expended *Z*'s portion of the trust before expending *X*'s and *Y*'s portion. Therefore, *Z*'s share of the remediation disbursement made in 1996 is $1,025,000 ($1,000,000 contribution by *Z* plus $25,000 of interest allocated to *Z*'s portion of the trust). *Z* takes the $1,025,000 disbursement into account under the appropriate federal tax accounting rules. In addition, *X*'s share of the remediation disbursement made in 1996 is $487,500, and *Y*'s share of the remediation disbursement made in 1996 is $487,500. *X* and *Y* take their respective shares of the disbursement into account under the appropriate federal tax accounting rules.

(e) The trustee made no further remediation disbursements in 1996, and *X* and *Y* made no further contributions in 1996. From December 1, 1996, to December 31, 1996, the interest earned on the funds remaining in the trust was $5,000, which is allocated $2,500 to *X*'s portion and $2,500 to *Y*'s portion. Accordingly, for 1996, *X* and *Y* each had interest income of $27,500 from the trust and *Z* had interest income of $25,000 from the trust.

(5) This paragraph (e) is applicable to trusts meeting the requirements of paragraph (e)(1) of this section that are formed on or after May 1, 1996. This paragraph (e) may be relied on by trusts formed before May 1, 1996, if the trust has at all times met all requirements of this paragraph (e) and the grantors have reported items of ,income and deduction consistent with this paragraph (e) on original or amended returns. For trusts formed before May 1, 1996, that are not described in the preceding sentence, the Commissioner may permit by letter ruling, in appropriate circumstances, this paragraph (e) to be applied subject to appropriate terms and conditions.

(f) *Effective date.* The rules of this section generally apply to taxable years beginning after December 31, 1960. Paragraph (e)(5) of this section contains rules of applicability for paragraph (e) of this section. In addition, the last sentences of paragraphs (b), (c)(1), and (c)(2) *Example 1* and *Example 3* of this section are effective as of January 1, 1997.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8080, 51 FR 9952, Mar. 24, 1986; T.D. 8668, 61 FR 19191, May 1, 1996; T.D. 8697, 61 FR 66592, Dec. 18, 1996]

### § 301.7701–5 Domestic and foreign business entities.

(a) *Domestic and foreign business entities.* A business entity (including an entity that is disregarded as separate from its owner under § 301.7701–2(c)) is domestic if it is created or organized as any type of entity (including, but not limited to, a corporation, unincorporated association, general partnership, limited partnership, and limited liability company) in the United States, or under the law of the United States or of any State. Accordingly, a business entity that is created or organized both in the United States and in a foreign jurisdiction is a domestic entity. A business entity (including an entity that is disregarded as separate

from its owner under § 301.7701–2(c)) is foreign if it is not domestic. The determination of whether an entity is domestic or foreign is made independently from the determination of its corporate or non-corporate classification. See §§ 301.7701–2 and 301.7701–3 for the rules governing the classification of entities.

(b) *Examples*. The following examples illustrate the rules of this section:

*Example 1*. (i) *Facts*. Y is an entity that is created or organized under the laws of Country A as a public limited company. It is also an entity that is organized as a limited liability company (LLC) under the laws of State B. Y is classified as a corporation for Federal tax purposes under the rules of §§ 301.7701–2, and 301.7701–3.

(ii) *Result*. Y is a domestic corporation because it is an entity that is classified as a corporation and it is organized as an entity under the laws of State B.

*Example 2*. (i) *Facts*. P is an entity with more than one owner organized under the laws of Country A as an unlimited company. It is also an entity that is organized as a general partnership under the laws of State B. P is classified as a partnership for Federal tax purposes under the rules of §§ 301.7701–2, and 301.7701–3.

(ii) *Result*. P is a domestic partnership because it is an entity that is classified as a partnership and it is organized as an entity under the laws of State B.

(c) *Effective date*.—(1) *General rule*. Except as provided in paragraph (c)(2) of this section, the rules of this section apply as of August 12, 2004, to all business entities existing on or after that date.

(2) *Transition rule*. For business entities created or organized under the laws of more than one jurisdiction as of August 12, 2004, the rules of this section apply as of May 1, 2006. These entities, however, may rely on the rules of this section as of August 12, 2004.

[T.D. 9246, 71 FR 4817, Jan. 30, 2006]

### § 301.7701–6 Definitions; person, fiduciary.

(a) *Person*. The term *person* includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization or group. The term also includes a guardian, committee, trustee, executor, administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, conservator, or any person acting in a fiduciary capacity.

(b) *Fiduciary*—(1) *In general*. Fiduciary is a term that applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. A committee or guardian of the property of an incompetent person is a fiduciary.

(2) *Fiduciary distinguished from agent*. There may be a fiduciary relationship between an agent and a principal, but the word agent does not denote a fiduciary. An agent having entire charge of property, with authority to effect and execute leases with tenants entirely on his own responsibility and without consulting his principal, merely turning over the net profits from the property periodically to his principal by virtue of authority conferred upon him by a power of attorney, is not a fiduciary within the meaning of the Internal Revenue Code. In cases when no legal trust has been created in the estate controlled by the agent and attorney, the liability to make a return rests with the principal.

(c) *Effective date*. The rules of this section are effective as of January 1, 1997.

[T.D. 8697, 61 FR 66593, Dec. 18, 1996]

### § 301.7701–7 Trusts—domestic and foreign.

(a) *In general*. (1) A trust is a United States person if—

(i) A court within the United States is able to exercise primary supervision over the administration of the trust (court test); and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust (control test).

(2) A trust is a United States person for purposes of the Internal Revenue Code (Code) on any day that the trust meets both the court test and the control test. For purposes of the regulations in this chapter, the term *domestic trust* means a trust that is a United

States person. The term *foreign trust* means any trust other than a domestic trust.

(3) Except as otherwise provided in part I, subchapter J, chapter 1 of the Code, the taxable income of a foreign trust is computed in the same manner as the taxable income of a nonresident alien individual who is not present in the United States at any time. Section 641(b). Section 7701(b) is not applicable to trusts because it only applies to individuals. In addition, a foreign trust is not considered to be present in the United States at any time for purposes of section 871(a)(2), which deals with capital gains of nonresident aliens present in the United States for 183 days or more.

(b) *Applicable law*. The terms of the trust instrument and applicable law must be applied to determine whether the court test and the control test are met.

(c) *The court test*—(1) *Safe harbor*. A trust satisfies the court test if—

(i) The trust instrument does not direct that the trust be administered outside of the United States;

(ii) The trust in fact is administered exclusively in the United States; and

(iii) The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section.

(2) *Example*. The following example illustrates the rule of paragraph (c)(1) of this section:

*Example*. *A* creates a trust for the equal benefit of *A*'s two children, *B* and *C*. The trust instrument provides that *DC*, a State *Y* corporation, is the trustee of the trust. State *Y* is a state within the United States. *DC* administers the trust exclusively in State *Y* and the trust instrument is silent as to where the trust is to be administered. The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section. The trust satisfies the safe harbor of paragraph (c)(1) of this section and the court test.

(3) *Definitions*. The following definitions apply for purposes of this section:

(i) *Court*. The term *court* includes any federal, state, or local court.

(ii) *The United States*. The term *the United States* is used in this section in a geographical sense. Thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See section 7701(a)(9). Accordingly, a court within a territory or possession of the United States or within a foreign country is not a court within the United States.

(iii) *Is able to exercise*. The term *is able to exercise* means that a court has or would have the authority under applicable law to render orders or judgments resolving issues concerning administration of the trust.

(iv) *Primary supervision*. The term *primary supervision* means that a court has or would have the authority to determine substantially all issues regarding the administration of the entire trust. A court may have primary supervision under this paragraph (c)(3)(iv) notwithstanding the fact that another court has jurisdiction over a trustee, a beneficiary, or trust property.

(v) *Administration*. The term *administration* of the trust means the carrying out of the duties imposed by the terms of the trust instrument and applicable law, including maintaining the books and records of the trust, filing tax returns, managing and investing the assets of the trust, defending the trust from suits by creditors, and determining the amount and timing of distributions.

(4) *Situations that cause a trust to satisfy or fail to satisfy the court test*. (i) Except as provided in paragraph (c)(4)(ii) of this section, paragraphs (c)(4)(i) (A) through (D) of this section set forth some specific situations in which a trust satisfies the court test. The four situations described are not intended to be an exclusive list.

(A) *Uniform Probate Code*. A trust meets the court test if the trust is registered by an authorized fiduciary or fiduciaries of the trust in a court within the United States pursuant to a state statute that has provisions substantially similar to Article VII, *Trust Administration*, of the Uniform Probate Code, 8 Uniform Laws Annotated 1 (West Supp. 1998), available from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611.

(B) *Testamentary trust*. In the case of a trust created pursuant to the terms of a will probated within the United

States (other than an ancillary probate), if all fiduciaries of the trust have been qualified as trustees of the trust by a court within the United States, the trust meets the court test.

(C) *Inter vivos trust.* In the case of a trust other than a testamentary trust, if the fiduciaries and/or beneficiaries take steps with a court within the United States that cause the administration of the trust to be subject to the primary supervision of the court, the trust meets the court test.

(D) *A United States court and a foreign court are able to exercise primary supervision over the administration of the trust.* If both a United States court and a foreign court are able to exercise primary supervision over the administration of the trust, the trust meets the court test.

(ii) *Automatic migration provisions.* Notwithstanding any other provision in this section, a court within the United States is not considered to have primary supervision over the administration of the trust if the trust instrument provides that a United States court's attempt to assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly would cause the trust to migrate from the United States. However, this paragraph (c)(4)(ii) will not apply if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c):

*Example 1. A*, a United States citizen, creates a trust for the equal benefit of *A*'s two children, both of whom are United States citizens. The trust instrument provides that *DC*, a domestic corporation, is to act as trustee of the trust and that the trust is to be administered in Country *X*, a foreign country. *DC* maintains a branch office in Country *X* with personnel authorized to act as trustees in Country *X*. The trust instrument provides that the law of State *Y*, a state within the United States, is to govern the interpretation of the trust. Under the law of Country *X*, a court within Country *X* is able to exercise primary supervision over the administration of the trust. Pursuant to the trust instrument, the Country *X* court applies the law of State *Y* to the trust. Under the terms of the trust instrument the trust is administered in Country *X*. No court within the United States is able to exercise primary supervision over the administration of the trust. The trust fails to satisfy the court test and therefore is a foreign trust.

*Example 2. A*, a United States citizen, creates a trust for *A*'s own benefit and the benefit of *A*'s spouse, *B*, a United States citizen. The trust instrument provides that the trust is to be administered in State *Y*, a state within the United States, by *DC*, a State *Y* corporation. The trust instrument further provides that in the event that a creditor sues the trustee in a United States court, the trust will automatically migrate from State *Y* to Country *Z*, a foreign country, so that no United States court will have jurisdiction over the trust. A court within the United States is not able to exercise primary supervision over the administration of the trust because the United States court's jurisdiction over the administration of the trust is automatically terminated in the event the court attempts to assert jurisdiction. Therefore, the trust fails to satisfy the court test from the time of its creation and is a foreign trust.

(d) *Control test*—(1) *Definitions*—(i) *United States person.* The term *United States person* means a United States person within the meaning of section 7701(a)(30). For example, a domestic corporation is a United States person, regardless of whether its shareholders are United States persons.

(ii) *Substantial decisions.* The term *substantial decisions* means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as the bookkeeping, the collection of rents, and the execution of investment decisions. Substantial decisions include, but are not limited to, decisions concerning—

(A) Whether and when to distribute income or corpus;

(B) The amount of any distributions;

(C) The selection of a beneficiary;

(D) Whether a receipt is allocable to income or principal;

(E) Whether to terminate the trust;

(F) Whether to compromise, arbitrate, or abandon claims of the trust;

(G) Whether to sue on behalf of the trust or to defend suits against the trust;

(H) Whether to remove, add, or replace a trustee;

(I) Whether to appoint a successor trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, even if the power to make such a decision is not accompanied by an unrestricted power to remove a trustee, unless the power to make such a decision is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa; and

(J) Investment decisions; however, if a United States person under section 7701(a)(30) hires an investment advisor for the trust, investment decisions made by the investment advisor will be considered substantial decisions controlled by the United States person if the United States person can terminate the investment advisor's power to make investment decisions at will.

(iii) *Control.* The term *control* means having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. To determine whether United States persons have control, it is necessary to consider all persons who have authority to make a substantial decision of the trust, not only the trust fiduciaries.

(iv) *Safe harbor for certain employee benefit trusts and investment trusts.* Notwithstanding the provisions of this paragraph (d), the trusts listed in this paragraph (d)(1)(iv) are deemed to satisfy the control test set forth in paragraph (a)(1)(ii) of this section, provided that United States trustees control all of the substantial decisions made by the trustees of the trust—

(A) A qualified trust described in section 401(a);

(B) A trust described in section 457(g);

(C) A trust that is an individual retirement account described in section 408(a);

(D) A trust that is an individual retirement account described in section 408(k) or 408(p);

(E) A trust that is a Roth IRA described in section 408A;

(F) A trust that is an education individual retirement account described in section 530;

(G) A trust that is a voluntary employees' beneficiary association described in section 501(c)(9);

(H) A group trust described in Rev. Rul. 81–100 (1981–1 C.B. 326) (*See* § 601.601(d)(2) of this chapter);

(I) An investment trust classified as a trust under § 301.7701–4(c), provided that the following conditions are satisfied—

(*1*) All trustees are United States persons and at least one of the trustees is a bank, as defined in section 581, or a United States Government-owned agency or United States Government-sponsored enterprise;

(*2*) All sponsors (persons who exchange investment assets for beneficial interests with a view to selling the beneficial interests) are United States persons; and

(*3*) The beneficial interests are widely offered for sale primarily in the United States to United States persons;

(J) Such additional categories of trusts as the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*)).

(v) *Examples.* The following examples illustrate the rules of paragraph (d)(1) of this section:

*Example 1.* Trust is a testamentary trust with three fiduciaries, *A*, *B*, and *C*. A and *B* are United States citizens, and *C* is a nonresident alien. No persons except the fiduciaries have authority to make any decisions of the trust. The trust instrument provides that no substantial decisions of the trust can be made unless there is unanimity among the fiduciaries. The control test is not satisfied because United States persons do not control all the substantial decisions of the trust. No substantial decisions can be made without *C*'s agreement.

*Example 2.* Assume the same facts as in *Example 1*, except that the trust instrument provides that all substantial decisions of the trust are to be decided by a majority vote among the fiduciaries. The control test is satisfied because a majority of the fiduciaries are United States persons and therefore United States persons control all the substantial decisions of the trust.

*Example 3.* Assume the same facts as in *Example 2*, except that the trust instrument directs that *C* is to make all of the trust's investment decisions, but that *A* and *B* may veto *C*'s investment decisions. *A* and *B* cannot act to make the investment decisions on their own. The control test is not satisfied

because the United States persons, *A* and *B*, do not have the power to make all of the substantial decisions of the trust.

*Example 4.* Assume the same facts as in *Example 3*, except *A* and *B* may accept or veto *C*'s investment decisions and can make investments that *C* has not recommended. The control test is satisfied because the United States persons control all substantial decisions of the trust.

*Example 5.* *X*, a foreign corporation, conducts business in the United States through various branch operations. *X* has United States employees and has established a trust as part of a qualified employee benefit plan under section 401(a) for these employees. The trust is established under the laws of State *A*, and the trustee of the trust is *B*, a United States bank governed by the laws of State *A*. *B* holds legal title to the trust assets for the benefit of the trust beneficiaries. A plan committee makes decisions with respect to the plan and the trust. The plan committee can direct *B*'s actions with regard to those decisions and under the governing documents *B* is not liable for those decisions. Members of the plan committee consist of United States persons and nonresident aliens, but nonresident aliens make up a majority of the plan committee. Decisions of the plan committee are made by majority vote. In addition, *X* retains the power to terminate the trust and to replace the United States trustee or to appoint additional trustees. This trust is deemed to satisfy the control test under paragraph (d)(1)(iv) of this section because *B*, a United States person, is the trust's only trustee. Any powers held by the plan committee or *X* are not considered under the safe harbor of paragraph (d)(1)(iv) of this section. In the event that *X* appoints additional trustees including foreign trustees, any powers held by such trustees must be considered in determining whether United States trustees control all substantial decisions made by the trustees of the trust.

(2) *Replacement of any person who had authority to make a substantial decision of the trust*—(i) *Replacement within 12 months.* In the event of an inadvertent change in any person that has the power to make a substantial decision of the trust that would cause the domestic or foreign residency of the trust to change, the trust is allowed 12 months from the date of the change to make necessary changes either with respect to the persons who control the substantial decisions or with respect to the residence of such persons to avoid a change in the trust's residency. For purposes of this section, an inadvertent change means the death, incapacity, resignation, change in residency or other change with respect to a person that has a power to make a substantial decision of the trust that would cause a change to the residency of the trust but that was not intended to change the residency of the trust. If the necessary change is made within 12 months, the trust is treated as retaining its pre-change residency during the 12-month period. If the necessary change is not made within 12 months, the trust's residency changes as of the date of the inadvertent change.

(ii) *Request for extension of time.* If reasonable actions have been taken to make the necessary change to prevent a change in trust residency, but due to circumstances beyond the trust's control the trust is unable to make the modification within 12 months, the trust may provide a written statement to the district director having jurisdiction over the trust's return setting forth the reasons for failing to make the necessary change within the required time period. If the district director determines that the failure was due to reasonable cause, the district director may grant the trust an extension of time to make the necessary change. Whether an extension of time is granted is in the sole discretion of the district director and, if granted, may contain such terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries. If the district director does not grant an extension, the trust's residency changes as of the date of the inadvertent change.

(iii) *Examples.* The following examples illustrate the rules of paragraphs (d)(2)(i) and (ii) of this section:

*Example 1.* A trust that satisfies the court test has three fiduciaries, *A*, *B*, and *C*. *A* and *B* are United States citizens and *C* is a nonresident alien. All decisions of the trust are made by majority vote of the fiduciaries. The trust instrument provides that upon the death or resignation of any of the fiduciaries, *D*, is the successor fiduciary. *A* dies and *D* automatically becomes a fiduciary of the trust. When *D* becomes a fiduciary of the trust, *D* is a nonresident alien. Two months after *A* dies, *B* replaces *D* with *E*, a United States person. Because *D* was replaced with *E* within 12 months after the date of *A*'s death, during the period after *A*'s death and before *E* begins to serve, the trust satisfies

the control test and remains a domestic trust.

*Example 2.* Assume the same facts as in *Example 1* except that at the end of the 12-month period after *A*'s death, *D* has not been replaced and remains a fiduciary of the trust. The trust becomes a foreign trust on the date *A* died unless the district director grants an extension of the time period to make the necessary change.

(3) *Automatic migration provisions.* Notwithstanding any other provision in this section, United States persons are not considered to control all substantial decisions of the trust if an attempt by any governmental agency or creditor to collect information from or assert a claim against the trust would cause one or more substantial decisions of the trust to no longer be controlled by United States persons.

(4) *Examples.* The following examples illustrate the rules of this paragraph (d):

*Example 1. A,* a nonresident alien individual, is the grantor and, during *A*'s lifetime, the sole beneficiary of a trust that qualifies as an individual retirement account (IRA). *A* has the exclusive power to make decisions regarding withdrawals from the IRA and to direct its investments. The IRA's sole trustee is a United States person within the meaning of section 7701(a)(30). The control test is satisfied with respect to this trust because the special rule of paragraph (d)(1)(iv) of this section applies.

*Example 2. A,* a nonresident alien individual, is the grantor of a trust and has the power to revoke the trust, in whole or in part, and revest assets in *A*. *A* is treated as the owner of the trust under sections 672(f) and 676. *A* is not a fiduciary of the trust. The trust has one trustee, *B,* a United States person, and the trust has one beneficiary, *C*. *B* has the discretion to distribute corpus or income to *C*. In this case, decisions exercisable by *A* to have trust assets distributed to *A* are substantial decisions. Therefore, the trust is a foreign trust because *B* does not control all substantial decisions of the trust.

*Example 3.* A trust, Trust T, has two fiduciaries, *A* and *B*. Both *A* and *B* are United States persons. *A* and *B* hire *C*, an investment advisor who is a foreign person, and may terminate *C*'s employment at will. The investment advisor makes the investment decisions for the trust. *A* and *B* control all other decisions of the trust. Although *C* has the power to make investment decisions, *A* and *B* are treated as controlling these decisions. Therefore, the control test is satisfied.

*Example 4. G,* a United States citizen, creates a trust. The trust provides for income to *A* and *B* for life, remainder to *A*'s and *B*'s descendants. *A* is a nonresident alien and *B* is a United States person. The trustee of the trust is a United States person. The trust instrument authorizes *A* to replace the trustee. The power to replace the trustee is a substantial decision. Because *A,* a nonresident alien, controls a substantial decision, the control test is not satisfied.

(e) *Effective date*—(1) *General rule.* Except for the election to remain a domestic trust provided in paragraph (f) of this section and except as provided in paragraph (e)(3) of this section, this section is applicable to taxable years ending after February 2, 1999. This section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the Small Business Job Protection Act of 1996, (the SBJP Act) Public Law 104–188, 110 Stat. 1755 (26 U.S.C. 7701 note).

(2) *Trusts created after August 19, 1996.* If a trust is created after August 19, 1996, and before April 5, 1999, and the trust satisfies the control test set forth in the regulations project REG–251703–96 published under section 7701(a)(30) and (31) (1997–1 C.B. 795) (See § 601.601(d)(2) of this chapter), but does not satisfy the control test set forth in paragraph (d) of this section, the trust may be modified to satisfy the control test of paragraph (d) by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as satisfying the control test of paragraph (d) for taxable years beginning after December 31, 1996, (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

(3) *Effective date of safe harbor for certain employee benefit trusts and investment trusts.* Paragraphs (d)(1)(iv) and (v) *Examples 1* and *5* of this section apply to trusts for taxable years ending on or after August 9, 2001. Paragraphs (d)(1)(iv) and (v) *Examples 1* and *5* of this section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending

after August 20, 1996, under section 1907(a)(3)(B) of the SBJP Act.

(f) *Election to remain a domestic trust*—(1) *Trusts eligible to make the election to remain domestic.* A trust that was in existence on August 20, 1996, and that was treated as a domestic trust on August 19, 1996, as provided in paragraph (f)(2) of this section, may elect to continue treatment as a domestic trust notwithstanding section 7701(a)(30)(E). This election is not available to a trust that was wholly-owned by its grantor under subpart E, part I, subchapter J, chapter 1, of the Code on August 20, 1996. The election is available to a trust if only a portion of the trust was treated as owned by the grantor under subpart E on August 20, 1996. If a partially-owned grantor trust makes the election, the election is effective for the entire trust. Also, a trust may not make the election if the trust has made an election pursuant to section 1907(a)(3)(B) of the SBJP Act to apply the new trust criteria to the first taxable year of the trust ending after August 20, 1996, because that election, once made, is irrevocable.

(2) *Determining whether a trust was treated as a domestic trust on August 19, 1996*—(i) *Trusts filing Form 1041 for the taxable year that includes August 19, 1996.* For purposes of the election, a trust is considered to have been treated as a domestic trust on August 19, 1996, if: the trustee filed a Form 1041, ''U.S. Income Tax Return for Estates and Trusts,'' for the trust for the period that includes August 19, 1996 (and did not file a Form 1040NR, ''U.S. Nonresident Alien Income Tax Return,'' for that year); and the trust had a reasonable basis (within the meaning of section 6662) under section 7701(a)(30) prior to amendment by the SBJP Act (prior law) for reporting as a domestic trust for that period.

(ii) *Trusts not filing a Form 1041.* Some domestic trusts are not required to file Form 1041. For example, certain group trusts described in Rev. Rul. 81–100 (1981–1 C.B. 326) (See § 601.601(d)(2) of this chapter) consisting of trusts that are parts of qualified retirement plans and individual retirement accounts are not required to file Form 1041. Also, a domestic trust whose gross income for the taxable year is less than the amount required for filing an income tax return and that has no taxable income is not required to file a Form 1041. Section 6012(a)(4). For purposes of the election, a trust that filed neither a Form 1041 nor a Form 1040NR for the period that includes August 19, 1996, will be considered to have been treated as a domestic trust on August 19, 1996, if the trust had a reasonable basis (within the meaning of section 6662) under prior law for being treated as a domestic trust for that period and for filing neither a Form 1041 nor a Form 1040NR for that period.

(3) *Procedure for making the election to remain domestic*—(i) *Required Statement.* To make the election, a statement must be filed with the Internal Revenue Service in the manner and time described in this section. The statement must be entitled ''Election to Remain a Domestic Trust under Section 1161 of the Taxpayer Relief Act of 1997,'' be signed under penalties of perjury by at least one trustee of the trust, and contain the following information—

(A) A statement that the trust is electing to continue to be treated as a domestic trust under section 1161 of the Taxpayer Relief Act of 1997;

(B) A statement that the trustee had a reasonable basis (within the meaning of section 6662) under prior law for treating the trust as a domestic trust on August 19, 1996. (The trustee need not explain the reasonable basis on the election statement.);

(C) A statement either that the trust filed a Form 1041 treating the trust as a domestic trust for the period that includes August 19, 1996, (and that the trust did not file a Form 1040NR for that period), or that the trust was not required to file a Form 1041 or a Form 1040NR for the period that includes August 19, 1996, with an accompanying brief explanation as to why a Form 1041 was not required to be filed; and

(D) The name, address, and employer identification number of the trust.

(ii) *Filing the required statement with the Internal Revenue Service.* (A) Except as provided in paragraphs (f)(3)(ii)(E) through (G) of this section, the trust must attach the statement to a Form 1041. The statement may be attached to either the Form 1041 that is filed for

the first taxable year of the trust beginning after December 31, 1996 (1997 taxable year), or to the Form 1041 filed for the first taxable year of the trust beginning after December 31, 1997 (1998 taxable year). The statement, however, must be filed no later than the due date for filing a Form 1041 for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated. If the trust filed a Form 1041 for the 1997 taxable year without the statement attached, the statement should be attached to the Form 1041 filed for the 1998 taxable year.

(B) If the trust has insufficient gross income and no taxable income for its 1997 or 1998 taxable year, or both, and therefore is not required to file a Form 1041 for either or both years, the trust must make the election by filing a Form 1041 for either the 1997 or 1998 taxable year with the statement attached (even though not otherwise required to file a Form 1041 for that year). The trust should only provide on the Form 1041 the trust's name, name and title of fiduciary, address, employer identification number, date created, and type of entity. The statement must be attached to a Form 1041 that is filed no later than October 15, 1999.

(C) If the trust files a Form 1040NR for the 1997 taxable year based on application of new section 7701(a)(30)(E) to the trust, and satisfies paragraph (f)(1) of this section, in order for the trust to make the election the trust must file an amended Form 1040NR return for the 1997 taxable year. The trust must note on the amended Form 1040NR that it is making an election under section 1161 of the Taxpayer Relief Act of 1997. The trust must attach to the amended Form 1040NR the statement required by paragraph (f)(3)(i) of this section and a completed Form 1041 for the 1997 taxable year. The items of income, deduction and credit of the trust must be excluded from the amended Form 1040NR and reported on the Form 1041. The amended Form 1040NR for the 1997 taxable year, with the statement and the Form 1041 attached, must be filed with the Philadelphia Service Center no later than the due date, plus extensions, for filing a Form 1041 for the 1998 taxable year.

(D) If a trust has made estimated tax payments as a foreign trust based on application of section 7701(a)(30)(E) to the trust, but has not yet filed a Form 1040NR for the 1997 taxable year, when the trust files its Form 1041 for the 1997 taxable year it must note on its Form 1041 that it made estimated tax payments based on treatment as a foreign trust. The Form 1041 must be filed with the Philadelphia Service Center (and not with the service center where the trust ordinarily would file its Form 1041).

(E) If a trust forms part of a qualified stock bonus, pension, or profit sharing plan, the election provided by this paragraph (f) must be made by attaching the statement to the plan's annual return required under section 6058 (information return) for the first plan year beginning after December 31, 1996, or to the plan's information return for the first plan year beginning after December 31, 1997. The statement must be attached to the plan's information return that is filed no later than the due date for filing the plan's information return for the first plan year beginning after December 31, 1997, plus extensions. The election will be effective for the first plan year beginning after December 31, 1996, and thereafter, until revoked or terminated.

(F) Any other type of trust that is not required to file a Form 1041 for the taxable year, but that is required to file an information return (for example, Form 5227) for the 1997 or 1998 taxable year must attach the statement to the trust's information return for the 1997 or 1998 taxable year. However, the statement must be attached to an information return that is filed no later than the due date for filing the trust's information return for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(G) A group trust described in Rev. Rul. 81–100 consisting of trusts that are parts of qualified retirement plans and individual retirement accounts (and any other trust that is not described above and that is not required to file a Form 1041 or an information return) need not attach the statement to any return and should file the statement

with the Philadelphia Service Center. The trust must make the election provided by this paragraph (f) by filing the statement by October 15, 1999. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(iii) *Failure to file the statement in the required manner and time.* If a trust fails to file the statement in the manner or time provided in paragraphs (f)(3)(i) and (ii) of this section, the trustee may provide a written statement to the district director having jurisdiction over the trust setting forth the reasons for failing to file the statement in the required manner or time. If the district director determines that the failure to file the statement in the required manner or time was due to reasonable cause, the district director may grant the trust an extension of time to file the statement. Whether an extension of time is granted shall be in the sole discretion of the district director. However, the relief provided by this paragraph (f)(3)(iii) is not ordinarily available if the statute of limitations for the trust's 1997 taxable year has expired. Additionally, if the district director grants an extension of time, it may contain terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries.

(4) *Revocation or termination of the election*—(i) *Revocation of election.* The election provided by this paragraph (f) to be treated as a domestic trust may only be revoked with the consent of the Commissioner. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(ii) *Termination of the election.* An election under this paragraph (f) to remain a domestic trust terminates if changes are made to the trust subsequent to the effective date of the election that result in the trust no longer having any reasonable basis (within the meaning of section 6662) for being treated as a domestic trust under section 7701(a)(30) prior to its amendment by the SBJP Act. The termination of the election will result in the trust changing its residency from a domestic trust to a foreign trust on the effective date of the termination of the election. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(5) *Effective date.* This paragraph (f) is applicable beginning on February 2, 1999.

[T.D. 8813, 64 FR 4970, Feb. 2, 1999, as amended by T.D. 8962, 66 FR 41779, Aug. 9, 2001]

### § 301.7701–8 Military or naval forces and Armed Forces of the United States.

The term ''military or naval forces of the United States'' and the term ''Armed Forces of the United States'' each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force. The terms also include the Coast Guard. The members of such forces include commissioned officers and the personnel below the grade of commissioned officer in such forces.

### § 301.7701–9 Secretary or his delegate.

(a) The term *Secretary or his delegate* means the Secretary of the Treasury, or any officer, employee, or agency of the Treasury Department duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform the function mentioned or described in the context, and the term ''or his delegate'' when used in connection with any other official of the United States shall be similarly construed.

(b) In any case in which a function is vested by the Internal Revenue Code of 1954 or any other statute in the Secretary or his delegate, and Treasury regulations or Treasury decisions approved by the Secretary or his delegate provide that such function may be performed by the Commissioner, assistant commissioner, regional commissioner, assistant regional commissioner, district director, director of a regional service center, or by a designated officer or employee in the office of any such officer, such provision in the regulations or Treasury decision shall constitute a delegation by the Secretary of

the authority to perform such function to the designated officer or employee. If such authority is delegated to any officer or employee performing services under the supervision and control of the Commissioner, such provision in the regulations or Treasury decision shall constitute a delegation by the Secretary to the Commissioner of the authority to perform such function and a redelegation thereof by the Commissioner to the designated officer or employee.

(c) An officer or employee, including the Commissioner, authorized by regulations or Treasury decision to perform a function shall have authority to redelegate the performance of such function to any officer or employee performing services under his supervision and control, unless such power to so redelegate is prohibited or restricted by proper order or directive. The Commissioner may also redelegate authority to perform such function to other officers or employees under his supervision and control and, to the extent he deems proper, may authorize further redelegation of such authority.

(d) The Commissioner may prescribe such limitations as he deems proper on the extent to which any officer or employee under his supervision and control shall perform any such function, but, in the case of an officer or employee designated in regulations or Treasury decision as authorized to perform such function, such limitations shall not render invalid any performance by such officer or employee of the function which, except for such limitations, such officer or employee is authorized to perform by such regulations or Treasury decision in effect at the time the function is performed.

### § 301.7701–10 District director.

The term *district director* means the district director of internal revenue for an internal revenue district. The term also includes the Assistant Commissioner (International).

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

### § 301.7701–11 Social security number.

For purposes of this chapter, the term *social security number* means the taxpayer identifying number of an individual or estate which is assigned pursuant to section 6011(b) or corresponding provisions of prior law, or pursuant to section 6109, and in which nine digits are separated by hyphens as follows: 000-00-0000. Such term does not include a number with a letter as a suffix which is used to identify an auxiliary beneficiary under the social security program. The terms ''account number'' and ''social security number'' refer to the same number.

[T.D. 7306, 39 FR 9947, Mar. 15, 1974]

### § 301.7701–12 Employer identification number.

For purposes of this chapter, the term *employer identification number* means the taxpayer identifying number of an individual or other person (whether or not an employer) which is assigned pursuant to section 6011 (b) or corresponding provisions of prior law, or pursuant to section 6109, and in which nine digits are separated by a hyphen, as follows: 00–0000000. The terms ''employer identification number'' and ''identification number'' (defined in § 31.0–2(a)(11) of this chapter (Employment Tax Regulations)) refer to the same number.

[T.D. 7306, 39 FR 9947, Mar. 15, 1974]

### § 301.7701–13 Pre-1970 domestic building and loan association.

(a) *In general*. For taxable years beginning after October 16, 1962, and before July 12, 1969, the term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, a Federal savings and loan association, and any other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law which meets supervisory test (described in paragraph (b) of this section), the business operations test (described in paragraph (c) of this section), and each of the various assets tests (described in paragraphs (d), (e), (f), and (h) of this section). For the definition of the term ''domestic building and loan association'', for taxable years beginning after July 11, 1969, see § 301.7701–13A.

(b) *Supervisory test*. A domestic building and loan association must be either

(1) an insured institution within the meaning of section 401(a) of the National Housing Act (12 U.S.C. 1724 (a)) or (2) subject by law to supervision and examination by State or Federal authority having supervision over such associations. An ''insured institution'' is one the accounts of which are insured by the Federal Savings and Loan Insurance Corporation.

(c) *Business operations test*—(1) *In general.* An association must utilize its assets so that substantially all of its business consists of acquiring the savings of the public and investing in the loans described in subparagraphs (6) through (10) of paragraph (d) of this section. The requirement of this paragraph is referred to in this section as the business operations test. The business of acquiring the savings of the public and investing in the prescribed loans includes ancillary or incidental activities which are directly and primarily related to such acquisition and investment, such as advertising for savings, appraising property on which loans are to be made by the association, and inspecting the progress of construction in connection with construction loans. Even though an association meets the supervisory test in paragraph (b) and all the assets tests described in paragraphs (d) through (h) of this section, it will nevertheless not qualify as a domestic building and loan association if any substantial part of its business consists of activities which are not directly and primarily related to such acquisition and investment, such as brokering mortgage paper, selling insurance, or subdividing real estate. However, an association will meet the business operations test for a taxable year if it meets the requirements of both subparagraphs (2) and (3) of this paragraph (c), relating respectively to acquiring the savings of the public, and investing in loans.

(2) *Acquiring the savings of the public.* The requirement that substantially all of an association's business (other than investing in loans) must consist of acquiring the savings of the public ordinarily will be considered to be met if savings are acquired in all material respects in conformity with the rules and regulations of the Federal Home Loan Bank Board or substantially equivalent rules of a State law or supervisory authority. In addition, such requirement will be considered to be met if more than 85 percent of the dollar amount of the total deposits and withdrawable shares of the association are held during the taxable year by the general public as opposed to amounts deposited by family or related business groups or persons who are officers or directors of the association. The percentage specified in this subparagraph shall be computed as of the close of the taxable year, or at the option of the taxpayer, on the basis of the average of the amounts of deposits held during the year. Such average shall be determined by computing the percentage specified either as of the close of each month, as of the close of each quarter, or semiannually during the taxable year and by using the yearly average of the monthly, quarterly, or semiannual percentages obtained.

(3) *Investing in loans*—(i) *In general.* The requirement that substantially all of an association's business (other than acquiring the savings of the public) must consist of investing in the loans described in subparagraphs (6) through (10) of paragraph (d) of this section ordinarily will be considered to be met for a taxable year if the association meets both the gross income test described in subdivision (ii) of this subparagraph, and the sales activity test described in subdivision (iii) of this subparagraph. However, if an association does not meet the requirements of both subdivisions (ii) and (iii) of this subparagraph, it will nevertheless meet the investing in loans requirement if it is able to demonstrate that substantially all its business (other than acquiring the savings of the public) consisted of investing in the prescribed loans. Transactions which are necessitated by exceptional circumstances and which are not undertaken as recurring business activities for profit will not be considered a substantial part of an association's business. Thus, for example, an association would meet the investing in loans requirement if it can establish that it failed to meet the gross income test because of receipt of a non-recurring item of income due to exceptional circumstances, or it failed to meet the sales activity test because

of sales made to achieve necessary liquidity to meet abnormal withdrawals from savings accounts. For the purposes of this subparagraph, however, the acquisition of loans in anticipation of their sale to other financial institutions does not constitute ''investing'' in loans, even though such acquisition and sale resulted from an excess of demand for loans over savings capital in the association's area.

(ii) *Gross income test*. The gross income test is met if more than 85 percent of the gross income of an association consists of:

(*a*) Interest or dividends on assets defined in subparagraph (2), (3), or (4) of paragraph (d) of this section,

(*b*) Interest on loans defined in subparagraphs (6) through (10) of paragraph (d) of this section,

(*c*) Income attributable to the portion of property used in the association's business as defined in paragraph (d)(5) of this section,

(*d*) Premiums, discounts, commissions, or fees (including late charges and penalties) on loans defined in subparagraphs (6) through (10) of paragraph (d) of this section which have at some time been held by the association, or for which firm commitments have been issued,

(*e*) Gain or loss on the sale of governmental obligations defined in paragraph (d)(3) of this section, or

(*f*) Income, gain, or loss attributable to foreclosed property (as defined in paragraph (j)(1) of this section), but not including such income, gain, or loss which, pursuant to section 595 and the regulations thereunder, is not included in gross income.

For the purposes of this subparagraph, gross income shall be computed without regard to gains or losses on the sale of the portion of property used in the association's business (described in paragraph (d)(5) of this section), without regard to gains or losses on the rented portion of property used as the principal or branch office of the association (described in such paragraph), and without regard to gains or losses on the sale of participations and loans (other than governmental obligations defined in paragraph (d)(3) of this section). Examples of types of income which would cause an association to fail to meet the gross income test, if in the aggregate they exceed 15 percent of gross income, are the excess of gains over losses on sale of real estate (other than foreclosed property); rental income (other than on foreclosed property and the portion of property used in the association's business); premiums, commissions, and fees (other than commitment fees) on loans which have never been held by the association; and insurance brokerage fees.

(iii) *Sales activity test: in general*. The sales activity test is met for a taxable year if the association meets both the sales of whole loans test described in subdivision (iv) of this subparagraph, and the sales of whole loans and participations test described in subdivision (v) of this subparagraph. For the purposes of this subdivision and subdivisions (iv), (v), and (vi) of this subparagraph:

(*a*) The term *loan* means loan as defined in paragraph (j)(1) of this section, other than foreclosed property defined in such paragraph and governmental obligations defined in paragraph (d)(3) of this section.

(*b*) The amount of a loan shall be determined in accordance with the rules contained in paragraph (l) (1) and (2)(ii) of this section.

(*c*) The term *loans acquired for investment during the taxable year* means the amount of loans outstanding as of the close of the taxable year, reduced (but not below zero) by the amount of loans outstanding as of the beginning of such year, and increased by the lesser of (*1*) the amount of repayments made on loans during the taxable year or (*2*) an amount equal to 20 percent of the amount of loans outstanding as of the beginning of the taxable year. For this purpose, repayments do not include repayments on loans to the extent such loans are refinanced by the association.

(*d*) The term *sales of participations* means sales by an association of interests in loans, which sales meet the requirements of the regulations of the Federal Home Loan Bank Board relating to sales of participations, or which meet substantially equivalent requirements of State law or regulations relating to sales of participations.

(*e*) The term *sales of whole loans* means sales of loans other than sales of

participations as defined in subdivision (*d*) of this subdivision, but in determining the amount of sales of whole loans, the following sales shall be disregarded: Sales of loans made to other financial institutions pursuant to an arrangement whereunder the association simultaneously enters in a bona fide agreement to repurchase such loans within a period of 18 months from the time of sale if such arrangement conforms to the rules and regulations of applicable supervisory authorities; sales made to the Federal Savings and Loan Insurance Corporation or to a corporation defined in paragraph (d)(4) of this section (relating to deposit insurance company securities); and sales made in the course of liquidation of the association pursuant to Federal or State law.

(iv) *Sales of whole loans test*. The sales of whole loans test is met for a taxable year if the amount of sales of whole loans during the taxable year does not exceed the greater of (*a*) 15 percent of the amount of loans acquired for investment during the taxable year, or (*b*) 20 percent of the amount of loans outstanding at the beginning of the taxable year. However, the 20 percent of beginning loans limitation specified in subdivision (*b*) of the previous sentence shall be reduced by the number of percentage points (rounded to the nearest one hundredth of a percentage point) which is equal to the sum of the 2 percentages obtained by dividing, for each of the 2 preceding taxable years, the amount of sales of whole loans during each such taxable year by the amount of loans outstanding at the beginning of such taxable year. For example, if the amounts of sales of whole loans made by a calendar year association in 1965 and 1966 were 3 percent and 4 percent, respectively, of loans outstanding at the beginning of each such year, the amount of sales of whole loans allowed under such subdivision (*b*) for 1967 would be an amount equal to 13 percent (20 percent minus 7 percentage points) of loans outstanding at the beginning of 1967. In computing the reduction to the 20 percent of beginning loans limitation specified in such subdivision (*b*), sales of whole loans made before January 1, 1964, shall not be taken into account.

(v) *Sales of whole loans and participations test*. The sales of whole loans and participations test is met if the sum of the amount of sales of whole loans and the amount of sales of participations during the taxable year does not exceed 100 percent of the amount of loans acquired for investment during the taxable year.

(vi) *Sales activity tests: special rules*—(*a*) *Carryover of sales*. The amount specified in subdivision (iv)(a) of this subparagraph as the maximum amount of sales of whole loans shall be increased by the amount by which 15 percent of the amount of loans acquired for investment by the association during the 2 preceding taxable years exceeds the amount of sales of whole loans made during such preceding taxable years; and the amount specified in subdivision (v) of this subparagraph as the maximum amount of sales of whole loans and participations shall be increased by the amount by which the amount of loans acquired for investment by the association during the 2 preceding taxable years exceeds the sum of the amount of sales of whole loans and participations made during such preceding taxable years. For example, if 15 percent of the amount of loans acquired for investment in 1965 and 1966 exceeded the amount of sales of whole loans during such years by $250,000, the amount of sales of whole loans permitted in 1967 under subdivision (iv)(*a*) of this subparagraph would be increased by $250,000.

(*b*) *Use of preceding year's base*. If the amount of loans acquired for investment by the association during the preceding taxable year exceeds such amount for the current taxable year, the 15 percent limitation provided in subdivision (iv)(*a*) of this subparagraph and the 100 percent limitation provided in subdivision (v) of this subparagraph shall be based upon such preceding taxable year's amount. However, the maximum amount of sales of whole loans permitted under subdivision (iv)(*a*) and the maximum amount of sales of whole loans and participations permitted under subdivision (v) in any taxable year shall be reduced by the amount of the increase in such sales allowed for the preceding taxable year solely by

reason of the application of the provisions of the previous sentence. For example, assuming no carryover of sales under subdivision (*a*) of this subdivision, if the amount of loans acquired for investment by a calendar year association was $1,000,000 in 1965, under subdivision (iv)(*a*) of this subparagraph the association could make sales of whole loans in 1966 of $150,000 (15 percent of $1,000,000) even though the amount of its loans acquired for investment during 1966 was only $800,000. However, the amount of sales of whole loans permitted in 1967 under subdivision (iv)(*a*) of this subparagraph would be reduced to the extent that the amount of the sales of whole loans made by the association during 1966 exceeded $120,000 (15 percent of $800,000).

(vii) *Examples illustrating sales activity test.* The provisions of subdivisions (iii) through (vi) of this subparagraph may be illustrated by the following examples in each of which it is assumed that the association is a calendar year taxpayer which is operated in all material respects in conformity with applicable rules and regulations of Federal or State supervisory authorities.

*Example 1.* X Association made sales of whole loans in 1964 and 1965 which were 10 percent and 7 percent, respectively, of the amounts of loans outstanding at the beginning of each such year, and which were 25 percent and 17 percent, respectively, of the amounts of loans acquired for investment in each such year. The amount of X's loans outstanding at the beginning of 1966 was $1 million, and the amount of its loans acquired for investment for such year was $300,000. The maximum amount of sales of whole loans which X may make under the percentage of beginning loans limitation for 1966 is $30,000, which is 3 percent (20 percent reduced by the sum of 10 percent and 7 percent) of $1 million. The maximum amount of sales of whole loans permitted under the percentage of loans acquired for investment limitation for 1966 is $45,000 (15 percent of $300,000). X may therefore sell whole loans in an amount up to $45,000 in 1966 and meet the sales of whole loans test. It is assumed that the amount of loans acquired for investment in 1965 did not exceed $300,000, so that the preceding year's base cannot be used to increase the amount of sales permitted in 1966.

*Example 2.* Assume the same facts as in the previous example, except that the amount of loans acquired for investment in the preceding year (1965) was $320,000. Since such amount is greater than the $300,000 amount of loans acquired for investment in 1966, X may base its 15 percent limitation for 1966 on the $320,000 amount and sell whole loans in an amount up to $48,000 (15 percent of $320,000) and still meet the sales of whole loans test. However, to the extent that the amount of sales of whole loans exceeds $45,000 (15 percent of the $300,000 amount of loans acquired for investment in 1966), the maximum amount of sales computed under the percentage of loans acquired for investment limitation (but not the 20 percent of beginning loans limitation) for 1967 must be reduced.

*Example 3.* Y Association made no sales of whole loans in 1964 and 1965, and made sales of participations in the 2 years in amounts which, in the aggregate, were $50,000 less than the amounts of loans acquired for investment for such years. At the beginning of 1966 the amount of Y's loans outstanding was $1 million, and the amount of its loans acquired for investment in such year was $100,000. Although the maximum amount of sales of whole loans which Y could make under the sales of whole loans test is $200,000 (20 percent of $1 million), nevertheless, in order to meet the sales of whole loans and participations test, the sum of the amounts of sales of whole loans and sales of participations may not exceed $150,000 (100 percent of the $100,000 amount of loans acquired for investment in 1966 plus a carryover of sales from the previous two years of $50,000). It is assumed that the amount of loans acquired for investment in 1965 did not exceed $100,000, so that the preceding year's base cannot be used to increase the amount of sales permitted in 1966.

(viii) *Reporting requirements.* In the case of income tax returns for taxable years ending after October 31, 1964, there shall be filed with the return a statement showing the amount of gross income for the taxable year in each of the categories described in subdivision (ii) of this subparagraph; and, for the taxable year and the two preceding taxable years, the amount of loans (described in subdivision (iii)(*a*) of this subparagraph) outstanding at the beginning of the year and at the end of the year, the amount of repayments on loans (not including repayments on loans to the extent such loans are refinanced by the association), the amount of sales of whole loans, and the amount of sales of participations.

(4) *Effective date.* The provisions of subparagraphs (1) through (3) of this paragraph (c), are applicable to taxable years ending after October 31, 1964. However, at the option of the taxpayer,

for a taxable year beginning before November 1, 1964, and ending after October 31, 1964, the provisions of subparagraphs (1) through (3) of this paragraph (except the 20 percent of beginning loans limitation specified in subdivision (iv)(*b*) of subparagraph (3) of this paragraph (c)) shall apply only to the part year falling after October 31, 1964, as if such part year constituted a taxable year. In such case, the following rules shall apply:

(i) The amount of the ''loans acquired for investment'' for such part year shall be equal to the loans acquired for investment during the entire taxable year within which falls such part year, multiplied by a fraction the numerator of which is the number of days in such part year and the denominator of which is the number of days in such entire taxable year.

(ii) The increase in sales of whole loans and participations permitted by subdivision (vi) of subparagraph (3) of this paragraph (c), (relating to carryover of sales and use of preceding year's base) shall be the amount of such increase computed under such subdivision, multiplied by the fraction specified in subdivision (i) of this subparagraph.

If, treating the part year as a taxable year, the association meets all the requirements of this paragraph for such part year it will be considered to have met the business operations test for the entire taxable year, providing it operated in all material respects in conformity with applicable rules and regulations of Federal or State supervisory authorities for the entire taxable year. The 20 percent of beginning loans limitation specified in subdivision (iv)(*b*) of subparagraph (3) of this paragraph (c), shall be applied only on the basis of a taxable year and not the part year. For taxable years beginning after October 16, 1962, and ending before November 1, 1964, an association will be considered to have met the business operations test if it operated in all material respects in conformity with applicable rules and regulations of Federal or State supervisory authorities.

(d) *90 percent of assets test*—(1) *In general.* At least 90 percent of the amount of the total assets of a domestic building and loan association must consist of the assets defined in subparagraphs (2) through (10) of this paragraph (d). For purposes of this paragraph, it is immaterial whether the association originated the loans defined in subparagraphs (6) through (10) of this paragraph (d), or purchased or otherwise acquired them in whole or in part from another. See paragraph (j) of this section for definition of certain terms used in this paragraph, and paragraph (k) of this section for the determination of amount and character of loans.

(2) *Cash.* The term ''cash'' means cash on hand, and time or demand deposits with, or withdrawable accounts in, other financial institutions.

(3) *Governmental obligations.* The term ''governmental obligations'' means obligations of the United States, a State or political subdivision of a State, and stock or obligations of a corporation which is an instrumentality of the United States, a State, or political subdivision of a State.

(4) *Deposit insurance company securities.* The term ''deposit insurance company securities'' means certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations.

(5) *Property used in the association's business*—(i) *In general.* The term ''property used in the association's business'' means land, buildings, furniture, fixtures, equipment, leasehold interests, leasehold improvements, and other assets used by the association in the conduct of its business of acquiring the savings of the public and investing in the loans defined in subparagraphs (6) through (10) of this paragraph (d). Real property held for the purpose of being used primarily as the principal or branch office of the association constitutes property used in the association's business so long as it is reasonably anticipated that such property will be occupied for such use by the association, or that construction work preparatory to such occupancy will be commenced thereon, within 2 years after acquisition of the property. Stock of a wholly owned subsidiary corporation which has as its exclusive activity the ownership and management of

property more than 50 percent of the fair rental value of which is used as the principal or branch office of the association constitutes property used in such business. Real property held by an association for investment or sale, even for the purpose of obtaining mortgage loans thereon, does not constitute property used in the association's business.

(ii) *Property rented to others.* Except as provided in the second sentence of subdivision (i) of this subparagraph, property or a portion thereof rented by the association to others does not constitute property used in the association's business. However, if the fair rental value of the rented portion of a single piece of real property (including appurtenant parcels) used as the principal or branch office of the association constitutes less than 50 percent of the fair rental value of such piece of property, or if such property has an adjusted basis of not more than $150,000, the entire property shall be considered used in such business. If such rented portion constitutes 50 percent or more of the fair rental value of such piece of property, and such property has an adjusted basis of more than $150,000, an allocation of its adjusted basis is required. The portion of the total adjusted basis of such piece of property which is deemed to be property used in the association's business shall be equal to an amount which bears the same ratio to such total adjusted basis as the amount of the fair rental value of the portion used as the principal or branch office of the association bears to the total fair rental value of such property. In the case of all property other than real property used or to be used as the principal or branch office of the association, if the fair rental value of the rented portion thereof constitutes less than 15 percent of the fair rental value of such property, the entire property shall be considered used in the association's business. If such rented portion constitutes 15 percent or more of the fair rental value of such property, an allocation of its adjusted basis (in the same manner as required for real property used as the principal or branch office) is required.

(6) *Passbook loan.* The term ''passbook loan'' means a loan to the extent secured by a deposit, withdrawable share, or savings account in the association, or share of a member of the association, with respect to which a distribution is allowable as a deduction under section 591.

(7) *Home loan.* The term ''home loan'' means a loan secured by an interest in—

(i) Improved residential real property consisting of a structure or structures containing, in the aggregate, no more than 4 family units.

(ii) An individually owned family unit in a multiple-unit structure, the owner of which unit owns an undivided interest in the underlying real estate and the common elements of such structure (so-called condominium type).

Or a construction loan or improvement loan for such property. A construction loan made for the purpose of financing more than one structure (so-called tract financing) constitutes a home loan, providing no individual structure contains more than 4 family units and it is contemplated that, as soon as possible after completion of construction, the structures will become property described in subdivision (i) of this subparagraph. A construction loan secured by a structure containing more than 4 family units constitutes a home loan only if the structure has been committed to a plan of individual apartment ownership described in subdivision (ii) of this subparagraph and such plan is held out and advertised as such. A loan secured by a cooperative apartment building containing more than 4 family units does not constitute a home loan.

(8) *Church loan.* The term ''church loan'' means a loan secured by an interest in real property which is used primarily for church purposes, or a construction loan or improvement loan for such property. For the purposes of this subparagraph, the term ''church purposes'' means the ministration of sacerdotal functions, the conduct of religious worship and closely associated activities designed primarily to provide fellowship among members of the congregation, or the instruction of religion. Thus, a parish hall would normally qualify as property used primarily for church purposes, whereas a

building used primarily to furnish education, other than the instruction of religion, would not.

(9) *Multifamily loan.* The term ''multifamily loan'' means a loan, other than one defined in subparagraph (7) of this paragraph (d), (relating to a home loan), secured by an interest in improved residential real property or a construction loan or improvement loan for such property.

(10) *Nonresidential real property loan.* The term ''nonresidential real property loan'' means a loan, other than one defined in subparagraph (7), (8), or (9) of this paragraph (d), (relating respectively to a home loan, church loan, and multifamily loan) secured by an interest in real property, or a construction loan or improvement loan for such property.

(e) *18 percent of assets test.* Not more than 18 percent of the amount of the total assets of a domestic building and loan association may consist of assets other than those defined in subparagraphs (2) through (9) of paragraph (d) of this section. Thus, the sum of the amounts of the nonresidential real property loans and the assets other than those defined in paragraph (d) of this section may not exceed 18 percent of total assets.

(f) *36 or 41 percent of assets test*—(1) *36 percent test.* Unless subparagraph (2) of this paragraph (f), applies, not more than 36 percent of the amount of the total assets of a domestic building and loan association may consist of assets other than those defined in subparagraphs (2) through (8) of paragraph (d) of this section. Thus, unless subparagraph (2) of this paragraph (f), applies, the sum of the amounts of multifamily loans, nonresidential real property loans, and assets other than those defined in paragraph (d) of this section may not exceed 36 percent of total assets.

(2) *41 percent test.* If this subparagraph applies, not more than 41 percent of the amount of the total assets of a domestic building and loan association may consist of assets other than those defined in subparagraphs (2) through (8) of paragraph (d) of this section. Thus, if this subparagraph applies, the sum of the amounts of multifamily loans, nonresidential real property loans, and assets other than those defined in paragraph (d) of this section may not exceed 41 percent of total assets. See section 593(b)(5) and the regulations thereunder for the effect of application of this subparagraph on the allowable addition to the reserves for bad debts.

(g) *Taxable years for which 41 percent of assets test applies*—(1) *First taxable year.* For an association's first taxable year beginning after October 16, 1962, subparagraph (2) of paragraph (f) applies.

(2) *Second taxable year.* For an association's second taxable year beginning after October 16, 1962, subparagraph (2) of paragraph (f) applies if such association met all the requirements of paragraphs (b) through (e), (h), and either subparagraph (1) or (2) of paragraph (f) for its first taxable year.

(3) *Years other than first and second taxable years.* For any taxable year of an association beginning after October 16, 1962, other than its first and second taxable years beginning after such date, subparagraph (2) of paragraph (f) applies if such association met either—

(i) The requirements of paragraphs (b) through (e), (f)(1), and (h) of this section for the immediately preceding taxable year, or

(ii) The requirements of paragraphs (b) through (e), (f)(2), and (h) of this section for the immediately preceding taxable year, and the requirements of paragraphs (b) through (e), (f)(1), and (h) of this section for the second preceding taxable year.

Thus, in years other than its first and second taxable years beginning after October 16, 1962, an association may apply the 41 percent of assets test for 2 consecutive years, but only if it met the 36 percent test (and all other tests) for the year previous to the 2 consecutive years.

(4) *Examples.* The provisions of paragraph (f) and this paragraph may be illustrated by the following examples in each of which it is assumed that the association at all times meets all the requirements of paragraphs (b) through (e) and (h) of this section and files its returns on a calendar year basis.

*Example 1.* An association has 41 percent of its assets invested in assets other than those defined in subparagraphs (2) through (8) of paragraph (d) of this section as of the close

of 1963 and 1964. Because 1963 is its first taxable year beginning after October 16, 1962, the 41 percent of assets test applies, and the association therefore qualifies as a domestic building and loan association for 1963. Because 1964 is its second taxable year beginning after such date and the 41 percent of assets test applied for its first taxable year, the 41 percent of assets test applies for 1964 and it therefor qualifies for such year.

*Example 2.* An association has 36 percent of its assets invested in assets other than those defined in subparagraphs (2) through (8) of paragraph (d) of this section as of the close of 1964, and 41 percent as of the close of 1965, 1966, and 1967. The association qualifies in 1965 because, as a result of having met the 36 percent of assets test for the immediately preceding taxable year (1964), the 41 percent of assets test applies to 1965. It qualifies in 1966 because as a result of having met the 41 percent of assets test in the immediately preceding taxable year (1965) and the 36 percent of assets test in the second preceding taxable year (1964), the 41 percent of assets test applies to 1966. The association would not qualify in 1967, however, because, although it met the 41 percent of assets test for the immediately preceding taxable year (1966), it did not meet the 36 percent of assets test in the second preceding taxable year (1965), and therefore the 41 percent of assets test does not apply to 1967.

*Example 3.* An association has more than 41 percent of its assets invested in assets other than those defined in subparagraphs (2) through (8) of paragraph (d) of this section as of the close of 1963, and 41 percent invested in such assets as of the close of 1964. The association does not qualify in either year. It does not qualify in 1963 because it exceeded the 41 percent limitation, and it does not qualify in 1964 because the 41 percent of assets test does not apply to 1964 since the association did not meet either the 41 percent of assets test or the 36 percent of assets test in the prior year (1963).

(h) *3 percent of assets test.* Not more than 3 percent of the amount of the total assets of a domestic building and loan association may consist of stock of any corporation, unless such stock is property which is defined in paragraph (d) of this section. The stock which constitutes property defined in such paragraph (d) is:

(1) Stock representing a withdrawable account in another financial institution;

(2) Stock of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof;

(3) Stock which was security for a loan and which, by reason of having been bid in at foreclosure or otherwise having been reduced to ownership or possession of the association, is a loan within the definition of such term in paragraph (j)(1) of this section; and

(4) Stock of a wholly owned subsidiary corporation which has as its exclusive activity the ownership and management of property more than 50 percent of the fair rental value of which is used as the principal or branch office of the association.

(i) [Reserved]

(j) *Definition of certain terms.* For purposes of this section—

(1) *Loan.* The term ''loan'' means debt, as the term ''debt'' is used in section 166 and the regulations thereunder. The term ''loan'' also includes a redeemable ground rent (as defined in section 1055(c)) which is owned by the taxpayer, and any property (referred to in this section as ''foreclosed property'') which was security for the payment of any indebtedness and which has been bid in at foreclosure, or otherwise been reduced to ownership or possession of the association by agreement or process of law, whether or not such property was acquired subsequent to December 31, 1962.

(2) *Secured.* A loan will be considered as ''secured'' only if the loan is on the security of any instrument (such as a mortgage, deed of trust, or land contract) which makes the interest of the debtor in the property described therein specific security for the payment of the loan, provided that such instrument is of such a nature that, in the event of default, the interest of the debtor in such property could be subjected to the satisfaction of the loan with the same priority as a mortgage or deed of trust in the jurisdiction in which the property is situated.

(3) *Interest.* The word ''interest'' means an interest in real property which, under the law of the jurisdiction in which such property is situated, constitutes either (i) an interest in fee in such property, (ii) a leasehold interest in such property extending or renewable automatically for a period of at least 30 years, or at least 10 years beyond the date scheduled for the final

payment on a loan secured by an interest in such property, (iii) a leasehold interest in property described in paragraph (d)(7)(i) of this section (relating to certain home loans) extending for a period of at least 2 years beyond the date scheduled for the final payment on a loan secured by an interest in such property or (iv) a leasehold interest in such property held subject to a redeemable ground rent defined in section 1055(c).

(4) *Real property*. The term ''real property'' means any property which, under the law of the jurisdiction in which such property is situated, constitutes real property.

(5) *Improved real property*. The term ''improved real property'' means—

(i) Land on which is located any building of a permanent nature (such as a house, apartment house, office building, hospital, shopping center, warehouse, garage, or other similar permanent structure), provided that the value of such building is substantial in relation to the value of such land;

(ii) Any building lot or site which, by reason of installations and improvements that have been completed in keeping with applicable governmental requirements and with general practice in the community, is a building lot or site ready for the construction of any building of a permanent nature within the meaning of subdivision (i) of this subparagraph; or

(iii) Real property which, because of its state of improvement, produces sufficient income to maintain such real property and retire the loan in accordance with the terms thereof.

(6) *Construction loan*. The term ''construction loan'' means a loan, the proceeds of which are to be disbursed to the borrower (either by the association or a third party) as construction work progresses on real property which is security for the loan, which property is, or from the proceeds of such loan will become, improved real property.

(7) *Improvement loan*. The term ''improvement loan'' means a loan which, by its terms and conditions, requires that the proceeds of the loan be used for altering, repairing, or improving real property. If more than 85 percent of the proceeds of a single loan are to be used for such purposes, the entire loan will qualify. If 85 percent or less of the proceeds of a loan are to be used for such purposes, an allocation of its adjusted basis is required. Examples of loans which constitute improvement loans are loans made for the purpose of painting a house, adding a new room to a house, remodeling the lobby of an apartment building, and purchasing and installing storm windows, storm doors, and awnings. Examples of loans which do not constitute improvement loans are loans made for the purpose of purchasing draperies, and removable appliances, such as refrigerators, ranges, and washing machines. It is not necessary that a loan be secured by the real property which is altered, repaired, or improved.

(8) *Residential real property*. The term ''residential real property'' means real property which consists of one or more family units. A family unit is a building or portion thereof which contains complete living facilities which are to be used on other than a transient basis by only one family consisting of one or more persons. Thus, an apartment which is to be used on other than a transient basis by one family, which contains complete facilities for living, sleeping, eating, cooking, and sanitation constitutes a family unit. Hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, sanitariums, rest homes, and parks and courts for mobile homes do not normally constitute residential real property.

(k) *Amount and character of loans*—(1) *Treatment at time of determination*—(i) *In general*. The amount of a loan, as of the time the determination required by subparagraph (3) of this paragraph (k), is made, shall be treated for the purposes of this section as being secured:

(*a*) First by the portion of property, if any, defined in subparagraph (6), (7), or (8) of paragraph (d) of this section to the extent of the loan value thereof;

(*b*) Next by the portion of property, if any, defined in subparagraph (9) of paragraph (d) of this section to the extent of the loan value thereof; and

(*c*) Next by the portion of property, if any, defined in subparagraph (10) of paragraph (d) of this section to the extent of the loan value thereof.

To the extent that the amount of a loan exceeds the amount treated as being secured by property defined in subparagraphs (6) through (10) of paragraph (d) of this section, such loan shall be treated as property not defined in paragraph (d) of this section. If the loan value of any one category of property defined in paragraph (d) of this section exceeds 85 percent of the amount of the loan for which it is security then the entire loan shall be treated as a loan secured by such property.

(ii) *Loans of $40,000 or less.* Notwithstanding the provisions of subdivision (i) of this subparagraph, in the case of loans amounting to $40,000 or less as of the time of a determination, made on the security of property which is a combination of two or more categories or property defined in subparagraph (6) through (10) of paragraph (d) of this section, all such loans for any taxable year may, at the option of the association, be treated for the purposes of this section as being secured by the category of property the loan value of which constitutes the largest percentage of the total loan value of the property except to the extent that the loan is treated as property not defined in paragraph (d) of this section.

(iii) *Home loans of $20,000 or less.* Notwithstanding the provisions of subdivisions (i) and (ii) of this subparagraph, if a loan amounting to $20,000 or less as of the time of a determination, is secured partly by property of a category described in subparagraph (7) of paragraph (d) of this section (relating to a home loan), the amount of the loan shall, for the purposes of this section, be treated as a loan described in such subparagraph except to the extent that the loan is treated as property not defined in paragraph (d) of this section.

(2) *Treatment subsequent to time of determination.* The amount of a loan outstanding as of any time subsequent to the time of a determination shall be treated, for the purposes of this section, as being secured by each of the categories of property in the same ratio that the amount which was treated as being secured by each category bore to the total amount of the loan at the time as of which the determination was last made with respect to such loan.

(3) *Time of determination*—(i) *In general.* The determination of the amount of a loan which is treated as being secured by each of the categories of property shall be made:

(*a*) As of the time a loan is made;

(*b*) As of the time a loan is increased;

(*c*) As of the time any portion of the property which was security for the loan is released; and

(*d*) As of any time required by applicable Federal or State regulatory authorities for reappraisal or reanalysis of such loans.

(ii) *Special rule.* In the case of loans outstanding with respect to which no event described in subdivision (i) of this subparagraph has occurred in a taxable year beginning on or after October 17, 1962, the determination of the amounts of such loans which are treated as being secured by each of the categories of property may be made, at the option of the association, as of the close of the first taxable year beginning on or after such date, providing the determinations with respect to all such loans are made as of such date.

(4) *Loan value.* The loan value of property which is security for a loan is the maximum amount at the time as of which the determination is made which the association is permitted to lend on such property under the rules and regulations of applicable Federal and State regulatory authorities. Such loan value shall not exceed the fair market value of such property at such time as determined under such rules and regulations. However, in the case of loans made incidentally with and as a part of a bona fide salvage operation, the loan value of the security property shall be considered to be the face amount of the loan where the loan can be shown by the association to have been made for the primary purpose of recovering the investment of the association, and where such salvage operation is in conformity with rules and regulations of applicable Federal or State regulatory authorities.

(5) *Examples.* The following examples, in each of which it is assumed that X Savings and Loan Association files its return on a calendar year basis, illustrate the application of the rules in this paragraph:

*Example 1.* On July 1, 1963, X makes a single loan of $1 million to M Corporation which loan is secured by real property which is a combination of homes, apartments, and stores. As of the time the loan is made X determines that the loan values of the categories of property are as follows:

| Category of property | Loan value |
|---|---|
| Home | $400,000 |
| Multifamily | 420,000 |
| Nonresidential real property | 240,000 |
| Total | 1,060,000 |

As of the time the loan is made, therefore, the $1,000,000 loan is treated under subparagraph (1)(i) of this paragraph as being secured as follows:

| Category of loan | Amount of loan | Percentage of total |
|---|---|---|
| Home loan | $400,000 | 40 |
| Multifamily loan | 420,000 | 42 |
| Nonresidential real property loan | 180,000 | 18 |
| Total | 1,000,000 | 100 |

Assuming that the $1 million loan to M was reduced to $900,000 as of the close of 1963, that there were no increases in the amount of the loan and no releases of property which was security for the loan, and that there was no regulatory requirement to reappraise or reanalyze the loan, such loan will be considered under subparagraph (2) of this paragraph to be secured, as of the close of 1963, as follows:

| Category | Percentage as of last determination July 1, 1963 | Amount as of Dec. 31, 1963 | |
|---|---|---|---|
| Home | 40 | $360,000 | (40%×$900,000) |
| Multifamily | 42 | 378,000 | (42%×$900,000) |
| Nonresidential real property | 18 | 162,000 | (18%×$900,000) |
| Total | | 900,000 | |

*Example 2.* X makes a loan of $40,000 secured by a building which contains a store on the first floor and four family units on the upper floors. The loan value of the part of the building used as a store is $21,000 and the loan value of the residential portion is $23,000. The loan will be treated under subdivision (i) of subparagraph (1) of this paragraph as a loan secured by residential real property containing four or fewer family units to the extent of $23,000, and by nonresidential property to the extent of $17,000, as of the time the loan is made. However, if X exercises the option to treat all loans of $40,000 or less in accordance with subdivision (ii) of subparagraph (1) of this paragraph, this loan would be treated as a home loan to the extent of the full $40,000 because the loan value of the residential portion is larger than the loan value of the nonresidential part.

(l) *Computation of percentages*—(1) *In general.* The percentages specified in paragraphs (d) through (h) of this section shall, except as provided in subparagraph (3) of this paragraph (l), be computed by comparing the amount of the assets described in each paragraph as of the close of the taxable year with the total amount of assets as of the close of the taxable year. The amount of the assets in any category and the total amount of assets shall be determined with reference to their adjusted basis under § 1.1011–1, or by such other method as is in accordance with sound accounting principles, provided such method is used in valuing all the assets in a taxable year.

(2) *Treatment of certain assets and reserves.* For purposes of this paragraph (l):

(i) Reserves for bad debts established pursuant to section 593, or corresponding provisions of prior law, and the regulations thereunder shall not constitute a reduction of total assets, but shall be treated as a surplus or net worth item.

(ii) The adjusted basis of a ''loan in process'' does not include the unadvanced portion of such loan.

(iii) Advances made by the association for taxes, insurance, etc., on loans shall be treated as being in the same category as the loan with respect to which the advances are made (irrespective of whether the advances are secured by the property securing the loan).

(iv) Interest receivable included in gross income shall be treated as being in the same category as the loan or asset with respect to which it is earned.

(v) The unamortized portion of premiums paid on mortgage loans acquired by the association shall be considered part of the acquisition cost of such loans.

(vi) Prepaid Federal Savings and Loan Insurance Corporation premiums shall be treated as being governmental obligations defined in paragraph (d)(3) of this section.

(vii) Accounts receivable (other than accrued interest receivable), and prepaid expenses and deferred charges other than those referred to in subdivision (v) or (vi) of this subparagraph, shall be disregarded both as separate categories and in the computation of total assets.

(viii) Foreclosed property (as defined in paragraph (j)(1) of this section) shall be treated as having the same character as the loan for which it was given as security.

(3) *Alternative method*. At the option of the taxpayer, the percentages specified in paragraphs (d) through (h) of this section may be computed on the basis of the average assets outstanding during the taxable year. Such average shall be determined by making the computation provided in subparagraph (1) of this paragraph (l), either as of the close of each month, as of the close of each quarter, or semiannually during the taxable year and by using the yearly average of the monthly, quarterly, or semiannual percentages obtained for each category. The method selected must be applied uniformly for the taxable year to all categories of assets, but the method may be changed from year to year.

(4) *Acquisition of certain assets*. For the purpose of the annual computation of percentages under subparagraph (1) of this paragraph (l)—

(i) Assets which, within a 60-day period beginning in one taxable year of the taxpayer and ending in the next year, are acquired directly or indirectly through borrowing and then repaid or disposed of within such period, shall be considered assets other than those defined in paragraph (d) of this section, unless both the acquisition and disposition are established to the satisfaction of the district director to have been for bona fide purposes; and

(ii) The amount of cash shall not include amounts received directly or indirectly from another financial institution (other than a Federal Home Loan Bank or a similar institution organized under State law) to the extent of the amount of cash which an association has on deposit or holds as a withdrawable account in such other financial institution.

(5) *Reporting requirements*. In the case of income tax returns for taxable years ending after October 31, 1964, there shall be filed with the return a statement showing the amount of assets as of the close of the taxable year in each of the categories defined in paragraph (d), and in the category described in paragraph (h) of this section, and a brief description and amount of all other assets. If the alternative method of computing percentages under subparagraph (3) of this paragraph (l) is selected, such statement shall show such information as of the end of each month, each quarter, or semiannually and the manner of calculating the averages. With respect to taxable years beginning after October 16, 1962, and ending before November 1, 1964, taxpayers shall maintain adequate records to establish to the satisfaction of the district director that it meets the various assets tests specified in this section.

(6) *Example*. The principles of this paragraph may be illustrated by the following example in which a description of the assets, the subparagraph of paragraph (d) in which the assets are defined, the amount of the assets, and the percentage of the total assets included in the calculation are set forth.

SAVINGS AND LOAN ASSOCIATION ASSETS AS OF DECEMBER 31, 1964

| Item | Described in paragraph (d), subparagraph | Amount | Percentage |
|---|---|---|---|
| 1. Cash | (2) | $1,000,000 | 1 |
| 2. Governmental obligations [1] | (3) | 8,000,000 | 8 |
| 3. Deposit insurance company securities | (4) | 1,000,000 | 1 |

SAVINGS AND LOAN ASSOCIATION ASSETS AS OF DECEMBER 31, 1964—Continued

| Item | Described in paragraph (d), subparagraph | Amount | Percentage |
|---|---|---|---|
| Loans outstanding:[2] | | | |
| 4. Home | (7) | 59,000,000 | 59 |
| 5. Church | (8) | 1,000,000 | 1 |
| 6. Multifamily | (9) | 20,000,000 | 20 |
| 7. Nonresidential real property | (10) | 5,000,000 | 5 |
| 8. Passbook | (6) | 1,000,000 | 1 |
| 9. Other | | 2,000,000 | 2 |
| Fixed assets (less depreciation reserves): | | | |
| 10. Used in the association's business | (5) | 1,000,000 | 1 |
| 11. Rented to others | | 500,000 | .5 |
| 12. Land held for investment | | 500,000 | .5 |
| 13. Total assets included for purposes of this paragraph | | 100,000,000 | 100.0% |
| 14. Accounts receivable | | 100,000 | (disregarded) |
| 15. Prepaid expenses (other than prepaid FSLIC premiums) | | 1,000,000 | (disregarded) |
| 16. Deferred charges | | 1,000,000 | (disregarded) |
| 17. Total assets | | 102,100,000 | |

[1] Prepaid FSLIC premiums treated as governmental obligations.
[2] Not including unadvanced portion of loans in process, but including interest receivable and advances with respect to loans.

The computation of the percentages of assets in the various categories for the purpose of determining whether the percentage of assets tests in the paragraphs in this section are met as of the close of the year are as follows:

| Test and paragraph | Items considered | Percentage |
|---|---|---|
| 90 percent test (d) | the sum of items 1 through 8 and 10 item—13 (total included assets) | =97 percent |
| 18 percent test (e) | the sum of items 7, 9, 11, and 12—item 13 (total included assets) | =8 percent |
| 36 percent test (f) | the sum of items 6, 7, 9, 11, and 12—item 13 (total included assets) | =28 percent |
| 3 percent test (h) | 0—item 13 (total included assets) | =0 percent |

At the option of the association, the computations listed above could have been made as of the close of each month, each quarter, or semiannually, and averaged for the entire year.

(m) *Taxable years beginning before October 17, 1962.* For taxable years beginning before October 17, 1962, the term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association substantially all the business of which is confined to making loans to members.

[32 FR 15241, Nov. 3, 1967, as amended by T.D. 7622, 44 FR 28661, May 16, 1979]

## § 301.7701–13A Post-1969 domestic building and loan association.

(a) *In general.* For taxable years beginning after July 11, 1969, the term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, a Federal savings and loan association, and any other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law which meets the supervisory test (described in paragraph (b) of this section), the business operations test (described in paragraph (c) of this section), and the assets test (described in paragraph (d) of this section). For the definition of the term ''domestic building and loan association'' for taxable years beginning after October 16, 1962, and before July 12, 1969, see § 301.7701–13.

(b) *Supervisory test.* A domestic building and loan association must be either (1) an insured institution within the meaning of section 401(a) of the National Housing Act (12 U.S.C. 1724(a)) or (2) subject by law to supervision and examination by State or Federal authority having supervision over such associations. An ''insured institution'' is one the accounts of which are insured by the Federal Savings and Loan Insurance Corporation.

(c) *Business operations test*—(1) *In general.* An association must utilize its assets so that its business consists principally of acquiring the savings of the

public and investing in loans. The requirement of this paragraph is referred to in this section as the business operations test. The business of acquiring the savings of the public and investing in loans includes ancillary or incidental activities which are directly and primarily related to such acquisition and investment, such as advertising for savings, appraising property on which loans are to be made by the association, and inspecting the progress of construction in connection with construction loans. Even though an association meets the supervisory test described in paragraph (b) of this section and the assets test described in paragraph (d) of this section, it will nevertheless not qualify as a domestic building and loan association if it does not meet the requirements of both paragraphs (2) and (3) of this paragraph (c), relating, respectively, to acquiring the savings of the public and investing in loans.

(2) *Acquiring the savings of the public.* The requirement that an association's business (other than investing in loans) must consist principally of acquiring the savings of the public ordinarily will be considered to be met if savings are acquired in all material respects in conformity with the rules and regulations of the Federal Home Loan Bank Board or substantially equivalent rules of a State law or supervisory authority. Alternatively, such requirement will be considered to be met if more than 75 percent of the dollar amount of the total deposits, withdrawable shares, and other obligations of the association are held during the taxable year by the general public, as opposed to amounts deposited or held by family or related business groups or persons who are officers or directors of the association. However, the preceding sentence shall not apply if the dollar amount of other obligations of the association outstanding during the taxable year exceeds 25 percent of the dollar amount of the total deposits, withdrawable shares, and other obligations of the association outstanding during such year. For purposes of this paragraph, the term ''other obligations'' means notes, bonds, debentures, or other obligations, or other securities (except capital stock), issued by an association in conformity with the rules and regulations of the Federal Home Loan Bank Board or substantially equivalent rules of a State law or supervisory authority. The term ''other obligations'' does not include an advance made by a Federal Home Loan Bank under the authority of section 10 or 10b of the Federal Home Loan Bank Act (12 U.S.C. 1430, 1430b) as amended and supplemented. Both percentages specified in this paragraph shall be computed either as of the close of the taxable year or, at the option of the taxpayer, on the basis of the average of the dollar amounts of the total deposits, withdrawable shares, and other obligations of the association held during the taxable year. Such averages shall be determined by computing each percentage specified either as of the close of each month, as of the close of each quarter, or semiannually during the taxable year and by using the yearly average of the monthly, quarterly, or semiannual percentages obtained. The method selected must be applied uniformly for the taxable year to both percentages, but the method may be changed from year to year.

(3) *Investing in loans*—(i) *In general.* The requirement that an association's business (other than acquiring the savings of the public) must consist principally of investing in loans will be considered to be met for a taxable year only if more than 75 percent of the gross income of the association consists of—

(*a*) Interest or dividends on assets defined in paragraphs (1), (2), and (3) of paragraph (e) of this section,

(*b*) Interest on loans,

(*c*) Income attributable to the portion of property used in the association's business, as defined in paragraph (e)(11) of this section,

(*d*) So much of the amount of premiums, discounts, commissions, or fees (including late charges and penalties) on loans which have at some time been held by the association, or for which firm commitments have been issued, as is not in excess of 20 percent of the gross income of the association,

(*e*) Net gain from sales and exchanges of governmental obligations, as defined in paragraph (e)(2) of this section, or

(*f*) Income, gain or loss attributable to foreclosed property, as defined in paragraph (e)(9) of this section, but not including such income, gain or loss which, pursuant to section 595 and the regulations thereunder, is not included in gross income.

Examples of types of income which would cause an association to fail to meet the requirements of this paragraph if, in the aggregate, they equal or exceed 25 percent of gross income, are: The excess of gains over losses from sales of real property (other than foreclosed property); rental income (other than on foreclosed property and the portion of property used in the association's business); premiums, commissions, and fees (other than commitment fees) on loans which have never been held by the association; and insurance brokerage fees.

(ii) *Computation of gross income.* For purposes of this paragraph, gross income is computed without regard to—

(*a*) Gain or loss on the sale or exchange of the portion of property used in the association's business as defined in paragraph (e)(11) of this section.

(*b*) Gain or loss on the sale or exchange of the rented portion of property used as the principal or branch office of the association, as defined in paragraph (e)(11) of this section, and

(*c*) Gains or losses on sales of participations, and loans, other than governmental obligations defined in paragraph (e)(2) of this section.

For purposes of this paragraph, gross income is also computed without regard to items of income which an association establishes arise out of transactions which are necessitated by exceptional circumstances and which are not undertaken as recurring business activities for profit. Thus, for example, an association would meet the investing in loans requirement if it can establish that it would otherwise fail to meet that requirement solely because of the receipt of a nonrecurring item of income due to exceptional circumstances. For this purpose, transactions necessitated by an excess of demand for loans over savings capital in the association's area are not to be deemed to be necessitated by exceptional circumstances. For purposes of paragraph (c)(3)(ii)(*c*) of this section, the term ''sales of participations'' means sales by an association of interests in loans, which sales meet the requirements of the regulations of the Federal Home Loan Bank Board relating to sales of participations, or which meet substantially equivalent requirements of State law or regulations relating to sales of participations.

(iii) *Reporting requirement.* In the case of income tax returns for taxable years beginning after July 11, 1969, there is required to be filed with the return a statement showing the amount of gross income for the taxable year in each of the categories described in paragraph (c)(3)(i) of this section.

(d) *60 percent of assets test.* At least 60 percent of the amount of the total assets of a domestic building and loan association must consist of the assets defined in paragraph (e) of this section. The percentage specified in this paragraph is computed as of the close of the taxable year or, at the option of the taxpayer, may be computed on the basis of the average assets outstanding during the taxable year. Such average is determined by making the appropriate computation described in this section either as of the close of each month, as of the close of each quarter, or semiannually during the taxable year and by using the yearly average of the monthly, quarterly, or semiannual percentage obtained for each category of assets defined in paragraph (e) of this section. The method selected must be applied uniformly for the taxable year to all categories of assets, but the method may be changed from year to year. For purposes of this paragraph, it is immaterial whether the association originated the loans defined in paragraphs (4) through (8) and (10) of paragraph (e) of this section or purchased or otherwise acquired them in whole or in part from another. See paragraph (f) of this section for definition of certain terms used in this paragraph and in paragraph (e) of this section, and for the determination of amount and character of loans.

(e) *Assets defined.* The assets defined in this paragraph are—

(1) *Cash.* The term ''cash'' means cash on hand, and time or demand deposits with, or withdrawable accounts in, other financial institutions.

(2) *Governmental obligations.* The term ''governmental obligations'' means—

(i) Obligations of the United States,

(ii) Obligations of a State or political subdivision of a State, and

(iii) Stock or obligations of a corporation which is an instrumentality of the United States, a State, or a political subdivision of a State,

other than obligations the interest on which is excludable from gross income under section 103 and the regulations thereunder.

(3) *Deposit insurance company securities.* The term ''deposit insurance company securities'' means certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations.

(4) *Passbook loan.* The term ''passbook loan'' means a loan to the extent secured by a deposit, withdrawable share, or savings account in the association, or share of a member of the association, with respect to which a distribution is allowable as a deduction under section 591.

(5) *Residential real property loan.* [Reserved]

(6) *Church loan.* [Reserved]

(7) *Urban renewal loan.* [Reserved]

(8) *Institutional loan.* [Reserved]

(9) *Foreclosed property.* [Reserved]

(10) *Educational loan.* [Reserved]

(11) *Property used in the association's business*—(i) *In general.* The term ''property used in the association's business'' means land, buildings, furniture, fixtures, equipment, leasehold interests, leasehold improvements, and other assests used by the association in the conduct of its business of acquiring the savings of the public and investing in loans. Real property held for the purpose of being used primarily as the principal or branch office of the association constitutes property used in the association's business so long as it is reasonably anticipated that such property will be occupied for such use by the association, or that construction work preparatory to such occupancy will be commenced thereon, within 2 years after acquisition of the property. Stock of a wholly owned subsidiary corporation which has as its exclusive activity the ownership and management of property more than 50 percent of the fair rental value of which is used as the principal or branch office of the association constitutes property used in such business. Real property held by an association for investment or sale, even for the purpose of obtaining mortgage loans thereon, does not constitute property used in the association's business.

(ii) *Property rented to others.* Except as provided in the second sentence of paragraph (11)(i) of this paragraph (e), property or a portion thereof rented by the association to others does not constitute property used in the association's business. However, if the fair rental value of the rented portion of a single piece of real property (including appurtenant parcels) used as the principal or branch office of the association constitutes less than 50 percent of the fair rental value of such piece of property, or if such property has an adjusted basis of not more than $150,000, the entire property shall be considered used in such business. If such rented portion constitutes 50 percent or more of the fair rental value of such piece of property, and such property has an adjusted basis of more than $150,000, an allocation of its adjusted basis is required. The portion of the total adjusted basis of such piece of property which is deemed to be property used in the association's business shall be equal to an amount which bears the same ratio to such total adjusted basis as the amount of the fair rental value of the portion used as the principal or branch office of the association bears to the total fair rental value of such property. In the case of all property other than real property used or to be used as the principal or branch office of the association, if the fair rental value of the rented portion thereof constitutes less than 15 percent of the fair rental value of such property, the entire property shall be considered used in the association's business. If such rented portion constitutes 15 percent or more of the fair rental value of such property, an allocation of its adjusted basis (in the same manner as required for real property used as the principal or branch office) is required.

(12) *Regular or residual interest in a REMIC*—(i) *In general.* If for any calendar quarter at least 95 percent of a REMIC's assets (as determined in accordance with § 1.860F–4(e)(1)(ii) or § 1.6049–7(f)(3) of this chapter) are assets defined in paragraph (e)(1) through (e)(11) of this section, then for that calendar quarter all the regular and residual interests in that REMIC are treated as assets defined in this paragraph (e). If less than 95 percent of a REMIC's assets are assets defined in paragraph (e)(1) through (e)(11) of this section, the percentage of each REMIC regular or residual interest treated as an asset defined in this paragraph (e) is equal to the percentage of the REMIC's assets that are assets defined in paragraph (e)(1) through (e)(11) of this section. See §§ 1.860F–4(e)(1)(ii)(B) and 1.6049–7(f)(3) of this chapter for information required to be provided to regular and residual interest holders if the 95 percent test is not met.

(ii) *Loans secured by manufactured housing.* For purposes of paragraph (e)(12)(i) of this section, a loan secured by manufactured housing treated as a single family residence under section 25(e)(10) is an asset defined in paragraph (e)(1) through (e)(11) of this section.

(f) *Special rules.* [Reserved]

[T.D. 7622, 44 FR 28661, May 16, 1979; 44 FR 29048, May 18, 1979, as amended by T.D. 8458, 57 FR 61313, Dec. 24, 1992]

### § 301.7701–14 Cooperative bank.

For taxable years beginning after October 16, 1962, the term ''cooperative bank'' means an institution without capital stock organized and operated for mutual purposes without profit which meets the supervisory test, the business operations test, and the various assets tests specified in paragraphs (d) through (h) of § 301.7701–13, employing the rules and definitions of paragraphs (j) through (l) of that section. In applying paragraphs (b) through (l) of such section any references to an ''association'' or to a ''domestic building and loan association'' shall be deemed to be a reference to a cooperative bank.

### § 301.7701–15 Income tax return preparer.

(a) *In general.* An income tax return preparer is any person who prepares for compensation, or who employs (or engages) one or more persons to prepare for compensation, other than for the person, all or a substantial portion of any return of tax under subtitle A of the Internal Revenue Code of 1954 or of any claim for refund of tax under subtitle A of the Internal Revenue Code of 1954.

(1) A person who furnishes to a taxpayer or other preparer sufficient information and advice so that completion of the return or claim for refund is largely a mechanical or clerical matter is considered an income tax return preparer, even though that person does not actually place or review placement of information on the return or claim for refund. See also paragraph (b) of this section.

(2) A person who only gives advice on specific issues of law shall not be considered an income tax return preparer, unless—

(i) The advice is given with respect to events which have occurred at the time the advice is rendered and is not given with respect to the consequences of contemplated actions; and

(ii) The advice is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund. For example, if a lawyer gives an opinion on a transaction which a corporation has consummated, solely to satisfy an accountant (not at the time a preparer of the corporation's return) who is attempting to determine whether the reserve for taxes set forth in the corporation's financial statement is reasonable, the lawyer shall not be considered a tax return preparer solely by reason of rendering such opinion.

(3) A person may be an income tax return preparer without regard to educational qualifications and professional status requirements.

(4) A person must prepare a return or claim for refund for compensation to be an income tax return preparer. A person who prepares a return or claim for refund for a taxpayer with no explicit or implicit agreement for compensation is not a preparer, even

though the person receives a gift or return service or favor.

(5) A person who prepares a return or claim for refund outside the United States is an income tax return preparer, regardless of his nationality, residence, or the locations of his places of business, if the person otherwise satisfies the definition of income tax return preparer. Notwithstanding the provisions of § 301.6109–1(g), the person shall secure an employer identification number if he is an employer of another preparer, is a partnership in which one or more of the general partners is a preparer, or is an individual not employed (or engaged) by another preparer. The person shall comply with the provisions of section 1203 of the Tax Reform Act of 1976 and the regulations thereunder.

(6) An official or employee of the Internal Revenue Service performing his official duties is not an income tax return preparer.

(7) The following persons are not income tax return preparers:

(i) Any individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program established by the Internal Revenue Service;

(ii) Any organization sponsoring or administering a Volunteer Income Tax Assistance (VITA) program established by the Internal Revenue Service, but only with respect to that sponsorship or administration;

(iii) Any individual who provides tax counseling for the elderly under a program established pursuant to section 163 of the Revenue Act of 1978;

(iv) Any organization sponsoring or administering a program to provide tax counseling for the elderly established pursuant to section 163 of the Revenue Act of 1978, but only with respect to that sponsorship or administration;

(v) Any individual who provides tax assistance as part of a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (a)(7)(vii) and (viii) of this section; and

(vi) Any organization that is a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (a)(7)(vii) and (viii) of this section.

(vii) Paragraphs (a)(7)(v) and (vi) of this section apply only if any assistance with a return of tax or claim for refund under subtitle A is directly related to a controversy with the Internal Revenue Service for which the qualified LITC is providing assistance, or is an ancillary part of an LITC program to inform individuals for whom English is a second language about their rights and responsibilities under the Internal Revenue Code.

(viii) Notwithstanding paragraph (a)(7)(vii) of this section, paragraphs (a)(7)(v) and (vi) of this section do not apply if an LITC charges a separate fee or varies a fee based on whether the LITC provides assistance with a return of tax or claim for refund under subtitle A, or if the LITC charges more than a nominal fee for its services.

(b) *Substantial preparation*. (1) Only a person (or persons acting in concert) who prepares all or a substantial portion of a return or claim for refund shall be considered to be a preparer (or preparers) of the return or claim for refund. A person who renders advice which is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund, will be regarded as having prepared that entry. Whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion is determined by comparing the length and complexity of, and the tax liability or refund involved in, that portion to the length and complexity of, and tax liability or refund involved in, the return or claim for refund as a whole.

(2) For purposes of applying the rule of paragraph (b)(1) of this section, if the schedule, entry, or other portion of the return or claim for refund involves amounts of gross income, amounts of deductions, or amounts on the basis of which credits are determined which are—

(i) Less than $2,000; or

(ii) Less than $100,000, and also less than 20 percent of the gross income (or adjusted gross income if the taxpayer is an individual) as shown on the return or claim for refund,

then the schedule or other portion is not considered to be a substantial portion. If more than one schedule, entry

or other portion is involved, they shall be aggregated in applying the rule of this paragraph (b)(2). Thus, if a person, for an individual taxpayer's return, prepares a schedule for dividend income which totals $1,500 and gives advice making him a preparer of a schedule of medical expenses which results in a deduction for medical expenses of $1,500, the person is not a preparer if the taxpayer's adjusted gross income shown on the return is more than $15,000. This paragraph shall not apply to a person who prepares all of a return or claim for refund.

(3) A preparer of a return is not considered to be a preparer of another return merely because an entry or entries reported on the return may affect an entry reported on the other return, unless the entry or entries reported on the prepared return are directly reflected on the other return and constitute a substantial portion of the other return. For example, the sole preparer of a partnership return of income or a small business corporation income tax return is considered a preparer of a partner's or a shareholder's return if the entry or entries on the partnership or small business corporation return reportable on the partner's or shareholder's return constitute a substantial portion of the partner's or shareholder's return.

(c) *Return and claim for refund*—(1) *Return*. A return of tax under subtitle A is a return filed by or on behalf of a taxpayer reporting the liability of the taxpayer for tax under subtitle A. A return of tax under subtitle A also includes an information return filed by or on behalf of a person or entity that is not a taxable entity and which reports information which is or may be reported on the return of a taxpayer of tax under subtitle A.

(i) A return of tax under subtitle A includes an individual or corporation income tax return, a fiduciary income tax return (for a trust or estate), a regulated investment company undistributed capital gains tax return, a return of a charitable remainder trust, a return by a transferor of stock or securities to a foreign corporation, foreign trust, or foreign partnership, a partnership return of income, a small business corporation income tax return, and a DISC return.

(ii) A return of tax under subtitle A does not include an estate tax return, a gift tax return, any other return of excise taxes or income taxes collected at source on wages, an individual or corporation declaration of estimated tax, an application for an extension of time to file an individual or corporation income tax return, or an information statement on Form 990, any Form 1099, or similar form.

(2) *Claim for refund*. A claim for refund of tax under subtitle A includes a claim for credit against any tax under subtitle A.

(d) *Persons who are not preparers*. A person shall not be considered to be a preparer of a return or claim for refund if the person performs only one or more of the following services:

(1) Typing, reproduction, or other mechanical assistance in the preparation of a return or claim for refund.

(2) Preparation of a return or claim for refund of a person, or an officer, a general partner, or employee of a person, by whom the individual is regularly and continuously employed or in which the individual is a general partner.

(3) Preparation of a return or claim for refund for a trust or estate of which the person either is a fiduciary or is an officer, general partner, or employee of the fiduciary.

(4) Preparation of a claim for refund for a taxpayer in response to—

(i) A notice of deficiency issued to the taxpayer; or

(ii) A waiver of restriction after initiation of an audit of the taxpayer or another taxpayer if a determination in the audit of the other taxpayer affects, directly or indirectly, the liability of the taxpayer for tax under subtitle A.

For purposes of paragraph (d)(2) of this section, the employee of a corporation owning more than 50 percent of the voting power of another corporation, or the employee of a corporation more than 50 percent of the voting power of which is owned by another corporation, is considered the employee of the other corporation as well. For purposes of paragraph (d)(3) of this section, an estate, guardianship, conservatorship,

committee, and any similar arrangement for a taxpayer under a legal disability (such as a minor, an incompetent, or an infirm individual) is considered a trust or estate.

[T.D. 7675, 45 FR 11468, Feb. 21, 1980, as amended by T.D. 9026, 67 FR 77419, Dec. 18, 2002]

### § 301.7701–16 Other terms.

For a definition of the term ''withholding agent'' see §1.1441–7(a). Any other terms that are defined in section 7701 and that are not defined in §§301.7701–1 to 301.7701–15, inclusive, shall, when used in this chapter, have the meanings assigned to them in section 7701.

(Secs. 1441(c)(4) (80 Stat. 1553; 26 U.S.C. 1441(c)(4)), 3401(a)(6) (80 Stat. 1554; 26 U.S.C. 3401(a)(6)), and 7805 (68A Stat. 917; 26 U.S.C. 7805), Internal Revenue Code of 1954)

[T.D. 7977, 49 FR 36836, Sept. 20, 1984]

### § 301.7701–17T Collective-bargaining plans and agreements (temporary).

Q-1: How did the Tax Reform Act of 1984 (TRA of 1984) change the laws with respect to plans that are maintained pursuant to collective bargaining agreements?

A-1: (a) Many of the requirements and rules applicable to deferred compensation and welfare benefit plans are different for plans maintained pursuant to a collective bargaining agreement. Prior to the TRA of 1984, the Internal Revenue Code provided no clear definition of an employee representative or whether there is a collective bargaining agreement between such employee representative and one or more employers.

(b) Section 526(c) of the TRA of 1984 added a new condition under a new section 7701(a)(46) that must be satisfied in order for a plan to be considered to be a plan maintained pursuant to a collective bargaining agreement between employee representatives and one or more employers for purposes of the Code after March 31, 1984. If more than one-half of the membership of an organization is comprised of owners, officers, and executives of employers covered by the plan, then such organization is not an employee representative for purposes of determining whether a plan is to be treated as maintained pursuant to a collective bargaining agreement between employee representatives and one or more employers. Whether an individual is an owner, officer or executive is to be determined separately with respect to each employer. Additionally, section 7701(a)(46) provides that the Internal Revenue Service shall make the determination for purposes of the Code as to whether there is a collective bargaining agreement between employee representatives and one or more employers.

Q-2: If an organization does not fail to be an employee representative under the 50 percent or less test of section 7701(a)(46), is a plan maintained pursuant to an agreement between such organization and one or more employers necessarily treated, under the Code, as a plan maintained pursuant to a collective bargaining agreement between an employee representative and one or more employers?

A-2: (a) No.

(b) Specific Code provisions generally require other conditions than that in section 7701(a)(46) to be satisfied in order for a plan to be considered to be collectively-bargained. For example, in order for a plan to be described in section 413(a), the Secretary of Labor must find that the plan is maintained pursuant to a collective bargaining agreement between employee representatives and one or more employers.

(c) Even if (1) the finding in the example in the preceding paragraph (b) is made by the Secretary of Labor, (2) the union has been recognized as exempt under section 501(c)(5), and (3) the percentage condition in section 7701(a)(46) is satisfied, the Internal Revenue Service has the authority, pursuant to section 7701(a)(46), to determine whether there is a collective bargaining agreement under the Code.

[T.D. 8073, 51 FR 4337, Feb. 4, 1986]

### § 301.7701(b)–0 Outline of regulation provision for section 7701(b)–1 through (b)–9.

This section lists the paragraphs contained in §§301.7701(b)–1 through 301.7701(b)–9.

*§ 301.7701(b)–1 Resident alien.*

(a) Scope.

(b) Lawful permanent resident.
(1) Green card test.
(2) Rescission of resident status.
(3) Administrative or judicial determination of abandonment of resident status.
(c) Substantial presence test.
(1) In general.
(2) Determination of presence.
(i) Physical presence.
(ii) United States.
(3) Current year.
(4) Thirty-one day minimum.
(d) Application of section 7701(b) to the possessions and territories.
(1) Application to aliens.
(2) Non-application to citizens.
(e) Examples.

*§ 301.7701(b)–2 Closer connection exception.*

(a) In general.
(b) Foreign country.
(c) Tax home.
(1) Definition.
(2) Duration and nature of tax home.
(d) Closer connection to a foreign country.
(1) In general.
(2) Permanent home.
(e) Special rule.
(f) Closer connection exception unavailable.
(g) Filing requirements.

*§ 301.7701(b)–3 Days of presence in the United States that are excluded for purposes of section 7701(b).*

(a) In general.
(b) Exempt individuals.
(1) In general.
(2) Foreign government-related individual.
(i) In general.
(ii) Definition of international organization.
(iii) Full-time diplomatic or consular status.
(3) Teacher or trainee.
(4) Student.
(5) Professional athlete.
(6) Substantial compliance.
(7) Limitation on teacher or trainee and student exemptions.
(i) Teacher or trainee limitation in general.
(ii) Special teacher or trainee limitation for section 872(b)(3) compensation.
(iii) Limitation on student exemption.
(iv) Transition rule.
(v) Examples.
(8) Immediate family.
(c) Medical condition.
(1) In general.
(2) Intent to leave the United States.
(3) Preexisting medical condition.
(4) Examples.
(d) Days in transit.
(e) Regular commuters from Mexico or Canada.
(1) General rule.
(2) Definitions.
(3) Examples.
(f) Determination of excluded days applies beyond year of determination.

*§ 301.7701(b)–4 Residency time periods.*

(a) First year of residency.
(b) Last year of residency.
(1) General rule.
(2) Exceptions.
(c) Rules relating to residency starting date and residency termination date.
(1) De minimis presence.
(2) Proration.
(3) Residency starting date for certain individuals.
(i) In general.
(ii) Determination of presence.
(iii) Thirty-one day period.
(iv) Period of continuous presence.
(v) Election procedure.
(A) Filing requirements.
(B) Election on behalf of a dependent child.
(C) Statement.
(vi) Penalty for failure to comply with filing requirements.
(A) General rule.
(B) Exception.
(d) Examples.
(e) No lapse.
(1) Residency in prior year.
(2) Residency in following year.
(3) Special rule.
(4) Example.

*§ 301.7701(b)–5 Coordination with section 877.*

(a) General rule.
(b) Tax imposed.
(c) Example.

*§ 301.7701(b)–6 Taxable year.*

(a) In general.
(b) Examples.

*§ 301.7701(b)–7 Coordination with income tax treaties.*

(a) Consistency requirement.
(1) Application.
(2) Computation of tax liability.
(3) Other Internal Revenue Code purposes.
(4) Special rules for S corporations. [Reserved]
(b) Filing requirements.
(c) Contents of statement.
(1) In general.
(i) Returns due after December 15, 1997.
(ii) Earlier returns.
(2) Controlled foreign corporation shareholders.
(3) S corporation shareholders. [Reserved]
(d) Relationship to section 6114(a) treaty-based return positions.
(e) Examples.

*§ 301.7701(b)–8 Procedural rules.*

(a) Who must file.
(1) Closer connection exception.
(2) Exempt individuals and individuals with a medical condition.
(3) De minimis presence and residency starting and termination dates.
(b) Contents of statement.
(1) Closer connection exception.
(i) Returns due after December 15, 1997.
(ii) Earlier returns.
(2) Exempt individuals and individuals with a medical condition.
(i) Returns due after December 15, 1997.
(ii) Earlier returns.
(3) De minimis presence and residency starting and termination dates.
(c) How to file.
(d) Penalty for failure to file statement.
(1) General rule.
(2) Exception.
(e) Filing requirement disregarded.

*§ 301.7701(b)–9 Effective dates of §§ 301.7701(b)–1 through 301.7701(b)–7.*

(a) In general.
(b) Special rules.
(1) Green card test-residency starting date.
(2) Substantial presence test-years included.
(3) Professional athletes.
(4) Procedural rules and filing requirements.

[T.D. 8411, 57 FR 15241, Apr. 27, 1992; 58 FR 17516, Apr. 5, 1993; as amended by T.D. 8733, 62 FR 53386, Oct. 14, 1997]

## § 301.7701(b)–1 Resident alien.

(a) *Scope.* Section 301.7701(b)–1(b) provides rules for determining whether an alien individual is a lawful permanent resident of the United States. Section 301.7701(b)–1(c) provides rules for determining if an alien individual satisfies the substantial presence test. Section 301.7701(b)–2 provides rules for determining when an alien individual will be considered to maintain a tax home in a foreign country and to have a closer connection to that foreign country. Section 301.7701(b)–3 provides rules for determining if an individual is an exempt individual because of his or her status as a foreign government-related individual, teacher, trainee, student, or professional athlete. Section 301.7701(b)–3 also provides rules for determining whether an individual may exclude days of presence in the United States because the individual was unable to leave the United States because of a medical condition. Section 301.7701(b)–4 provides rules for determining an individual's residency starting and termination dates. Section 301.7701(b)–5 provides rules for applying section 877 to a nonresident alien individual. Section 301.7701(b)–6 provides rules for determining the taxable year of an alien. Section 301.7701(b)–7 provides rules for determining the effect of these regulations on rules in tax conventions to which the United States is a party. Section 301.7701(b)–8 provides procedural rules for establishing that an individual is a nonresident alien. Section 301.7701(b)–9 provides the effective dates of section 7701(b) and the regulations under that section. Unless the context indicates otherwise, the regulations under §§ 301.7701(b)–1 through 301.7701(b)–9 apply for purposes of determining whether a United States citizen is also a resident of the United States. (This determination may be relevant, for example, to the application of section 861(a)(1) which treats income from interest-bearing obligations of residents as income from sources within the United States.) The regulations do not apply and §§ 1.871–2 and 1.871–5 of this chapter continue to apply for purposes of the bona fide residence test of section 911. See § 1.911–2(c) of this chapter. For purposes of determining whether an individual is a resident of the United States for estate and gift tax purposes, see § 20.0–1(b)(1) and (2) and § 25.2501–1(b) of this chapter, respectively.

(b) *Lawful permanent resident*—(1) *Green card test.* An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.

(2) *Rescission of resident status.* Resident status is considered to be rescinded if a final administrative or judicial order of exclusion or deportation is issued regarding the alien individual. For purposes of this paragraph, the

term ''final judicial order'' means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

(3) *Administrative or judicial determination of abandonment of resident status.* An administrative or judicial determination of abandonment of resident status may be initiated by the alien individual, the Immigration and Naturalization Service (INS), or a consular officer. If the alien initiates this determination, resident status is considered to be abandoned when the individual's application for abandonment (INS Form I–407) or a letter stating the alien's intent to abandon his or her resident status, with the Alien Registration Receipt Card (INS Form I–151 or Form I–551) enclosed, is filed with the INS or a consular officer. If INS replaces any of the form numbers referred to in this paragraph or § 301.7701(b)–2(f), refer to the comparable INS replacement form number. For purposes of this paragraph, an alien individual shall be considered to have filed a letter stating the intent to abandon resident status with the INS or a consular office if such letter is sent by certified mail, return receipt requested (or a foreign country's equivalent thereof). A copy of the letter, along with proof that the letter was mailed and received, should be retained by the alien individual. If the INS or a consular officer initiates this determination, resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment. If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.

(c) *Substantial presence test*—(1) *In general.* An alien individual is a resident alien if the individual meets the substantial presence test. An individual satisfies this test if he or she has been present in the United States on at least 183 days during a three year period that includes the current year. For purposes of this test, each day of presence in the current year is counted as a full day. Each day of presence in the first preceding year is counted as one-third of a day and each day of presence in the second preceding year is counted as one-sixth of a day. For purposes of this paragraph, any fractional days resulting from the above calculations will not be rounded to the nearest whole number. (See § 301.7701(b)–9(b)(2) for transitional rules for calendar years 1985 and 1986.)

(2) *Determination of presence*—(i) *Physical presence.* For purposes of the substantial presence test, an individual shall be treated as present in the United States on any day that he or she is physically present in the United States at any time during the day. (But see § 301.7701(b)–3 relating to days of presence that may be excluded.)

(ii) *United States.* For purposes of section 7701(b) and the regulations thereunder, the term *United States* when used in a geographical sense includes the states and the District of Columbia. It also includes the territorial waters of the United States and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It does not include the possessions and territories of the United States or the air space over the United States.

(3) *Current year.* The term *current year* means any calendar year for which an alien individual is determining his or her resident status.

(4) *Thirty-one day minimum.* If an individual is not physically present for more than 30 days during the current year, the substantial presence test will not be applied for that year even if the three-year total is 183 or more days. For purposes of the substantial presence test, it is irrelevant that an individual was not present for more than 30 days in the first or second year preceding the current year.

(d) [Reserved] For further guidance, see § 301.7701(b)–1T(d).

(e) *Examples.* This section may be illustrated by the following examples:

*Example 1.* B, an alien individual, is present in the United States for 122 days in the current year. He was present in the United States for 122 days in the first preceding calendar year and for 122 days in the second preceding calendar year. In determining his status for the current year, B counts all 122 days in the United States in the current year

plus ⅓ of the 122 days in the United States in the first preceding calendar year (40⅔ days) and ⅙ of the 122 days in the United States during the second preceding calendar year (20⅓ days). The total of 122+40⅔+20⅓ equals 183 days. B meets the substantial presence test and is a resident alien for the current year.

*Example 2.* C, an alien individual, is present in the United States for 25 days during the current year. She was present in the United States for 365 days during the first preceding year and 365 days during the second preceding year. The substantial presence test does not apply because C is present in the United States for fewer than 31 days during the current year.

*Example 3.* D, an alien individual, is present in the United States for 170 days during the current year. He was present in the United States for 30 days during the first preceding year and 30 days during the second preceding year. In determining his status for the current year, D counts all 170 days in the United States in the current year plus ⅓ of the 30 days in the United States in the first preceding calendar year (10 days) and ⅙ of the 30 days in the United States during the second preceding calendar year (5 days). The total of 170+10+5 equals 185 days. D meets the substantial presence test and is a resident alien for the current year notwithstanding the fact that he was present in the United States for fewer than 31 days in each of the two preceding years.

[T.D. 8411, 57 FR 15242, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992, as amended by T.D. 9194, 70 FR 18947, Apr. 11, 2005]

### § 301.7701(b)–1T Resident alien (temporary).

(a) through (c) [Reserved] For further guidance, see § 301.7701(b)–1(a) through (c).

(d) *Application of section 7701(b) to the possessions and territories—(1) Application to aliens for purposes of mirror systems.* Section 7701(b) provides the basis for determining whether an alien individual is a resident of a United States possession or territory that administers income tax laws that are identical (except for the substitution of the name of the possession or territory for the term *United States* where appropriate) to those in force in the United States, for purposes of applying such laws with respect to income tax liability incurred to such possession or territory.

(2) *Non-application for bona fide resident determination.* Section 7701(b) does not provide the basis for determining whether an individual (including an alien individual) is a bona fide resident of a United States possession or territory for U.S. Federal income tax purposes. For the applicable rules for making this determination, see section 937(a) and the regulations thereunder.

(e) [Reserved] For further guidance, see § 301.7701(b)–1(e).

(f) *Effective date.* This section shall apply for taxable years ending after October 22, 2004.

[T.D. 9194, 70 FR 18947, Apr. 11, 2005]

### § 301.7701(b)–2 Closer connection exception.

(a) *In general.* An alien individual who meets the substantial presence test may nevertheless be considered a nonresident alien for the current year if the following conditions are satisfied—

(1) The individual is present in the United States for fewer than 183 days in the current year;

(2) The individual maintains a tax home in a foreign country during the current year; and

(3) Except as provided in paragraph (e) of this section, the individual has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than to the United States.

(b) *Foreign country.* For purposes of section 7701(b) and the regulations thereunder, the term ''foreign country'' when used in a geographical sense includes any territory under the sovereignty of the United Nations or a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It also includes the possessions and territories of the United States.

(c) *Tax home*—(1) *Definition.* For purposes of section 7701 (b) and the regulations under that section, the term ''tax

home'' has the same meaning that it has for purposes of section 162(a)(2) (relating to travel expenses while away from home). Thus, an individual's tax home is considered to be located at the individual's regular or principal (if more than one regular) place of business. If the individual has no regular or principal place of business because of the nature of the business, or because the individual is not engaged in carrying on any trade or business within the meaning of section 162(a), then the individual's tax home is the individual's regular place of abode in a real and substantial sense.

(2) *Duration and nature of tax home.* The tax home maintained by the alien individual must be in existence for the entire current year. The tax home must be located in the same foreign country for which the individual is claiming to have the closer connection described in paragraph (d) of this section.

(d) *Closer connection to a foreign country*—(1) *In general.* For purposes of section 7701(b) and the regulations under that section, an alien individual will be considered to have a closer connection to a foreign country than the United States if the individual or the Commissioner establishes that the individual has maintained more significant contacts with the foreign country than with the United States. In determining whether an individual has maintained more significant contacts with a foreign country than the United States, the facts and circumstances to be considered include, but are not limited to, the following—

(i) The location of the individual's permanent home;

(ii) The location of the individual's family;

(iii) The location of personal belongings, such as automobiles, furniture, clothing and jewelry owned by the individual and his or her family;

(iv) The location of social, political, cultural or religious organizations with which the individual has a current relationship;

(v) The location where the individual conducts his or her routine personal banking activities;

(vi) The location where the individual conducts business activities (other than those that constitute the individual's tax home);

(vii) The location of the jurisdiction in which the individual holds a driver's license;

(viii) The location of the jurisdiction in which the individual votes;

(ix) The country of residence designated by the individual on forms and documents; and

(x) The types of official forms and documents filed by the individual, such as Form 1078 (Certificate of Alien Claiming Residence in the United States), Form W–8 (Certificate of Foreign Status) or Form W–9 (Payer's Request for Taxpayer Identification Number).

(2) *Permanent home.* For purposes of paragraph (d)(1)(i) of this section, it is immaterial whether a permanent home is a house, an apartment, or a furnished room. It is also immaterial whether the home is owned or rented by the alien individual. It is material, however, that the dwelling be available at all times, continuously, and not solely for stays of short duration.

(e) *Special Rule.* An alien individual may demonstrate in one year that he or she has a closer connection to two foreign countries (but no more than two) if he or she satisfies all of the following conditions—

(1) The individual maintains a tax home beginning on the first day of the current year in one foreign country;

(2) The individual changes his or her tax home during the current year to a second foreign country;

(3) The individual continues to maintain his or her tax home in the second foreign country for the remainder of the current year;

(4) The individual has a closer connection to each foreign country than to the United States for the period during which the individual maintains a tax home in that foreign country; and

(5) The individual is subject to taxation as a resident pursuant to the internal laws of either foreign country for the entire year or subject to taxation as a resident in both foreign countries for the period during which the individual maintains a tax home in each foreign country.

(f) *Closer connection exception unavailable.* An alien individual who has personally applied, or taken other affirmative steps, to change his or her status to that of a permanent resident during the current year or has an application pending for adjustment of status during the current year will not be eligible for the closer connection exception. Affirmative steps to change status to that of a permanent resident include, but are not limited to, the following—

(1) The filing of Immigration and Naturalization Form I–508 (Waiver of Immunities) by the alien;

(2) The filing of Immigration and Naturalization Form I–485 (Application for Status as Permanent Resident) by the alien;

(3) The filing of Immigration and Naturalization Form I–130 (Petition for Alien Relative) on behalf of the alien;

(4) The filing of Immigration and Naturalization Form I–140 (Petition for Prospective Immigrant Employee) on behalf of the alien;

(5) The filing of Department of Labor Form ETA-750 (Application for Alien Employment Certification) on behalf of the alien; or

(6) The filing of Department of State Form OF–230 (Application for Immigrant Visa and Alien Registration) by the alien.

(g) *Filing requirements.* See § 301.7701(b)–8 with regard to the statement that must be filed by an alien individual claiming the closer connection exception.

[T.D. 8411, 57 FR 15244, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992; 58 FR 17516, Apr. 5, 1993]

### § 301.7701(b)–3 Days of presence in the United States that are excluded for purposes of section 7701(b).

(a) *In general.* In computing days of presence in the United States, an alien is considered to be present if the individual is physically present in the United States at any time during the day (see § 301.7701(b)–1(c)(2)(i)). However, for purposes of section 7701(b) and the regulations under that section, the following days shall be excluded and will not count as days of presence in the United States—

(1) Any day that an individual is present in the United States as an exempt individual;

(2) Any day that an individual is prevented from leaving the United States because of a medical condition that arose while the individual was present in the United States;

(3) Any day that an individual is in transit between two points outside the United States; and

(4) Any day on which a regular commuter residing in Canada or Mexico commutes to and from employment in the United States.

(b) *Exempt individuals*—(1) *In general.* An exempt individual is an individual who is either a—

(i) Foreign government-related individual as defined in paragraph (b)(2) of this section;

(ii) Teacher or trainee as defined in paragraph (b)(3) of this section;

(iii) Student as defined in paragraph (b)(4) of this section; or

(iv) Professional athlete as defined in paragraph (b)(5) of this section.

(2) *Foreign government-related individual*—(i) *In general.* A foreign government-related individual is an individual (and that individual's immediate family) who is temporarily present in the United States—

(A) As a full-time employee of an international organization;

(B) By reason of diplomatic status; or

(C) By reason of a visa that the Secretary of the Treasury or his or her delegate (after consultation with the Secretary of State when appropriate) determines represents full-time diplomatic or consular status. An individual described in this paragraph shall be considered to be temporarily present in the United States if the individual is not a lawful permanent resident as described in § 301.7701(b)–1(b)(1), regardless of the actual amount of time that the individual is present in the United States.

(ii) *Definition of international organization.* The term ''international organization'' means any public international organization that has been designated by the President by Executive Order as being entitled to enjoy the privileges, exemptions, and immunities provided for in the International Organizations

Act (22 U.S.C. 288). An individual described in paragraph (b)(2)(i) of this section will be a full-time employee of an international organization if that individual's employment with the organization is consistent with an employment schedule of a person with a standard full-time work schedule with the organization.

(iii) *Full-time diplomatic or consular status.* An individual is considered to have full-time diplomatic or consular status if—

(A) The individual has been accredited by a foreign government recognized de jure or de facto by the United States;

(B) The individual intends to engage primarily in official activities for that foreign government while in the United States; and

(C) The individual has been recognized by the President, or by the Secretary of State, or by a consular officer acting on behalf of the Secretary of State, as being entitled to such status.

(3) *Teacher or trainee.* A teacher or trainee includes any individual (and that individual's immediate family), other than a student, who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15)(J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (J), (Q)) and who substantially complies with the requirements of being admitted.

(4) *Student.* A student is any individual (and that individual's immediate family) who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15)(F) or (M) (relating to the admission of students into the United States) or as a student under section 101(a)(15)(J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (F), (J), (M), (Q)) who substantially complies with the requirements of being admitted. For rules concerning taxation of certain nonresident students or trainees, see section 871(c) and § 1.871–9(a) of this chapter.

(5) *Professional athlete.* A professional athlete is an individual who is temporarily present in the United States to compete in a charitable sports event described in section 274(l)(1)(B). For purposes of computing the days of presence in the United States, only days on which the athlete actually competes in a charitable sports event described in section 274(l)(1)(B) shall be excluded. Thus, days on which the individual is present to practice for the event, to perform promotional or other activities related to the event, or to travel between events shall be included for purposes of the substantial presence test.

(6) *Substantial compliance.* An individual described in paragraph (b) (3) or (4) of this section will be deemed to comply substantially with the visa requirements relevant to residence for tax purposes if the individual has not engaged in activities that are prohibited by the Immigration and Nationality Act and the regulations thereunder and could result in the loss of F, J or M visa status. An individual will not be deemed to comply substantially with the visa requirements relevant to residence for tax purposes merely by showing that the individual's visa has not been revoked. An independent determination of substantial compliance may be made by the Internal Revenue Service for any individual claiming to be an exempt individual under paragraph (b) (3) or (4) of this section. For example, if an individual with an F visa (student visa) is found to have accepted unauthorized employment or to have maintained a course of study that is not considered by the Internal Revenue Service to be full-time, the individual will not be considered to comply substantially with the individual's visa requirements regardless of whether the individual's visa has been revoked.

(7) *Limitation on teacher or trainee and student exemptions*—(i) *Teacher or trainee limitation in general.* Except as otherwise provided, an individual shall not exclude days of presence as a teacher or trainee if the individual has been exempt as a teacher, trainee, or student

for any part of two of the six preceding calendar years.

(ii) *Special teacher or trainee limitation for section 872(b)(3) compensation.* If—

(A) A teacher or trainee receives compensation in the current year and all of that compensation is described in section 872(b)(3);

(B) That individual was present in the United States as a teacher or trainee in any prior year within the last 6 years; and

(C) During each prior year (within the 6 year period) in which the individual was present as a teacher or trainee, the individual received compensation all of which was described in section 872(b)(3);

Then that individual shall include days of presence as a teacher or trainee in the current year only if the individual has been exempt as a teacher, trainee, or student for any part of four of the six preceding calendar years.

(iii) *Limitation on student exemption.* An individual will not be able to exclude days of presence as a student if the individual has been exempt as a teacher, trainee, or student for any part of more than five calendar years, unless it is established to the satisfaction of the district director that the individual does not intend to reside permanently in the United States and has substantially complied with the requirements of the student visa providing for the individual's temporary presence in the United States. For purposes of this paragraph (b)(7), the facts and circumstances to be considered in determining if an individual has demonstrated an intent to reside permanently in the United States include (but are not limited to)—

(A) Whether the individual has maintained a closer connection with a foreign country as described in § 301.7701(b)–2; and

(B) Whether the individual has taken affirmative steps within the meaning of paragraph (f) of § 301.7701(b)–2 to adjust the individual's status from nonimmigrant to lawful permanent resident.

(iv) *Transition rule.* The rules in this paragraph (b)(7) relating to stated periods of exempt status apply only for those stated periods that occur after 1984. Thus, for example, an alien who is present as a student during the calendar years 1982–1990 will not be subject to the five year rule for students until 1990.

(v) *Examples.* The following examples illustrate the application of paragraphs (b)(7) (i) and (ii) of this section:

*Example 1.* B is temporarily present in the United States during the current year as a teacher, within the meaning of section 101(a)(15)(J) of the Immigration and Nationality Act. B does not receive compensation described in section 872(b)(3) in the current year. B has been treated as an exempt student for the past three years. Although this is the first year that B is seeking to be exempt as a teacher, he will not be considered an exempt individual for the year because he has been exempt as a student for at least two of the past six years.

*Example 2.* C is temporarily present in the United States during the current year as a teacher and receives compensation described in section 872(b)(3) in the current year. C has been treated as an exempt teacher for the past two years but C's compensation for those years was not described in section 872(b)(3). C will not be considered an exempt individual for the current year because she has been exempt as a teacher for at least two of the past six years.

*Example 3.* The facts are the same as in *Example 2,* except that all of C's compensation for the two preceding years was described in section 872(b)(3). C will be considered to be an exempt individual for the current year because she has not been exempt as a student, teacher or trainee for four of the six preceding calendar years.

*Example 4.* D is temporarily present in the United States during the current year as a teacher, within the meaning of section 101(a)(15)(J) of the Immigration and Nationality Act. D does not receive compensation described in section 872(b)(3) in the current year. D entered the United States in December of the second preceding year and intends to remain in the United States until June of the current year. D will not be considered an exempt individual for the current year because he has been exempt as a teacher for at least two of the past six years.

(8) *Immediate family.* The immediate family of an exempt individual includes the individual's spouse and unmarried children (whether by blood or adoption) but only if the spouse's or unmarried children's visa status are derived from and dependent on the visa classification of the exempt individual. For the purposes of this paragraph, the term *unmarried children* means those children who are under 21 years of age,

who reside regularly in the household of the exempt individual, and who are not members of some other household. The immediate family of an exempt individual does not include the attendants, servants, and personal employees of that individual.

(c) *Medical condition*—(1) *In general.* An individual will not be considered present on any day that the individual intends to leave and is unable to leave the United States because of a medical condition or medical problem that arose while the individual was present in the United States. A day of presence will not be excluded if the individual, who was initially prevented from leaving, is subsequently able to leave the United States and then remains in the United States beyond a reasonable period for making arrangements to leave the United States. A day will also not be excluded if the medical condition arose during a prior stay in the United States (whether or not days of presence during the prior stay were excluded) and the alien returns to the United States for treatment of the medical condition or medical problem that arose during the prior stay.

(2) *Intent to leave the United States.* For purposes of paragraph (c)(1) of this section, whether an individual intends to leave the United States on a particular day will be determined based on all the facts and circumstances. Thus, if at the time an individual's medical condition or medical problem arose, the individual was present in the United States for a definite purpose which by its nature could be accomplished within the United States during a period of time that would not cause the individual to be a resident under the substantial presence test, the individual may be able to establish that he or she intended to leave the United States. However, if the individual's purpose is of such a nature that an extended period of time would be required for its accomplishment (sufficient to cause the individual to be a resident under the substanial presence test), the individual would not be able to establish the requisite intent to leave the United States. If the individual is present in the United States for no particular purpose or a purpose by its nature that does not require a specific period of time to accomplish, the determination of whether the individual has the requisite intent to leave the United States will depend on all the surrounding facts and circumstances. In the case of an individual adjudicated mentally incompetent, proof of intent to leave the United States may be determined by analyzing the incompetent's pattern of behavior prior to the adjudication of incompetence. Generally, an individual will be presumed to have intended to leave during a period of illness if the individual leaves the United States within a reasonable period of time (time to make arrangements to leave) after becoming physically able to leave.

(3) *Pre-existing medical condition.* A medical condition or problem will not be considered to arise while the individual is present in the United States, if the condition or problem existed prior to the individual's arrival in the United States, and the individual was aware of the condition or problem, regardless of whether the individual required treatment for the condition or problem when the individual entered the United States.

(4) *Examples.* The following examples illustrate the application of this paragraph (c):

*Example 1.* B is in a serious automobile accident in the United States on March 25. B intended to leave the United States on March 31 (as evidenced by an airline ticket), but was unable to leave on that date as a result of the injuries suffered in the accident. B recovered from the injuries and was able to leave and did leave the United States on May 31. B's presence in the United States during the period from April 1 through May 31 will not be counted as days of presence in the United States.

*Example 2.* The facts are the same as in *Example 1*, except that B's return flight (as evidenced by an airline ticket) was scheduled for May 31. Because B did not intend to leave the United States until May 31, B may not exclude any days of presence in the United States.

(d) *Days in transit.* An alien individual may exclude days of presence in the United States if the individual is in transit between two foreign points, and is physically present in the United States for fewer than 24 hours. For purposes of this paragraph, an individual

will be considered to be in transit if the individual pursues activities that are substantially related to completing his or her travel to a foreign point of destination. For example, an alien who travels between airports in the United States in order to change planes en route to the individual's destination will be considered to be in transit. However, if the individual attends a business meeting while he or she is present in the United States, whether or not that meeting is within the confines of the airport, the individual will not be considered to be in transit. For purposes of this paragraph, the term ''foreign point'' means any areas that are not included within the definition of the term ''United States'' provided in § 301.7701(b)–1(c)(2)(ii).

(e) *Regular commuters from Mexico or Canada*—(1) *General rule.* An alien individual will not be considered to be present in the United States on days that the individual commutes to the United States from the individual's residence in Mexico or Canada if the individual regularly commutes from Mexico or Canada. An alien individual will be considered to commute regularly if the individual commutes to the individual's location of employment or self-employment in the United States from his or her residence in Mexico or Canada on more than 75% of the workdays during the working period.

(2) *Definitions.* (i) The term *commutes* means to travel to employment or self-employment and to return to one's residence within a 24-hour period.

(ii) The term *workdays* means days on which the individual works in the United States or Canada or Mexico.

(iii) The term *working period* means the period beginning with the first day in the current year on which the individual is physically present in the United States for purposes of engaging in employment or self-employment and ending on the last day in the current year on which the individual is physically present in the United States for purposes of engaging in that employment or self-employment. If the nature of the employment or self-employment is such that it requires the individual to be present in the United States only on a seasonal or cyclical basis, the working period will begin with the first day of the season or cycle on which the individual is present in the United States for purposes of engaging in that employment or self-employment and end on the last day of the season or cycle on which the individual is present in the United States for the purpose of engaging in that employment or self-employment. Thus, there may be more than one working period in a calendar year and a working period may begin in one calendar year and end in the following calendar year.

(3) *Examples.* The following examples illustrate the operation of this paragraph (e):

*Example 1.* B lives in Mexico and is employed by Corporation X in its office in Mexico. B was temporarily assigned to X's office in the United States. B's employment in the United States office began on February 1, 1988, and continued through June 1, 1988. On June 2, B resumed his employment in Mexico. On 59 days in the period beginning on February 1, 1988, and ending on June 1, 1988, B travelled each morning from his residence in Mexico to X Corporation's United States office for the purpose of engaging in his employment with X Corporation. B returned to his residence in Mexico on each of those evenings. On seven days in the period from February 1, 1988, through June 1, 1988, B worked in X's Mexico office. B is not considered to have been present in the United States on any of the days that he travelled to X's United States office for the purpose of engaging in employment with Corporation X because he commuted to his place of employment within the United States on more than 75% of the workdays during the working period (59 workdays in the United States/66 workdays in the working period=89.4%).

*Example 2.* C, who lives in Canada, contracted with a resort located in the United States to provide snow-skiing instructions for the resort's customers for two skiing seasons, the first beginning on November 15, 1987, and ending on March 15, 1988, and the second beginning on November 15, 1988, and ending on March 15, 1989. On 90 days in each of the two skiing seasons, C travelled in the morning from Canada to the resort to provide skiing instructions pursuant to the contract. C returned to Canada on each of those evenings. On 20 days during each of the two skiing seasons, C worked in Canada. C is not considered to have been present in the United States on any of the days that she travelled to the United States to provide ski instructions in either the first working period beginning on November 15, 1987, and ending on March 15, 1988, or the second working period beginning on November 15, 1988, and ending on March 15, 1989, because she

commuted to her employment within the United States on more than 75% of the workdays during each of the working periods (90 workdays in the United States/110 workdays in the working period=81.8%).

*Example 3.* D, who lives in Canada, is the sole proprietor of a wholesale lumber business with offices in both the United States and Canada. Beginning on January 4, 1988, and ending on February 12, 1988, D commuted to work in his United States office on 30 days. Beginning on February 15, 1988, and ending on March 25, 1988, D commuted to work in his Canadian office on 30 days. Beginning on March 28, 1988, and ending on May 27, 1988, D commuted to work in his United States office on 45 days. Subsequent to May 27, D did not commute to the United States on any other days in 1988. D is considered to have been present in the United States on each day that he travelled to his office in the United States because D did not commute to the United States office on more than 75% of the workdays during the working period beginning on January 4, 1988, and ending on May 27, 1988 (75 workdays in the United States/105 workdays in the working period=71.4%).

(f) *Determination of excluded days applies beyond year of determination.* If a day of presence is excluded under this section, then that day shall not be taken into account in the current year or the first or second preceding year.

[T.D. 8411, 57 FR 15245, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992; as amended by T.D. 8733, 62 FR 53386, Oct. 14, 1997]

### § 301.7701(b)–4 Residency time periods.

(a) *First year of residency.* An alien individual who was not a United States resident during the preceding calendar year and who is a United States resident for the current year will begin to be a resident for tax purposes on the alien's residency starting date. The residency starting date for an alien who meets the substantial presence test is the first day during the calendar year on which the individual is present in the United States. The residency starting date for an alien who meets the lawful permanent resident test (green card test), described in paragraph (b)(1) of § 301.7701(b)–1, is the first day during the calendar year in which the individual is physically present in the United States as a lawful permanent resident. The residency starting date for an alien who satisfies both the substantial presence test and the green card test will be the earlier of the first day the individual is physically present in the United States as a lawful permanent resident of the United States or the first day during the year that the individual is present for purposes of the substantial presence test. (See § 301.7701(b)–9(b)(1) for the transitional rule relating to the residency starting date of an alien individual who was a lawful permanent resident in 1984. See also § 301.7701(b)–3 for days that may be excluded.)

(b) *Last year of residency*—(1) *General rule.* An alien individual who is a United States resident during the current year but who is not a United States resident at any time during the following calendar year will cease to be a resident for tax purposes on the individual's residency termination date. Generally, the residency termination date will be the last day of the calendar year.

(2) *Exceptions.* Notwithstanding paragraph (b)(1) of this section, the residency termination date for an alien individual who meets the substantial presence test is the last day during the calendar year that the individual is physically present in the United States if the individual establishes that, for the remainder of the calendar year, the individual's tax home was in a foreign country and he or she maintained a closer connection (within the meaning of § 301.7701(b)–2(d)) to that foreign country than to the United States. Similarly, the residency termination date for an alien who meets the green card test is the first day during the calendar year that the alien is no longer a lawful permanent resident if the individual establishes that, for the remainder of the calendar year, his or her tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. The residency termination date for an alien who satisfies both the substantial presence test and the green card test for the current year, will be the later of the first day the individual is no longer a lawful permanent resident of the United States or the last day the individual was physically present in the United States if the alien establishes that, for the remainder of the calendar year, his or

her tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. It is immaterial whether the individual's tax home was in the United States, or that the individual had a closer connection to the United States than to the foreign country, prior to the date of his or her departure from the United States or the date on which the individual was no longer a lawful permanent resident, whichever is applicable.

(c) *Rules relating to residency starting date and residency termination date*—(1) *De minimis presence*. An alien individual may be present in the United States for up to 10 days without triggering the residency starting date (for purposes of the substantial presence test) or extending the residency termination date (for purposes of the substantial presence test) if the individual is able to establish that, during that period, the individual's tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. Days from more than one period of presence may be disregarded for purposes of determining an individual's residency starting date or termination date so long as the total is not more than 10 days. However, an individual may not disregard any days that occur in a period of consecutive days of presence, if all the days that occur during that period cannot be excluded. An individual must include days of presence for purposes of determining whether the individual meets the substantial presence test even though the days may be disregarded for purposes of determining the individual's residency starting date or residency termination date.

(2) *Proration*. If an individual's residency starting date does not fall on the first day of the tax year, or the individual's residency termination date does not fall on the last day of the tax year, the individual's income tax liability should be calculated in accordance with §1.871–13 of this chapter dealing with the taxation of individuals who change residence status during the taxable year.

(3) *Residency starting date for certain individuals*—(i) *In general*. If an alien individual (who otherwise does not meet the substantial presence test or the green card test for the current year) is physically present in the United States for at least 31 consecutive days during the current year, and also for a period of continuous presence beginning with the first day of that thirty-one day period (see paragraph (c)(3)(iii) of this section), then the individual may elect to be treated as a resident during the current year. The individual's residency starting date shall be the first day of that thirty-one day period, if—

(A) The individual was not a resident of the United States under the substantial presence test or the green card test in the year preceding the current year; and

(B) The individual is a resident of the United States in the subsequent year under the substantial presence test (whether or not the individual is also a resident of the United States under the green card test).

(ii) *Determination of presence*. Except as otherwise provided in paragraph (c)(3)(iii) of this section, an individual shall be treated as present in the United States on any day that the individual is physically present in the United States at any time during the day.

(iii) *Thirty-one day period*. For purposes of this paragraph (c)(3), the term *thirty-one day period* means any period of 31 consecutive days during which an individual is physically present in the United States during each day of the period.

(iv) *Period of continuous presence*. For purposes of this paragraph (c)(3), the term *continuous presence* means a period of presence in the United States that includes 75 percent of the days in the current year beginning with (and including) the first day of the individual's thirty-one day period of presence. Only for purposes of the continuous presence requirement, an individual will be deemed to be present in the United States for up to 5 days on which the individual is absent from the United States. These days will not be deemed to be days of presence for purposes of the thirty-one day period of presence requirement. If an individual is present for more than one thirty-one day period of presence and satisfies the continuous presence requirement with

regard to each period, the individual's residency starting date shall be the first day of the first thirty-one day period of presence. If an individual is present for more than one thirty-one day period of presence but satisfies the continuous presence requirement only for a later thirty-one day period, the individual's residency starting date shall be the first day of the later thirty-one day period of presence. For purposes of this paragraph (c)(3), days of presence that are otherwise excluded under section 7701(b)(3)(D)(i) and § 301.7701(b)–3(a)(1) (exempt individual), (a)(2) (medical condition), (a)(3) (in transit between two foreign points), and (a)(4) (regular commuter) shall not be counted as days of presence for purposes of either the thirty-one day period or continuous presence requirement.

(v) *Election procedure*—(A) *Filing requirements*. An alien individual shall make an election to be treated as a resident under paragraph (c)(3) of this section by attaching a statement (described in paragraph (c)(3)(v)(C) of this section) to the individual's income tax return (Form 1040) for the taxable year for which the election is to be in effect (the election year). The alien individual may not make this election until such time as he has satisfied the substantial presence test for the year following the election year. If an alien individual has not satisfied the substantial presence test for the year following the election year as of the due date (not including extensions) of the tax return for the election year, the alien individual may request an extension of time for filing the return until a reasonable period after he or she has satisfied such test, provided that the individual pays with his or her extension application the amount of tax he or she expects to owe for the election year computed as if he or she were a nonresident alien throughout the election year. An election made under paragraph (c)(3) of this section may not be revoked without the approval of the Commissioner or his delegate.

(B) *Election on behalf of a dependent child*. An individual may make an election on behalf of a dependent child (as defined in paragraphs (1) and (2) of section 152(a), without regard to section 152(b)(3)) if the individual is qualified to make an election on his or her own behalf, the child qualifies to make an election under this paragraph (c)(3), and the child is not required by section 6012 to file a United States income tax return for the year for which the election is to be effective.

(C) *Statement*. The statement required by paragraph (c)(3)(v)(A) of this section shall include the name and address of the alien individual and contain a signed declaration that the election is being made. If the individual is also making an election on behalf of any dependent children, then the statement must include the required information with respect to those children. The statement must specify—

(*1*) That the alien individual was not a resident in the year immediately preceding the election year;

(*2*) That the alien individual is a resident under the substantial presence test in the year following the election year;

(*3*) The individual's number of days of presence in the United States during the year following the election year;

(*4*) The date or dates of the alien individual's thirty-one day period of presence and period of continuous presence in the United States during the election year; and

(*5*) The date or dates of absence from the United States during the election year that are deemed to be days of presence.

(vi) *Penalty for failure to comply with filing requirements*—(A) *General rule*. If an individual fails to comply with the election procedure of paragraph (c)(3)(v) of this section, the individual must file his or her income tax return for the current year as a nonresident alien.

(B) *Exception*. The penalty described in paragraph (c)(3)(vi)(A) of this section shall not apply if the individual can show by clear and convincing evidence that he or she took reasonable actions to become aware of the filing requirements and significant affirmative steps to comply with the requirements. An individual who requests an extension of time to file his or her income tax return pursuant to paragraph

(c)(3)(v) of this section will be considered to have taken significant affirmative steps to comply with the requirement that the individual pay his or her tax determined as if the individual were a nonresident alien if the individual paid with his or her extension application at least 90 percent of the amount of the tax the individual actually owed for the election year computed as if he or she were a nonresident alien throughout the election year.

(d) *Examples*. The following examples illustrate the operation of this section:

*Example 1*. B, a citizen of foreign country X, is an alien who has never before been a United States resident for tax purposes. B comes to the United States on January 6, 1985, to attend a business meeting and returns to country X on January 10, 1985. B is able to establish a closer connection to country X for the period January 6–10. On March 1, 1985, B moves to the United States and resides here until August 20, 1985, when he returns to country X. On December 12, 1985, B comes to the United States for pleasure and stays here until December 16, 1985 when he returns to country X. B is able to establish a closer connection to country X for the period December 12–16. B is not a United States resident for tax purposes during the following year and can establish a closer connection to country X for the remainder of calendar year 1985. B is a resident of the United States under the substantial presence test because B is present in the United States for 183 days (5 days in January plus 173 days for the period March 1–August 20 plus 5 days in December). B's residency starting date is March 1, 1985, and his residency termination date is August 20, 1985.

*Example 2*. The facts are the same as in *Example 1*, except that B remains in the United States until December 17, 1985, and is able to establish a closer connection to country X for the period December 18 through 31. B's residency termination date is December 17, 1985.

*Example 3*. C, a citizen of foreign country Y, is an alien who has never before been a United States resident for tax purposes. C comes to the United States for the first time on February 10, 1985, and attends a business conference until February 24, 1985, when she returns to country Y. On April 20, 1985, C enters the United States as a lawful permanent resident. On November 10, 1985, C ceases to be a lawful permanent resident but stays on in the United States until November 20, 1985 when she returns to country Y. On December 8, 1985, C comes to the United States and stays here until December 17, 1985 when she returns to country Y. She can establish a closer connection to country Y for that period. C is not a resident of the United States during the following calendar year and can establish a closer connection to country Y for the remainder of calendar year 1985. C qualifies as a United States resident under both the green card test and the substantial presence test. C's residency starting date under the green card test is April 20, 1985. Under the substantial presence test, C's residency starting date is February 10, 1985, because she is present for more than ten days in February and cannot take advantage of the de minimis presence rule. Therefore, C's residency starting date is February 10, 1985. C's residency termination date under the green card test is November 10, 1985. Her residency termination date under the substantial presence test is November 20, because B can disregard ten days of presence in December. Thus, her residency termination date is November 20, 1985, the later of her residency termination date under the substantial presence test or the green card test.

*Example 4*. The facts are the same as in *Example 3*, except that C is initially present in the United States on business from February 5 to February 9, 1985. C is able to establish a closer connection to country Y for that period. C may take advantage of only ten days of de minimis presence and may exclude days from a continuous period of presence only if she can exclude all the days that occur during that period. Thus, C may choose either of the following periods of residency: residency starting date February 5, 1985, and residency termination date November 20, 1985, or residency starting date April 20, 1985, and residency termination date December 17, 1985.

*Example 5*. D, a citizen of foreign country Z, is an alien who has never before been a United States resident for tax purposes. D comes to the United States on November 1, 1985 and is present in the United States on 31 consecutive days (from November 1 through December 1, 1985). D returns to country Z on December 1 and does not come back to the United States until December 17, 1985. He remains in the United States for the rest of the year. During 1986, D is a resident of the United States under the substantial presence test. D may elect to be treated as a resident of the United States for 1985 because he was present in the United States in 1985 for a 31 consecutive day period of presence (November 1 through December 1, 1985) and for at least 75 percent of the days following (and including) the first day of D's 31 consecutive day period of presence (46 total days of presence in the United States/61 days in the period from November 1 through December 31=75.4%). If D makes the election to be treated as a resident, his residency starting date will be November 1, 1985.

*Example 6*. The facts are the same as in *Example 5*, except that D is absent from the United States on December 24, 25, 29, 30 and 31. D may make the election to be treated as

a resident for 1985 because up to five days of absence will be deemed to be days of presence for purposes of the continuous presence requirement.

*Example 7.* F, a citizen of foreign country M, is an alien individual who has never before been a United States resident for tax purposes. F comes to the United States on January 1, 1985 and remains in the United States through January 31, 1985, when she returns to country M. F comes back to the United States on October 1, 1985 and is present in the United States through November 1, 1985. From November 1, 1985 through December 31, 1985, F is present in the United States for 38 days. Although F satisfies two 31 consecutive day periods of presence, (January 1 through January 31 and October 1 through November 1), she satisfies the continuous presence requirement only with regard to the later period of presence (69 total days of presence/92 days in the period from October 1 through December 31=75%). Thus, if F makes the election to be treated as a resident, his residency starting date is October 1, 1985.

(e) *No lapse*—(1) *Residency in prior year.* An alien individual who was a United States resident during any part of the preceding calendar year and who is a United States resident for any part of the current year will be considered to be taxable as a resident at the beginning of the current year. For purposes of this paragraph (e)(1), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(2) *Residency in following year.* An alien individual who is a United States resident for any part of the current year and who is also a United States resident for any part of the following year (regardless of whether the individual has a closer connection to a foreign country than the United States during the current year) will be taxable as a resident through the end of the current year. For purposes of this paragraph (e)(2), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(3) *Special rule.* If an individual meets the green card test for the current year but is not physically present in the United States during the current year, then the individual's residency starting date shall be the first day of the following year.

(4) *Example.* The following example illustrates the application of this paragraph (e).

*Example.* B, an alien individual who is a citizen of foreign country M, comes to the United States for the first time on May 1, 1985, and remains in the United States until November 5, 1985, when he returns to country M. B comes back to the United States on March 5, 1986 as a lawful permanent resident and remains in the United States until September 10, 1986, when he ceases to be a lawful permanent resident and returns to country M. B is not a resident in calendar year 1987. B's United States residency in calendar year 1985 continues through December 31, 1985, because he is a United States resident in the following calendar year. In calendar year 1986, B's United States residency is deemed to begin on January 1, 1986 because B qualified as a resident in the preceding calendar year. Thus, B's residency period in the United States begins on May 1, 1985, and ends on September 10, 1986.

[T.D. 8411, 57 FR 15247, Apr. 27, 1992; 57 FR 28612, June 26, 1992]

### § 301.7701(b)–5 Coordination with section 877.

(a) *General rule.* An alien individual will be subject to United States income tax in the manner provided by section 877, regardless of whether the individual has a tax avoidance motive, if—

(1) The alien individual is a resident alien of the United States for at least three consecutive calendar years (the initial residency period) beginning after December 31, 1984;

(2) The period of residence for each of the three consecutive calendar years includes at least 183 days;

(3) The alien is once again taxed as a nonresident (including an individual taxed as a nonresident) under § 301.7701(b)–7(a)(1); and

(4) The alien then becomes a resident of the United States before the close of the third calendar year beginning after the individual's residency termination date in the initial residency period.

(b) *Tax imposed.* The tax provided for under paragraph (a) of this section will be imposed for the intervening period of nonresidency only if the amount of tax would exceed the amount of tax that would be imposed under section 871, relating to the taxation of nonresident aliens.

(c) *Example*. The following example illustrates the application of this section.

*Example*. B, a citizen of foreign country F, enters the United States on April 1, 1985, as a lawful permanent resident. On August 1, 1987, B ceases to be a lawful permanent resident and returns to country F. B meets the initial residency period requirement because he is a resident of the United States for at least 183 days in each of three consecutive years (1985, 1986 and 1987). B returns to the United States on October 5, 1990, as a lawful permanent resident. Because B became a resident of the United States before the close of the third calendar year (1990) beginning after the close of the initial residency period (August 1, 1987), he is subject to tax under section 877(b) for the intervening period of nonresidency, August 2, 1987 through October 4, 1990, if the amount of the tax imposed under section 877 is more than the tax imposed under section 871.

[T.D. 8411, 57 FR 15250, Apr. 27, 1992]

### § 301.7701(b)–6 Taxable year.

(a) *In general*. An alien individual who has not established a fiscal year as his or her taxable year prior to the period that the individual is subject to United States income tax as a resident or a nonresident shall adopt the calendar year as his or her taxable year. An alien who has established a fiscal year in a foreign country prior to the period that the individual is subject to United States income tax may adopt the calendar year as his or her taxable year for United States income tax purposes without requesting a change in accounting period. An individual will be considered to have established a fiscal year (whether in the United States or a foreign country) if the annual accounting period on which the individual computes his or her income is a fiscal year, the individual keeps his or her books in accordance with that fiscal year, and the requirements of section 441 and § 1.441–1(b) of this chapter are otherwise satisfied. An alien who has established a fiscal year and is a resident alien during the calendar year will be treated as a resident alien with respect to any portion of his or her taxable year (beginning with the individual's residency starting date and ending with the individual's residency termination date) that falls within such calendar year. Once the individual has established either a fiscal or calendar year taxable year for any period for which the individual is subject to United States income tax, the individual may not change that taxable year without the approval of the Secretary. See section 442.

(b) *Examples*. The following examples illustrate the operation of this section:

*Example 1*. B, a citizen and resident of foreign country F, was engaged in a United States business during 1982 and filed a return on a fiscal year basis. B's fiscal year runs from October 1 to September 30. B comes to the United States on March 8, 1985 and remains in the United States until October 10, 1985, when he returns to country F. B maintains a closer connection to and his tax home in Country F for the remainder of calendar year 1985. B, who is not a United States resident at any time in 1986, is a United States resident for the period that begins on March 8, 1985, and ends on October 10, 1985. B has adopted a fiscal year taxable year for purposes of computing his United States income tax liability. For his fiscal year that ends on September 30, 1985, B will be taxed as a United States resident for the period that begins on March 8, 1985 and ends on September 30, 1985. For his fiscal year that ends on September 30, 1986, B will only be taxed as a United States resident for the period that begins on October 1, 1985 and ends on October 10, 1985.

*Example 2*. The facts are the same as in *Example 1*, except that B's 1982 business was a country F business established on a fiscal year basis and at no time prior to 1985 was B subject to United States income tax. B may adopt a calendar year as his taxable year for United States income tax purposes without requesting a change of accounting period. B continues to use a fiscal year as his taxable year. For his fiscal year that ends on September 30, 1985, B will be taxed as a United States resident for the period that begins on March 8, 1985 and ends September 30, 1985. For his fiscal year that ends on September 30, 1986, B will be taxed as a United States resident for the period that begins on October 1, 1985 and ends on October 10, 1985.

*Example 3*. The facts are the same as in *Example 1*, except that B's 1982 business was a country F business established on a fiscal year basis and at no time prior to 1985 was B subject to United States income tax. B may adopt a calendar year as his taxable year for United States income tax purposes without requesting a change of accounting period. B adopts a calendar year as his taxable year for 1985. For his calendar year taxable year ending on December 31, 1985, B will be taxed as a United States resident for the period

that begins on March 8, 1985, and ends on October 10, 1985.

[T.D. 8411, 57 FR 15250, Apr. 27, 1992; 57 FR 28612, June 26, 1992, as amended by T.D. 8996, 67 FR 35012, May 17, 2002]

### § 301.7701(b)–7 Coordination with income tax treaties.

(a) *Consistency requirement*—(1) *Application*. The application of this section shall be limited to an alien individual who is a dual resident taxpayer pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States and its treaty partner. A ''dual resident taxpayer'' is an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws. If the alien individual determines that he or she is a resident of the foreign country for treaty purposes, and the alien individual claims a treaty benefit (as a nonresident of the United States) so as to reduce the individual's United States income tax liability with respect to any item of income covered by an applicable tax convention during a taxable year in which the individual was considered a dual resident taxpayer, then that individual shall be treated as a nonresident alien of the United States for purposes of computing that individual's United States income tax liability under the provisions of the Internal Revenue Code and the regulations thereunder (including the withholding provisions of section 1441 and the regulations under that section in cases in which the dual resident taxpayer is the recipient of income subject to withholding) with respect to that portion of the taxable year the individual was considered a dual resident taxpayer.

(2) *Computation of tax liability*. If an alien individual is a dual resident taxpayer, then the rules on residency provided in the convention shall apply for purposes of determining the individual's residence for all purposes of that treaty.

(3) *Other Code purposes*. Generally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under section 957 or whether a foreign corporation is a foreign personal holding company under section 552. In addition, the application of paragraph (a)(2) of this section does not affect the determination of the individual's residency time periods under § 301.7701(b)–4.

(4) *Special rules for S corporations*. [Reserved]

(b) *Filing requirements*. An alien individual described in paragraph (a) of this section who determines his or her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident. The individual shall prepare a return and compute his or her tax liability as a nonresident alien. The individual shall attach a statement (in the form required in paragraph (c) of this section) to the Form 1040NR. The Form 1040NR and the attached statement, shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The filing of a Form 1040NR by an individual described in paragraph (a) of this section may affect the determination by the Immigration and Naturalization Service as to whether the individual qualifies to maintain a residency permit.

(c) *Contents of statement*—(1) *In general*—(i) *Returns due after December 15, 1997*. The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form. See section 6114 and § 301.6114–1 for rules relating to other treaty-based return positions taken by the same taxpayer.

(ii) *Earlier returns*. For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997,

the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (c)(1) of this section in effect prior to December 15, 1997 (see § 301.7701(b)–7(c)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Controlled foreign corporation shareholders.* If the taxpayer who claims a treaty benefit as a nonresident of the United States is a United States shareholder in a controlled foreign corporation (CFC), as defined in section 957 or section 953(c), and there are no other United States shareholders in that CFC, then for purposes of paragraph (c)(1) of this section, the approximate amount of subpart F income (as defined in section 952) that would have been included in the taxpayer's income may be determined based on the audited foreign financial statements of the CFC.

(3) *S corporation shareholders.* [Reserved]

(d) *Relationship to section 6114(a) treaty-based return positions.* The statement required by paragraph (b) of this section will be considered disclosure for purposes of section 6114 and § 301.6114–1(a), but only if the statement is in the form required by paragraph (c) of this section. If the taxpayer fails to file the statement required by paragraph (b) of this section on or before the date prescribed in paragraph (b) of this section, the taxpayer will be subject to the penalties imposed by section 6712. See section 6712 and § 301.6712–1.

(e) *Examples.* The following examples illustrate the application of this section:

*Example 1.* B, an alien individual, is a resident of foreign country X, under X's internal law. Country X is a party to an income tax convention with the United States. B is also a resident of the United States under the Internal Revenue Code. B is considered to be a resident of country X under the convention. The convention does not specifically deal with characterization of foreign corporations as controlled foreign corporations or the taxability of United States shareholders on inclusions of subpart F income, but it provides, in an ''Other Income'' article similar to Article 21 of the 1981 draft of the United States Model Income Tax Convention (U.S. Model), that items of income of a resident of country X that are not specifically dealt with in the convention shall be taxable only in country X. B owns 80% of the one class of stock of foreign corporation R. The remaining 20% is owned by C, a United States citizen who is unrelated to B. In 1985, corporation R's only income is interest that is foreign personal holding company income under § 1.954A-2 of this chapter. Because the United States-X income tax convention does not deal with characterization of foreign corporations as controlled foreign corporations, United States internal income tax law applies. Therefore, B and C are United States shareholders within the meaning of § 1.951–1(g) of this chapter, corporation R is a controlled foreign corporation within the meaning of § 1.957–1 of this chapter, and corporation R's income is included in C's income as subpart F income under § 1.951–1 of this chapter. B may avoid current taxation on his share of the subpart F inclusion by filing as a nonresident (*i.e.,* by following the procedure in § 301.7701(b)–7(b)).

*Example 2.* The facts are the same as in *Example 1,* except that B also earns United States source dividend income. The United States-X income tax convention provides that the rate of United States tax on United States source dividends paid to residents of country X shall not exceed 15 percent of the gross amount of the dividends. B's United States tax liability with respect to the dividends would be smaller if he were treated as a resident alien, subject to tax on a net basis (*i.e.,* after the allowance of deductions) than if he were treated as a nonresident alien. If, however, B chooses to file as a nonresident in order to claim treaty benefits with respect to his share of R's subpart F income, his overall United States tax liability, including the portion attributable to the dividends, must be determined as if he were a nonresident alien.

*Example 3.* C, a married alien individual with three children, is a resident of foreign country Y, under Y's internal law. Country Y is a party to an income tax convention with the United States. C is also a resident of the United States under the Internal Revenue Code. C is considered to be a resident of country Y under the convention. The convention specifically covers, among other items of income, personal services income, dividends and interest. C is sent by her country Y employer to work in the United States from January 1, 1985 until December 31, 1985. During 1985, C also earns United States source dividends and interest and incurs mortgage interest expenses on her personal residence. The United States-Y treaty provides that remuneration for personal services performed in the United States by a country Y resident is exempt from United States tax if, among other things, the individual performing such services is present in the United States for a period that is not in excess of 183 days. The treaty provides that the rate of United States tax on United

States source dividends paid to residents of Y shall not exceed 15 percent of the gross amount of the dividends and it exempts residents of Y from United States tax on United States source interest. In filing her 1985 tax return, C may choose to file either as a resident alien without claiming any treaty benefits or as a nonresident alien if she desires to claim any treaty benefit. C files as a nonresident (*i.e.* by following the procedure described in § 301.7701(b)–7(b)). Because C does not satisfy the requirements of the United States-Y treaty with regard to exempting personal services income from United States tax, C will be taxed on her personal services income at graduated rates under section 1 of the Code pursuant to section 871(b) of the Code. She will not be entitled to deduct her mortgage interest expenses or to claim more than one personal exemption because she is taxed as a nonresident alien under the Code by virtue of her decision to claim treaty benefits, and section 873 of the Code denies nonresidents the deduction for personal residence mortgage interest expense and generally limits them to only one personal exemption. C will be subject to a tax of 15 percent of the gross amount of her dividend income under section 871(a) of the Code as modified by the treaty, and she will be exempt from tax on her interest income. C is not entitled to file a joint return with her spouse even if he is a resident alien under the Code for 1985.

*Example 4.* The facts are the same as in *Example 3,* except that C does not choose to claim treaty benefits with respect to any items of income covered by the treaty (*i.e.,* she files as a resident). Therefore, she is taxed as a resident under the Code and pays tax at graduated rates on her personal services income, dividends, and interest. In addition, she is entitled to deduct her mortgage interest expenses and to take personal exemptions for her spouse and three children. C will be entitled to file a joint return with her spouse if he is a resident alien for 1985 or, if he is a nonresident alien, C and her spouse may elect to file a joint return pursuant to section 6013.

[T.D. 8411, 57 FR 15251, Apr. 27, 1992; 57 FR 28612, June 26, 1992, as amended by T.D. 8733, 62 FR 53387, Oct. 14, 1997]

### § 301.7701(b)–8 Procedural rules.

(a) *Who must file*—(1) *Closer connection exception.* An alien individual who otherwise meets the substantial presence test must file a statement to explain the basis of the individual's claim that he or she is able to satisfy the closer connection exception described in § 301.7701(b)–2.

(2) *Exempt individuals and individuals with a medical condition.* An alien individual must file a statement to explain the basis of the individual's claim that he or she is able to exclude days of presence in the United States because the individual—

(i) Is an exempt individual as described in § 301.7701(b)–3(b)(3) (teacher/trainee) or (b)(4) (student);

(ii) Is an exempt individual described in § 301.7701 (b)–3(b)(5) (professional athlete); or

(iii) Has a medical condition or problem as described in § 301.7701(b)–3(c).

(3) *De minimis presence and residency starting and termination dates.* A statement must be filed by an individual who is seeking to establish—

(i) That a period of de minimis presence of ten or fewer days should be disregarded for purposes of the individual's residency starting or termination date; or

(ii) A residency termination date.

(b) *Contents of statement*—(1) *Closer connection exception*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8840 (Closer Connection Exception Statement) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (b)(1) of this section in effect prior to December 15, 1997 (see § 301.7701(b)–8(b)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Exempt individuals and individuals with a medical condition*—(i) *Returns due after December 15, 1997.* The statement filed by an individual described in paragraph (a)(2) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8843 (Statement for Exempt Individuals and Individuals with a Medical

Condition) or appropriate successor form.

(ii) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(2) of this section must contain the information in accordance with paragraph (b)(2) of this section in effect prior to December 15, 1997 (see § 301.7701(b)–8(b)(2) as contained in 26 CFR part 301, revised April 1, 1997).

(3) *De minimis presence and residency starting and termination dates.* The statement filed by an individual described in paragraph (a)(3) of this section shall be dated, signed by the individual seeking to exclude de minimis presence for purposes of the individual's residency starting or termination date or to establish a residency termination date, and verified by a declaration that the statement is made under the penalty of perjury. The statement shall contain the information described in paragraphs (b)(1) (i), (ii) and (iii) of this section and the following information (as applicable)—

(i) The first day that the individual was present in the United States during the current year;

(ii) The last day that the individual was present in the United States during the current year;

(iii) Dates of de minimis presence that the individual is seeking to exclude from his or her residency starting or termination dates;

(iv) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country during a period of de minimis presence;

(v) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country following the individual's last day of presence in the United States during the current year or following the abandonment or rescission of the individual's status as a lawful permanent resident during the current year;

(vi) Date that the individual's status as a lawful permanent resident was abandoned or rescinded; and

(vii) Sufficient facts (including copies of relevant documents) to establish that the individual's status as lawful permanent resident has been abandoned or rescinded.

(c) *How to file.* Individuals described in paragraph (a) of this section who are required to make a return on Form 1040 or 1040NR pursuant to paragraph (a) or (b) of § 1.6012–1 of this chapter must attach the statement described in paragraph (b) of this section to their return for the taxable year for which the statement is relevant. An individual who is not required to file either Form 1040 or 1040NR must file the statement with the Internal Revenue Service Center, Philadelphia, PA 19255 on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident for the calendar year for which the statement applies. The statement may be signed and filed for the taxpayer by the taxpayer's agent in accordance with § 1.6061–1 of this chapter.

(d) *Penalty for failure to file statement*—(1) *General rule.* If an individual is required to file a statement pursuant to paragraph (a)(1), (a)(2)(ii), (a)(2)(iii) or (a)(3) of this section and fails to file such statement on or before the date prescribed by paragraph (c) of this section, the individual will not be eligible for the closer connection exception described in § 301.7701(b)–2 and will be required to include all days of presence in the United States (calculated without the benefit of §§ 301.7701(b)–3(b)(5), 301.7701(b)–3(c), and 301.7701(b)–4(c)(1)) for purposes of the substantial presence test and for determining the individual's residency starting and termination dates. If an individual is considered to be a resident because of this paragraph and the individual is also a resident of a country with which the United States has an income tax convention pursuant to that convention, the individual shall be treated in the manner provided in § 301.7701(b)–7 (a) (relating to the treatment of individuals who are dual residents).

(2) *Exception.* The penalty described in paragraph (d)(1) of this section shall not apply if the individual can show by clear and convincing evidence that he or she took reasonable actions to become aware of the filing requirements

and significant affirmative steps to comply with those requirements.

(e) *Filing requirement disregarded*. Notwithstanding paragraph (d) of this section, the Secretary or his or her delegate may in their sole discretion, when it is in the best interest of the government to do so and based on all of the facts and circumstances, disregard the individual's failure to file timely the statement described in paragraph (a) of this section in determining the individual's days of presence in the United States.

[T.D. 8411, 57 FR 15252, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992; as amended by T.D. 8733, 62 FR 53387, Oct. 14, 1997]

### § 301.7701(b)–9 Effective dates of §§ 301.7701(b)–1 through 301.7701(b)–7.

(a) *In general*. Except as indicated in paragraph (b) of this section, §§ 301.7701(b)–1 through 301.7701(b)–7 apply to taxable years beginning after December 31, 1984. For the rules applicable to earlier taxable years, see §§ 1.871–2 through 1.871–5 of this chapter.

(b) *Special rules*—(1) *Green card test-residency starting date*. If an alien was a lawful permanent resident throughout 1984 (regardless of whether the individual was physically present in the United States), or was physically present in the United States at any time during 1984 while a lawful permanent resident, the individual will be considered to have been a resident of the United States during 1984 for purposes of applying the provisions of section 7701(b)(2)(A) and § 301.7701(b)–4 such that the individual will, if he meets the substantial presence or green card test in 1985, be considered a resident of the United States as of January 1, 1985, regardless of when the individual was first present in the United States in 1985.

(2) *Substantial presence test-years included*. For purposes of applying the substantial presence test for calendar years 1985 and 1986, days of presence in 1984 will only be counted for aliens who had been residents under prior law (§§ 1.871–2 through 1.871–5 of this chapter) at the end of calendar year 1984. Days of presence in 1983 will only be counted for aliens who had been residents under prior law at the end of both calendar year 1983 and 1984.

(3) *Professional athletes*. For purposes of applying the substantial presence test, only days of presence in the United States after October 22, 1986, shall be excluded for individuals described in § 301.7701(b)–3(b)(5) (professional athletes).

(4) *Procedural rules and filing requirements*. The procedural rules and filing requirements described in §§ 301.7701(b)–7(b) and 301.7701(b)–8 shall apply to taxable years beginning after December 31, 1991.

[T.D. 8411, 57 FR 15253, Apr. 27, 1992]

### § 301.7701(i)–0 Outline of taxable mortgage pool provisions.

This section lists the major paragraphs contained in §§ 301.7701(i)–1 through 301.7701(i)–4.

*§ 301.7701(i)–1 Definition of a taxable mortgage pool.*

(a) Purpose.
(b) In general.
(c) Asset composition tests.
(1) Determination of amount of assets.
(2) Substantially all.
(i) In general.
(ii) Safe harbor.
(3) Equity interests in pass-through arrangements.
(4) Treatment of certain credit enhancement contracts.
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[T.D. 8610, 60 FR 40088, Aug. 7, 1995]

## § 301.7701(i)–1 Definition of a taxable mortgage pool.

(a) *Purpose.* This section provides rules for applying section 7701(i), which defines taxable mortgage pools. The purpose of section 7701(i) is to prevent income generated by a pool of real estate mortgages from escaping Federal income taxation when the pool is used to issue multiple class mortgage-backed securities. The regulations in this section and in §§ 301.7701(i)–2 through 301.7701(i)–4 are to be applied in accordance with this purpose. The taxable mortgage pool provisions apply to entities or portions of entities that qualify for REMIC status but do not elect to be taxed as REMICs as well as to certain entities or portions of entities that do not qualify for REMIC status.

(b) *In general.* (1) A taxable mortgage pool is any entity or portion of an entity (as defined in § 301.7701(i)–2) that satisfies the requirements of section 7701(i)(2)(A) and this section as of any testing day (as defined in § 301.7701(i)–3(c)(2)). An entity or portion of an entity satisfies the requirements of section 7701(i)(2)(A) and this section if substantially all of its assets are debt obligations, more than 50 percent of those debt obligations are real estate mortgages, the entity is the obligor under debt obligations with two or more maturities, and payments on the debt obligations under which the entity is obligor bear a relationship to payments on the debt obligations that the entity holds as assets.

(2) Paragraph (c) of this section provides the tests for determining whether substantially all of an entity's assets are debt obligations and for determining whether more than 50 percent of its debt obligations are real estate mortgages. Paragraph (d) of this section defines real estate mortgages for purposes of the 50 percent test. Paragraph (e) of this section defines two or more maturities and paragraph (f) of this section provides rules for determining whether debt obligations bear a relationship to the assets held by an entity. Paragraph (g) of this section provides anti-avoidance rules. Section 301.7701(i)–2 provides rules for applying section 7701(i) to portions of entities and § 301.7701(i)–3 provides effective dates. Section 301.7701(i)–4 provides special rules for certain entities. For purposes of the regulations under section 7701(i), the term entity includes a portion of an entity (within the meaning

of section 7701(i)(2)(B)), unless the context clearly indicates otherwise.

(c) *Asset composition tests*—(1) *Determination of amount of assets.* An entity must use the Federal income tax basis of an asset for purposes of determining whether substantially all of its assets consist of debt obligations (or interests therein) and whether more than 50 percent of those debt obligations (or interests) consist of real estate mortgages (or interests therein). For purposes of this paragraph, an entity determines the basis of an asset with the assumption that the entity is not a taxable mortgage pool.

(2) *Substantially all*—(i) *In general.* Whether substantially all of the assets of an entity consist of debt obligations (or interests therein) is based on all the facts and circumstances.

(ii) *Safe harbor.* Notwithstanding paragraph (c)(2)(i) of this section, if less than 80 percent of the assets of an entity consist of debt obligations (or interests therein), then less than substantially all of the assets of the entity consist of debt obligations (or interests therein).

(3) *Equity interests in pass-through arrangements.* The equity interest of an entity in a partnership, S corporation, trust, REIT, or other pass-through arrangement is deemed to have the same composition as the entity's share of the assets of the pass-through arrangement. For example, if an entity's stock interest in a REIT has an adjusted basis of $20,000, and the assets of the REIT consist of equal portions of real estate mortgages and other real estate assets, then the entity is treated as holding $10,000 of real estate mortgages and $10,000 of other real estate assets.

(4) *Treatment of certain credit enhancement contracts*—(i) *In general.* A credit enhancement contract (as defined in paragraph (c)(4)(ii) of this section) is not treated as a separate asset of an entity for purposes of the asset composition tests set forth in section 7701(i)(2)(A)(i), but instead is treated as part of the asset to which it relates. Furthermore, any collateral supporting a credit enhancement contract is not treated as an asset of an entity solely because it supports the guarantee represented by that contract.

(ii) *Credit enhancement contract defined.* For purposes of this section, a credit enhancement contract is any arrangement whereby a person agrees to guarantee full or partial payment of the principal or interest payable on a debt obligation (or interest therein) or on a pool of such obligations (or interests), or full or partial payment on one or more classes of debt obligations under which an entity is the obligor, in the event of defaults or delinquencies on debt obligations, unanticipated losses or expenses incurred by the entity, or lower than expected returns on investments. Types of credit enhancement contracts may include, but are not limited to, pool insurance contracts, certificate guarantee insurance contracts, letters of credit, guarantees, or agreements whereby an entity, a mortgage servicer, or other third party agrees to make advances (regardless of whether, under the terms of the agreement, the payor is obligated, or merely permitted, to make those advances). An agreement by a debt servicer to advance to an entity out of its own funds an amount to make up for delinquent payments on debt obligations is a credit enhancement contract. An agreement by a debt servicer to pay taxes and hazard insurance premiums on property securing a debt obligation, or other expenses incurred to protect an entity's security interests in the collateral in the event that the debtor fails to pay such taxes, insurance premiums, or other expenses, is a credit enhancement contract.

(5) *Certain assets not treated as debt obligations*—(i) *In general.* For purposes of section 7701(i)(2)(A), real estate mortgages that are seriously impaired are not treated as debt obligations. Whether a mortgage is seriously impaired is based on all the facts and circumstances including, but not limited to: the number of days delinquent, the loan-to-value ratio, the debt service coverage (based upon the operating income from the property), and the debtor's financial position and stake in the property. However, except as provided in paragraph (c)(5)(ii) of this section, no single factor in and of itself is determinative of whether a loan is seriously impaired.

(ii) *Safe harbor*—(A) *In general.* Unless an entity is receiving or anticipates receiving payments with respect to a mortgage, a single family residential real estate mortgage is seriously impaired if payments on the mortgage are more than 89 days delinquent, and a multi-family residential or commercial real estate mortgage is seriously impaired if payments on the mortgage are more than 59 days delinquent. Whether an entity anticipates receiving payments with respect to a mortgage is based on all the facts and circumstances.

(B) *Payments with respect to a mortgage defined.* For purposes of paragraph (c)(5)(ii)(A) of this section, payments with respect to a mortgage mean any payments on the mortgage as defined in paragraph (f)(2)(i) of this section if those payments are substantial and relatively certain as to amount and any payments on the mortgage as defined in paragraph (f)(2) (ii) or (iii) of this section.

(C) *Entity treated as not anticipating payments.* With respect to any testing day (as defined in § 301.7701(i)–3(c)(2)), an entity is treated as not having anticipated receiving payments on the mortgage as defined in paragraph (f)(2)(i) of this section if 180 days after the testing day, and despite making reasonable efforts to resolve the mortgage, the entity is not receiving such payments and has not entered into any agreement to receive such payments.

(d) *Real estate mortgages or interests therein defined*—(1) *In general.* For purposes of section 7701(i)(2)(A)(i), the term real estate mortgages (or interests therein) includes all—

(i) Obligations (including participations or certificates of beneficial ownership therein) that are principally secured by an interest in real property (as defined in paragraph (d)(3) of this section);

(ii) Regular and residual interests in a REMIC; and

(iii) Stripped bonds and stripped coupons (as defined in section 1286(e) (2) and (3)) if the bonds (as defined in section 1286(e)(1)) from which such stripped bonds or stripped coupons arose would have qualified as real estate mortgages or interests therein.

(2) *Interests in real property and real property defined*—(i) *In general.* The definition of interests in real property set forth in § 1.856–3(c) of this chapter and the definition of real property set forth in § 1.856–3(d) of this chapter apply to define those terms for purposes of paragraph (d) of this section.

(ii) *Manufactured housing.* For purposes of this section, the definition of real property includes manufactured housing, provided the properties qualify as single family residences under section 25(e)(10) and without regard to the treatment of the properties under state law.

(3) *Principally secured by an interest in real property*—(i) *Tests for determining whether an obligation is principally secured.* For purposes of paragraph (d)(1) of this section, an obligation is principally secured by an interest in real property only if it satisfies either the test set out in paragraph (d)(3)(i)(A) of this section or the test set out in paragraph (d)(3)(i)(B) of this section.

(A) *The 80 percent test.* An obligation is principally secured by an interest in real property if the fair market value of the interest in real property (as defined in paragraph (d)(2) of this section) securing the obligation was at least equal to 80 percent of the adjusted issue price of the obligation at the time the obligation was originated (that is, the issue date). For purposes of this test, the fair market value of the real property interest is first reduced by the amount of any lien on the real property interest that is senior to the obligation being tested, and is reduced further by a proportionate amount of any lien that is in parity with the obligation being tested.

(B) *Alternative test.* An obligation is principally secured by an interest in real property if substantially all of the proceeds of the obligation were used to acquire, improve, or protect an interest in real property that, at the origination date, is the only security for the obligation. For purposes of this test, loan guarantees made by Federal, state, local governments or agencies, or other third party credit enhancement, are not viewed as additional security for a loan. An obligation is not considered to be secured by property other than real property solely because

the obligor is personally liable on the obligation.

(ii) *Obligations secured by real estate mortgages (or interests therein), or by combinations of real estate mortgages (or interests therein) and other assets*—(A) *In general*. An obligation secured only by real estate mortgages (or interests therein), as defined in paragraph (d)(1) of this section, is treated as an obligation secured by an interest in real property to the extent of the value of the real estate mortgages (or interests therein). An obligation secured by both real estate mortgages (or interests therein) and other assets is treated as an obligation secured by an interest in real property to the extent of both the value of the real estate mortgages (or interests therein) and the value of so much of the other assets that constitute real property. Thus, under this paragraph, a collateralized mortgage obligation may be an obligation principally secured by an interest in real property. This section is applicable only to obligations issued after December 31, 1991.

(B) *Example*. The following example illustrates the principles of this paragraph (d)(3)(ii):

*Example*. At the time it is originated, an obligation has an adjusted issue price of $300,000 and is secured by a $70,000 loan principally secured by an interest in a single family home, a fifty percent co-ownership interest in a $400,000 parcel of land, and $80,000 of stock. Under paragraph (d)(3)(ii)(A) of this section, the obligation is treated as secured by interests in real property and under paragraph (d)(3)(i)(A) of this section, the obligation is treated as principally secured by interests in real property.

(e) *Two or more maturities*—(1) *In general*. For purposes of section 7701(i)(2)(A)(ii), debt obligations have two or more maturities if they have different stated maturities or if the holders of the obligations possess different rights concerning the acceleration of or delay in the maturities of the obligations.

(2) *Obligations that are allocated credit risk unequally*. Debt obligations that are allocated credit risk unequally do not have, by that reason alone, two or more maturities. Credit risk is the risk that payments of principal or interest will be reduced or delayed because of a default on an asset that supports the debt obligations.

(3) *Examples*. The following examples illustrate the principles of this paragraph (e):

*Example 1*. (i) Corporation M transfers a pool of real estate mortgages to a trustee in exchange for Class A bonds and a certificate representing the residual beneficial ownership of the pool. All Class A bonds have a stated maturity of March 1, 2002, but if cash flows from the real estate mortgages and investments are sufficient, the trustee may select one or more bonds at random and redeem them earlier.

(ii) The Class A bonds do not have different maturities. Each outstanding Class A bond has an equal chance of being redeemed because the selection process is random. The holders of the Class A bonds, therefore, have identical rights concerning the maturities of their obligations.

*Example 2*. (i) Corporation N transfers a pool of real estate mortgages to a trustee in exchange for Class C bonds, Class D bonds, and a certificate representing the residual beneficial ownership of the pool. The Class D bonds are subordinate to the Class C bonds so that cash flow shortfalls due to defaults or delinquencies on the real estate mortgages are borne first by the Class D bond holders. The terms of the bonds are otherwise identical in all relevant aspects except that the Class D bonds carry a higher coupon rate because of the subordination feature.

(ii) The Class C bonds and the Class D bonds share credit risk unequally because of the subordination feature. However, neither this difference, nor the difference in interest rates, causes the bonds to have different maturities. The result is the same if, in addition to the other terms described in paragraph (i) of this *Example 2*, the Class C bonds are accelerated as a result of the issuer becoming unable to make payments on the Class C bonds as they become due.

(f) *Relationship test*—(1) *In general*. For purposes of section 7701(i)(2)(A)(iii), payments on debt obligations under which an entity is the obligor (liability obligations) bear a relationship to payments (as defined in paragraph (f)(2) of this section) on debt obligations an entity holds as assets (asset obligations) if under the terms of the liability obligations (or underlying arrangement) the timing and amount of payments on the liability obligations are in large part determined by the timing and amount of payments or projected payments on the asset obligations. For purposes of the relationship test, any payment arrangement,

including a swap or other hedge, that achieves a substantially similar result is treated as satisfying the test. For example, any arrangement where the timing and amount of payments on liability obligations are determined by reference to a group of assets (or an index or other type of model) that has an expected payment experience similar to that of the asset obligations is treated as satisfying the relationship test.

(2) *Payments on asset obligations defined*. For purposes of section 7701(i)(2)(A)(iii) and this section, payments on asset obligations include—

(i) A payment of principal or interest on an asset obligation, including a prepayment of principal, a payment under a credit enhancement contract (as defined in paragraph (c)(4)(ii) of this section) and a payment from a settlement at a discount (other than a substantial discount);

(ii) A payment from a settlement at a substantial discount, but only if the settlement is arranged, whether in writing or otherwise, prior to the issuance of the liability obligations; and

(iii) A payment from the foreclosure on or sale of an asset obligation, but only if the foreclosure or sale is arranged, whether in writing or otherwise, prior to the issuance of the liability obligations.

(3) *Safe harbor for entities formed to liquidate assets*. Payments on liability obligations of an entity do not bear a relationship to payments on asset obligations of the entity if—

(i) The entity's organizational documents manifest clearly that the entity is formed for the primary purpose of liquidating its assets and distributing proceeds of liquidation;

(ii) The entity's activities are all reasonably necessary to and consistent with the accomplishment of liquidating assets;

(iii) The entity plans to satisfy at least 50 percent of the total issue price of each of its liability obligations having a different maturity with proceeds from liquidation and not with scheduled payments on its asset obligations; and

(iv) The terms of the entity's liability obligations (or underlying arrangement) provide that within three years of the time it first acquires assets to be liquidated the entity either—

(A) Liquidates; or

(B) Begins to pass through without delay all payments it receives on its asset obligations (less reasonable allowances for expenses) as principal payments on its liability obligations in proportion to the adjusted issue prices of the liability obligations.

(g) *Anti-avoidance rules*—(1) *In general*. For purposes of determining whether an entity meets the definition of a taxable mortgage pool, the Commissioner can disregard or make other adjustments to a transaction (or series of transactions) if the transaction (or series) is entered into with a view to achieving the same economic effect as that of an arrangement subject to section 7701(i) while avoiding the application of that section. The Commissioner's authority includes treating equity interests issued by a non-REMIC as debt if the entity issues equity interests that correspond to maturity classes of debt.

(2) *Certain investment trusts*. Notwithstanding paragraph (g)(1) of this section, an ownership interest in an entity that is classified as a trust under § 301.7701–4(c) will not be treated as a debt obligation of the trust.

(3) *Examples*. The following examples illustrate the principles of this paragraph (g):

*Example 1*. (i) Partnership P, in addition to its other investments, owns $10,000,000 of mortgage pass-through certificates guaranteed by FNMA (FNMA Certificates). On May 15, 1997, Partnership P transfers the FNMA Certificates to Trust 1 in exchange for 100 Class A bonds and Certificate 1. The Class A bonds, under which Trust 1 is the obligor, have a stated principal amount of $5,000,000 and bear a relationship to the FNMA Certificates (within the meaning of § 301.7701(i)–1(f)). Certificate 1 represents the residual beneficial ownership of the FNMA Certificates.

(ii) On July 5, 1997, with a view to avoiding the application of section 7701(i), Partnership P transfers Certificate 1 to Trust 2 in exchange for 100 Class B bonds and Certificate 2. The Class B bonds, under which Trust 2 is the obligor, have a stated principal amount of $5,000,000, bear a relationship to the FNMA Certificates (within the meaning of § 301.7701(i)-1(f)), and have a different maturity than the Class A bonds (within the

meaning of § 301.7701(i)-1(e)). Certificate 2 represents the residual beneficial ownership of Certificate 1.

(iii) For purposes of determining whether Trust 1 is classified as a taxable mortgage pool, the Commissioner can disregard the separate existence of Trust 2 and treat Trust 1 and Trust 2 as a single trust.

*Example 2.* (i) Corporation Q files a consolidated return with its two wholly-owned subsidiaries, Corporation R and Corporation S. Corporation R is in the business of building and selling single family homes. Corporation S is in the business of financing sales of those homes.

(ii) On August 10, 1998, Corporation S transfers a pool of its real estate mortgages to Trust 3, taking back Certificate 3 which represents beneficial ownership of the pool. On September 25, 1998, with a view to avoiding the application of section 7701(i), Corporation R issues bonds that have different maturities (within the meaning of § 301.7701(i)–1(e)) and that bear a relationship (within the meaning of § 301.7701(i)-1(f)) to the real estate mortgages in Trust 3. The holders of the bonds have an interest in a credit enhancement contract that is written by Corporation S and collateralized with Certificate 3.

(iii) For purposes of determining whether Trust 3 is classified as a taxable mortgage pool, the Commissioner can treat Trust 3 as the obligor of the bonds issued by Corporation R.

*Example 3.* (i) Corporation X, in addition to its other assets, owns $110,000,000 in Treasury securities. From time to time, Corporation X acquires pools of real estate mortgages, which it immediately uses to issue multiple-class debt obligations.

(ii) On October 1, 1996, Corporation X transfers $20,000,000 in Treasury securities to Trust 4 in exchange for Class C bonds, Class D bonds, Class E bonds, and Certificate 4. Trust 4 is the obligor of the bonds. The different classes of bonds have the same stated maturity date, but if cash flows from the Trust 4 assets exceed the amounts needed to make interest payments, the trustee uses the excess to retire the classes of bonds in alphabetical order. Certificate 4 represents the residual beneficial ownership of the Treasury securities.

(iii) With a view to avoiding the application of section 7701(i), Corporation X reserves the right to replace any Trust 4 asset with real estate mortgages or guaranteed mortgage pass-through certificates. In the event the right is exercised, cash flows on the real estate mortgages and guaranteed pass-through certificates will be used in the same manner as cash flows on the Treasury securities. Corporation X exercises this right of replacement on February 1, 1997.

(iv) For purposes of determining whether Trust 4 is classified as a taxable mortgage pool, the Commissioner can treat February 1, 1997, as a testing day (within the meaning of § 301.7701(i)-3(c)(2)). The result is the same if Corporation X has an obligation, rather than a right, to replace the Trust 4 assets with real estate mortgages and guaranteed pass-through certificates.

*Example 4.* (i) Corporation Y, in addition to its other assets, owns $1,900,000 in obligations secured by personal property. On November 1, 1995, Corporation Y begins negotiating a $2,000,000 loan to individual A. As security for the loan, A offers a first deed of trust on land worth $1,700,000.

(ii) With a view to avoiding the application of section 7701(i), Corporation Y induces A to place the land in a partnership in which A will have a 95 percent interest and agrees to accept the partnership interest as security for the $2,000,000 loan. Thereafter, the loan to A, together with the $1,900,000 in obligations secured by personal property, are transferred to Trust 5 and used to issue bonds that have different maturities (within the meaning of § 301.7701(i)-1(e)) and that bear a relationship (within the meaning of § 301.7701(i)-1(f)) to the $1,900,000 in obligations secured by personal property and the loan to A.

(iii) For purposes of determining whether Trust 5 is a taxable mortgage pool, the Commissioner can treat the loan to A as an obligation secured by an interest in real property rather than as an obligation secured by an interest in a partnership.

*Example 5.* (i) Corporation Z, in addition to its other assets, owns $3,000,000 in notes secured by interests in retail shopping centers. Partnership L, in addition to its other assets, owns $20,000,000 in notes that are principally secured by interests in single family homes and $3,500,000 in notes that are principally secured by interests in personal property.

(ii) On December 1, 1995, Partnership L asks Corporation Z for two separate loans, one in the amount of $9,375,000 and another in the amount of $625,000. Partnership L offers to collateralize the $9,375,000 loan with $10,312,500 of notes secured by interests in single family homes and the $625,000 loan with $750,000 of notes secured by interests in personal property. Corporation Z has made similar loans to Partnership L in the past.

(iii) With a view to avoiding the application of section 7701(i), Corporation Z induces Partnership L to accept a single $10,000,000 loan and to post as collateral $7,500,000 of the notes secured by interests in single family homes and all $3,500,000 of the notes secured by interests in personal property. Ordinarily, Corporation Z would not make a loan on these terms. Thereafter, the loan to Partnership L, together with the $3,000,000 in notes secured by interests in retail shopping centers, are transferred to Trust 6 and used to issue bonds that have different maturities (within the meaning of § 301.7701(i)–1(e)) and

that bear a relationship (within the meaning of § 301.7701(i)–1(f)) to the loans secured by interests in retail shopping centers and the loan to Partnership L.

(iv) For purposes of determining whether Trust 6 is a taxable mortgage pool, the Commissioner can treat the $10,000,000 loan to Partnership L as consisting of a $9,375,000 obligation secured by interests in real property and a $625,000 obligation secured by interests in personal property. Under § 301.7701(i)–1(d)(3)(ii)(A), the notes secured by single family homes are treated as $7,500,000 of interests in real property. Under § 301.7701(i)–1(d)(3)(i)(A), $7,500,000 of interests in real property are sufficient to treat a $9,375,000 obligation as principally secured by an interest in real property ($7,500,000 equals 80 percent of $9,375,000).

[T.D. 8610, 60 FR 40088, Aug. 7, 1995; 60 FR 49754, Sept. 27, 1995]

### § 301.7701(i)–2 Special rules for portions of entities.

(a) *Portion defined*. Except as provided in paragraph (b) of this section and § 301.7701(i)–1, a portion of an entity includes all assets that support one or more of the same issues of debt obligations. For this purpose, an asset supports a debt obligation if, under the terms of the debt obligation (or underlying arrangement), the timing and amount of payments on the debt obligation are in large part determined, either directly or indirectly, by the timing and amount of payments or projected payments on the asset or a group of assets that includes the asset. Indirect payment arrangements include, for example, a swap or other hedge, or arrangements where the timing and amount of payments on the debt obligations are determined by reference to a group of assets (or an index or other type of model) that has an expected payment experience similar to that of the assets. For purposes of this paragraph, the term payments includes all proceeds and receipts from an asset.

(b) *Certain assets and rights to assets disregarded*—(1) *Credit enhancement assets*. An asset that qualifies as a credit enhancement contract (as defined in § 301.7701(i)–1(c)(4)(ii)) is not included in a portion as a separate asset, but is treated as part of the assets in the portion to which it relates under § 301.7701(i)–1(c)(4)(i). An asset that does not qualify as a credit enhancement contract (as defined in § 301.7701(i)–1(c)(4)(ii)), but that nevertheless serves the same function as a credit enhancement contract, is not included in a portion as a separate asset or otherwise.

(2) *Assets unlikely to service obligations*. A portion does not include assets that are unlikely to produce any significant cash flows for the holders of the debt obligations. This paragraph applies even if the holders of the debt obligations are legally entitled to cash flows from the assets. Thus, for example, even if the sale of a building would cause a series of debt obligations to be redeemed, the building is not included in a portion if it is not likely to be sold.

(3) *Recourse*. An asset is not included in a portion solely because the holders of the debt obligations have recourse to the holder of that asset.

(c) *Portion as obligor*—(1) *In general*. For purposes of section 7701(i)(2)(A)(ii), a portion of an entity is treated as the obligor of all debt obligations supported by the assets in that portion.

(2) *Example*. The following example illustrates the principles of this section:

*Example*. (i) Corporation Z owns $1,000,000,000 in assets including an office complex and $90,000,000 of real estate mortgages.

(ii) On November 30, 1998, Corporation Z issues eight classes of bonds, Class A through Class H. Each class is secured by a separate letter of credit and by a lien on the office complex. One group of the real estate mortgages supports Class A through Class D, another group supports Class E through Class G, and a third group supports Class H. It is anticipated that the cash flows from each group of mortgages will service its related bonds.

(iii) Each of the following constitutes a separate portion of Corporation Z: the group of mortgages supporting Class A through Class D; the group of mortgages supporting Class E through Class G; and the group of mortgages supporting Class H. No other asset is included in any of the three portions notwithstanding the lien of the bonds on the office complex and the fact that Corporation Z is the issuer of the bonds. The letters of credit are treated as incidents of the mortgages to which they relate.

(iv) For purposes of section 7701(i)(2)(A)(ii), each portion described above is treated as the obligor of the bonds of that portion, notwithstanding the fact that Corporation Z is the legal obligor with respect to the bonds.

[T.D. 8610, 60 FR 40091, Aug. 7, 1995]

**§ 301.7701(i)–3 Effective dates and duration of taxable mortgage pool classification.**

(a) *Effective dates.* Except as otherwise provided, the regulations under section 7701(i) are effective and applicable September 6, 1995.

(b) *Entities in existence on December 31, 1991*—(1) *In general.* For transitional rules concerning the application of section 7701(i) to entities in existence on December 31, 1991, see section 675(c) of the Tax Reform Act of 1986.

(2) *Special rule for certain transfers.* A transfer made to an entity on or after September 6, 1995, is a substantial transfer for purposes of section 675(c)(2) of the Tax Reform Act of 1986 only if—

(i) The transfer is significant in amount; and

(ii) The transfer is connected to the entity's issuance of related debt obligations (as defined in paragraph (b)(3) of this section) that have different maturities (within the meaning of § 301.7701–1(e)).

(3) *Related debt obligation.* A related debt obligation is a debt obligation whose payments bear a relationship (within the meaning of § 301.7701–1(f)) to payments on debt obligations that the entity holds as assets.

(4) *Example.* The following example illustrates the principles of this paragraph (b):

*Example.* On December 31, 1991, Partnership Q holds a pool of real estate mortgages that it acquired through retail sales of single family homes. Partnership Q raises $10,000,000 on October 25, 1996, by using this pool to issue related debt obligations with multiple maturities. The transfer of the $10,000,000 to Partnership Q is a substantial transfer (within the meaning of § 301.7701(i)–3(b)(2)).

(c) *Duration of taxable mortgage pool classification*—(1) *Commencement and duration.* An entity is classified as a taxable mortgage pool on the first testing day that it meets the definition of a taxable mortgage pool. Once an entity is classified as a taxable mortgage pool, that classification continues through the day the entity retires its last related debt obligation.

(2) *Testing day defined.* A testing day is any day on or after September 6, 1995, on which an entity issues a related debt obligation (as defined in paragraph (b)(3) of this section) that is significant in amount.

[T.D. 8610, 60 FR 40092, Aug. 7, 1995]

**§ 301.7701(i)–4 Special rules for certain entities.**

(a) *States and municipalities*—(1) *In general.* Regardless of whether an entity satisfies any of the requirements of section 7701(i)(2)(A), an entity is not classified as a taxable mortgage pool if—

(i) The entity is a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof (within the meaning of § 1.103–1(b) of this chapter), or is empowered to issue obligations on behalf of one of the foregoing;

(ii) The entity issues the debt obligations in the performance of a governmental purpose; and

(iii) The entity holds the remaining interests in all assets that support those debt obligations until the debt obligations issued by the entity are retired.

(2) *Governmental purpose.* The term governmental purpose means an essential governmental function within the meaning of section 115. A governmental purpose does not include the mere packaging of debt obligations for resale on the secondary market even if any profits from the sale are used in the performance of an essential governmental function.

(3) *Determinations by the Commissioner.* If an entity is not described in paragraph (a)(1) of this section, but has a similar purpose, then the Commissioner may determine that the entity is not classified as a taxable mortgage pool.

(b) *REITs.* [Reserved]

(c) *Subchapter S corporations*—(1) *In general.* An entity that is classified as a taxable mortgage pool may not elect to be an S corporation under section 1362(a) or maintain S corporation status.

(2) *Portion of an S corporation treated as a separate corporation.* An S corporation is not treated as a member of an affiliated group under section 1361(b)(2)(A) solely because a portion of

the S corporation is treated as a separate corporation under section 7701(i).

[T.D. 8610, 60 FR 40092, Aug. 7, 1995]

### § 301.7704–2 Transition provisions.

See the regulations under section 7704 contained in part 1 of this chapter for a definition of the ''substantial new line of business'' that an ''existing'' publicly traded partnership cannot enter without forfeiting its partnership status under the transition provisions applicable to section 7704.

[T.D. 8450, 57 FR 58710, Dec. 11, 1992]

## General Rules

APPLICATION OF INTERNAL REVENUE LAWS

### § 301.7803–1 Security bonds covering personnel of the Internal Revenue Service.

For regulations relating to the procurement of security bonds covering designated personnel of the Internal Revenue Service between January 1, 1956, and June 6, 1972, see 31 CFR part 226.

(Sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805))

[T.D. 7239, 37 FR 28628, Dec. 28, 1972]

### § 301.7805–1 Rules and regulations.

(a) *Issuance*. The Commissioner, with the approval of the Secretary, shall prescribe all needful rules and regulations for the enforcement of the Code (except where this authority is expressly given by the Code to any person other than an officer or employee of the Treasury Department), including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) *Retroactivity*. The Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any regulation or Treasury decision relating to the internal revenue laws shall be applied without retroactive effect. The Commissioner may prescribe the extent, if any, to which any ruling relating to the internal revenue laws, issued by or pursuant to authorization from him, shall be applied without retroactive effect.

(c) *Preparation and distribution of regulations, forms, stamps, and other matters*. The Commissioner, under the direction of the Secretary, shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

### § 301.7811–1 Taxpayer assistance orders.

(a) *Authority to issue*—(1) *In general*. When an application is filed by the taxpayer or the taxpayer's duly authorized representative, in the form, manner and time specified in paragraph (b) of this section, the Ombudsman may issue a taxpayer assistance order if, in the determination of the Ombudsman, the taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Internal Revenue Service, including action or inaction on the part of the Internal Revenue Service.

(2) *Issuance without an application*. The Ombudsman may issue a taxpayer assistance order in the absence of an application under section 7811(a).

(3) *Duly authorized taxpayer's representative*. A ''duly authorized taxpayer's representative'' is any attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(4) *Significant hardship*—(i) *Determination required*. A determination of significant hardship is required to be made by the Ombudsman prior to the issuance of a taxpayer assistance order.

(ii) *Term Defined*. The term *significant hardship* means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the Internal Revenue Service. Mere economic or personal inconvenience to the taxpayer does not constitute significant hardship.

(5) *Finding different from relief*. A finding that a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Internal Revnue Service will not automatically result in relief being granted to a taxpayer under this section. A finding of ''significant hardship'' is separate and distinct from a determination that the taxpayer will be granted relief. The granting of relief requires an examination of the behavior of the taxpayer and of the action or inaction of the Internal Revenue Service that causes or is about to cause the significant hardship to the taxpayer.

(b) *Application for taxpayer assistance order*—(1) *Form*. The application for a taxpayer assistance order shall be made on a Form 911 (Application for Taxpayer Assistance Order to Relieve Hardship) available from any local office of the Internal Revenue Service or in a written statement which shall contain the following information:

(i) Name, social security number (or the employer identification number), and current mailing address of the taxpayer submitting the application.

(ii) Kind of tax (individual, corporate, etc.) and tax period or periods involved.

(iii) Description of the Internal Revenue Service action or proposed action which is causing or is about to cause a significant hardship to the taxpayer and, if known, the Internal Revenue Service office and personnel involved.

(iv) Description of the specific hardship caused or about to be caused and the kind of relief requested.

(v) Signature of the taxpayer/applicant or duly authorized representative.

(2) *Manner*. An application for a taxpayer assistance order shall be filed with the Internal Revenue Service Problem Resolution Office in the district where the taxpayer resides. Overseas applicants having a APO or FPO address shall file applications with the Internal Revenue Service, Problem Resolution Office where the return was filed. All other overseas applicants shall file applications with the Internal Revenue Service, Problem Resolution Office, Assistant Commissioner (International), Washington, DC. Where appropriate, these Problem Resolution offices may refer an application for a taxpayer assistance order to another office of the Internal Revenue Service.

(3) *Time*. An application for a taxpayer assistance order shall be submitted within a reasonable time after the taxpayer becomes aware of the significant hardship or the potential significant hardship.

(c) *Contents of Taxpayer Assistance Orders*—(1) *Terms of order*. Upon deciding that a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered, the Ombudsman may issue a taxpayer assistance order requiring the Internal Revenue Service to—

(i) Release levied property (to the extent that the Internal Revenue Service may by law release such property), or

(ii) Stop any action or refrain from taking further action against a taxpayer pursuant to:

(A) Chapter 64 (relating to collection),

(B) Chapter 70, subchapter B (relating to bankruptcy and receiverships),

(C) Chapter 78 (relating to discovery of liability and enforcement of title), or

(D) Any other section of the Internal Revenue Code under which the Internal Revenue Service is taking or is about to take administrative action against the taxpayer that causes or will cause a significant hardship.

(2) *Binding effect*. A taxpayer assistance order is binding on the Internal Revenue Service unless reversed by an official authorized to modify or rescind such an order as provided in paragraph (d) of this section.

(3) *Scope*. The terms of a taxpayer assistance order may require the release from levy of property of the taxpayer to the extent that the Internal Revenue Service will by law release such property. In the absence of an overpayment there is, for example, no authority under which the Internal Revenue Service may release sums which have been credited against the taxpayer's liability and deposited into the Treasury of the United States. A taxpayer assistance order may generally not be issued with respect to the investigation of any criminal tax violation and generally may not be issued to enjoin an

act of the Office of Chief Counsel (with the exception of Appeals). A taxpayer assistance order will not be issued to contest the merits of any tax liability nor is a taxpayer assistance order intended to be a substitute for or an addition to any established administrative or judicial review procedure.

(d) *Authority to modify or rescind.* A taxpayer assistance order may be modified or rescinded only by the Ombudsman, a district director, a service center director, a compliance center director, a regional director of appeals, or the superiors of such officials. A modification or rescission by one of these designated officials may be elevated by the Ombudsman to the superior of such official.

(e) *Suspension of statutes of limitations*—(1) *In general.* The running of the applicable period of limitations for any action which is the subject of a taxpayer assistance order shall be suspended for the period beginning on the date the Ombudsman receives an application for a taxpayer assistance order in the form, manner, and time specified in paragraph (b) of this section and ending on the date on which the Ombudsman makes a determination with respect to the application, and for any additional period specified by the Ombudsman in an order issued pursuant to a taxpayer's application. For the purpose of computing the period suspended, all calendar days except the date of receipt of the application shall be included.

(2) *Date of decision.* The ''date on which the Ombudsman makes a decision with respect to the application'' is the date on which the taxpayer's request for a taxpayer assistance order is denied, or agreement is reached with the involved function of the Service, or a taxpayer assistance order is issued (except that when the taxpayer assistance order is reviewed by an official who may modify or rescind the taxpayer assistance order as provided in paragraph (d) of this section, the decision date is the date on which such review is completed).

(3) *Periods suspended.* The periods of limitations which are suspended under section 7811(d) are those which apply to the taxable periods to which the application for a taxpayer assistance order relate or the taxable periods specifically indicated in the terms of a taxpayer assistance order.

*Example 1.* On August 31, 1989, the Internal Revenue Service levies on funds in the taxpayer's checking account. On September 1, 1989 (at which time 7 months remain before the period of limitations on collection after assessment will expire on April 1, 1990) the Ombudsman receives the taxpayer's written application for a taxpayer assistance order. Subsequently, on September 6, 1989, the Ombudsman determines that the levy has caused a significant hardship and the Internal Revenue Service function which served the levy agrees to release the levy. The levy is released. As a result of the application and the decision by the Ombudsman and the involved function of the Service resolving the hardship, the statute of limitations on collection after assessment is suspended from the date the Ombudsman received the application, September 1, 1989, until the date on which the decision was made to release the levy, September 6, 1989. Therefore, the statute of limitations on collection after assessment will not expire until after April 6, 1990, which is 7 months plus 5 days after the date on which the application for a taxpayer assistance order was received by the Ombudsman.

*Example 2.* The facts are the same as in example 1 except that the Internal Revenue Service function which served the levy does not agree to release the levy, and the Ombudsman, having made a determination that the levy is causing a significant hardship, issues a taxpayer assistance order on September 6, 1989, in which the levy is ordered to be released and specifies that the statute of limitations on collection after assessment is suspended for an additional 15 days. The period of limitations on collection after assessment will therefore not expire until after April 21, 1990, which is 7 months and 20 days (5 days plus 15 days) after the application for the taxpayer assistance order was received by the Ombudsman.

*Example 3.* The facts are the same as in example 2 except that the Ombudsman does not specifically suspend the statute of limitations on collection after assessment for an additional number of days in the taxpayer assistance order, but rather the function seeks modification or rescission of the taxpayer assistance order and the appropriate official charged with that responsibility completes his consideration of the assistance order on September 8, 1989. The period of limitations on collection after assessment will therefore not expire until after April 8, 1990, which is 7 months and 7 days after the application for the taxpayer assistance order was received by the Ombudsman.

(4) *Absence of a written application.* The statute of limitations is not suspended in cases where the Ombudsman issues an order in the absence of a written application for relief by the taxpayer or the taxpayer's duly authorized representative.

(f) *Independent action of Ombudsman.* The Ombudsman may take any of the actions described in section 7811(b) in the absence of an application by the taxpayer.

(g) *Ombudsman.* The term ''Ombudsman'' includes any designee of the Ombudsman, such as Problem Resolution Officers in Internal Revenue Service regional and district offices and at Internal Revenue Service compliance and service centers.

(h) *Effective Date.* These regulations are effective as of March 20, 1992.

[T.D. 8246, 54 FR 11700, Mar. 22, 1989, as amended by T.D. 8403, 56 FR 9977, March 23, 1992]

MISCELLANEOUS PROVISIONS

**§ 301.9000–1 Definitions when used in §§ 301.9000–1 through 301.9000–6.**

(a) *IRS records or information* means any material (including copies thereof) contained in the files (including paper, electronic or other media files) of the Internal Revenue Service (IRS), any information relating to material contained in the files of the IRS, or any information acquired by an IRS officer or employee, while an IRS officer or employee, as a part of the performance of official duties or because of that IRS officer's or employee's official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS. IRS records or information includes, but is not limited to, returns and return information as those terms are defined in section 6103(b)(1) and (2) of the Internal Revenue Code (Code), tax convention information as defined in section 6105 of the Code, information gathered during Bank Secrecy Act and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS records and information also includes information received, generated or collected by an IRS contractor pursuant to the contractor's contract or agreement with the IRS. The term does not include records or information obtained by IRS officers and employees, solely for the purpose of a federal grand jury investigation, while under the direction and control of the United States Attorney's Office. The term IRS records or information nevertheless does include records or information obtained by the IRS before, during, or after a Federal grand jury investigation if the records or information are obtained—

(1) At the administrative stage of a criminal investigation (prior to the initiation of the grand jury);

(2) From IRS files (such as transcripts or tax returns); or

(3) For use in a subsequent civil investigation.

(b) *IRS officers and employees* means all officers and employees of the United States appointed by, employed by, or subject to the directions, instructions, or orders of the Commissioner or IRS Chief Counsel and also includes former officers and employees.

(c) *IRS contractor* means any person, including the person's current and former employees, maintaining IRS records or information pursuant to a contract or agreement with the IRS, and also includes former contractors.

(d) A *request* is any request for testimony of an IRS officer, employee or contractor or for production of IRS records or information, oral or written, by any person, which is not a demand.

(e) A *demand* is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority.

(f) An *IRS matter* is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any IRS officer or employee acting in an official capacity, or any IRS officer or employee (including an officer or

employee of IRS Office of Chief Counsel) in his or her individual capacity if the United States Department of Justice or the IRS has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS, including, but not limited to, judicial and administrative proceedings described in section 6103(h)(4) and (l)(4) of the Internal Revenue Code.

(g) An *IRS congressional matter* is any matter before the Congress, or a committee or subcommittee of the Congress, that is related to the administration of the internal revenue laws or any other laws administered by or concerning the IRS, or to IRS records or information.

(h) A *non-IRS matter* is any matter that is not an IRS matter or an IRS congressional matter.

(i) A *testimony authorization* is a written instruction or oral instruction memorialized in writing within a reasonable period by an authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information and may make an authorization effective only upon the occurrence of a precedent condition, such as the receipt of a consent complying with the provisions of section 6103(c) of the Internal Revenue Code. To authorize testimony means to issue the instruction described in this paragraph (i).

(j) An *authorizing official* is a person with delegated authority to authorize testimony and the disclosure of IRS records or information.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9000–2 Considerations in responding to a request or demand for IRS records or information.

(a) *Situations in which disclosure shall not be authorized.* Authorizing officials shall not permit testimony or disclosure of IRS records or information in response to requests or demands if testimony or disclosure of IRS records or information would—

(1) Violate a Federal statute including, but not limited to, sections 6103 or 6105 of the Internal Revenue Code (Code), the Privacy Act of 1974 (5 U.S.C. 552a), or a rule of procedure, such as the grand jury secrecy rule, Fed. R. Crim. P. 6(e);

(2) Violate a specific Federal regulation, including, but not limited to, 31 CFR 103.53;

(3) Reveal classified national security information, unless properly declassified;

(4) Reveal the identity of an informant; or

(5) Reveal investigatory records or information compiled for law enforcement purposes that would permit interference with law enforcement proceedings or would disclose investigative techniques and procedures, the effectiveness of which could thereby be impaired.

(b) *Assertion of privileges.* Any applicable privilege or protection under law may be asserted in response to a request or demand for testimony or disclosure of IRS records or information, including, but not limited to, the following—

(1) Attorney-client privilege;

(2) Attorney work product doctrine; and

(3) Deliberative process (executive) privilege.

(c) *Non-IRS matters.* If any person makes a request or demand for IRS records or information in connection with a non-IRS matter, authorizing officials shall take into account the following additional factors in responding to the request or demand—

(1) Whether the requester is a Federal agency, or a state or local government or agency thereof;

(2) Whether the demand was issued by a Federal or state court, administrative agency or other authority;

(3) The potential effect of the case on the administration of the internal revenue laws or any other laws administered by or concerning the IRS;

(4) The importance of the legal issues presented;

(5) Whether the IRS records or information are available from other sources;

(6) The IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand;

(7) The number of similar requests and their cumulative effect on the expenditure of IRS resources;

(8) Whether the request or demand allows a reasonable time for compliance (generally, at least fifteen business days);

(9) Whether the testimony or disclosure is appropriate under the rules of procedure governing the case or matter in which the request or demand arises;

(10) Whether the request or demand involves expert witness testimony;

(11) Whether the request or demand is for the testimony of an IRS officer, employee or contractor who is without personal knowledge of relevant facts;

(12) Whether the request or demand is for the testimony of a presidential appointee or senior executive and whether the testimony of a lower-level official would suffice;

(13) Whether the procedures in § 301.9000–5 have been followed; and

(14) Any other relevant factors that may be brought to the attention of the authorizing official.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9000–3 Testimony authorizations.

(a) *Prohibition on disclosure of IRS records or information without testimony authorization.* Except as provided in paragraph (b) of this section, when a request or demand for IRS records or information is made, no IRS officer, employee or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization. However, an IRS officer, employee or contractor may appear in person to advise that he or she is awaiting instructions from an authorizing official with respect to the request or demand.

(b) *Exceptions.* No testimony authorization is required in the following circumstances—

(1) To respond to a request or demand for IRS records or information by the attorney or other government representative representing the IRS in a particular IRS matter;

(2) To respond solely in writing, under the direction of the attorney or other government representative, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties;

(3) To respond to a request or demand issued to a former IRS officer, employee or contractor for expert or opinion testimony if the testimony sought from the former IRS officer, employee or contractor involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee or contractor was employed or under contract with the IRS; or

(4) If a more specific procedure established by the Commissioner governs the disclosure of IRS records or information. These procedures include, but are not limited to, those relating to: procedures pursuant to § 601.702(d) of this chapter; Freedom of Information Act requests pursuant to 5 U.S.C. 552; Privacy Act of 1974 requests pursuant to 5 U.S.C. 552a; disclosures to state tax agencies pursuant to section 6103(d) of the Internal Revenue Code (Code); and disclosures to the United States Department of Justice pursuant to an ex parte order under section 6103(i)(1) of the Code.

(c) *Disclosures of IRS records or information with or without testimony authorization must be permitted under other applicable law.* Any disclosure of IRS records or information that is otherwise permissible under this section must not be prohibited under applicable law. For example, in a case in which returns and return information may be disclosed, the disclosure must be authorized under section 6103, even if any required testimony authorization is obtained. If tax convention information (as defined under section 6105) may be disclosed, in deciding whether the disclosure is authorized, the authorizing official must coordinate the disclosure with the U.S. Competent Authority.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

**§ 301.9000–4 Procedure in the event of a request or demand for IRS records or information.**

(a) *Purpose and scope.* This section prescribes procedures to be followed by IRS officers, employees and contractors upon receipt of a request or demand in matters in which a testimony authorization is or may be required.

(b) *Notification of the Disclosure Officer.* Except as provided in paragraphs (c), (d), and (e) of this section, an IRS officer, employee or contractor who receives a request or demand for IRS records or information for which a testimony authorization is or may be required shall notify promptly the disclosure officer servicing the IRS officer's, employee's or contractor's geographic area. The IRS officer, employee or contractor shall await instructions from the authorizing official concerning the response to the request or demand. An IRS officer, employee, or contractor who receives a request or demand in one of the following matters should not notify the disclosure officer, but should follow the instructions in paragraph (c), (d), or (e) of this section, as applicable:

(1) United States Tax Court cases.

(2) Personnel matters, labor relations matters, government contract matters, matters related to informant claims or matters related to the rules of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (Bivens matters), or matters under the Federal Tort Claims Act (FTCA).

(3) IRS congressional matters.

(c) *Requests or demands in United States Tax Court cases.* An IRS officer, employee or contractor who receives a request or demand for IRS records or information on behalf of a petitioner in a United States Tax Court case shall notify promptly the IRS Office of Chief Counsel attorney assigned to the case. The IRS Office of Chief Counsel attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official.

(d) *Requests or demands in personnel, labor relations, government contract, Bivens or FTCA matters, or matters related to informant claims.* An IRS officer, employee or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant or representative, for IRS records or information in a personnel, labor relations, government contract, Bivens or FTCA matter, or matter related to informant claims, shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney assigned to the case. If no IRS Associate Chief Counsel (General Legal Services) attorney is assigned to the case, the IRS officer, employee or contractor shall notify promptly the IRS Associate Chief Counsel (General Legal Services) attorney servicing the geographic area. The IRS Associate Chief Counsel (General Legal Services) attorney shall notify promptly the authorizing official. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official.

(e) *Requests or demands in IRS congressional matters.* An IRS officer, employee or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official.

(f) *Opposition to a demand for IRS records or information in IRS and non-IRS matters.* If, in response to a demand for IRS records or information, an authorizing official has not had a sufficient opportunity to issue a testimony authorization, or determines that the demand for IRS records or information should be denied, the authorizing official shall request the government attorney or other representative of the government to oppose the demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official either has not yet issued a testimony authorization, or has issued a testimony authorization to the IRS officer, employee or contractor that denies permission to testify or disclose the IRS records or information. If the authorizing official denies authorization in whole or in part, the government attorney or other representative of the government shall inform the court, administrative agency or other

authority of the reasons the authorizing official gives for not authorizing the testimony or the disclosure of the IRS records or information or take other action in opposition as may be appropriate (including, but not limited to, filing a motion to quash or a motion to remove to Federal court).

(g) *Procedure in the event of an adverse ruling.* In the event the court, administrative agency, or other authority rules adversely with respect to the refusal to disclose the IRS records or information pursuant to the testimony authorization, or declines to defer a ruling until a testimony authorization has been received, the IRS officer, employee or contractor who has received the request or demand shall, pursuant to this section, respectfully decline to testify or disclose the IRS records or information.

(h) *Penalties.* Any IRS officer or employee who discloses IRS records or information without following the provisions of this section or § 301.9000–3, may be subject to administrative discipline, up to and including dismissal. Any IRS officer, employee or contractor may be subject to applicable contractual sanctions and civil or criminal penalties, including prosecution under 5 U.S.C. 552a(i), for willful disclosure in an unauthorized manner of information protected by the Privacy Act of 1974, or under section 7213 of the Internal Revenue Code, for willful disclosure in an unauthorized manner of return information.

(i) *No creation of benefit or separate privilege.* Nothing in §§ 301.9000–1 through 301.9000–3, this section, and §§ 301.9000–5 and 301.9000–6, creates, is intended to create, or may be relied upon to create, any right or benefit, substantive or procedural, enforceable at law by a party against the United States. Nothing in these regulations creates a separate privilege or basis to withhold IRS records or information.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9000–5 Written statement required for requests or demands in non-IRS matters.

(a) *Written statement.* A request or demand for IRS records or information for use in a non-IRS matter shall be accompanied by a written statement made by or on behalf of the party seeking the testimony or disclosure of IRS records or information, setting forth—

(1) A brief description of the parties to and subject matter of the proceeding and the issues;

(2) A summary of the testimony, IRS records or information sought, the relevance to the proceeding, and the estimated volume of IRS records involved;

(3) The time that will be required to present the testimony (on both direct and cross examination);

(4) Whether any of the IRS records or information is a return or is return information (as defined in section 6103(b) of the Internal Revenue Code (Code)), or tax convention information (as defined in section 6105(c)(1) of the Code), and the statutory authority for the disclosure of the return or return information (and, if no consent to disclose pursuant to section 6103(c) of the Code accompanies the request or demand, the reason consent is not necessary);

(5) Whether a declaration of an IRS officer, employee or contractor under penalties of perjury pursuant to 28 U.S.C. 1746 would suffice in lieu of deposition or trial testimony;

(6) Whether deposition or trial testimony is necessary in a situation in which IRS records may be authenticated without testimony under applicable rules of evidence and procedure;

(7) Whether IRS records or information are available from other sources; and

(8) A statement that the request or demand allows a reasonable time (generally at least fifteen business days) for compliance.

(b) *Permissible waiver of statement.* The requirement of a written statement in paragraph (a) of this section may be waived by the authorizing official for good cause.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9000–6 Examples.

The following examples illustrate the provisions of §§ 301.9000–1 through 301.9000–5:

*Example 1.* A taxpayer sues a practitioner in state court for malpractice in connection with the practitioner's preparation of a Federal income tax return. The taxpayer subpoenas an IRS employee to testify concerning the IRS employee's examination of

the taxpayer's Federal income tax return. The taxpayer provides the statement required by § 301.9000–5. This is a non-IRS matter. A testimony authorization would be required for the IRS employee to testify. (In addition, the taxpayer would be required to execute an appropriate consent under section 6103(c) of the Code). The IRS would oppose the IRS employee's appearance in this case because the IRS is a disinterested party with respect to the dispute and would consider the commitment of resources to comply with the subpoena inappropriate.

*Example 2.* In a state judicial proceeding concerning child support, the child's custodial parent subpoenas for a deposition an IRS agent who is examining certain post-divorce Federal income tax returns of the non-custodial parent. This is a non-IRS matter. The custodial parent submits with the subpoena the statement required by § 301.9000–5 stating as the reason for the lack of taxpayer consent to disclosure that the non-custodial parent has refused to provide the consent (both a consent from the taxpayer complying with section 6103(c) and a testimony authorization would be required prior to the IRS agent testifying at the deposition). If taxpayer consent is obtained, the IRS may provide a declaration or certified return information of the taxpayer. A deposition would be unnecessary under the circumstances.

*Example 3.* The chairperson of a congressional committee requests the appearance of an IRS employee before the committee and committee staff to submit to questioning by committee staff concerning the procedures for processing Federal employment tax returns. This is an IRS congressional matter. Even though questioning would not involve the disclosure of returns or return information, the questioning would involve the disclosure of IRS records or information; therefore, a testimony authorization would be required. The IRS employee must contact the IRS Office of Legislative Affairs for instructions before appearing.

*Example 4.* The IRS opens a criminal investigation as to the tax liabilities of a taxpayer. This is an IRS matter. During the criminal investigation, the IRS refers the matter to the United States Department of Justice, requesting the institution of a Federal grand jury to investigate further potential criminal tax violations. The United States Department of Justice approves the request and initiates a grand jury investigation. The grand jury indicts the taxpayer. During the taxpayer's trial, the taxpayer subpoenas an IRS special agent for testimony regarding the investigation. The records and information collected during the administrative stage of the investigation, including the taxpayer's tax returns from IRS files, are IRS records and information. A testimony authorization is required for the IRS special agent to testify regarding this information. However, no IRS testimony authorization is required regarding the information collected by the IRS special agent when the IRS special agent was acting under the direction and control of the United States Attorney's Office in the Federal grand jury investigation. That information is not IRS records or information within the meaning of § 301.9000–1(a). Disclosure of that information should be coordinated with the United States Attorney's Office.

*Example 5.* The United States Department of Justice attorney representing the IRS in a suit for refund requests testimony from an IRS revenue agent. This is an IRS matter. A testimony authorization would not be required for the IRS revenue agent to testify because the testimony was requested by the government attorney.

*Example 6.* In response to a request by the taxpayer's counsel to interview an IRS revenue agent who was involved in a case at the administrative level, the United States Department of Justice attorney representing the IRS in a suit for refund asks that the IRS revenue agent be made available to be interviewed. This is an IRS matter. A testimony authorization would be required for the IRS revenue agent to testify because the testimony was first requested by taxpayer's counsel.

*Example 7.* A state assistant attorney general, acting in accordance with a recommendation from his state's department of revenue, is prosecuting a taxpayer under a state criminal law proscribing the intentional failure to file a state income tax return. The assistant attorney general serves an IRS employee with a subpoena to testify concerning the taxpayer's Federal income tax return filing history. This is a non-IRS matter. This is also a state judicial proceeding pertaining to tax administration within the meaning of section 6103(h)(4) and (b)(4). As such, the requirements of section 6103(h)(4) apply. A testimony authorization would be required for the testimony demand in the subpoena.

*Example 8.* A former IRS revenue agent is requested to testify in a divorce proceeding. The request seeks testimony explaining the meaning of entries appearing on one party's transcript of account, which is already in the possession of the parties. This is a non-IRS matter. No testimony authorization is required because the testimony requested from the former IRS employee involves general knowledge gained while the former IRS revenue agent was employed with the IRS.

*Example 9.* A Department of Justice attorney requests an IRS employee to testify in a refund suit involving Taxpayer A. The testimony may include tax convention information, as defined in section 6105, which was originally obtained by the IRS from a treaty partner in connection with a tax case

against Taxpayer B. While no testimony authorization is necessary, because the testimony is being requested by government counsel in a tax matter, the IRS employee may not testify (or otherwise disclose IRS records or information) without coordinating with the U.S. Competent Authority, as disclosure of tax convention information is governed by section 6105. The disclosure must also meet the requirements in section 6103(h)(4).

*Example 10.* In a state court tort action, Defendant subpoenas IRS for Plaintiff's federal income tax returns for particular taxable years. This is a non-IRS matter. The Disclosure Officer instructs Defendant that the IRS has established procedures for obtaining copies of Federal income tax returns. Section 601.702(d)(1) of this chapter establishes the procedures for obtaining Federal tax returns by requiring written requests for copies of tax returns using IRS Form 4506, ''Request for Copy of Tax Return.'' At Defendant's request, Plaintiff executes Form 4506, naming Defendant's counsel as designee, and the form is properly submitted to IRS. A testimony authorization would not be required to disclose Plaintiff's returns to Defendant's counsel.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9000–7 Effective date.

These regulations are applicable on February 14, 2005.

[T.D. 9178, 70 FR 7397, Feb. 14, 2005]

### § 301.9001 Statutory provisions; Outer Continental Shelf Lands Act Amendments of 1978.

Section 302 of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629) provides as follows:

Sec. 302. (a) There is hereby established in the Treasury of the United States an Offshore Oil Pollution Compensation Fund in an amount not to exceed $200,000,000, except that such limitation shall be increased to the extent necessary to permit any moneys recovered or collected which are referred to in subsection (b)(2) of this section to be paid into the Fund. The Fund shall be administered by the Secretary[1] and the Secretary of the Treasury as specified in this title. The Fund may sue and be sued in its own name.

(b) The Fund shall be composed of—

(1) All fees collected pursuant to subsection (d) of this section; and

(2) All other moneys recovered or collected on behalf of the Fund under section 308 or any other provision of this title.

(c) The Fund shall be immediately available for—

(1) Removal costs described in section 301(22):

(2) The processing and settlement claims under section 307 of this title (including the costs of assessing injury to, or destruction of, natural resources); and

(3) Subject to such amounts as are provided in appropriation Acts, all administrative and personnel costs of the Federal Government incident to the administration of this title, including, but not limited to, the claims settlement activities and adjudicatory and judicial proceedings, whether or not such costs are recoverable under section 308 of this title.

The Secretary is authorized to promulgate regulations designating the person or persons who may obligate available money in the Fund for such purposes.

(d)(1) The Secretary shall levy and the Secretary of the Treasury shall collect a fee of not to exceed 3 cents per barrel on oil obtained from the Outer Continental Shelf, which shall be imposed on the owner of the oil when such oil is produced.

(2) The Secretary of the Treasury, after consulting with the Secretary, may promulgate reasonable regulations relating to the collection of the fees authorized by paragraph (1) of this subsection and, from time to time, the modification thereof. Any modification shall become effective on the date specified in the regulation making such modification, but no earlier than the ninetieth day following the date such regulation is published in the FEDERAL REGISTER. Any modification of the fee shall be designed to insure that the Fund is maintained at a level of not less than $100,000,000 and not more than $200,000,000. No regulation that sets or modifies fees, whether or not in effect, may be stayed by any court pending completion of judicial review of such regulation.

(3)(A) Any person who fails to collect or pay any fee as required by any regulation promulgated under paragraph (2) of this subsection shall be liable for a civil penalty not to exceed $10,000, to be assessed by the Secretary of the Treasury, in addition to the fee required to be collected or paid and the interest on such fee at the rate such fee would have earned if collected or paid when due and invested in special obligations of the United States in accordance with subsection (e)(2) of this section. Upon the failure of any person so liable to pay any penalty, fee, or interest upon demand, the Attorney General may, at the request of the Secretary of the Treasury, bring an action in the name of the Fund against that person for such amount.

(B) Any person who falsifies records or documents required to be maintained under any regulation promulgated under this subsection shall be subject to prosecution for a

[1] ''Secretary'' wherever used in this section means the Secretary of Transportation.

violation of section 1001 of title 18, United States Code.

(4) The Secretary of the Treasury may, by regulation, designate the reasonably necessary records and documents to be kept by persons from whom fees are to be collected pursuant to paragraph (1) of this subsection, and the Secretary of the Treasury and the Comptroller General of the United States shall have access to such records and documents for the purpose of audit and examination.

(e)(1) The Secretary shall determine the level of funding required for immediate access in order to meet potential obligations of the Fund.

(2) The Secretary of the Treasury may invest any excess in the Fund above the level determined under paragraph (1) of this subsection, in interest-bearing special obligations of the United States. Such special obligations may be redeemed at any time in accordance with the terms of the special issue and pursuant to regulations promulgated by the Secretary of the Treasury. The interest on, and the proceeds from the sale of, any obligations held in the Fund shall be deposited in and credited to the Fund.

(f) If at any time the moneys available in the Fund are insufficient to meet the obligations of the Fund, the Secretary shall issue to the Secretary of the Treasury notes or other obligations in the forms and denominations, bearing the interest rates and maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Redemption of such notes or other obligations shall be made by the Secretary from moneys in the Fund. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the average market yield on outstanding marketable obligations of comparable maturity. The Secretary of the Treasury shall purchase any notes or other obligations issued under this subsection and, for that purpose, he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act. The purpose for which securities may be issued under that Act are extended to include any purchase of such notes or other obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

(Sec. 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 672) and sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805))

[T.D. 7697, 45 FR 33974, May 21, 1980]

## § 301.9001–1 Collection of fee.

(a) *Imposition of fee*—(1) *In general*. Under section 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978 (Act), the Internal Revenue Service is authorized to collect a fee of not more than 3 cents per barrel on oil that is obtained from the Outer Continental Shelf. This fee is established by the Commandant, United States Coast Guard, and is imposed on the owner of the oil as defined in paragraph (a)(2) of this section. The barrels subject to the fee shall be those barrels reported by the owner of the oil (§ 301.9001–1 (a)(2)), or a person authorized to act for the owner, on the monthly royalty reports, Form 9–153, filed with the U.S. Geological Survey as required by 30 CFR 250.94. For the purpose of computing this fee, the owner of the oil shall measure the Outer Continental Shelf oil production by employing the criteria of the U.S. Geological Survey contained in 30 CFR 250.60 and Outer Continental Shelf Gulf of Mexico Order 13. No reduction in the amount due will be permitted by reason of theoretical or actual oil lost in transit. To ensure that the Fund is maintained at a level of not less than $100,000,000 and not more than $200,000,000, the Commandant, United States Coast Guard, may modify the amount of this fee.

(2) *Owner of oil*. For the purposes of §§ 301.9001–1, 301.9001–2, and 301.9001–3, the owner of oil is the person in whom is vested ownership of the oil as it is produced at the wellhead without regard to the existence of contractual arrangements for the sale or other disposition of the oil between such a person and third parties. Under this rule, the Federal government entitlement to royalty oil does not constitute ownership of oil by the Federal government at the time of production.

(3) *Example*. The provisions of paragraph (a)(2) of this section may be illustrated by the following example:

*Example*. X is the owner of oil produced on the Outer Continental Shelf. During one reporting period, 10,000 barrels of oil were obtained from this location. X will use a portion of this oil to make a royalty payment to the United States government. X also has a contract with Y to sell Y the remaining barrels of oil. For the purpose of the Act, X is

the owner of the oil and must pay a fee of 3 cents per barrel on all 10,000 barrels of oil.

(4) *Cross-references.* See § 301.9001–2(a) for the definition of barrel, § 301.9001–2(b) for the definition of oil, and § 301.9001–2(c) for the definition of person.

(5) *Effective Date.* The provisions of §§ 301.9001–1, 301.9001–2, and 301.9001–3 are effective on July 25, 1979, at 7:00 a.m., local time. If, however, the established practice has been to gauge oil production at a time other than 7:00 a.m., the effective date is July 25, 1979, at the time production has been gauged.

(b) *Collection of fee.* The Internal Revenue Service shall collect the fee imposed by section 302(d) of the Act. Administrative procedures for the collection of this fee shall be prescribed from time to time by the Commissioner. The Commissioner may designate the reasonably necessary records and documents to be kept by the person or persons from whom the fee is collected. See also the regulations under 33 CFR 135.103 for additional rules relating to the implementation of the Act.

(c) *Time and place for payment of the fee*—(1) *In general.* Payment of the fee shall be made in accordance with the rules established in paragraph (c)(2), (3) and (4) of this section. When a deposit is required by these rules, it must be filed with the Internal Revenue Service Center, Austin, Texas 73301 using Form 6008, Fee Deposit for Offshore Oil. Adjustments required in the amount paid during the calendar quarter to reflect the actual amount due for the quarter shall be made on Form 6009, Quarterly Report of Fees Due. Form 6009 must be filed on or before the last day of the month following the end of the calendar quarter with the Austin Service Center. The rules under section 7502, relating to the treatment of timely mailing as timely filing and paying, and section 7503, relating to the time for performance of acts where the last day falls on Saturday, Sunday, or legal holiday are applicable to the filing of Form 6009.

(2) *$100 or less of fees.* If the owner of oil is liable in any calendar quarter for $100 or less of fees, the owner or a person authorized to act for the owner may either deposit this amount or pay the full amount of the fee when Form 6009 is filed.

(3) *More than $100 of fees.* If the owner of oil is liable in the first or second month of the calendar quarter for more than $100 of fees and is not required to make a semimonthly deposit (see paragraph (c)(4) of this section), the owner or a person authorized to act for the owner must deposit the amount on or before the last day of the following month following the month of production.

(4) *More than $2000 of fees.* The owner of oil who is liable for more than $2000 of fees for any month of a calendar quarter must deposit fees for the following quarter (regardless of amount) on a semimonthly basis. The deposit must be made on or before the ninth day following the semimonthly period for which it is reportable. The first deposit for a month may be reasonably estimated when an accounting of oil production is normally done by the month. Under these circumstances, the second for that month deposit should be adjusted to reflect the total barrels produced in that month.

(d) *Responsibility for payment of fee*—(1) *In general.* Form 6009, Quarterly Report of Fees Due, must be filed and the fee must be paid either by the owner of the oil (§ 301.9001–1(a)(2)) or by a person authorized to act for the owner of the oil under an acceptable power of attorney filed with the Austin Service Center. For the purposes of the regulations at §§ 301.9001–1, 301.9001–2, and 301.9001–3, an operating agreement between the operator of the oil-producing facility and the owner of oil is considered an acceptable power of attorney if the operating agreement specifically states that the operator is authorized to pay the fee imposed by section 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978.

(2) *Example.* The provisions of this paragraph may be illustrated by the following example:

*Example.* W, X, Y, and Z are oil companies that own equal interests in oil produced on the Outer Continental Shelf. W was selected to be the operator of the offshore facility. Additionally, X, Y, and Z authorized W to file Form 6009 and to pay the fee imposed by section 302(d) of the Act on the oil produced

at this facility. Pursuant to this authorization, W paid a fee of $16,600. Since the ownership of the oil is divided equally among W, X, Y, and Z, each company's share of the fee is $4,150.

(e) *Penalty and Interest.* Failure to collect or pay the fee shall result in a civil penalty assessed by the Secretary of the Treasury. The amount of the penalty is not to exceed $10,000 in addition to the fee and the interest on the unpaid fee that would have been earned if paid when due and invested in the special Treasury securities which are to be purchased by the fund. The computation of the rate of interest to be levied on underpayment of fees shall be based on the average interest rate earned by the interest-bearing special obligations of the United States in the fund for each calendar quarter for which there is underpayment. Unless it can be shown that the failure to collect or pay the fee is due to reasonable cause and not due to the willful neglect, the amount of the penalty is the lesser of—

(1) $10,000 or

(2) The amount of the fee.

(Sec. 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 672) and sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917: 26 U.S.C. 7805))

[T.D. 7697, 45 FR 33975, May 21, 1980]

### § 301.9001–2 Definitions.

The terms enumerated in this section are to be defined for the purposes of §§ 301.9001–1, 301.9001–2, and 301.9001–3 in the following manner:

(a) ''Barrel'' means 42 United States gallons at 60 degrees Fahrenheit.

(b) ''Oil'' means petroleum, including crude oil or any fraction or residue therefrom, and natural gas condensate, except that the term does not include natural gas.

(c) ''Person'' means an individual, firm, corporation, association, partnership, consortium, joint venture, or governmental entity.

(d) ''Outer Continental Shelf'' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of title 43 and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(Sec. 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 672) and sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805))

[T.D. 7697, 45 FR 33976, May 21, 1980]

### § 301.9001–3 Cross reference.

See the Coast Guard regulations under 33 CFR parts 135 and 136 for rules relating to the implementation of the Act.

(Sec. 302(d) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 672) and sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805))

[T.D. 7697, 45 FR 33976, May 21, 1980]

### § 301.9100–0 Outline of regulations.

This section lists the paragraphs in §§ 301.9100–1 through 301.9100–3.

*§ 301.9100–1 Extensions of time to make elections.*

(a) Introduction.
(b) Terms.
(c) General standards for relief.
(d) Exceptions.
(e) Effective dates.

*§ 301.9100–2 Automatic extensions.*

(a) Automatic 12-month extension.
(1) In general.
(2) Elections eligible for automatic 12-month extension.
(b) Automatic 6-month extension.
(c) Corrective action.
(d) Procedural requirements.
(e) Examples.

*§ 301.9100–3 Other extensions.*

(a) In general.
(b) Reasonable action and good faith.
(1) In general.
(2) Reasonable reliance on a qualified tax professional.
(3) Taxpayer deemed to have not acted reasonably or in good faith.
(c) Prejudice to the interests of the Government.
(1) In general.
(i) Lower tax liability.
(ii) Closed years.
(2) Special rules for accounting method regulatory elections.
(3) Special rules for accounting period regulatory elections.
(d) Effect of amended returns.
(1) Second examination under section 7605(b).
(2) Suspension of the period of limitations under section 6501(a).

(e) Procedural requirements.
(1) In general.
(2) Affidavit and declaration from taxpayer.
(3) Affidavits and declarations from other parties.
(4) Other information.
(5) Filing instructions.
(f) Examples.

[T.D. 8742, 62 FR 68169, Dec. 31, 1997]

### § 301.9100–1 Extensions of time to make elections.

(a) *Introduction.* The regulations under this section and §§ 301.9100–2 and 301.9100–3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. The regulations under this section and § 301.9100–2 also provide an automatic extension of time to make certain statutory elections. An extension of time is available for elections that a taxpayer is otherwise eligible to make. However, the granting of an extension of time is not a determination that the taxpayer is otherwise eligible to make the election. Section 301.9100–2 provides automatic extensions of time for making regulatory and statutory elections when the deadline for making the election is the due date of the return or the due date of the return including extensions. Section 301.9100–3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100–2.

(b) *Terms.* The following terms have the meanings provided below—

*Election* includes an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under section 6081.

*Regulatory election* means an election whose due date is prescribed by a regulation published in the FEDERAL REGISTER, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

*Statutory election* means an election whose due date is prescribed by statute.

*Taxpayer* means any person within the meaning of section 7701(a)(1).

(c) *General standards for relief.* The Commissioner in exercising the Commissioner's discretion may grant a reasonable extension of time under the rules set forth in §§ 301.9100–2 and 301.9100–3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

(d) *Exceptions.* Notwithstanding the provisions of paragraph (c) of this section, an extension of time will not be granted—

(1) For elections under section 4980A(f)(5); or

(2) For elections that are expressly excepted from relief or where alternative relief is provided by a statute, a regulation published in the FEDERAL REGISTER, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(e) *Effective dates.* In general, this section and §§ 301.9100–2 and 301.9100–3 apply to all requests for an extension of time submitted to the Internal Revenue Service (IRS) on or after December 31, 1997. However, the automatic 12-month and 6-month extensions provided in § 301.9100–2 apply to elections for which corrective action is taken on or after December 31, 1997. For other requests for an extension of time, see §§ 301.9100–1T through 301.9100–3T in effect prior to December 31, 1997 (§§ 301.9100–1T through 301.9100–3T as contained in the 26 CFR part 1 edition revised as of April 1, 1997).

[T.D. 8742, 62 FR 68169, Dec. 31, 1997]

### § 301.9100–2 Automatic extensions.

(a) *Automatic 12-month extension*—(1) *In general.* An automatic extension of 12 months from the due date for making a regulatory election is granted to make elections described in paragraph (a)(2) of this section provided the taxpayer takes corrective action as defined in paragraph (c) of this section within that 12-month extension period. For purposes of this paragraph (a), the due date for making a regulatory election is the extended due date of the return if the due date of the election is the due date of the return or the due date of the return including extensions

and the taxpayer has obtained an extension of time to file the return. This extension is available regardless of whether the taxpayer timely filed its return for the year the election should have been made.

(2) *Elections eligible for automatic 12-month extension.* The following regulatory elections are eligible for the automatic 12-month extension described in paragraph (a)(1) of this section—

(i) The election to use other than the required taxable year under section 444;

(ii) The election to use the last-in, first-out (LIFO) inventory method under section 472;

(iii) The 15-month rule for filing an exemption application for a section 501(c)(9), 501(c)(17), or 501(c)(20) organization under section 505;

(iv) The 15-month rule for filing an exemption application for a section 501(c)(3) organization under section 508;

(v) The election to be treated as a homeowners association under section 528;

(vi) The election to adjust basis on partnership transfers and distributions under section 754;

(vii) The estate tax election to specially value qualified real property (where the Internal Revenue Service (IRS) has not yet begun an examination of the filed return) under section 2032A(d)(1);

(viii) The chapter 14 gift tax election to treat a qualified payment right as other than a qualified payment under section 2701(c)(3)(C)(i); and

(ix) The chapter 14 gift tax election to treat any distribution right as a qualified payment under section 2701(c)(3)(C)(ii).

(b) *Automatic 6-month extension.* An automatic extension of 6 months from the due date of a return excluding extensions is granted to make regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions provided the taxpayer timely filed its return for the year the election should have been made and the taxpayer takes corrective action as defined in paragraph (c) of this section within that 6-month extension period. This paragraph (b) does not apply to regulatory or statutory elections that must be made by the due date of the return excluding extensions.

(c) *Corrective action.* For purposes of this section, corrective action means taking the steps required to file the election in accordance with the statute or the regulation published in the FEDERAL REGISTER, or the revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). For those elections required to be filed with a return, corrective action includes filing an original or an amended return for the year the regulatory or statutory election should have been made and attaching the appropriate form or statement for making the election. Taxpayers who make an election under an automatic extension (and all taxpayers whose tax liability would be affected by the election) must file their return in a manner that is consistent with the election and comply with all other requirements for making the election for the year the election should have been made and for all affected years; otherwise, the IRS may invalidate the election.

(d) *Procedural requirements.* Any return, statement of election, or other form of filing that must be made to obtain an automatic extension must provide the following statement at the top of the document: ''FILED PURSUANT TO § 301.9100–2''. Any filing made to obtain an automatic extension must be sent to the same address that the filing to make the election would have been sent had the filing been timely made. No request for a letter ruling is required to obtain an automatic extension. Accordingly, user fees do not apply to taxpayers taking corrective action to obtain an automatic extension.

(e) Examples. The following examples illustrate the provisions of this section:

*Example 1. Automatic 12-month extension.* Taxpayer A fails to make an election described in paragraph (a)(2) of this section when filing A's 1997 income tax return on March 16, 1998, the due date of the return. This election does not affect the tax liability of any other taxpayer. The applicable regulation requires that the election be made by attaching the appropriate form to a timely

filed return including extensions. In accordance with paragraphs (a) and (c) of this section, A may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by March 15, 1999 (12 months from the March 16, 1998 due date of the return). If A obtained a 6-month extension to file its 1997 income tax return, A may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by September 15, 1999 (12 months from the September 15, 1998 extended due date of the return).

*Example 2. Automatic 6-month extension.* Taxpayer B fails to make an election not described in paragraph (a)(2) of this section when filing B's 1997 income tax return on March 16, 1998, the due date of the return. This election does not affect the tax liability of any other taxpayer. The applicable regulation requires that the election be made by attaching the appropriate form to a timely filed return including extensions. In accordance with paragraphs (b) and (c) of this section, B may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by September 15, 1998 (6 months from the March 16, 1998 due date of the return).

[T.D. 8742, 62 FR 68170, Dec. 31, 1997]

### § 301.9100–3 Other extensions.

(a) *In general.* Requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100–2 must be made under the rules of this section. Requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in paragraph (e) of this section) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

(b) *Reasonable action and good faith*—(1) *In general.* Except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer—

(i) Requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service (IRS);

(ii) Failed to make the election because of intervening events beyond the taxpayer's control;

(iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;

(iv) Reasonably relied on the written advice of the Internal Revenue Service (IRS); or

(v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

(2) *Reasonable reliance on a qualified tax professional.* For purposes of this paragraph (b), a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not—

(i) Competent to render advice on the regulatory election; or

(ii) Aware of all relevant facts.

(3) *Taxpayer deemed to have not acted reasonably or in good faith.* For purposes of this paragraph (b), a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer—

(i) Seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664–2(c)(3) of this chapter) and the new position requires or permits a regulatory election for which relief is requested;

(ii) Was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) Uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

(c) *Prejudice to the interests of the Government*—(1) *In general.* The Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by

the granting of relief. This paragraph (c) provides the standards the Commissioner will use to determine when the interests of the Government are prejudiced.

(i) *Lower tax liability*. The interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

(ii) *Closed years*. The interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. The IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to paragraph (e)(3) of this section) certifying that the interests of the Government are not prejudiced under the standards set forth in paragraph (c)(1)(i) of this section.

(2) *Special rules for accounting method regulatory elections*. The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested—

(i) Is subject to the procedure described in § 1.446–1(e)(3)(i) of this chapter (requiring the advance written consent of the Commissioner);

(ii) Requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made);

(iii) Would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or

(iv) Provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

(3) *Special rules for accounting period regulatory elections*. The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if an election is an accounting period regulatory election (other than the election to use other than the required taxable year under section 444) and the request for relief is filed more than 90 days after the due date for filing the Form 1128, Application to Adopt, Change, or Retain a Tax Year (or other required statement).

(d) *Effect of amended returns*—(1) *Second examination under section 7605(b)*. Taxpayers requesting and receiving an extension of time under this section waive any objections to a second examination under section 7605(b) for the issue(s) that is the subject of the relief request and any correlative adjustments.

(2) *Suspension of the period of limitations under section 6501(a)*. A request for relief under this section does not suspend the period of limitations on assessment under section 6501(a). Thus, for relief to be granted, the IRS may require the taxpayer to consent under section 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

(e) *Procedural requirements*—(1) *In general*. Requests for relief under this section must provide evidence that satisfies the requirements in paragraphs (b) and (c) of this section, and must provide additional information as required by this paragraph (e).

(2) *Affidavit and declaration from taxpayer*. The taxpayer, or the individual who acts on behalf of the taxpayer with respect to tax matters, must submit a detailed affidavit describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure. When the taxpayer relied on a qualified tax professional for advice, the taxpayer's affidavit must describe the engagement and responsibilities of the professional as well as the extent to which the taxpayer relied on the professional. The affidavit must be accompanied by a dated declaration, signed by the taxpayer, which states: ''Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete.'' The individual who signs for an entity must have personal knowledge of the facts and circumstances at issue.

(3) *Affidavits and declarations from other parties*. The taxpayer must submit detailed affidavits from the individuals having knowledge or information about the events that led to the failure to make a valid regulatory election and to the discovery of the failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) who made a substantial contribution to the preparation of the return, and any accountant or attorney, knowledgeable in tax matters, who advised the taxpayer with regard to the election. An affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the taxpayer. Each affidavit must include the name, current address, and taxpayer identification number of the individual, and be accompanied by a dated declaration, signed by the individual, which states: ''Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete.''

(4) *Other information*. The request for relief filed under this section must also contain the following information—

(i) The taxpayer must state whether the taxpayer's return(s) for the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the IRS office considering the request for relief if the IRS starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) The taxpayer must submit a copy of any documents that refer to the election;

(iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

(5) *Filing instructions*. A request for relief under this section is a request for a letter ruling. Requests for relief should be submitted in accordance with the applicable procedures for requests for a letter ruling and must be accompanied by the applicable user fee.

(f) *Examples*. The following examples illustrate the provisions of this section:

*Example 1. Taxpayer discovers own error*. Taxpayer A prepares A's 1997 income tax return. A is unaware that a particular regulatory election is available to report a transaction in a particular manner. A files the 1997 return without making the election and reporting the transaction in a different manner. In 1999, A hires a qualified tax professional to prepare A's 1999 return. The professional discovers that A did not make the election. A promptly files for relief in accordance with this section. Assume paragraphs (b)(3) (i) through (iii) of this section do not apply. Under paragraph (b)(1)(i) of

this section, A is deemed to have acted reasonably and in good faith because A requested relief before the failure to make the regulatory election was discovered by the IRS.

*Example 2. Reliance on qualified tax professional.* Taxpayer B hires a qualified tax professional to advise B on preparing B's 1997 income tax return. The professional was competent to render advice on the election and B provided the professional with all the relevant facts. The professional fails to advise B that a regulatory election is necessary in order for B to report income on B's 1997 return in a particular manner. Nevertheless, B reports this income in a manner that is consistent with having made the election. In 2000, during the examination of the 1997 return by the IRS, the examining agent discovers that the election has not been filed. B promptly files for relief in accordance with this section, including attaching an affidavit from B's professional stating that the professional failed to advise B that the election was necessary. Assume paragraphs (b)(3) (i) through (iii) of this section do not apply. Under paragraph (b)(1)(v) of this section, B is deemed to have acted reasonably and in good faith because B reasonably relied on a qualified tax professional and the tax professional failed to advise B to make the election.

*Example 3. Accuracy-related penalty.* Taxpayer C reports income on its 1997 income tax return in a manner that is contrary to a regulatory provision. In 2000, during the examination of the 1997 return, the IRS raises an issue regarding the reporting of this income on C's return and asserts the accuracy-related penalty under section 6662. C requests relief under this section to elect an alternative method of reporting the income. Under paragraph (b)(3)(i) of this section, C is deemed to have not acted reasonably and in good faith because C seeks to alter a return position for which an accuracy-related penalty could be imposed under section 6662.

*Example 4. Election not requiring adjustment under section 481(a).* Taxpayer D prepares D's 1997 income tax return. D is unaware that a particular accounting method regulatory election is available. D files D's 1997 return without making the election and uses another permissible method of accounting. The applicable regulation provides that the election is made on a cut-off basis (without an adjustment under section 481(a)). In 1998, D requests relief under this section to make the election under the regulation. If D were granted an extension of time to make the election, D would pay no less tax than if the election had been timely made. Assume that paragraphs (c)(2) (i), (iii), and (iv) of this section do not apply. Under paragraph (c)(2)(ii) of this section, the interests of the Government are not deemed to be prejudiced because the election does not require an adjustment under section 481(a).

*Example 5. Election requiring adjustment under section 481(a).* The facts are the same as in Example 4 of this paragraph (f) except that the applicable regulation provides that the election requires an adjustment under section 481(a). Under paragraph (c)(2)(ii) of this section, the interests of the Government are deemed to be prejudiced except in unusual or compelling circumstances.

*Example 6. Under examination by the IRS.* A regulation permits an automatic change in method of accounting for an item on a cut-off basis. Taxpayer E reports income on E's 1997 income tax return using an impermissible method of accounting for the item. In 2000, during the examination of the 1997 return by the IRS, the examining agent notifies E in writing that its method of accounting for the item is an issue under consideration. Any change from the impermissible method made as part of an examination is made with an adjustment under section 481(a). E requests relief under this section to make the change pursuant to the regulation for 1997. The change on a cut-off basis under the regulation would be more favorable than if the change were made with an adjustment under section 481(a) as part of an examination. Under paragraph (c)(2)(iii) of this section, the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances because E seeks to change from an impermissible method of accounting that is an issue under consideration in the examination on a basis that is more favorable than if the change were made as part of an examination.

[T.D. 8742, 62 FR 68171, Dec. 31, 1997]

## § 301.9100–4T Time and manner of making certain elections under the Economic Recovery Tax Act of 1981.

(a) *Miscellaneous elections*—(1) *Elections to which this paragraph applies.* This paragraph applies to the following elections provided under the Economic Recovery Tax Act of 1981:

| Section of Act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 127(a) ... | 162(i) (originally enacted as sec. 162(h); subsequently redesignated by sec. 2146 of Pub. L. 97–35). | Travel expenses of state legislators ..... | Taxable years beginning after 1975. |
| 201(a) ... | 168(b)(3) ..... | Different recovery period ..... | Property placed in service after 1980. |

| Section of Act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 201(a) ... | 168(d)(2)(A) ..... | Inclusion in income of entire proceeds of disposition. | Property placed in service after 1980. |
| 201(a) ... | 168(e)(2) ..... | Exclusion of property from recovery system .. | Property placed in service after 1980. |
| 201(a) ... | 168(f)(2)(C) ..... | Different recovery period for property used outside U.S.. | Property placed in service after 1980. |
| 202(a) ... | 179 ..... | Expensing certain depreciable property ..... | Taxable years beginning after 1981. |
| 237 ..... | 474 ..... | For small business to use one inventory pool when LIFO is elected. | Taxable years beginning after 1981. |
| 266(a) ... | ..... | Deferral of commencement of amortization period for motor carrier operating authority. | Taxable years ending after June 30, 1980. |
| 508(c) ... | ..... | Application of title V of the Act to all regulated futures contracts or positions held on June 23, 1981. | Property held on June 23, 1981. |
| 509 ..... | ..... | Application of Code sec. 1256 and extension of time for payment of tax for all regulated futures contracts held at any time during taxable year that includes June 23, 1981. | Property held during taxable year that includes June 23, 1981. |

(2) *Time for making elections*—(i) *In general*. Except as otherwise provided in this paragraph (a)(2), the elections specified in paragraph (a)(1) of this section shall be made by the later of—

(A) The due date (taking extensions into account) of the income tax return for the taxable year for which the election is to be effective, or

(B) April 15, 1982.

(ii) *No extension of time for payment*. Payments of tax due shall be made in accordance with chapter 62 of the Code.

(iii) *Elections under section 508(c) or 509 of the Act*. Elections under section 508(c) or 509 of the Act shall be made by the due date (taking extensions into account) of the income tax return for the taxable year for which the election is to be effective.

(iv) *No extension of refund period with respect to travel expenses of state legislators*. In no event may an election be made under this section after the expiration of the period of limitation for filing a claim for credit or refund of overpayment of tax for the taxable year to which the election relates.

(3) *Manner of making elections*. The elections specified in paragraph (a)(1) of this section shall be made by attaching a statement to the income tax return (or amended return) for the taxable year for which the election is made. Except as otherwise provided in the return or in the instructions accompanying the return for the taxable year, the statement shall—

(i) Contain the name, address, and taxpayer identification number of the electing taxpayer,

(ii) Identify the election,

(iii) Indicate the section of the Code (or, if the provision is not codified, the section of the Act) under which the election is being made,

(iv) Specify the period for which the election is being made and the property to which the election is to apply, and

(v) Provide any information required by the relevant statutory provisions and any information necessary to show that the taxpayer is entitled to make the election.

(b) *Designation of principal campaign committee*. This paragraph applies to the designation of a principal campaign committee under section 527(h) of the Code, as added by section 128 of the Act. References in this section to ''elections'' include designations under section 527(h). Under that provision a candidate for Congress may designate one committee as the candidate's principal campaign committee. The political organization taxable income of that committee shall be taxed at the appropriate rates under section 11(b); that income is ordinarily taxed at the highest rate specified in section 11(b). The candidate shall designate the principal campaign committee by filing a statement of designation with the income tax return of the committee for the first taxable year of the committee ending after 1981 for which the designation is to be effective. The return and the statement shall be filed by the due date (taking extensions into account) of the return. The rules of section 21 (relating to effects of changes in rates during a taxable year) shall apply in

the case of any taxable year beginning before 1982 for which a designation is made. The statement of designation shall be signed by the candidate and shall—

(1) Contain the name, address, and taxpayer identification number of the candidate and of the committee,

(2) Identify the statement as a designation under section 527(h) of the Code, and

(3) Designate the committee as the principal campaign committee of the candidate.

The candidate shall attach to the statement a copy of the statement of designation filed with the Federal Election Commission.

(c) *Election to be treated as a qualified fund for purposes of the research credit.* This paragraph applies to the election provided under section 44F(e)(4) of the Code, as added by section 221(a) of the Act. The election to be treated as a qualified fund for purposes of the research credit may be made effective as of any date after June 30, 1981, and before January 1, 1986. An organization shall make this election by filing with the service center with which it files its annual return a statement signed by a person authorized to act on behalf of the organization. That statement shall—

(1) Contain the name, address, and taxpayer identification number of the electing organization and of the organization that established and maintains the electing organization,

(2) Identify the election as an election under section 44F(e)(4) of the Code,

(3) Specify the date on which the election is to become effective (in the case of elections filed before February 1, 1982, not earlier than the date that is 7 months before the date on which the election is filed; in the case of elections filed after January 31, 1982, not earlier than the date on which the election is filed), and

(4) Provide all information necessary to show that the organization is entitled to make the election.

(d) *Election to treat qualified subchapter S trust as grantor trust.* This paragraph applies to the election provided under section 1371(g)(2) of the Code, as added by section 234(b) of the Act. The election to treat a qualified subchapter S trust as a grantor trust described in section 1371(e)(1)(A) of the Code is available for taxable years beginning after 1981. The beneficiary of the trust (or the legal representative of the beneficiary) shall make this election by signing and filing with the service center with which the subchapter S corporation files its income tax return a statement that—

(1) Contains the name, address, and taxpayer identification number of the beneficiary, the trust, and the subchapter S corporation,

(2) Identifies the election as an election under section 1371(g)(2) of the Code,

(3) Specifies the date on which the election is to become effective (not earlier than 60 days before the date on which the election is filed), and

(4) Provides all information necessary to show that the beneficiary is entitled to make the election.

Note that this election does not itself constitute an election as to the status of the corporation; the corporation must make the election provided in section 1372(a) to be treated as an electing small business corporation.

(e) *Election to have Code section 422A apply to options granted before 1981.* This paragraph applies to the election provided under section 251(c)(1)(B) of the Act to have Code section 422A apply to certain options granted before 1981. A corporation may make only one election under this provision. Thus, a corporation that makes an election under this provision with respect to certain options granted before 1981 may not make any subsequent election under this provision with respect to other options granted before 1981. An election under this provision shall be made no later than the due date (taking extensions into account) of the income tax return of the corporation for its first taxable year during which either an option subject to the election or an option subject to the rules of section 422A of the Code is exercised. In any event, no election under this provision will be permitted after the due date (taking extensions into account) of the income tax return for the taxable year including December 31, 1982. A corporation shall make this election by attaching

to its income tax return (or amended return) a statement that—

(1) Contains the name, address, and taxpayer identification number of the corporation,

(2) Identifies the election as an election under section 251(c)(1)(B) of the Economic Recovery Tax Act of 1981,

(3) Specifies the options to which the election applies, and

(4) Provides all information necessary to show that the corporation is entitled to make the election.

(f) *Election to increase basis of property on which additional estate tax is imposed.* This paragraph applies to the election provided under section 1016(c) of the Code, as amended by section 421(g) of the Act. The election to increase the basis of property on which additional estate tax is imposed is available with respect to the estates of decedents dying after 1981. The qualified heir shall make this election by filing with the Form 706–A (Additional Estate Tax Return) a statement that—

(1) Contains the name, address, and taxpayer identification number of the qualified heir and of the estate,

(2) Identifies the election as an election under section 1016(c) of the Code,

(3) Specifies the property with respect to which the election is made, and

(4) Provides any additional information required by the instructions accompanying Form 706–A.

A qualified heir making an election under this paragraph must pay interest on the additional estate tax from the date that is 9 months after the date of the decedent's death to the date of the payment of the additional estate tax.

(g) *Revocation of elections.* Elections under paragraph (f) of this section are irrevocable. Other elections made under this section may be revoked only with the consent of the Commissioner. An application for consent to revoke an election shall be signed by the applicant and filed with the service center with which the election was filed and shall—

(1) Contain the name, address, and taxpayer identification number of all parties identified in connection with the election,

(2) Identify the election being revoked by reference to the section of the Code or Act under which the election was made,

(3) Specify the scope of the election, and

(4) Explain why the applicant seeks to revoke the election.

(h) *Additional information required.* If later regulations issued under the section of the Code or Act under which the election was made require the furnishing of information in addition to that which was furnished with the statement of election and an office of the Internal Revenue Service requests the taxpayer to provide the additional information, the taxpayer shall furnish the additional information in a statement filed with that office of the Internal Revenue Service within 60 days after the request is made. This statement shall also—

(1) Contain the name, address, and taxpayer identification numbers of all parties identified in connection with the election,

(2) Identify the election by reference to the section of the Code or Act under which the election was made, and

(3) Specify the scope of the election.

If the additional information is not provided within 60 days after the request is made, the election may, at the discretion of the Commissioner, be held invalid.

(i) *Effective date.* This section applies to elections made after August 12, 1981.

[T.D. 7793, 46 FR 54538, Nov. 3, 1981. Redesignated by T.D. 8435, 57 FR 43895, Sept. 23, 1992]

### § 301.9100–5T Time and manner of making certain elections under the Tax Equity and Fiscal Responsibility Act of 1982.

(a) *Miscellaneous elections*—(1) *Elections to which this paragraph applies.* This paragraph applies to the following elections provided under the Tax Equity and Fiscal Responsibility Act of 1982.

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 201(c) ... | 58(i)(1) | Optional 10-year write off of certain tax preferences. | Taxable years beginning after Dec. 31, 1982. |
| 201(c)(1) | 58(i)(4) | Intangible drilling and development costs. | Taxable years beginning after Dec. 31, 1982. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 205(a) ... | 48(q) .. | Reduced investment credit in lieu of basis adjustment. | Generally to period beginning after Dec. 31, 1982. |
| 256(f) .... | 820 ..... | Insurance company revocation of election under section 820. | Contracts which took effect in 1980 or 1981. |

(2) *Time for making elections*—(i) *In general*. Except as otherwise provided in paragraph (a)(2) of this section, the elections specified in paragraph (a)(1) of this section shall be made by the later of—

(A) The due date (taking extensions into account) of the income tax return for the taxable year for which the election is to be effective, or

(B) April 15, 1983.

(ii) *No extensions of time for payment*. Payments of tax due shall be made in accordance with chapter 62 of the Code.

(iii) *Election by insurance companies relating to repeal of section 820*. Elections under section 256(f) of the Act, relating to special rule allowing reinsured insurance company to revoke an election under section 820, must be made before March 5, 1983.

(3) *Manner of making elections*. The elections specified in paragraph (a)(1) of this section shall be made by attaching a statement to the income tax return (or amended return) for the taxable year for which the election is made. Except as otherwise provided in the return or in the instructions accompanying the return for the taxable year, the statement shall—

(i) Contain the name, address, and taxpayer identification number of the electing taxpayer,

(ii) Identify the election,

(iii) Indicate the section of the Code (or, if the provision is not codified, the section of the Act) under which the election is being made,

(iv) Specify the period for which the election is being made and the property to which the election is to apply, and

(v) Provide any information required by the relevant statutory provisions and any information necessary to show that the taxpayer is entitled to make the election.

(b) *Special rules for reduced investment credit in lieu of basis adjustment*—(1) *Appropriate return*. For purposes of section 48(q) of the Code and paragraph (a)(2)(i)(A) and (3) of this section the term ''income tax return for the taxable year for which the election is effective'' with respect to any property is the tax return for the taxable year in which such property is placed in service, or in the case of property to which an election under section 46(d) (relating to qualified progress expenditures) applies, the appropriate return is the return for the first taxable year for which qualified progress expenditures were taken into account with respect to such property.

(2) *Applicability of election*. In general, the election under section 48(q) is applicable to periods beginning after December 31, 1982 under rules similar to the rules of section 48(m) of the Code. However, the election does not apply to property excepted by section 205(c)(1)(B) of the Act.

(c) *Election by a reinsurer to make installment payments of taxes owed resulting from the repeal of section 820*. This paragraph applies to the election by an insurance company provided under section 256(e) of the Act. A reinsurer that is a calendar year tax-payer shall be considered to have made an election under section 256(e) of the Act if by March 15, 1983 it files its income tax return (or an application on Form 7004 for an automatic extension of time to file its income tax return), with the statement required to be filed under this paragraph attached and, unless the reinsurer is making a further election under section 256(e)(2)(B) of the Act, pays one-third of the amount described in section 256(e)(1) of the Act by March 15, 1983. A reinsurer making an election under section 256(e)(2)(B) of the Act must pay one-sixth of the amount described in section 256(e)(1) of the Act by March 15, 1983 and one-sixth of such amount by June 15, 1983. The statement required to be filed under this paragraph shall—

(1) Contain the name, address, and tax-payer identification number of the corporation,

(2) Identify the election as an election under section 256(e) of the Act, and section 256(e)(2)(B) if applicable, and

(3) Provide all information necessary to show the taxpayer is entitled to make the election.

For provisions relating to the use of authorized financial institutions in depositing the taxes, see § 1.6302–1.

(d) [Reserved]

(e) *Additional information required.* If later regulations issued under the section of the Code or Act under which the election was made require the furnishing of information in addition to that which was furnished with the statement of election and an office of the Internal Revenue Service requests the taxpayer to provide the additional information, the taxpayer shall furnish the additional information in a statement filed with that office of the Internal Revenue Service within 60 days after the request is made. This statement shall also—

(1) Contain the name, address, and taxpayer identification numbers of all parties identified in connection with the election,

(2) Identify the election by reference to the section of the Code or Act under which the election was made, and

(3) Specify the scope of the election.

If the additional information is not provided within 60 days after the request is made, the election may, at the discretion of the Commissioner, be held invalid.

(f) *Effective date.* This section applies to elections made after September 3, 1982.

[T.D. 7870, 48 FR 1486, Jan. 13, 1983. Redesignated by T.D. 8435, 57 FR 43895, Sept. 23, 1992, as amended by T.D. 8952, 66 FR 33832, June 26, 2001]

## § 301.9100–6T Time and manner of making certain elections under the Deficit Reduction Act of 1984.

(a) *Miscellaneous elections*—(1) *Elections to which this paragraph applies.* This paragraph applies to the following elections provided under the Deficit Reduction Act of 1984 (the Act):

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 31(a) and 31(g)(16). | 168(j)(4)(E)(ii) | Election by certain 501(c)(12) organizations to be treated as taxable organizations and to have certain arbitrage profits taxed. | Generally for property placed in service after May 23, 1983, or leased after such date. |
| 31(f) | 46(e)(4)(C) | Election by section 593 organizations not to apply section 46(e)(4)(A). | Generally for property placed in service after Nov. 5, 1983, or leased after such date. |
| 41(a) | 1282(b)(2) | Election to have section 1281 apply to all short-term obligations acquired on or after the first day of the first taxable year to which the election relates (but not to obligations acquired before July 19, 1984). | Taxable years ending after July 18, 1984, with respect to obligations acquired after such date. |
| 41(a) | 1283(c)(2) | Election to have section 1283(c)(1) not apply to all obligations acquired on or after the first day of the first taxable year to which the election relates (but not to obligations acquired before July 19, 1984). | Do. |
| 113 | 48(r) | Election by all persons having an ownership interest in a sound recording to treat such recording as 3-yr. recovery property. | Property placed in service after Mar. 15, 1984. |
| 211 | 806(d)(4) | Election with respect to loss from operations of member of group. | Taxable years beginning after Dec. 31, 1983. |
| 211 | 807(d)(4)(C) | Election to use preceding year's interest rate for nonannuity reserves. | Taxable years beginning after Dec. 31, 1983. |
| 211 | 810(b)(3) | Election to forgo carryback period by life insurance companies. | Losses from operations for taxable years beginning after Dec. 31, 1983. |
| 216(c)(1) | | Election not to have reserves recomputed | First taxable year beginning after Dec. 31, 1983. |
| 216(c)(2) | | Election to use adjusted statutory reserves for certain contracts. | Generally for contracts issued after 1983 and before 1989 by certain companies that make an election under sec. 216(c)(1) of the act. |
| 217(i) | | Election to treat individual noncancellable accident and health contracts as cancellable. | First taxable year beginning after Dec. 31, 1983. |
| 217(l)(2)(B) | | Treatment of losses from certain guaranteed interest contracts. | Taxable years beginning after Dec. 31, 1983, and before Jan. 1, 1988. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 431(e)(2) | 46(c) (8) and (9), 48(d)(6), 47(d) (1) and (2). | Election to apply the investment tax credit at risk rules as modified by the Tax Reform Act of 1984 to all transactions covered by sec. 211(f) of the Economic Recovery Tax Act of 1981. | Generally to property placed in service between Feb. 18, 1981, and July 19, 1984. |
| 712(l)(7)(B) | 304 | Election to apply certain technical corrections of sec. 304 to all transfers covered by the changes made to sec. 304 by the Tax Equity and Fiscal Responsibility Act of 1982. | Stock acquired after Aug. 31, 1982, and before June 19, 1984. |
| 712(l)(7)(C)(ii) | 304 | Election with respect to bank holding companies to apply certain technical corrections of sec. 304 to stock acquired after June 18, 1984. | Generally to transfers to bank holding companies formed pursuant to application filed with Federal Reserve Board before June 18, 1984. |
| 1066 | 163(d) | Elections to treat certain income from S corporations, for purposes of sec. 163(d), as such income would have been treated prior to the Subchapter S Revision Act of 1982. | With respect to S corporation taxable years beginning in 1983 or 1984. |
| 1078 | | Election to exclude from gross income payments from U.S. Forest Service as result of restricting motorized traffic in the boundary waters canoe area. | Payments in taxable years beginning after Dec. 31, 1979. |

(2) *Time for making elections*—(i) *In general*. Except as otherwise provided in this paragraph (a)(2), the elections specified in paragraph (a)(1) of this section shall be made by the later of—

(A) The due date (taking extensions into account) of the tax return for the first taxable year for which the election is to be effective, or

(B) April 15, 1985 (in which case the election generally must be made by amended return).

(ii) *No extension of time for payment*. Payments of tax due shall be made in accordance with chapter 62 of the Code.

(iii) *Time for making certain life insurance company elections*—(A) *Election to use preceding year's interest rate for non-annuity reserves*. The election under section 807(d)(4)(C) to use the preceding year's interest rate for non-annuity reserves applies on a contract-by-contract basis. For contracts issued before the first day of the first taxable year beginning after December 31, 1983, the election shall be made by the due date (including extensions) of the income tax return for the first taxable year beginning after December 31, 1983. For contracts issued on or after the first day of the first taxable year beginning after December 31, 1983, the election shall be made by the due date (including extensions) of the income tax return for the taxable year in which the contract is issued.

(B) *Election not to have reserves recomputed*. The election under section 216(c)(1) of the Act not to have reserves recomputed shall be made by the due date (including extensions) of the income tax return for the first taxable year beginning after December 31, 1983.

(C) *Election to use adjusted statutory reserves for certain contracts*. The election under section 216(c)(2) of the Act to use adjusted statutory reserves for certain contracts may be made only by life insurance companies that make an election under section 216(c)(1) of the Act and that meet the other requirements of section 216(c)(2). The election, if made, applies to all contracts issued on or after the first day of the first taxable year beginning after December 31, 1983, and before January 1, 1989. The election shall be made by the due date (including extensions) of the income tax return for the first taxable year beginning after December 31, 1983.

(D) *Election to treat individual non-cancellable accident and health contracts as cancellable*. The election under section 217(i) of the Act to treat individual non-cancellable accident and health contracts as cancellable shall be made by the due date (including extensions) of the income tax return for the first taxable year beginning after December 31, 1983.

(E) *Treatment of losses from certain guaranteed interest contracts*. The election under section 217(l)(2)(B) of the

Act with respect to the treatment of losses from certain guaranteed interest contracts shall be made by the due date (including extensions) of the income tax return for the first taxable year beginning after December 31, 1983.

(iv) *Time for making the election to exclude from gross income payments received from the U.S. Forest Service as a result of the restriction of motorized traffic in the Boundary Waters Canoe Area.* Elections under section 1078 of the Act shall be made by the later of the expiration of the period for making a claim for credit or refund of the tax imposed by chapter 1 of the Code for the taxable year in which the reinvestment of the payment occurred, or July 18, 1985. Amended returns for years after the year for which the election is made must be filed if making this election affects the tax liability for such years.

(3) *Manner of making elections*—(i) *In general.* The elections specified in paragraph (a)(1) of this section shall be made by attaching a statement to the tax return for the taxable year in which the election is made. If because of paragraph (a)(2)(i)(B) the election may be filed after the due date of the tax return for the first taxable year for which the election is to be effective, such election must be attached to a tax return or amended return for the taxable year to which the election relates. Except as otherwise provided in the return or in the instructions accompanying the return for the taxable year, the statement shall—

(A) Contain the name, address, and taxpayer identification number of the electing taxpayer,

(B) Identify the election,

(C) Indicate the section of the Code (or, if the provision is not codified, the section of the Act) under which the election is made,

(D) Specify, as applicable, the period for which the election is being made and/or the property or other items to which the election is to apply, and

(E) Provide any information required by the relevant statutory provisions and any information necessary to show that the taxpayer is entitled to make the election.

(ii) *Special rules for making the election with respect to sound recordings.* The election under section 48(r), as amended by section 113 of the Act, shall be made separately for each sound recording and must be made by all persons having an ownership interest in the sound recording. In the case of an ownership interest held by a partnership or an S corporation, the partnership or S corporation shall make the election. Each person making the election shall do so in accordance with paragraph (a)(2) and (3) of this section, and shall identify in the statement described in paragraph (a)(3) of this section the persons with ownership interests in the sound recording, and shall state that each such person is making the election with respect to that sound recording.

(iii) *Special rules for making the election with respect to redemption through use of related corporations.* For either election available under section 712(l)(7) of the Act (relating to redemptions through related corporations) to be effective, such election must be made jointly by both the issuing and acquiring corporations. The election is made jointly when both the issuing and acquiring corporations make the election in accordance with paragraph (a)(2) and (3) of this section.

(iv) *Special rules for making the election for investment tax credit at risk rules.* The election under section 431(e)(2) of the Act is made by filing an amended return for the first taxable year ending after February 18, 1981, during which taxable year property, to which the amendments made by section 211(f) of the Economic Recovery Tax Act of 1981 apply, was placed in service. If that taxable year is a closed year, the election is made by filing an amended return for the first succeeding open taxable year, but in such event this election can be made only if the aggregate amount of the investment tax credit that would have been allowable in the closed years had the election been effective for those years is greater than or equal to the amount of the investment tax credits actually claimed in the closed years. In the case of partnerships and S corporations, the election under section 431(e) is made, respectively, at the partner or the shareholder level. Any election made under section 431(e) shall apply to all property of the taxpayer to which the

amendments made by section 211(f) of the Economic Recovery Tax Act of 1981 apply. Amended returns must be filed for any year the tax liability for which is affected by making this election.

(v) *Special rules for certain elections by life insurance companies*—(A) *Election with respect to loss from operations of member of group.* Any life insurance company that makes an election under section 806(d)(4) must include on the statement described in paragraph (a)(3) of this section the name, address and taxpayer identification number of the members of the controlled group that did not file a consolidated return with the life insurance company for the taxable year to which the election applies, the amount of loss subject to the limitation provided by section 806(d)(4)(B), and a computation showing how such amount was derived.

(B) *Election to use preceding year's interest rate for non-annuity reserves.* If the election under section 807(d)(4)(C) is not made for all non-annuity contracts issued by the life insurance company before the end of the taxable year in which the election is made, the company must reasonably identify, in the statement described in paragraph (a)(3) of this section, the contracts or groups of contracts for which the election is made. The statement, however, need not specify each individual contract for which the election is made.

(4) *Revocation.* The elections under Act sections 31(a), 31(g)(16), 31(f), 113, 211 (Code section 810(b)(3)), 216(c) (1) and (2), 217(l), 431(e)(2), and 712(l)(7) (B) and (C)(ii) are irrevocable. Elections under Act sections 41(a) (Code sections 1282(b)(2) and 1283(c)(2)), 211 (Code sections 806(d)(4), and 807(d)(4)(C)), 217(i), 1066, and 1078 are revocable only with the consent of the Commissioner. A revocation under Act section 211 (Code section 807(d)(4)(C)) shall be treated as a change in basis of computing reserves that is subject to the adjustment provided in section 807(f) of the Code.

(b) *Church or qualified church-controlled organization's election of exemption from social security taxes under chapter 21*—(1) *In general.* This paragraph applies to the election under section 3121(w) of the Code, as added by section 2603(b) of the Act, by a church or qualified church-controlled organization (as defined in section 3121(w)(3)) that service performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and chapter 21 of the Internal Revenue Code. Any election made under section 3121(w) shall apply to all services performed on or after January 1, 1984, by employees of such church or organization (whether or not they were employees on that date or on the date the election is made). Employees of the electing church or organization are subject to the provisions of chapter 2 of the Code (relating to the tax on self-employment income) as amended by section 2603 (c)(2) and (d)(2) of the Act for service performed for such church or organization on or after January 1, 1984.

(2) *Time for making the election.* Any election under section 3121(w) by a church or qualified church-controlled organization for which a quarterly employment tax return for the tax imposed under section 3111 is due (or would be due but for the election) on October 31, 1984, must be made on or before October 30, 1984. Any election under section 3121(w) by a church or organization for which the first quarterly employment tax return for the tax imposed under section 3111 is due (or would be due but for this election) after October 31, 1984, must be made on or before the day before the first date that such tax return would be due from the church or organization (disregarding any extension of such due date). A purported election filed after the date prescribed in this paragraph (b)(2) shall be void.

(3) *Manner of making the election.* To make an election under section 3121(w), a church or qualified church-controlled organization must certify that it is opposed for religious reasons to the payment of the tax imposed by section 3111 (relating to the employer tax) of the Code. The election and certification are made by executing and filing Form 8274 in accordance with the form and its instructions. The form shall be signed by an official authorized to sign tax returns for the church or organization. Where tax imposed by section 3111 is reported (or would be reported but for this election) with respect to more

than one church or organization on a single quarterly employment tax return, and the election under section 3121(w) is made, then all of the churches and organizations covered by the last such return filed before such election was made for which the time for making the election has not expired shall be covered by the election unless specifically excluded by stating such exclusion in the election.

(4) *Refunds of FICA taxes paid.* Where a church or qualified church-controlled organization makes a timely election under section 3121(w), a refund, without interest, shall be made to such church or organization of any taxes paid under sections 3101 and 3111 with respect to service performed after December 31, 1983, covered by the election. However, the refund will be made only if the church or organization agrees on its claim for the refund to pay to each employee covered by the election the portion of the refund attributable to the tax imposed on the wages of the employee by section 3101. The employee may not receive any other refund of such taxes. The claim for refund shall be made by the church or organization by filing Form 843 with the service center where the Form 941 on which the taxes subject to refund was filed. Form 843 shall be executed in accordance with the form and its instructions, and also in accordance with the instructions to Form 8274 that relate to Form 843.

(5) *Irrevocability of election except by Commissioner.* An election under section 3121 shall be irrevocable by the electing church or organization. The Commissioner, however, shall permanently revoke the election if the church or organization fails to furnish the information required under section 6051 to the Internal Revenue Service for a period of 2 years or more and also fails to furnish such information within 60 days after a written request therefor is made by the Internal Revenue Service.

(c) *Election to issue taxable student loan bonds.* This paragraph applies to the election by an issuer to issue taxable student loan bonds under section 625(c) of the Act. The election is available for obligations issued after December 31, 1983, and is made by filing a statement and necessary attachments with the Internal Revenue Service Center, Philadelphia, PA 19255, prior to the issuance of such taxable bonds. The statement shall identify the election as made under section 625(c) of the Tax Reform Act of 1984 and shall contain the name, address and taxpayer identification number of the issuer, and the total purchase price, face amount and interest rate of the issue, bond issuance costs, amounts allocated to reasonably required reserve or replacement funds, and the date of issue. The issuer shall attach to the statement of election a copy of previous Internal Revenue Service correspondence relating to the tax exempt status of the issuing authority and a statement containing the total purchase price, face amount, interest rate, bond issuance costs, amounts allocated to reasonably required reserve or replacement funds, and the date of issuance of outstanding tax exempt issues of student loan bonds of the issuer. With respect to outstanding tax exempt issues of student loan bonds of the issuer issued after December 31, 1982, the issuer may alternatively attach copies of the Form 8038 filed with respect to such issues. Each taxable student loan bond must state on its face that the interest paid on such bond is subject to federal income taxation. An election with respect to an issue is irrevocable once made.

(d) [Reserved]

(e) *Election not to claim the credit for alcohol used as fuel.* The election under section 40(f) (as added by section 474(k) of the Act) not to claim the alcohol fuels credit is available for taxable years beginning after December 31, 1983, and shall be made for the taxable year in which such credit is determined by not claiming such credit on an original return or amended return at any time before the expiration of the 3-year period beginning on the last date prescribed by law for filing the return for the taxable year (determined without regard for extensions). The election may be revoked within the 3-year period by filing an amended return and claiming the credit on the return.

(f) *Protective election to adopt LIFO method*—(1) *Time for making the election.* A protective election in connection with the enactment of section 95 of the

Act to adopt the LIFO method of accounting for inventory under section 472 of the Code can only be made for the taxpayer's first taxable year beginning after July 18, 1984, and must be made on or before the due date (including extensions) of the tax return for such taxable year. Once made, the election is irrevocable unless the Commissioner authorizes the use of another inventory method (see § 1.472–5).

(2) *Manner for making a protective election*. The protective election is made by completing all line items on a current Form 970 and indicating that the election is a protective election filed in connection with the enactment of section 95 of the Tax Reform Act of 1984. The Form 970 must be attached to the taxpayer's income tax return for the taxable year for which the protective election is made. The LIFO method adopted under the protective election must be consistent in all respects with the taxpayer's LIFO method used in the taxpayer's most recently completed taxable year for which the LIFO method was used. In completing the current Form 970, the taxpayer shall specify the method of inventory valuation that the taxpayer would have used, the opening LIFO inventory for the taxable year for which the protective election is made, and the section 481 adjustment that would be required, as if the taxpayer were not on the LIFO method for the taxable year immediately preceding the taxable year for which the protective election is made.

(g) *Election by an estate or trust to recognize gain or loss on the distribution of property (other than cash) to a beneficiary*. This paragraph applies to the election made by a trust or estate to recognize gain or loss on the distribution of property (other than cash) to a beneficiary under section 643(d) of the Code as amended by section 81 of the Act. The election is available for distributions made after June 1, 1984, in taxable years ending after such date. The election must be made by the fiduciary who is required to make the return of the estate or trust under section 641 and § 1.641(b)–2. The election shall be made by such fiduciary on the tax return of the estate or trust for the taxable year with respect to which the distribution of property was made and must be filed by the due date (including extensions) of such return. Until the Form 1041, U.S. Fiduciary Income Tax Return is revised, the election should be made by including the gain or loss on the Schedule D (or other appropriate schedule, if applicable) of the Form 1041 and attaching the statement described in paragraph (a)(3) of this section to the tax return on which the election is made and including on that statement the name and taxpayer identification number of the distributee. For distributions made after June 1, 1984, and before July 18, 1984, the election must be filed by the later of the due date (including extentions) of the tax return of the estate or trust for the taxable year with respect to which the distribution was made or January 1, 1985. For those distributions, the fiduciary may make the election in the manner described above on a tax return, or amended return, for the year with respect to which the distribution was made. An election under section 643(d) may be revoked only with the consent of the Commissioner. The request for revocation of an election should be made by the fiduciary in the form of a ruling request and must contain the information required by regulations and revenue procedures pertaining thereto.

(h) *Election to treat a stapled foreign entity as a subsidiary*. This paragraph applies to the election, provided under section 136(c)(6) of the Act, to treat a foreign corporation which was a stapled entity with a domestic corporation as of June 30, 1983, as being owned (to the extent of its stapled interests) by the domestic corporation with which it is stapled. This treatment, if so elected, is in lieu of the treatment prescribed in section 269B(a)(1) of the Code, as added by the Act. This election may be made by the domestic corporation with which the foreign entity is stapled. The election may not be made by the foreign entity or by shareholders of the domestic corporation. This election must be made no later than January 14, 1985, and may be revoked only with the consent of the Commissioner. This election shall be effective after December 31, 1986. The domestic corporation shall make this

election by filing with the service center with which the domestic corporation files its income tax return a statement that—

(1) Contains the name, address, and taxpayer identification number of the domestic corporation,

(2) Identifies the election as made under section 136(c)(6) of the Tax Reform Act of 1984, and,

(3) Identifies the foreign entity and the interests in the foreign entity which constitute stapled interests with respect to the stock of the domestic corporation, and specifies the date on which those interests became stapled interests.

If this election is not made, the foreign corporation (interests in which were stapled interests as of June 30, 1983) will be treated as a domestic corporation, effective January 1, 1987, under section 269B(a)(1) of the Code.

(i) *Election to treat certain section 1248 amounts as included in gross income under section 951(a)(1)(A).* This paragraph applies to the elections, provided under section 133(d)(3) of the Act, to treat amounts included in the gross income of any person as a dividend by reason of section 1248 (a) or (f) after October 9, 1975, and before July 19, 1985, as an amount included in the gross income of such person under section 951(a)(1)(A). The election with respect to transactions to which section 1248(a) applies may be made by the foreign corporation described in section 1248(a) (or its successor in interest). The election with respect to transactions to which section 1248(f) applies may be made by the domestic corporation described in section 1248(f)(1) (or its successor in interest). Neither election may be made by an affected shareholder of any such corporation (unless the shareholder is the successor in interest). This election must be made no later than January 14, 1985, and shall apply with respect to all transactions to which section 1248 (a) or (f) applies that occurred after October 9, 1975, and before July 19, 1984. Once made, the election may be revoked only with the consent of the Commissioner. A foreign corporation shall make this election by filing the statement described in this paragraph with the Internal Revenue Service Center, Philadelphia, PA 19255. A domestic corporation shall make this election by filing the statement described in this paragraph with the service center with which the domestic corporation files its income tax return. In either case, the statement shall—

(1) Contain the name, address, and taxpayer identification number (if any) of the corporation making the election,

(2) Identify the election as made under section 133(d)(3) of the Tax Reform Act of 1984, and

(3) Identify all of the transactions (including the date of each transaction), shareholders involved in those transactions, and amounts to which the election applies.

(j) *Special election for computing investment company taxable income.* This paragraph applies to the election by a regulated investment company provided under section 1071(b) of the Act, which added section 852(b)(2)(F) to the Code. Under section 852(b)(2)(F), the taxable income of a regulated investment company shall be computed without regard to section 454(b) (relating to short-term obligations issued on a discount basis) if the company so elects. The election may be made only for taxable years beginning after December 31, 1978. A regulated investment company shall make the election by computing taxable income without regard to section 454(b) on its return for the first taxable year for which it desires the election to apply and shall attach the statement described in paragraph (a)(3) of this section to the return on which the election is made. A regulated investment company shall make the election by the time set forth in paragraph (a)(2) of this section. Once made, the election applies to the first taxable year for which it is made and to all subsequent taxable years and cannot be revoked without the consent of the Commissioner.

(k) *Election of extension of time for payment of estate tax for interests in certain holding companies.* An election under section 6166(b)(8), as added by section 1021(a) of the Act, or under section 1021(d)(2) of the Act, shall be made by including on the notice of election under section 6166 required by § 20.6166–1(b) a statement that an election is being made under section 6166(b)(8) or section 1021(d)(2) of the Act (whichever

is applicable) and the facts which formed the basis for the executor's conclusion that the estate qualified for such election. If a taxpayer makes an election described in this paragraph (k), then the special 4-percent interest rate of section 6601(j) and the 5-year deferral of principal payments of section 6166(a)(3) are not available. Thus, the first installment of tax is due on the date prescribed by section 6151(a) and subsequent installments bear interest at the rate determined under section 6621. If the executor makes an election described in this paragraph (k) and the notice of election under section 6166 fails to state the amount of tax to be paid in installments or the number of installments, then the election is presumed to be for the maximum amount so payable and for payment thereof in 10 equal annual installments, beginning on the date prescribed in section 6151(a). The elections described under this paragraph (k) are available for estates of decedents dying after July 18, 1984.

(l) *Subchapter S election by commodities dealers and options dealers*. This paragraph applies to a commodities dealer or options dealer referred to in section 102(d)(3) of the Act (relating to the election by such a dealer to be an S corporation) whose taxable year is the calendar year and that was a small business corporation (as defined in section 1361(b) of the Code) as of January 1, 1984. The election by such a dealer under section 102(d)(3) of the Act shall be made in the manner prescribed by section 1362 and the regulations thereunder, except that the election under section 102(d)(3) must be made before October 2, 1984. In addition to making the election in the manner prescribed under such section 1362 and the regulations thereunder, the commodities dealer or options dealer must indicate on Form 2553 that the election is made under section 102(d)(3) of the Act. Although section 102(d)(3) of the Act applies to dealers not covered by this paragraph, and such dealers may make an election under such section 102(d)(3), guidelines for making such an election are not provided in this paragraph and are forthcoming.

(m) *Election with respect to treatment of S termination year*. For the election provided under section 1362(e)(3), as amended by section 721(h) of the Act, see § 18.1362–4 of this chapter.

(n) *Election to be an S corporation; certain short taxable years*. For the election provided under section 1362(b), as amended by section 721(l) of the Act, see § 18.1362–1(b) of this chapter.

(o) *Election with respect to subchapter S passive investment income rules*. For the election provided under section 721(i) of the Act which amends section 6(b) of the Subchapter S Revision Act of 1982, see § 18.1362–5 of this chapter.

(p) *Election with respect to subchapter S distributions during certain post-termination transition periods*. For the election provided under section 1371(e), as amended by section 721(o) of the Act, see § 18.1371–1 of this chapter.

(q) *No elections for closed year*. Any election under this section which is allowed to be made by filing an amended return may only be made if the period for making a claim for refund or credit with respect to the taxable year for which such election is to be effective has not expired. This paragraph shall not apply to the election under paragraph (a)(2)(iv) of this section with respect to the election under section 1078 of the Act.

(r) *Additional information required*. Later regulations or revenue procedures issued under provisions of the Code or Act covered by this section may require the furnishing of information in addition to that which was furnished with the statement of election described herein. In such event the later regulations or revenue procedures will provide guidance with respect to the furnishing of such additional information.

[T.D. 7976, 49 FR 35487, Sept. 10, 1984; T.D. 7976, 49 FR 43640, Oct. 31, 1984; 49 FR 43951, Nov. 1, 1984, as amended by T.D. 8062, 50 FR 46004, Nov. 6, 1985. Redesignated by T.D. 8435, 57 FR 43895, Sept. 23, 1992; T.D. 9172, 70 FR 296, Jan. 4, 2005]

### § 301.9100–7T Time and manner of making certain elections under the Tax Reform Act of 1986.

(a) *Miscellaneous elections*—(1) *Elections to which this paragraph applies*. This paragraph applies to the elections set forth below provided under the Tax Reform Act of 1986 (the Act). General

rules regarding the time for making the elections are provided in paragraph (a)(2) of this section. General rules regarding the manner for making the elections are provided in paragraph (a)(3) of this section. Special rules regarding the time and manner for making certain elections are contained in paragraphs (a) through (i) of this section. If a special rule applies to one of the elections listed below, a cross-reference to the special rule is shown in brackets at the end of the description of the ''Availability of Election.'' Paragraph (j) of this section provides that additional information with respect to elections may be required by future regulations or revenue procedures.

| Section of Act | Section of Code | Description of Election | Availability of Election |
|---|---|---|---|
| 201(a) | 168(b)(5) | Election to depreciate property using the straight line method of recovery with respect to one or more classes of property for any taxable year | Property placed in service after 12–31–86. Election must be made for taxable year in which property is placed in service. Election shall apply to all property in the class placed in service during the taxable year for which the election is made. |
| 201(a) | 168(f)(1) | Election to exclude certain property from the accelerated cost recovery system | Property placed in service after 12–31–86. Election must be made for taxable year in which property is placed in service. |
| 201(a) | 168(g)(7) | Election to use alternative depreciation system with respect to one or more classes of property for any taxable year (except for residential rental or non-residential real property where the election may be made separately with respect to each property) | Property placed in service after 12–31–86. Election must be made for taxable year in which property is placed in service. Except for residential rental or non-residential real property, election shall apply to all property in the class placed in service during the taxable year for which the election is made. |
| 201(a), 1802(a) | 168(h)(6)(F)(ii), 168(j) (as in effect before October 22, 1986). | Election by a tax-exempt controlled entity to treat any gain recognized by the tax-exempt parent on any disposition of an interest in the tax-exempt controlled entity (and to treat any dividends or interest received or accrued from the tax-exempt controlled entity) as unrelated business taxable income under Code section 511 in order for the tax-exempt controlled entity to not be treated as a tax-exempt entity (or as a successor to a tax-exempt entity) | Property placed in service after 9–27–85, but can apply to property placed in service before such date if the tax-exempt controlled entity so elects. [See paragraph (a)(3)(ii) of this section.] |
| 203(a)(1)(B) | | Election to apply Act section 201 (including all elections within section 201) | Property placed in service after 7–31–86 and before 1–1–87. |
| 204(e) | | Election to have Act section 201 either (i) not apply to any property placed in service during 1987 or 1988 which is replacement property for property lost, damaged or destroyed in a flood which occurred 11–3–85 through 11–7–85 and which was declared a natural disaster area by the President of the United States, or (ii) apply to all such replacement property placed in service during 1985 or 1986 | (i) Property placed in service during 1987 or 1988; or (ii) property placed in service during 1985 or 1986. |
| 243(a) | | Election to begin the 60 month amortization period with the first month of the taxpayer's first taxable year beginning after 11–19–82 in lieu of the 11–19–82 date or the bus operating authority acquisition date | Bus operating authorities held on 11/19/82, or acquired after that date under a written contract that was binding on that date. |
| 243(b) | | Election to begin the 60 month amortization period on the first month of the taxpayer's first taxable year beginning after the deregulation month in lieu of the deregulation month | Freight forwarder operating authorities held at the beginning of the 60 month period applicable to the taxpayer (*i.e.,* the deregulation date or the first month of the first taxable year beginning after the deregulation date). |
| 243 (a), (b) | | Election by a qualified corporate taxpayer to allocate a portion of the cost basis of a qualified acquiring corporation in the stock of an acquired corporation to the basis of the authority | For bus operating authorities: authorities held on 11/19/82, or acquired after that date under a written contract that was binding on that date. For freight forwarders: authorities held at the beginning of the 60-month period applicable to the taxpayer. |

| Section of Act | Section of Code | Description of Election | Availability of Election |
|---|---|---|---|
| 252(a) | 42(f)(1) | Election concerning beginning of credit period for low-income housing credit | Buildings placed in service after 12–31–86 and before 1–1–90 (before 1–1–91 for buildings described in Code section 42(n)(2)(B)). [See paragraph (b) of this section.] |
| 252(a) | 42(g)(1) | Election concerning qualified low-income housing project to either satisfy the 20–50 or the 40–60 occupancy test | Buildings placed in service after 12–31–86 and before 1–1–90 (before 1–1–91 for buildings described in Code section 42(n)(2)(B)). [See paragraph (b) of this section.] |
| 252(a) | 42(i)(2) | Election to reduce eligible basis by outstanding balance of Federal loan subsidy | Buildings placed in service after 12–31–86 and before 1–1–90 (before 1–1–91 for buildings described in Code section 42(n)(2)(B)). [See paragraph (b) of this section.] |
| 252(a) | 42(j)(5) | Election to have certain partnerships treated as the taxpayer eligible for low-income housing credit | Buildings placed in service after 12–31–86 and before 1–1–90 (before 1–1–91 for buildings described in Code section 42(n)(2)(B) [See paragraph (b) of this section.] |
| 311(d)(2) | | Revocation of prior election under Code section 631(a). | Election for taxable years beginning before 1–1–87 may be revoked for taxable years ending after 12–31–86. |
| 411(b)(1) | 263(i) | For intangible drilling and development costs paid or incurred with respect to an oil, gas, or geothermal well located outside the United States, election to include such costs in adjusted basis for purposes of computing the amount of any deduction under Code section 611 (without regard to section 613). | Costs paid or incurred after 12–31–86 in taxable years ending after such date. [See paragraph (a)(2)(iii) of this section.] |
| 411(b)(2) | 616(d) | For expenditures paid or incurred with respect to the development of a mine or other natural deposit (other than an oil, gas, or geothermal well) located outside the United States, election to include such expenditures paid or incurred during the taxable year for which made in adjusted basis for purposes of computing the amount of any deduction under Code section 611 (without regard to section 613) | Costs paid or incurred after 12–31–86 in taxable years ending after such date. [See paragraph (a)(2)(iv) of this section.] |
| 411(b)(2) | 617(h) | For expenditures paid or incurred before the development stage for the purpose of ascertaining the existence, location, extent or quality of any deposit of ore or other mineral deposit (other than an oil, gas or geothermal well) located outside the United States, election to include all such expenditures, paid or incurred during the taxable year with respect to any such deposit, in adjusted basis for purposes of computing the amount of any deduction under Code section 611 (without regard to section 613) | Costs paid or incurred after 12–31–86 in taxable years ending after such date. [See paragraph (a)(2)(v) of this section.] |
| 501(a) | 469(j)(9) | Election to increase basis of property by amount of disallowed credit for purposes of determining gain or loss from a disposition of property used in a passive activity | Taxable years beginning after 12–31–86. [See paragraph (a)(3)(iii) of this section.] |
| 614(b) | 1059(c)(4) | Election to determine whether a dividend is extraordinary by reference to the fair market value of the share of stock with respect to which the dividend was received | Dividends declared after July 18, 1986 in taxable years ending after such date. |
| 644(d) | 216(b)(3) | Election by a cooperative housing corporation to allocate real estate taxes or interest or both to each tenant-stockholder's dwelling unit in a manner which reasonably reflects the cost to the corporation of the tenant-stockholder's dwelling unit | Taxable years beginning after 12–31–86. [See paragraph (a)(3)(iv) of this section.] |

| Section of Act | Section of Code | Description of Election | Availability of Election |
|---|---|---|---|
| 646 | | Election by an entity to be treated as a trust under the Internal Revenue Code if such entity was created in 1906 as a common law trust and governed by the trust laws of the State of Minnesota, receives royalties from iron ore leases, and income interests in the entity are publicly traded on a national stock exchange | The election is effective beginning on the first day of the first taxable year beginning after October 22, 1986 and following the year in which the election is made. Such election must be made by the board of trustees of such entity and must be accompanied by a written agreement signed by the board of trustees of the entity. |
| 651 | 4982(e)(4) | Election by a regulated investment company to use taxable years ending on 11–30 or 12–31 for purposes of computing capital gain net income under Code section 4982 | Calendar years beginning after 12–31–86. [See paragraph (a)(2)(vi) of this section.] |
| 701(a) | 56(f)(3)(B) | Election to have amount of net book income be equal to amount of earnings and profits | Taxable years beginning after 12–31–86. |
| 801(a) | 448(d)(4) | Election of common parent of an affiliated group that all members of such group be treated as one taxpayer if substantially all the activities of all members of the affiliated group involve performance of services in the same field | Taxable years beginning after 12–31–86. |
| 801(d)(2) | | Election to continue using the cash method of accounting for loans, leases and related party transactions | Loans, leases and related party transactions entered into before 9–26–85. |
| 802 | 474 | Election by certain small businesses to use the simplified dollar-value LIFO method | Taxable years beginning after 12–31–86. [See paragraph (a)(3)(v) of this section.] |
| 803(a) | 263A(d)(3) | Election to have rules of Code section 263A (relating to capitalization and inclusion in inventory costs of certain expenses) not apply to any plant or animal produced in any farming business conducted by the electing taxpayer | Unless consent is obtained from the Commissioner, the first taxable year beginning after 12–31–86 during which the taxpayer engages in a farming business. [See paragraph (c) of this section.] |
| 806(e)(2)(C) | | Election to have net income for the short taxable year of a partnership or S corporation which results from the required change in accounting period included entirely in income for such short taxable year | Partner and shareholder taxable years beginning after 12–31–86 with or within which the short taxable year created under section 806 of the Act ends. [See paragraph (d) of this section.] |
| | | Election to reduce partnership or S corporation income for the short taxable year resulting from a required change in accounting period under section 806 of the Act by an unamortized adjustment amount existing as of October 22, 1986, where such adjustment was required to effectuate a previous accounting period change under Rev. Proc. 72–51, 1972–2 C.B. 832 or Rev. Proc. 83–25, 1983–1 C.B. 689 | Short taxable years of partnerships or S corporations beginning after 12–31–86. [See paragraph (e) of this section.] |
| 811(a) | 453C(b)(2)(B) | Election to compute adjusted bases using depreciation deduction used under Code section 312(k) | Taxable years ending after 12–31–86 with respect to dispositions made after 2–28–86. |
| 811(a) | 453C(e)(4) | Election to have Code section 453C not apply to obligations arising from sales of timeshares and unimproved residential lots to invididuals | Taxable years ending after 12–31–86 with respect to dispositions made after 2–28–86. [See paragraph (a)(3)(vi) of this section.] |
| 905(a) | 165(l)(1) | Election to treat amount of reasonably estimated loss on a deposit in insolvent or bankrupt qualified financial institution as a loss described in Code section 165(c)(3) and incurred in the taxable year | Taxable years beginning after 12–31–81. [See the cross-–reference in paragraph (f) of this section.] |
| 905(c) | | Election to apply Code section 451(f) (relating to treatment of interest on frozen deposits in certain financial institutions) | Taxable years beginning after 12–31–82 and before 1–1–87. |
| 1301(b) | 141(b)(9) | Election by issuer of tax-exempt bonds to treat a portion of an issue as a qualified 501(c)(3) bond if such portion would have qualified as a 501(c)(3) bond had it been issued separately | Bonds issued after 8–15–86. [See paragraph (g) of this section.] |
| 1301(b) | 142(d)(1) | Election by issuer of tax-exempt bonds for residential rental property to satisfy either the 20–50 or the 40–60 occupancy test | Bonds issued after 8–15–86. [See paragraph (g) of this section.] |

| Section of Act | Section of Code | Description of Election | Availability of Election |
|---|---|---|---|
| 1301(b) | 142(d)(4)(B) | Election by issuer of tax-exempt bonds for residential rental property to treat the project as a deep rent skewed project | Bonds issued after 8–15–86. [See paragraph (g) of this section.] |
| 1301(b) | 143(k)(9)(D)(iii) | Election to treat limited equity cooperative housing as residential rental property and not as owner-occupied housing | Bonds issued after 8–15–86 and before 1–1–89. [See paragraph (g) of this section.] |
| 1301(b) | 145(d) | Election by issuer of tax-exempt bonds to have Code section 145 not apply to the issue if the issue is an issue of exempt facility bonds or qualified redevelopment bonds, to which the volume cap applies | Bonds issued after 8–15–86. [See paragraph (g) of this section.] |
| 1301(b) | 147(b)(4)(A) | Election by issuer of qualified 501(c)(3) bonds to have such bonds treated as meeting the limitation on maturity requirements of Code section 147(b)(1) if the requirements of section 147(b)(4)(B) are met | Bonds issued after 8–15–86. [See paragraph (g) of this section.] |
| 1704(b) | | Election to revoke prior election under Code section 1402(e) (relating to exemption from social security taxes for certain clergy) | Remuneration received in taxable years ending on or after October 22, 1986. [See paragraph (h) of this section.] |
| 1801(a) | 168(i) (as in effect before October 22, 1986). | Election to make finance leasing rules inapplicable to property which would otherwise be subject to them under the transitional rules of section 12(c)(1) of the Tax Reform Act of 1984 | Personal property leased under certain lease agreements effective on or after 1–1–84. [See paragraph (a)(3)(vii) of this section.] |
| 1804(e)(4) | | Election by a common parent of an affiliated group to apply amendments made by the Tax Reform Act of 1984 for taxable years beginning after 12–31–83 | Groups which include a corporation which on 6–22–84 is a member of the group which files a consolidated return for such corporation's taxable year which includes 6–22–84. |
| 1807(a)(7) | 468B | Election to treat a qualified payment made to a court-ordered fund as a payment made to a designated settlement fund | Generally, liabilities arising out of personal injury, death or property damage that are incurred after 7–18–84 under law in effect before the enactment of Code section 461(h). Election is made for the taxable year in which qualified payments are made to a designated settlement fund. |
| 1809(e)(2) | 48(b)(2) | Election by lessee and lessor not to apply the rule of Code section 48(b)(2) concerning the date leased property is treated as originally placed in service | Property originally placed in service after 4–11–84 (as determined under Code section 48(b) prior to its amendment by section 114(a)of the Tax Reform Act of 1984). [See paragraph (a)(3)(viii) of this section.] |
| 1810(1)(4) | 7701(b) | Election to be treated as a resident alien | Taxable years beginning after December 31, 1984. [See paragraph (a)(3)(ix) of this section.] |
| 1879(p)(1) | 83(c)(3) | Election to treat certain stock acquired upon the exercise of nonqualified stock options as subject to a substantial risk of forfeiture by reason of Code section 83(c)(3) even though the transfer of stock pursuant to such exercise occurred before 1–1–82, the effective date of section 83(c)(3) | Transfers of stock described in section 1879(p)(1) of the Act. [See paragraph (a)(2)(vii) and(a)(3)(x) of this section.] |
| 1882(c) | 3121(w)(2) | Election to revoke prior election under Code section 3121(w) (relating to exemption from social security taxes for certain churches and qualified church-controlled organizations) | Remuneration paid after 12–31–86 unless such electing church or church-controlled organization had withheld and paid over all employment taxes due, as if such election had never been in effect during the period from the stated effective date of the election being revoked through 12–31–86. [See paragraph (i) of this section.] |

(2) *Time for making elections*—(i) *In general*. Except as otherwise provided in this section, the elections specified in paragraph (a)(1) of this section shall be made by the later of—

(A) The due date (taking extensions into account) of the tax return for the first taxable year for which the election is to be effective, or

(B) April 15, 1987 (in which case the election generally must be made by amended return).

(ii) *No extension of time for payment.* Payments of tax due shall be made in accordance with chapter 62 of the Code.

(iii) *Time for making the election with respect to foreign intangible drilling costs.* With respect to the election under Act section 411(b)(1) (Code section 263(i)(2)(A)), the election shall be made on a property-by-property basis for each oil, gas, or geothermal property (as defined in Code section 614). The election shall be made by the due date (taking extensions into account) of the income tax return for the first taxable year in which the taxpayer pays or incurs any cost with respect to the development of such property for which the election is available.

(iv) *Time for making the election with respect to foreign development expenditures.* With respect to the election under Act section 411(b)(2) (Code section 616(d)(2)(A)), the election shall be made for each mine or other natural deposit not later than the time prescribed by law for filing the income tax return (taking extensions into account) for the taxable year to which such election is applicable.

(v) *Time for making the election with respect to foreign exploration expenditures.* With respect to the election under Act section 411(b)(2) (Code section 617(h)(2)(A)), the election may be made at any time before the expiration of the period prescribed for filing a claim for credit or refund of the tax imposed by chapter 1 of the Code for the first taxable year for which the taxpayer desires the election to be applicable.

(vi) *Time for making certain elections by regulated investment companies.* The election under Act section 651 (Code section 4982(e)(4)) shall be made on a statement attached to the form prescribed by the Internal Revenue Service which is used to report and pay the excise tax liability under section 4982. The election shall be filed on or before the later of—

(A) March 15 of the first calendar year beginning after the end of the first excise tax period for which the election is to be effective, or

(B) If the regulated investment company has been granted an extension of time to file a return for the excise tax under Code section 4982 for such excise tax period, the due date (including extensions thereof) for such return.

The statement of election under section 4982(e)(4) shall be attached to the prescribed form regardless of whether the regulated investment company is liable for the excise tax imposed by section 4982 for the excise tax period in question.

(vii) *Time for making the election with respect to certain nonqualified stock options.* The election under section 1879(p)(1) of the Act (Code section 83(c)(3)) shall be made—

(A) By April 21, 1987, in any case in which the operation of any law or rule of law on or before such date would prevent the credit or refund of any overpayment of tax resulting from such election, and

(B) By no later than any date after April 21, 1987 on which the operation of any law or rule of law would prevent the credit or refund of any overpayment of tax resulting from such election.

(3) *Manner of making elections*—(i) *In general.* Except as otherwise provided in this section, the elections specified in paragraph (a)(1) of this section shall be made by attaching a statement to the tax return for the taxable year for which the election is to be effective. If because of paragraph (a)(2)(i)(B) of this section the election may be filed after the due date of the tax return for the first taxable year for which the election is to be effective, such statement must be attached to a tax return or amended return for the taxable year to which the election relates. Except as otherwise provided in the return or in the instructions accompanying the return for the taxable year, the statement shall—

(A) Contain the name, address and taxpayer identification number of the electing taxpayer,

(B) Identify the election,

(C) Indicate the section of the Code (or, if the provision is not codified, the section of the Act) under which the election is made,

(D) Specify, as applicable, the period for which the election is being made

and/or the property or other items to which the election is to apply, and

(E) Provide any information required by the relevant statutory provisions and any information necessary to show that the taxpayer is entitled to make the election.

(ii) *Special rules for making the transitional rule elections with respect to certain tax-exempt controlled entities.* The irrevocable election under Act sections 201(a) and 1802(a) (Code sections 168(h)(6)(F)(ii) and 168(j), as in effect before October 22, 1986), shall be made by the tax-exempt controlled entity at the time and in the manner described in paragraphs (a)(2) and (a)(3)(i) of this section. A copy of the election statement filed by the tax-exempt controlled entity shall also be attached to the Federal tax returns (*e.g.*, Form 990 or 5500) of each of the tax-exempt shareholders or beneficiaries of the controlled entity.

(iii) *Special rule for making the election with respect to gain or loss from a disposition of property used in a passive activity.* The election under Act section 501(a) (Code section 469(j)(9)) shall be made on the form prescribed by the Internal Revenue Service for computing the taxpayer's passive activity loss and credit for the taxable year in which the property is disposed.

(iv) *Special rules for making the election with respect to cooperative housing corporations.* The election under Act section 644(d) (Code section 216(b)(3)(B)(ii)) may be made by a cooperative housing corporation with respect to its real estate taxes or interest or both. The election is available for any taxable year beginning after December 31, 1986, if the cooperative housing corporation has, by January 31 of the year following the first calendar year that includes any period to which the election applies, furnished to each tenant-stockholder during that period a written statement showing the amount of the allocation (or allocations) under section 216(b)(3)(B)(i) attributable to such tenant-stockholder's dwelling unit (or units) for that period. Any cooperative housing corporation making the election shall do so in accordance with paragraphs (a) (2) and (3) of this section and shall identify in the statement described in paragraph (a)(3) of this section whether the election is for real estate taxes or interest or both.

(v) *Special rules for making the election with respect to the simplified dollar-value LIFO method.* The election under Act section 802 (Code section 474) may be made only if the taxpayer files with the taxpayer's income tax return for the taxable year as of the close of which the method is first to be used a statement of the taxpayer's election to use the simplified dollar-value LIFO inventory method. The statement shall be on Form 970 pursuant to the instructions to the form and to the requirements of the regulations under section 474, or in such other manner as may be acceptable to the Commissioner.

(vi) *Special rules for making the election to have section 453C not apply to obligations arising from sales of timeshares and unimproved residential lots to individuals.* The election under Act section 811(a) (Code section 453C(e)(4)) to have section 453C not apply to obligations arising from sales of timeshares and unimproved residential lots to individuals may be made with respect to any obligation, or with respect to a class of such obligations. In the case of an election made with respect to a class of obligations, such election shall describe the class of obligations with such specificity as to make the class readily identifiable.

(vii) *Special rules for making certain finance leasing transitional rule elections.* The election relating to finance leases under Act section 1801(a)(1) (Code section 168(i) as in effect before October 22, 1986) shall be made by the lessor under a lease agreement subject to the finance lease rules of section 168(i) of the Code, as in effect before October 22, 1986, by noting this election in the books and records relating to the lease agreement within 12 months after February 5, 1987.

(viii) *Special rules for making the election relating to the date leased property is treated as originally placed in service.* The election under Act section 1809(e)(2) (Code section 48(b)(2)) must be made jointly by the lessee and the lessor. The election is made jointly when both the lessee and the lessor make the election in accordance with paragraphs

(a)(2) and (a)(3)(i) of this section. In addition to the other information required to be provided under paragraph (a)(3)(i) of this section, the statement described therein shall include a copy of the lease agreement and shall be signed by both the lessee and the lessor.

(ix) *Special rules for making the election to be treated as a resident alien*. The election under Act section 1810(l)(4) (Code section 7701(b)) to be treated as a resident under Code section 7701(b) shall be made by an alien individual by attaching a statement to the individual's income tax return (Form 1040), for the taxable year for which the election is to be in effect (the election year). The alien individual may not make this election until such time as he has satisfied the substantial presence test of Code section 7701(b)(1)(A)(ii) for the year following the election year. If an alien individual has not satisfied the substantial presence test for the year following the election year as of the due date (without regard to extensions) of the tax return for the election year, the alien individual may request an extension of time for filing the return until after he has satisfied such test, provided that he pays with his extension application the amount of tax he expects to owe for the election year, computed as if he were a non-resident alien throughout the election year. The statement shall include the name and address of the alien individual and contain a signed declaration that the election is being made. It must specify—

(A) That the alien individual was not a resident in the year immediately preceding the election year;

(B) That the alien individual is a resident in the year immediately following the election year under the substantial presence test and the individual's number of days of presence in the United States during such year;

(C) The date or dates of the alien individual's 31 consecutive day period of presence and continuous presence in the United States during the election year; and

(D) The date or dates of absence from the United States during the election year that are deemed to be days of presence.

(x) *Special rules for making the election with respect to the treatment of the exercise of certain nonqualified stock options*. The election under Act section 1879(p)(1) (Code section 83(c)(3)) is made by filing on Form 1040X a claim for credit or refund of the overpayment of tax resulting from the election. In order to satisfy the requirements of § 301.6402–2(b)(1) (relating to grounds set forth in claim), the claim for credit or refund must set forth)—

(A) The date on which the option was granted,

(B) The name of the corporation which granted the option,

(C) The date on which the stock was transferred pursuant to the exercise of the option,

(D) The fair market value of such stock on December 4, 1973,

(E) The fair market value on July 1, 1974 of the stock received upon the reorganization of the corporation which granted the option, and

(F) The date on which the taxpayer sold substantially all of the stock received in such reorganization. The taxpayer shall file a single claim for credit or refund of the entire overpayment of tax resulting from the election under Act section 1879(p)(1).

(4) *Revocation*—(i) *Irrevocable elections*. The elections described in this section under:

| Act Sections | Code Sections |
|---|---|
| 201(a) | 168(b)(5), 168(f)(1), 168(g)(7), 168(h)(6)(F)(ii) |
| 203(a)(1)(B), 252(a) | 42(f)(1), 42(g)(1), 42(i)(2), 42(j)(5) |
| 411(b)(1) | 263(i) |
| 411(b)(2)(A) | 616(d)(2)(A) |
| 501(a) | 469(j)(9) |
| 801(d)(2), 905(c), 1301(b) | 141(b)(9), 142(d)(1), 142(d)(4)(B) 143(k)(9)(D)(iii), 145(d), 147(b)(4)(A) |
| 1704(b), 1802(a) | 168(j) as in effect before October 22, 1986 |
| 1804(e)(4), 1879(p)(1) | 83(c)(3) |
| 1882(c) | 3121(w)(2) |

are irrevocable.

(ii) *Elections revocable with the consent of the Commissioner*. The elections described in this section under:

| Act Sections | Code Sections |
|---|---|
| 204(e), 243(a), 243(b), 243(a)(b), 411(b)(2)(B) | 617(h)(2)(A) |
| 614(b) | 1059(c)(4) |
| 644(d) | 216(b)(3) |
| 646, 651 | 4982(e)(4)(B) |
| 701(a) | 56(f)(3)(B) |
| 801(a) | 448(d)(4) |
| 802 | 474 |
| 803(a) | 263A(d)(3) |
| 806(e)(2)(C) and the election described in H.R. Rep. No. 99–841 at II–320, 811(a) | 453C(b)(2)(B)(i), 453C(e)(4) |
| 905(a) | 165(l)(1) |
| 1801(a) | 168(i) as in effect before October 22, 1986 |
| 1807(a)(7) | 468B) |
| 1809(e)(2) | 48(b)(2) |
| 1810(l)(4) | 7701(b) |

are revocable only with the consent of the Commissioner.

(iii) *Freely revocable election.* The election described in this section under Act section 311(d)(2) is freely revocable.

(b) *Elections with respect to the low-income housing credit.* The elections under Act section 252(a) (Code sections 42(f)(1), 42(g)(1), 42(i)(2), and 42(j)(5)) must be made for the taxable year in which the project is placed in service and shall be made in the certification required to be filed pursuant to section 42(l)(1).

(c) *Election to have the rules of section 263A (relating to capitalization and inclusion in inventory costs of certain expenses) not apply to any plant or animal produced in any farming business conducted by the electing taxpayer*—(1) *In general.* This paragraph applies to the election under Act section 803(a) (Code section 263A(d)(3)) to have the rules of section 263A (relating to capitalization and inclusion in inventory costs of certain expenses) not apply to any plant or animal produced in any farming business conducted by the electing taxpayer. The election is available to taxpayers engaged in the business of farming, including producers of agricultural crops, livestock, nursery stock, sod, trees bearing fruit, nuts or other crops, and ornamental trees (for purposes of section 263A, an evergreen tree that is more than 6 years old at the time it is severed from the roots shall not be treated as an ornamental tree). The election is not available to a corporation, partnership, or tax shelter that is required to use the accrual method of accounting under section 447 or section 448(a)(3), or farming syndicates (as defined in section 464(c)), or with respect to the planting, cultivation, maintenance or development of pistachio trees. In addition, the election does not apply with respect to costs incurred for the planting, cultivation, maintenance or development of any citrus or almond grove incurred during the 4-taxable-year period beginning with the taxable year in which such grove was planted. If a citrus or almond grove is planted in more than one taxable year, the portion of the grove planted in one taxable year is treated as a separate grove for this purpose.

(2) *Time and manner of making the election.* Unless consent is obtained from the Commissioner, the election may only be made for the taxpayer's first taxable year that begins after December 31, 1986, and during which the taxpayer engages in a farming business. The election shall be made on the Schedule E, F or other schedule required to be attached to the income tax return for the first taxable year for which the election is effective. In the case of a partnership or S corporation, the election must be made at the partner or shareholder level.

(3) *Election treated as if made if certain requirements satisfied.* A taxpayer eligible to make the election under section 263A(d)(3) shall be treated as having made the election if such taxpayer reports income and expense, in accordance with the rules under the election on a timely filed income tax return.

(4) *Revocation.* Once the election is made, it is revocable only with the consent of the Commissioner.

(5) *Special rules for treatment of expenses.* If the election is made, the plant or animal produced is treated as section 1245 property and gain is recaptured (treated as ordinary income) in the amount of deductions which, but for the election, would have been required to be capitalized with respect to the plant or animal. If the taxpayer or a related person makes the election, a non-accelerated method of depreciation (as defined in section 168(g)(2)) shall be applied to all property used predominantly in any farming business of the taxpayer or related person and placed in service in any taxable year during

which the election is in effect. For purposes of this election, related party means: (i) The members of the taxpayer's family (defined for this purpose to include the spouse of the taxpayer and any of his or her children who have not reached the age of 18 as of the last day of the taxable year); (ii) any corporation (including an S corporation) 50 percent or more of the value of which is owned directly or indirectly (through the application of section 318) by the taxpayer or members of the taxpayer's family; (iii) any corporation that is a member of the same controlled group (within the meaning of section 1563) as the taxpayer; and (iv) any partnership if 50 percent or more of the value of the interests in such partnership is owned directly or indirectly (through the application of section 318) by the taxpayer or members of the taxpayer's family.

(d) *Election with respect to the treatment of net income for the short taxable year resulting from a required change in accounting period.* This paragraph applies to the election under section 806(e)(2)(C) of the Act. Net income for the short taxable year resulting from a required change in accounting period under the provisions of section 806 of the Act which is to be included ratably in the partners' and S corporation shareholders' income for the first four taxable years (including the short taxable year) beginning after December 31, 1986, or included entirely in income for the short taxable year at the election of the partner or shareholder, shall be taken into account in accordance with section 702 (with respect to partners) and section 1366 (with respect to S corporation shareholders).

(e) *Election with respect to reducing partnership or S corporation income for the short taxable year resulting from a required change in accounting period under section 806 of the Act by an unamortized adjustment amount existing as of October 22, 1986*—(1) *In general.* This paragraph applies to the election described in H.R. Rep. No. 99–841 at II–320.

(2) *Partnerships or S corporations that make the election to reduce income for the short taxable year by an unamortized adjustment amount existing as of October 22, 1986.* Where a partnership or S corporation elects to reduce its income for the short taxable year required under the provisions of section 806 of the Act by the unamortized adjustment amount existing as of October 22, 1986, in accordance with paragraph (a) of this section, the income for the short taxable year (reduced by the unamortized adjustment amount) may then be subject to the election, under section 806(e)(2)(C) of the Act, by partners and S corporation shareholders to include all the net income for the short taxable year entirely in income for the partners' or shareholders' taxable year with or within which the short taxable year ends.

(3) *Partnerships or S corporations that do not make the election to reduce income for the short taxable year by an unamortized adjustment amount existing as of October 22, 1986.* Where a partnership or S corporation does not elect to reduce its income for the short taxable year created by the provisions of section 806 of the Act by the unamortized adjustment amount existing as of October 22, 1986, as provided in paragraph (a) of this section, the short taxable year required under the provisions of section 806 of the Act shall be considered one taxable year for purposes of amortizing the adjustment amount under the requirements of Rev. Proc. 72–51, 1972–2 C.B. 832, or Rev. Proc. 83–25, 1983–1 C.B. 689. The net income of the partnership or S corporation after reduction by the adjustment amount for the short taxable year may then be subject to the election under section 806(e)(2)(C) of the Act by partners or S corporation shareholders to include all the net income for the short taxable year entirely in income for the partners' or shareholders' taxable year with or within which the short taxable year of the partnership or S corporation ends.

(f) *Cross-reference.* See § 301.9100–8(d) for rules on both the election under section 905(a) of the Act, relating to section 165(l)(1), and the related election under section 165(l)(5), added by section 1009(d) of the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3342. An election under section 165(l) is available only to qualified individuals and, in general, applies to reasonably estimated losses on deposits in

an insolvent or bankrupt financial institution.

(g) *Elections with respect to certain bonds.* The elections under Act section 1301(b) (Code sections 141(b)(9), 142(d)(1), 142(d)(4)(B), 143(k)(9)(D)(iii), 145(d), and 147(b)(4)(A)) must be made in the bond indenture or a related document (as defined in § 1.103–13(b)(8)) on or before the date of issue. With respect to obligations issued on or before March 9, 1987 these elections must be made on or before March 9, 1987 and need not be made in the bond indenture or a related document, but must be made in writing and retained as part of the issuer's books and records.

(h) *Revocation of the election for exemption from social security taxes by certain clergy*—(1) *In general.* This paragraph applies to the election under Act section 1704(b) to revoke an election under section 1402(e)(1) of the Code by a duly ordained, commissioned, or licensed minister of a church, a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order), or a Christian Science practitioner. Only elections which are effective for the taxable year containing October 22, 1986 may be revoked under this paragraph.

(2) *Time for revoking the election.* The election shall be revoked by filing Form 2031 before the date on which the individual becomes entitled to benefits under sections 202(a) or 223 of the Social Security Act (without regard to sections 202(j)(1) or 223(b) of such Act), and not later than the due date of the Federal income tax return (including any extension thereof) for the individual's first taxable year beginning after October 22, 1986.

(3) *Manner of revoking the election.* To revoke an election under section 1402(e)(1), the individual shall file Form 2031 in accordance with the instructions accompanying that form. The revocation shall be made effective, as designated by the individual on the form, either with respect to the individual's first taxable year ending on or after October 22, 1986, or with respect to the individual's first taxable year beginning after October 22, 1986.

(4) *Special rules for payment of self-employment taxes with respect to certain taxable years ending on or after October 22, 1986*—(i) *Elections filed after the due date of the Federal income tax return.* If Form 2031 is filed on or after the due date of the Federal income tax return (including any extension thereof) for the individual's first taxable year ending on or after October 22, 1986, and the election made therein is effective with respect to that taxable year, Form 2031 shall be accompanied by an amended Federal income tax return for such taxable year together with payment in full of an amount equal to the total of the taxes that would have been imposed by section 1401 of the Code with respect to all of the individual's income derived in that taxable year which would have constituted net earnings from self-employment for purposes of chapter 2 of subtitle A of the Code (notwithstanding paragraph (4) or (5) of section 1402(c)) but for the exemption under section 1402(e)(1).

(ii) *Elections filed before the due date of the Federal income tax return.* If Form 2031 is filed before the due date of the Federal income tax return (including any extension thereof) for the individual's first taxable year ending on or after October 22, 1986, and the election is effective with respect to that taxable year, payment in full of an amount equal to the total of the taxes that would have been imposed by section 1401 of the Code with respect to all of the individual's income derived in that taxable year which would have constituted net earnings from self-employment for purposes of chapter 2 of subtitle A of the Code (notwithstanding paragraph (4) or (5) of section 1402(c)) but for the exemption under section 1402(e)(1) shall be made:

(A) In the case of Forms 2031 that are filed on or before the date on which the individual's Federal income tax return for such first taxable year is filed, with the individual's Federal income tax return for such taxable year; and

(B) In the case of Forms 2031 that are filed after the date on which the individual's Federal income tax return for such first taxable year is filed, with an amended Federal income tax return for that taxable year filed on or before the due date for the individual's Federal income tax return (including any extension thereof) for such taxable year.

(iii) *Interest on amounts paid after the due date of the Federal income tax return.* If any amount of tax imposed by section 1401 for an individual's taxable year with respect to which an election under this paragraph (h) is effective is paid after the due date of the individual's Federal income tax return (without regard to extensions) for such taxable year, interest will be assessed on such tax from the due date of such return (without regard to extensions) to the date on which such tax is paid.

(5) *Revocability of the revocation of the election.* Once having filed Form 2031, the individual may not thereafter file an application for an exemption under section 1402(e)(1).

(6) *Effective date of this provision.* This provision shall apply with respect to remuneration received in the taxable years for which the individual designates the revocation to be effective, as described in paragraph (h)(3) of this section, and with respect to monthly insurance benefits payable under title II of the Social Security Act on the basis of the wages and self-employment income of any individual for months in or after the calendar year in which such individual's application for revocation is effective (and lump-sum death payments payable under such title on the basis of such wages and self-employment income in the case of deaths occurring in or after such calendar year).

(i) *Revocation of the election for exemption from social security taxes by certain churches on qualified church-controlled organizations*—(1) *In general.* This paragraph applies to the election under Act section 1882 (Code section 3121 (w)(2)) to revoke an election under section 3121(w) by a church or qualified church-controlled organization (as defined in section 3121(w)(3)).

(2) *Time and manner of revoking the election.* The revocation described in this paragraph (i) shall be made by filing a Form 941 on or before the due date for filing Form 941 (without regard to extensions) for the first quarter for which the revocation is to be effective, accompanied by payment in full of the taxes that would be due for that quarter had there been no election under section 3121(w). See paragraph(i)(4) of this section for the effective date of revocations made under this paragraph (i).

(3) *Revocability of the revocation of the election.* Once an election under section 3121(w) is revoked under this paragraph (i), a new election under section 3121(w) may not be made.

(4) *Effective date of this paragraph.* A revocation made under this paragraph (i) shall be effective for the quarter of the calendar year covered by the Form 941 on which the revocation is made in accordance with paragraph (i)(2) of this section and all subsequent quarters. However, no revocation shall be effective prior to January 1, 1987 unless such electing church or church-controlled organization had withheld and paid over all employment taxes due, as if such election had never been in effect, during the period from the effective date of the election being revoked through December 31, 1986.

(j) *Additional information required.* Later regulations or revenue procedures issued under provisions of the Code or Act covered by this section may require the furnishing of information in addition to that which was furnished with the statement of election described in this section. In such event, the later regulations or revenue procedures will provide guidance with respect to the furnishing of such additional information.

[T.D. 8124, 52 FR 3624, Feb. 5, 1987; 52 FR 8405, Mar. 17, 1987; 52 FR 10085, Mar. 30, 1987, as amended by T.D. 8180, 53 FR 6147, Mar. 1, 1988; T.D. 8267, 54 FR 38980, Sept. 22, 1989. Redesignated and amended by T.D. 8435, 57 FR 43895, 43896, Sept. 23, 1992; T.D. 8513, 58 FR 68764, 68765, Dec. 29, 1993; T.D. 8530, 59 FR 12844, Mar. 18, 1994; T.D. 8644, 60 FR 66926, Dec. 27, 1995]

### § 301.9100–8 Time and manner of making certain elections under the Technical and Miscellaneous Revenue Act of 1988.

(a) *Miscellaneous elections*—(1) *Elections to which this paragraph applies.* This paragraph applies to the elections set forth below provided under the Technical and Miscellaneous Revenue Act of 1988, 102 Stat. 3342 (the Act). General rules regarding the time for making the elections are provided in paragraph (a)(2) of this section. General rules regarding the manner for making the elections are provided in

paragraph (a)(3) of this section. Special rules regarding the time and manner for making certain elections are contained in paragraphs (a) through (i) of this section. In this paragraph (a)(1), a cross-reference to a special rule applicable to an election is shown in brackets at the end of the description of the ''Availability of Election.'' Paragraph (j) of this section lists certain elections provided under the Act that are not addressed in this section. Paragraph (k) of this section provides that additional information with respect to elections may be required by future regulations or revenue procedures.

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 1002 (a)(11)(A) | 168(b)(2) | Election to depreciate property using the 150 percent declining balance method for one or more classes of property for any taxable year. | For property placed in service after December 31, 1986, the election must be made for the taxable year in which the property is placed in service. For taxable years ending before January 1, 1989, taxpayers have until January 22, 1990, to amend their returns to elect the 150 percent declining balance method, regardless of whether the taxpayer had used or elected to use a different method for property placed in service during those taxable years. The election will apply to all property in the class placed in service during the taxable year for which the election is made. |
| 1002(a)(23)(B) | 168(d)(3)(B) | Election to disregard property placed in service and disposed of in the same taxable year in applying the 40 percent test to determine if the mid-quarter convention applies. | Available for property placed in service in taxable years beginning on or before March 31, 1988. Election will apply to all property placed in service and disposed of during the taxable year for which the election is made. |
| 1002(l)(1)(A) | 42(b)(2)(A)(ii) | Election to use the applicable percentage for a month other than the month in which a building is placed in service. | Available for qualified buildings placed in service after December 31, 1987, and with respect to which either a binding agreement is made as to the allocable credit dollar amount or tax-exempt bonds are issued. [See paragraph (b) of this section.] |
| 1002(l)(2)(B) | 42(f)(1) | Election to defer the beginning of the credit period for the low-income housing credit. | Available for qualified buildings placed in service after December 31, 1986. |
| 1002(l)(4) | 42(d)(3)(B) | Election to exclude excess costs of disproportionate units. | Available for qualified buildings placed in service after December 31, 1986. |
| 1002(l)(12) | 42(g)(3)(B)(i) | Election to aggregate buildings in a low-income housing project to satisfy the minimum set-aside requirement elected under section 42(g)(1) of the Code. | Available for qualified buildings placed in service after December 31, 1986. |
| 1002(l)(19)(B) | 42(i)(2)(B) | Election to reduce eligible basis by outstanding balance of Federal loan subsidy or proceeds of tax-exempt obligation. | Available for qualified buildings placed in service after December 31, 1986. |
| 1005(c)(11) | 469,163 | Election to treat certain carryovers of disallowed investment interest expense as passive activity deductions for the first taxable year beginning after December 31, 1986. | Available for investment interest that is disallowed for the last taxable year beginning before January 1, 1987, and is properly allocable to a passive activity for the first taxable year beginning after December 31, 1986. [See paragraph (c) of this section.] |
| 1006(d)(15) | 382 | As a general rule, a firm commitment underwriter of an offering of a loss corporation's stock made before September 19, 1986 (January 1, 1989, for an institution described in section 591) is not treated as acquiring underwritten stock if it is disposed of pursuant to the offering on or before 60 days after the initial offering. The loss corporation may elect not to apply the general rule. | Available to any loss corporation to which the general rule would otherwise apply. The election is to be made by filing a statement with the District Director with whom the loss corporation would file its Federal income tax return. The statement must identify the election as an election under section 1006(d)(15) of the Act and must (1) contain the taxpayer's name, address, and employee identification number, (2) identify the transaction to which the election relates, (3) represent that the conditions for making the election have been satisfied, and (4) be signed by a person authorized to sign the Federal income tax return of the loss corporation. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 1006(j)(1)(C) | 171(e) | Election to reduce interest payments received on certain bonds by allocable bond premium in accordance with section 171(e) of the Code. | Available for obligations acquired after October 22, 1986, and before January 1, 1988. |
| 1006(t)(18)(B) | 860F(e) | Election not treat a REMIC (real estate mortgage investment conduit) as a partnership for purposes of determining who may sign the REMIC return. | Available for REMICs with a start-up date (as defined in section 860G(a)(9) of the Code, as in effect on November 9, 1988) before November 10, 1988. The election is made by attaching a statement to the amended tax return for tax year 1987 or to the tax return for the first taxable year for which the election is to be effective. |
| 1008(c)(4)(A) | 460(b)(3) | Election not to discount an amount received or accrued after completion of a contract to its value as of the completion of the contract for purposes of applying the look-back method. | Effective as if included in the Tax Reform Act of 1986 (1986 Act) (available for contracts entered into after February 28, 1986). The election must be made on a contract-by-contract basis by attaching a statement to the tax return for the first year after completion in which the taxpayer includes in income any adjustments to the contract price or deducts any adjustments to contract costs (or, if later, the first tax return filed after October 23, 1989). |
| 1009(d) | 165(1) | Election to treat amount of reasonably estimated loss on a deposit in an insolvent or bankrupt qualified financial institution as a loss described in either section 165(c) (2) or (3) of the Code and incurred in the taxable year for which the election is made. | Available for taxable years beginning after December 31, 1981. [See paragraph (d) of this section.] |
| 1010(f)(1) | 831(b)(2)(A) | Election for insurance companies other than life to use alternative tax under certain circumstances. | Available for taxable years beginning after December 31, 1986. |
| 1010(f)(2) | 835(a) | Election for an interinsurer or reciprocal underwirter mutual insurance company subject to section 831(a) of the Code to be subject to section 835(b) limitation. | Available for taxable years beginning after December 31, 1986. |
| 1011(a) | 219(g)(4) | Election to treat a married individual as not married for purposes of certain contributions made to an individual retirement plan for 1987. | Available to a married individual who (1) was an active participant during 1987, (2) lived apart from the other spouse during the entire 1987 calendar year, (3) filed a separate income tax return for 1987, (4) had adjusted gross income of not more than $35,000 for 1987, and (5) made a contribution to an individual retirement plan for 1987. |
| 1012(d)(4) | 865(f) | Election to treat an affiliate and its wholly-owned subsidiaries as one corporation. | Shareholder-level election, available, subject to certain conditions, to United States residents selling stock in an affiliate which is a foreign corporation. Available for taxable years beginning after December 31, 1986. |
| 1012(d)(6) | 865(g)(3) | Election to treat a corporation and its wholly-owned subsidiaries as one corporation. | Shareholder-level election, available only to individual bona fide residents of Puerto Rico, if the corporate group is engaged in active trade or business in Puerto Rico and meets a gross income test. Available for taxable years beginning after December 31, 1986. |
| 1012(d)(8) | 865(h)(2) | Election to apply treaty source rule to treat gain from a sale of an intangible or of stock in a foreign corporation as foreign source. | Taxpayer election for treatment of gain on the disposition of certain stocks and intangibles. Available for taxable years beginning after December 31, 1986. |
| 1012(1)(2) | 245(a)(10) | Election to apply treaty source rules to treat dividends received from a qualified 10-percent owned foreign corporation as foreign source. | Available to corporations for distributions out of earnings and profits for taxable years beginning after December 31, 1986. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 1012(n)(3) | 936 | Election to reduce the amount of qualified possession source investment income for certain corporations that fail the 75 percent active trade or business income requirement of section 936(a)(2)(B) of the Code due to section 1231(d) of the 1986 Act. | Corporate-level election, available for any taxable year beginning in 1987 or 1988. |
| 1012(bb)(4) | 904(g)(10) | Election to apply treaty source rules (in lieu of rules in section 904(g) of the Code) to treat an amount derived from a U.S.-owned foreign corporation as foreign source. | Available generally beginning July 18, 1984 (the amendment is to take effect as if included in the amendment made in section 121 of the Tax Reform Act of 1984). |
| 1014(c)(1) | 664(b) | Election by a beneficiary of a trust to which section 664 of the Code applies to obtain certain benefits of section 1403(c)(2) of the 1986 Act, relating to the ratable inclusion of certain income over 4 taxable years. | Available for taxable years beginning after December 31, 1986, provided the trust was required to change its taxable year under section 1403(a) of the 1986 Act. Election is made by attaching a statement to an amended return for the trust beneficiary's first taxable year beginning after December 31, 1986. Amended return must be filed on or before January 22, 1990. If no such election is filed, the benefits of section 1403(c)(2) are waived. |
| 1014(c)(2) | 652, 662 | Election by any trust beneficiary (other than a beneficiary of a trust to which section 664 of the Code applies), to waive the benefits of section 1403(c)(2) of the 1986 Act. | Available for taxable years beginning after December 31, 1986. Election is made by attaching a statement to an amended return for the trust beneficiary's first taxable year beginning after December 31, 1986. Amended return must be filed on or before January 22, 1990. |
| 1014(d)(3)(B), 1014(d)(4). | 643(g)(2) | Election to have certain payments of estimated tax made by a trust or estate treated as paid by the beneficiary. | Available for taxable years beginning after December 31, 1986. In the case of an estate, the election is available only for a taxable year reasonably expected to be the estate's last taxable year. Election must be made by the fiduciary of the trust or estate on or before the 65th day after the close of the taxable year for which the election is made. The election must be made by that date by filing Form 1041–T with the Internal Revenue Service Center where the trust's return for such taxable year is required to be filed. The trust's return (or amended return) for that year must include a copy of the Form 1041–T. |
| 2004(j)(1) | 1503(e) | Election, made by an affiliated group filing a consolidated return upon the disposition of intragroup stock on or before December 15, 1987, to reduce the disposing member's basis in the indebtedness of the subsidiary member whose stock has been disposed of, in lieu of taking into account as negative basis the "unrecaptured amount" allocable to the stock disposed of. | Available to an affiliated group filing a consolidated return in which a member disposes of intragroup stock on or before December 15, 1987. |
| 2004(m)(5) | 384 | Election to have amendments (to the limitation on use of preacquisition losses to offset corporate built-in gains) made by section 2004(m) of the Act not apply in any case where the acquisition date is before March 31, 1988. | Available when the acquisition date is before March 31, 1988. Election must be made not later than the later of the due date (including extensions) for filing the return for the taxable year of the acquiring corporation in which the acquisition date occurs or March 10, 1989. |
| 4004(a) | 42(j)(5)(B) | Election to have certain partnerships not treated as the taxpayer to which the low-income housing credit is allowable. | Available for qualified buildings placed in service after December 31, 1986, and owned by partnerships with 35 or more partners. [See paragraph (b) of this section.] |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 4008(b) | 41(h) | Election to have the research credit under secction 41 of the Code not apply for any taxable year. | Available in any taxable year beginning after December 31, 1988. The election is made by not claiming the research credit on an original return, or by filing an amended return on which no research credit is claimed, at any time before the expiration of the 3-year period beginning on the last day prescribed by law for filing the return for the taxable year (determined without regard to extensions). The election may be revoked within the above-described 3-year period by filing an amended return on which the credit is claimed. |
| 5012(e)(4) | 7002A(c)(3) 72(e). | Election to recognize gain on exchange of life insurance contracts to avoid the characterization of life insurance contract as a modified endowment contract. | Available for contracts entered into after June 20, 1988, and before November 6, 1988, which are exchanged before February 10, 1989. |
| 5031(a) | 7520(a) | Election to use 120 percent of the Applicable Federal Midterm rate for either of the two months preceding a valuation date in valuing certain interests transferred to charity for which an income, estate, or gift tax charitable deduction is allowable. | Available in cases where the valuation date occurs on or after May 1, 1989. The election is made by attaching a statement to the last income, estate, or gift tax return filed before the due date, or if a timely return is not filed, the first return filed after the due date. The statement shall contain the following: (1) A statement that an election under section 7520(a) is being made; (2) the transferor's name and taxpayer identification number as they appear on the return; (3) a description of the interest being valued; (4) the recipients, beneficiaries, or donees of the transferred interest; (5) the date of the transfer; (6) the Applicable Federal Midterm rate that is used to value the transferred interest and the month to which the rate pertains. |
| 5033(a)(2) | 2056(d) | Election to treat a trust for the benefit of a surviving spouse who is not a U.S. citizen as a Qualified Domestic Trust, transfers to which are deductible under section 2056(a) of the Code. | Available in the case of estates of decedents dying after November 11, 1988. The election is made by the executor on the last Federal estate tax return filed by the executor before the due date of the return, or if a timely return is not filed by the executor, on the first estate tax return filed by the executor after the due date. However, elections made on or after May 5, 1991, may not be made on any return filed more than one year after the time prescribed for filing the return (including extensions). |
| 6006(a) | 1(i)(7) | Election to include certain unearned income of a child on the parent's return. | Available for taxable years beginning after December 31, 1988. The election must be made in the manner prescribed by the appropriate forms for the parent's return for the year for which the election is effective. The election must be made by the due date (taking extensions into account) of such tax return. |
| 6011 | 121(d)(9) | Election to exclude gain on the sale of a principal residence by certain incapacitated taxpayers age 55 or over. | Election may be made for a sale or exchange after September 30, 1988, by a taxpayer who becomes physically or mentally incapable of self-care and meets the required use rule provided in section 121(d)(9) of the Code. For the time and manner of making the election see § 1.121–4 of the Income Tax Regulations. |
| 6026(a) | 263A(h) | Election for certain authors, photographers, and artists to apply the exemption from the uniform capitalization rules for the first taxable year ending after November 10, 1988. | Available for the first taxable year ending after November 10, 1988. An eligible taxpayer will be treated as having made the election if the taxpayer reports income and expenses for the first taxable year ending after November 10, 1988 in accordance with the exemption from section 263A of the Code. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 6026(b)(1) ..... | 263A(d)(1) ..... | Revocation of prior election under section 263A(d)(3) of the Code (relating to the capitalization of certain expenses for the production of animals). | Election for any taxable year beginning before January 1, 1989, may be revoked for the first taxable year beginning after December 31, 1988. |
| 6026(c) ..... | 263A(d)(3)(B) .... | Election by eligible taxpayers not to have section 263A of the Code apply to costs incurred in the planting, cultivation, maintenance, or development of pistachio trees. | Available without the consent of the Commissioner for the first taxable year beginning after December 31, 1986, during which the taxpayer engages in the planting, cultivation, maintenance, or development of pistachio trees. Consent must be obtained from the Commissioner for the election to be made for any subsequent taxable year. |
| 6152(a), 6152(c)(3). | 2056(b)(7)(C)(ii) | Election to treat a survivor annuity payable to a surviving spouse that is otherwise deductible under section 2056(b)(7)(C) of the Code as a nondeductible terminable interest. | Available in the case of estates of decedents dying after December 31, 1981, and in no event will the time for making the election expire before November 11, 1990. [See paragraph (e) of this section.] |
| 6152(b), 6152(c)(3). | 2523(f)(6)(B) ..... | Election to treat a joint and survivor annuity in which the donee spouse has a survivorship interest that is otherwise deductible under section 2523(f)(6)(A) of the Code as a nondeductible terminable interest. | Available in the case of transfers made after December 31, 1981, and in no event will the time for making the election expire before November 11, 1990. [See paragraph (f) of this section.] |
| 6152(c)(2) ..... | 2056(b)(7)(C)(ii), 2523(f)(6)(B). | Election to treat as deductible for estate or gift tax purposes under sections 2056(b)(7)(C) or 2523(f)(6) of the Code, respectively, a survivor's annuity payable to a surviving spouse reported on an estate or gift tax return filed prior to November 11, 1988, as a nondeductible terminable interest. | Available to estates of decedents dying after December 31, 1981, or to transfers made after December 31, 1981, where: (1) the estate or gift tax return was filed prior to November 11, 1988; (2) the annuity was not deducted on the return as qualified terminable interest property under sections 2056(b)(7) or 2523(f) of the Code; and (3) the executor or donor elects to treat the interest as a deductible terminable interest under sections 2056(b)(7)(C) or 2523(f)(6) prior to November 11, 1990. [See paragraph (g) of this section.] |
| 6180(b)(1) ..... | 142(i)(2) ..... | Election by a nongovernmental owner of a highspeed intercity rail facility not to claim any deduction under section 167 or 168 of the Code and any credit under subtitle A, in order for the facility to be described in section 142(a)(11). | Available for bonds issued after November 10, 1988. [See paragraph (h) of this section.] |
| 6181(c)(2) ..... | 148(f)(4)(A) ..... | One-time election by the issuer of tax-exempt bonds outstanding as of November 11, 1988, other than private activity bonds, to apply the amendments made by section 148(b) of the Code to amounts deposited after such date in bona fide debt service funds. | Available for bonds outstanding as of November 11, 1988. The election must be made in writing on the later of March 21, 1990, or the first date any payment is required under section 148(f) of the Code. The election should be retained as part of the issuer's books and records (as defined in § 1.103–10(b)(2)(vi) of the regulations) of the bond issue to which it relates. |
| 6277 ..... | 382, 383 ..... | Election by a loss corporation that otherwise qualifies for the exception of section 621(f)(5) of the 1986 Act not to apply that exception. That exception provides for the inapplicability, in certain situations, of the amendments to sections 382 and 383 of the Code made by the 1986 Act (relating to limitation of corporate attributes after an ownership change). That exception applies with respect to a loss corporation's ownership change resulting from a reorganization described in section 368(a)(1)(G) of the Code or from an exchange of debt for stock in a title 11 or similar case if a petition was filed with the court before August 14, 1986. | Available for ownership changes described in section 621(f)(5) of the 1986 Act, if a petition was filed with the court before August 14, 1986. The election is to be made by filing a statement with the District Director with whom the loss corporation would file its Federal income tax return. The statement must identify the election as an election under section 6277 of the Act and must (1) contain the taxpayer's name, address, and employee identification number, (2) identify the transaction to which the election relates, (3) represent that the conditions for making the election have been satisfied, and (4) be signed by a person authorized to sign the Federal income tax return of the loss corporation. |

| Section of act | Section of code | Description of election | Availability of election |
|---|---|---|---|
| 8007(a)(1) ..... | 3127 ..... | Election to be exempted from the taxes imposed by sections 3101 and 3111 of the Code. | An individual employer and an employee, both of whom are members of a recognized religious sect or a division thereof described in section 1402(g)(1) of the Code and adherents of established tenets or teachings of such sect or division, may, if both qualify and make elections, obtain exemptions from the taxes imposed by sections 3101 and 3111. [See paragraph (i) of this section.] |

(2) *Time for making elections*—(i) *In general*. Except as otherwise provided in this section, the elections described in paragraph (a)(1) of this section must be made by the later of—

(A) The due date (taking into account any extensions of time to file obtained by the taxpayer) of the tax return for the first taxable year for which the election is effective, or

(B) January 22, 1990 (in which case the election generally must be made by amended return).

(ii) *No extension of time for payment*. Payments of tax due must be made in accordance with chapter 62 of the Code.

(3) *Manner of making elections*. Except as otherwise provided in this section, the elections described in paragraph (a)(1) of this section must be made by attaching a statement to the tax return for the first taxable year for which the election is to be effective. If such tax return is filed prior to the making of the election, the statement must be attached to an amended tax return of the first taxable year for which the election is to be effective. Except as otherwise provided in the return or in the instructions accompanying the return for the taxable year, the statement must—

(i) Contain the name, address and taxpayer identification number of the electing taxpayer;

(ii) Identify the election;

(iii) Indicate the section of the Code (or, if the provision is not codified, the section of the Act) under which the election is made;

(iv) Specify, as applicable, the period for which the election is being made and the property or other items to which the election is to apply; and

(v) Provide any information required by the relevant statutory provisions and any information requested in applicable forms and instructions, such as the information necessary to show that the taxpayer is entitled to make the election.

Notwithstanding the foregoing, an amended return need not be filed for an election made prior to October 23, 1989, if the taxpayer made the election in a reasonable manner.

(4) *Revocation*—(i) *Irrevocable elections*. The elections described in this section that are made under the following sections of the Act are irrevocable: 1002(a)(11)(A) (Code section 168(b)(2)), 1002(a)(23)(B), 1002(l)(1)(A) (Code section 42(b)(2)(A)(ii)), 1002 (l)(2)(B) (Code section 42(f)(1)), 1005(c)(11), 1008(c)(4)(A) (Code section 460(b)(3)), 1014(c)(1), 1014(c)(2), 1014(d)(3)(B) and 1014(d)(4) (Code section 643(g)(2)), 2004(m)(5), 4004(a) (Code section 42(j)(5)(B)), 5033(a)(2) (Code section 2056A(d)), 6006(a) (Code section 1(i)(7)), 6026(a) (Code section 263A(h)), 6026(b)(1) (Code section 263A(d)(1)), 6152(a) and 6152(c)(3) (Code section 2056(b)(7)(C)(ii)), 6152(b) and 6152(c)(3) (Code section 2523(f)(6)(B)), 6152(c)(2) (Code sections 2056(b)(7)(C)(ii) and 2523(f)(6)(B)), and 6180(b)(1) (Code section 142(i)(2)).

(ii) *Elections revocable with the consent of the Commissioner*. The elections described in this section that are made under the following sections of the Act are revocable only with the consent of the Commissioner: 1006(d)(15), 1006(j)(1)(C), 1006(t)(18)(B), 1009(d) (Code section 165(l)), 1010(f)(1) (Code section 831(b)(2)(A)), 1010(f)(2) (Code section 835(a)), 1012(d)(4) (Code section 865(f)), 1012(d)(6) (Code section 865(g)(3)), 1012(d)(8) (Code section 865(h)(2)), 1012(l)(2) (Code section 245(a)(10)), 1012(n)(3), 1012(bb)(4) (Code section 904(g)(10)), 2004(j)(1), 5031(a) (Code section 7520(a)), 6026(c) (Code section 263A(d)(3)(B)), and 6277.

(iii) *Freely revocable elections.* The election described in this section that is made under section 6011 of the Act is revocable without the consent of the Commissioner. (See section 121(c) of the Code and § 1.121–4 of the regulations.)

(b) *Elections with respect to the low-income housing credit.* The elections under sections 42(d)(3)(B), 42(f)(1), 42(g)(3)(B)(i), 42(i)(2)(B), and 42(j)(5)(B) of the Code generally must be made for the taxable year in which the building is placed in service, or the succeeding taxable year if the section 42(f)(1) election is made to defer the start of the credit period, and must be made in the certification required to be filed pursuant to section 42(l) (1) and (2), as amended by the Act. The election under section 42(j)(5)(B) of the Code must be made by the later of the due date of the certification or January 22, 1990. The election under section 42(b)(2)(A)(ii) must be made in accordance with the requirements of Notice 89–1, 1989–2 I.R.B. 10.

(c) *Election to treat certain carryovers of disallowed investment interest expense as passive activity deductions.* The requirements of paragraphs (a) (2) and (3) of this section do not apply to an election under section 1005(c)(11) of the Act. Instead, the election must be made at the time and in the manner prescribed in Notice 89–36, 1989–13 I.R.B. 6. Thus, the election must be made before the filing deadline specified in Notice 89–36 by amending previously filed returns to reflect any change in the computation of tax liability that results from the election.

(d) *Election with respect to the treatment of reasonably estimated losses in an insolvent or bankrupt financial institution*—(1) *In general.* This paragraph (d) applies to an election under section 905(a) of the 1986 Act, and to an election under section 1009(d) of the Act, both relating to section 165(l) of the Code. If—

(i) As of the close of the taxable year, it can reasonably be estimated that there is a loss on a deposit (within the meaning of section 165(l)(4)) of a qualified individual (as defined in section 165(l)(2)) in a qualified financial institution (as defined in section 165(l)(3)), and

(ii) Such loss is on account of the bankruptcy or insolvency of such institution, then the qualified individual may elect under either section 165(l)(1) or (5) (but not both), to treat the amount (subject to the applicable limitations if under section 165(l)(5)) so estimated for that taxable year as a loss described in either section 165(c)(3), relating to casualty losses, or section 165(c)(2), relating to transactions entered into for profit, and incurred during the taxable year.

The election will apply to all losses of the qualified individual on deposits in the institution with respect to which an election is made. For additional information and examples of the application of the election rules, see Notice 89–28, 1989–12 I.R.B. 72.

This paragraph (d) includes the procedural and the principal substantive rules first issued in Notice 89–28. For specific rules relating to an election under section 165(1)(5), see paragraph (d)(2) of this section.

(2) *Specific rules relating to the section 165(1)(5) election*—(i) *Applicability.* An election under section 165(1)(5) of the Code may be made only if no part of the taxpayer's deposits in the financial institution is federally insured. Generally, this requirement will be met only in cases in which none of the deposits in the financial institution are federally insured.

(ii) *Dollar limitations.* An election under section 165(1)(5) of the Code is limited to $20,000 ($10,000 in the case of a separate return by a married individual) in aggregate losses on deposits in any one financial institution. The applicable dollar limit must be reduced by the amount of any insurance proceeds that can reasonably be expected to be received under any state law.

(3) *Time and manner of determining loss and making the election*—(i) *Year of election and determination of loss.* A qualified individual may make an election under section 165(1) of the Code either for the first taxable year in which a reasonable estimate of the loss can be made or for a later taxable year that is prior to the taxable year in which the loss is sustained. The amount of the loss is determined by the difference between a taxpayer's basis in the deposits

and the amount that is reasonably estimated to be recovered, taking into account all facts and circumstances reasonably available to the taxpayer as of the date the election is made. A reasonable estimate might be based, for example, on the percentage of total deposits likely to be recovered by the depositors according to a determination made by the regulatory authority or trustee having responsibility over the institution. In addition, the taxpayer's basis in the deposits must be reduced to the extent that a loss is claimed.

(ii) *Time and manner of making election.* A qualified individual may make an election under section 165(1) of the Code on—

(A) The income tax return for the taxable year with respect to which the taxpayer made a reasonable estimate of the loss;

(B) An amended income tax return for a taxable year described in paragraph (d)(3)(ii)(A) of this section, if the period prescribed for filing a claim for refund or credit for that taxable year has not yet expired; or, if applicable,

(C) An amended income tax return for a taxable year (beginning after December 31, 1981) described in paragraph (d)(3)(ii)(A) of this section, whether or not the claim for refund or credit is barred by another provision of law, but only if the amended return is properly filed on or before November 9, 1989.

(iii) *Information to include with election.* The election should include any information requested in the applicable forms and instructions (e.g., Form 4684, Casualties and Thefts). If the applicable form(s) and instructions do not make reference to or request information concerning this election, the taxpayer should, on an appropriate line or space clearly indicate the name of the financial institution, include the following language: ''Insolvent Financial Institution Election,'' and include the calculation of the reasonably estimated loss claimed.

(4) *Revocability of the election*—(i) *In general.* If a taxpayer desires to revoke an election under section 165(l) of the Code, the taxpayer must request, in writing, the consent of the Secretary setting forth the pertinent facts surrounding the election and the reasons for requesting a revocation.

(ii) *Exception.* With respect to an election made under section 165(l)(1) of the Code prior to November 9, 1989, a qualified individual may revoke such election without securing the prior consent of the Secretary but only if the taxpayer makes an election under section 165(l)(5) by November 9, 1989, in the manner prescribed in paragraph (d)(3) of this section.

(5) *Effective date.* Paragraph (d) of this section is generally effective for elections made under section 165(1) of the Code on or after November 10, 1988. However, an election filed prior to February 24, 1989, that is made in any reasonable manner will be effective.

(e) *Election to treat a survivor annuity payable to a surviving spouse as a nondeductible terminable interest.* Where the time for making the election under section 2056(b)(7)(C)(ii) of the Code to treat the survivor annuity as nondeductible otherwise expires before November 11, 1990, the election may be made before November 11, 1990, by filing with the Service Center where the original return was filed supplemental information under § 20.6081–1(c) of the Estate Tax Regulations containing:

(1) A statement that the election under section 2056(b)(7)(C)(ii) of the Code is being made;

(2) The applicable revised schedules;

(3) A recomputation of the tax due; and

(4) Payment of any additional tax due.

(f) *Election to treat a joint and survivor annuity in which the donee spouse has a survivor interest as a nondeductible terminable interest.* Where the time for making the election under section 2523(f)(6)(B) of the Code to treat the interest as nondeductible otherwise expires before November 11, 1990, the election may be made before November 11, 1990, by filing with the appropriate Service Center an original return (or an amended return if an original return was filed) containing:

(1) A statement that the election under section 2523(f)(6)(B) is being made;

(2) A recomputation of the tax due; and

(3) Payment of any additional tax due.

(g) *Election to treat survivor's annuity payable to the surviving spouse as qualified terminable interest property deductible under sections 2056(b)(7)(C) or 2523(f)(6) of the Code in the case of a return filed prior to November 11, 1988.* (1) In the case of an estate tax election under section 2056(b)(7)(C) the election is made by filing with the Service Center where the estate tax return was filed supplemental information under § 20.6081–1(c) of the Estate Tax Regulations (and timely claim for refund under section 6511 of the Code, if applicable) containing:

(i) A statement that the election under section 6152(c)(2) of the Technical and Miscellaneous Revenue Act of 1988 is being made;

(ii) The applicable revised schedules; and

(iii) A recomputation of the estate's tax liability showing the amount of any refund due.

(2) In the case of a gift tax election under section 2523(f)(6) of the Code, the election is made by filing with the Service Center where the original return was filed an amended return (and timely claim for refund under section 6511, if applicable) containing:

(i) A statement that the election under section 6152(c)(2) of the Technical and Miscellaneous Revenue Act of 1988 is being made;

(ii) The applicable revised schedules; and

(iii) A recomputation of the gift tax liability showing the amount of any refund due.

(h) *Elections with respect to certain nongovernmentally owned rail facilities*—(1) *In general.* This paragraph applies to the election under section 6180(b)(1) of the Act (Code section 142(i)(2)) not to claim a deduction under section 167 or 168 of the Code or any credit with respect to certain bond-financed property. An electing owner that is not a governmental unit must make the election at the time the loan agreement with the issuer of the bond is executed. The election must be signed by the owner and include—

(i) A description of the property with respect to which the election is being made;

(ii) The name, address, and taxpayer identification number of the issuing authority;

(iii) The name, address, and taxpayer identification number of the electing owner; and

(iv) The date and face amount of the issue used to provide the property.

(2) *Other requirements.* The electing owner must provide a copy of the election to the issuing authority and to any person purchasing the facilities during the period the bonds are outstanding or within 6 years after the last bond that is part of the issue is retired. The electing owner, purchaser, and all successors in interest to the electing owner or purchaser must each retain the original election document or a copy thereof in its records until 6 years after the later of the date the last bond that is part of the issue is retired or the date such owner, purchaser or successor in interest ceases to own the facilities. The issuer must retain a copy of the election until 6 years after the date the last bond that is part of the issue is retired. In addition, while the facilities are nongovernmentally owned, any publicly recorded document with respect to the facilities must state that neither the electing owner, nor any person purchasing the facilities during the period the bonds are outstanding or within 6 years after the date the last bond that is part of the issue is retired, nor any successor in interest to the electing owner or such purchaser, may claim any deduction under section 167 or 168 of the Code or any credit with respect to the facilities.

(3) *Election is binding on purchasers and successors.* The election is binding at all times on any person purchasing the facilities during the period the bonds are outstanding or within 6 years after the date the last bond that is part of the issue is retired and on all successors in interest to the electing owner and such purchaser.

(i) *Election under section 3127 of the Code to be exempted from the taxes imposed by sections 3111 and 3101*—(1) *Application for exemption.* To be exempt from the taxes imposed under section 3111 and 3101 of the Code with regard to wages paid after December 31, 1988, an individual who is an employer and his

or her employee must each file an application on the prescribed form with the Internal Revenue Service office designated in the instructions relating to the application for exemption.

(2) *Approval of application for exemption*. The application for exemption by the individual employer or the employee will be approved only if:

(i) The application contains or is accompanied by the evidence described in section 1402(g)(1)(A) of the Code and a waiver described in section 1402(g)(1)(B);

(ii) The Secretary of Health and Human Services makes the findings described in section 1402(g)(1) (C), (D), and (E) with respect to the religious sect or division described in section 1402(g)(1) of which the individual employer and employee are members; and

(iii) No benefit or other payment referred to in section 1402(g)(1)(B) became payable (or, but for sections 203 or 222(b) of the Social Security Act, would have become payable) to the employee filing the application at or before the time of the filing.

(3) *Effective period of exemption*. The election provided in paragraph (h)(1) of this section will apply with respect to wages paid by such individual employer during the period commencing with the first day of the first calendar quarter, after the quarter in which such application is filed, throughout which such individual employer or employee meets the applicable requirements specified in paragraphs (h)(2) and (h)(3).

(4) *Termination of election*. The exemption granted under section 3127 of the Code will end on the last day of the calendar quarter preceding the first calendar quarter thereafter in which:

(i) Such individual employer or the employee involved ceases to meet the applicable requirements of paragraphs (h)(2) and (h)(3), or

(ii) The sect or division thereof of which such individual employer or employee is a member is found by the Secretary of Health and Human Services to have failed to meet the requirements of section 3127(b)(2).

(5) *Both the individual employer and employee must qualify and elect*. The exemption from the taxes imposed under sections 3101 and 3111 of the Code is applicable only if both the individual employer and the employee qualify and make the election under the provisions of section 3127.

(j) *Certain elections not addressed in this section*. Elections under the Act that are not addressed in this section include:

(1) An election relating to the effective date of certain source rules under section 861(a) of the Code (section 1012(g)(1) of the Act);

(2) An election relating to transitional rules for interest allocation under 864(e) of the Code (section 1012(h)(7) of the Act);

(3) An election relating to the chain deficit rules under section 952(c)(1)(C) of the Code (section 1012(i)(25) of the Act);

(4) An election relating to the definition of a passive foreign investment company in section 1296 of the Code (section 1012(p)(27) of the Act);

(5) An election by a shareholder of a qualified electing fund under section 1291(d)(2)(B) of the Code (section 1012(p)(28) of the Act);

(6) An election to be treated as a qualified electing fund under section 1295 of the Code (section 6127 of the Act);

(7) An election relating to treatment of an insurance branch as a separate corporation under section 964(d) of the Code (section 6129 of the Act);

(8) An election relating to certain regulated futures contracts and nonequity options under section 988(c)(1)(D) of the Code (section 6130(b) of the Act);

(9) An election relating to certain qualified funds under section 988(c)(1)(E) of the Code (section 6130(b) of the Act);

(10) An election under section 952(c)(1)(B) of the Code to apply section 953(a) without regard to the same country exception (section 6131(a) of the Act);

(11) An election relating to treatment of a foreign insurance company as a domestic corporation under section 953(d) of the Code (section 6135 of the Act).

Guidance concerning the elections described in this paragraph (j) will generally be provided in regulations to be issued under the relevant Code sections. With respect to certain elections

described in this paragraph (j), preliminary guidance has been published. See Notice 88–125, 1988–52 I.R.B. 4, for guidance with respect to the election described in paragraph (j)(6) of this section, relating to the qualified electing fund election. See Notice 88–124, 1988–51 I.R.B. 6, for guidance with respect to the elections described in paragraph (j)(8) and (9) of this section, relating to section 988(c)(1) (D) and (E) of the Code.

(k) *Additional information required.* Later regulations or revenue procedures issued under provisions of the Code or Act covered by this section may require the furnishing of information in addition to that which was furnished with the statement of election described in this section. In that event, the later regulations or revenue procedures will provide guidance with respect to the furnishing of additional information.

[T.D. 8267, 54 FR 38980, Sept. 22, 1989; 54 FR 41243, 41364, Oct. 6, 1989. Redesignated and amended by T.D. 8435, 57 FR 43895, 43896, Sept. 23, 1992; 57 FR 47373, Oct. 15, 1992]

### § 301.9100–9T Election by a bank holding company to forego grandfather provision for all property representing pre-June 30, 1968, activities.

(a) *In general.* For purposes of sections 1101 through 1103 and 6158 of the Code, a bank holding company may elect under section 1103(g) to have the determination of whether property is prohibited property or is property eligible to be distributed without recognition of gain under section 1101(b)(1) made under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) as if the Act did not contain the proviso of section 4(a)(2) thereof.

(b) *Manner of making election.* The election under section 1103(g) shall be made in a written statement filed with the Federal Reserve Board indicating that by resolution of its board of directors, the bank holding company is electing to apply the provisions of section 1103(g). In addition, the bank holding company shall indicate on its income tax return for each taxable year in which the election applies to a distribution or sale of property (in the manner specified in the Internal Revenue Service's instructions for the preparation of the return) that it has made the election under section 1103(g). The election shall be considered to be made on the date on which the written statement is received by the Federal Reserve Board.

(c) *Scope of election.* The election under section 1103(g) applies to all determinations of whether property is prohibited property or is property eligible to be distributed without recognition of gain under section 1101(b)(1).

(d) *Election; binding effect.* An election made under section 1103(g) is irrevocable.

(e) *Final certification.* An election under section 1103(g) shall not apply unless the final certification referred to in section 1101(e) or section 6158(c)(2), as the case may be, includes a certification by the Federal Reserve Board that the bank holding company has disposed of either all banking property or all nonbanking property (including property described in the proviso of section 4(a)(2) of the Bank Holding Company Act).

(f) *Conditional certification.* A certification by the Federal Reserve Board under section 1101 (a)(1)(B), 1101 (b)(1)(B), 1101 (c)(2)(C), 1101 (c)(3)(C), or 6158(a) that is conditioned upon the bank holding company's making an election under section 1103(g) shall not be considered to be made before the distribution or sale unless the certification and the election are made before the distribution or sale.

[T.D. 7570, 43 FR 52057, Nov. 8, 1978. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–10T Election by certain family-owned bank holding companies to divest all banking or nonbanking property.

(a) *In general.* For purposes of sections 1101 through 1103 and 6158 of the Code, a bank holding company may elect under section 1103(h) to have the determination of whether property is prohibited property or is property eligible to be distributed without recognition of gain under section 1101(b)(1) made under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) as if the Act did not contain clause (ii) of section 4(c) thereof.

(b) *Manner of making election.* The election under section 1103(h) shall be

made in a written statement filed with the Federal Reserve Board indicating that by resolution of its board of directors, the bank holding company is electing to apply, the provisions of section 1103(h). In addition, the bank holding company shall indicate on its income tax return for each taxable year in which the election applies to a distribution or sale of property (in the manner specified in the Internal Revenue Service's instructions for the preparation of the return) that it has made the election under section 1103(h). The election shall be considered to be made on the date on which the written statement is received by the Federal Reserve Board.

(c) *Scope of election.* The election under section 1103(h) applies to all determinations of whether property is prohibited property or is property eligible to be distributed without recognition of gain under section 1101(b)(1).

(d) *Election; binding effect.* An election made under section 1103(h) is irrevocable.

(e) *Final certification.* An election under section 1103(h) shall not apply unless the final certification referred to in section 1101(e) or section 6158(c)(2), as the case may be, includes a certification by the Federal Reserve Board that the bank holding company has disposed of either all banking property or all nonbanking property.

(f) *Conditional certification.* A certification by the Federal Reserve Board under section 1101 (a)(1)(B), 1101 (b)(1)(B), 1101 (c)(2)(C), 1101 (c)(3)(C), or 6158(a) that is conditioned upon the bank holding company's making an election under section 1103(h) shall note considered to be made before the distribution or sale unless the certification and the election are made before the distribution or sale.

[T.D. 7570, 43 FR 52057, Nov. 8, 1978. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–11T Election by a qualified bank holding corporation to pay in installments the tax attributable to sales under the Bank Holding Company Act.

(a) *In general.* Under section 6158(a) of the Code, a qualified bank holding corporation may elect to pay in installments the tax under chapter I of the Code attributable to the sale of bank property or prohibited property (as those terms are defined in section 6158(f) (2) and (3)) if—

(1) It meets the conditions described in paragraph (b) of this section, and

(2) It files an election in accordance with the rules set forth in paragraph (c) of this section.

(b) *Conditions.* (1) The sale of bank property or prohibited property must take place after July 7, 1970.

(2) The Federal Reserve Board must certify before the sale of the bank property or prohibited property that the divestiture of such property is necessary or appropriate to effectuate section 4 or the policies of the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*).

(3) If bank property is sold, the qualified bank holding corporation (or a corporation having control of it or a subsidiary of it) must not have—

(i) Previously elected to apply section 6158 to a sale of prohibited property, or

(ii) Previously distributed prohibited property under section 1101(a).

(4) If prohibited property is sold, the qualified bank holding corporation (or a corporation having control of it or a subsidiary of it) must not have—

(i) Previously elected to apply section 6158 to a sale of bank property, or

(ii) Previously distributed bank property under section 1101(b).

(5) The qualified bank holding corporation must not have elected to return the income from the sale under the installment provisions of section 453.

(c) *Time and manner of making election.* (1) Except as provided in paragraph (c)(2) of this section, a qualified bank holding corporation shall make the election under section 6158(a) by—

(i) Attaching a statement to its income tax return for the taxable year in which the prohibited property or bank property is sold showing the tax computation under paragraph (f) of this section and the amount of the installment paid with the return, and

(ii) Entering the amount of the installment payment followed by the words ''computed under section 6158'' in the appropriate place on the tax return.

(2) If the qualified bank holding corporation filed its income tax return for the year of sale before February 6, 1979 (without electing under section 6158(a)), then it shall make the election under section 6158(a) by attaching a statement to its claim for credit or refund (amended tax return) for its overpayment of income tax attributable to the application of section 6158 showing the tax computation under paragraph (f) of this section and entering the amount of the credit or refund followed by the words ''attributable to the application of section 6158'' in the appropriate place on the claim. In order for the election to be effective, the claim must be filed before the earlier of—

(i) The expiration of the period of limitation for the filing of the claim, or

(ii) February 6, 1979.

(d) *Scope of election*. An election under section 6158 will apply only to the particular sale or sales of property with respect to which the election is being made.

(e) *Special rule for certifying sales*. For purposes of section 6158(a) and paragraph (b)(2) of this section, in the case of a sale which takes place after July 7, 1970, and before January 1, 1977, a certification by the Federal Reserve Board shall be treated as made before the sale if application for such certification was made before January 1, 1977.

(f) *Tax attributable to sales*. The tax under chapter I of the Code attributable to sales with respect to which an election under section 6158 has been made shall be the amount, if any, by which the tax under chapter I on the taxable income of the qualified bank holding corporation (computed without regard to section 6158) for the taxable year during which the sales occur exceeds the greater of—

(1) The tax under chapter I for such year on the taxable income of the corporation exclusive of gains on sales of property with respect to which an election under section 6158 has been made, or

(2) The tax under chapter I for such year on the taxable income of the corporation exclusive of gains and losses on all sales of the type of property (either bank property or prohibited property) with respect to which an election under section 6158 has been made.

[T.D. 7570, 43 FR 52057, Nov. 8, 1978. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

## § 301.9100–12T Various elections under the Tax Reform Act of 1976.

(a) *Elections covered by temporary rules*. The sections of the Internal Revenue Code of 1954, or of the Tax Reform Act of 1976, to which this section applies and under which an election or notification may be made pursuant to the procedures described in paragraphs (b) and (d) are as follows:

(1) FIRST CATEGORY

| Section | Description of election | Availability of election |
|---|---|---|
| 167(o) of Code | Substantially rehabilitated historic property | Additions to capital account occurring after June 30, 1976, and before July 1, 1981. |
| 172(b)(3)(E) of Code | Forego of carryback period | Any taxable year ending after December 31, 1975. |
| 402(e)(4)(L) of Code | Lump sum distributions from qualified plans. | Distributions and payments made after December 31, 1975, in taxable years beginning after such date. |
| 812(b)(3) of Code | Forego of carryback period by life insurance companies. | Any taxable year ending after December 31, 1975 |
| 819A of Code | Contiguous country branches of domestic life insurance companies. | All taxable years beginning after December 31, 1975. |
| 825(d)(2) of Code | Forego of carryback period by mutual insurance companies. | Any taxable year ending after December 31, 1975. |
| 911(e) of Code | Foregoing of benefits of section 911 | All taxable years beginning after December 31, 1975. |

(2) SECOND CATEGORY

| | | |
|---|---|---|
| 185(d) of Code | Amortization of railroad grading and tunnel bores. | All taxable years beginning after December 31, 1974. |
| 1057 of Code | Transfer to foreign trusts etc | Any transfer of property after October 2, 1975. |

(b) *Time for making election or serving notice*—(1) *Category (1)*. A taxpayer may make an election under any section referred to in paragraph (a)(1) of this section for the first taxable year for which the election is required to be made or for the taxable year selected by the taxpayer when the choice of the taxable year is optional. The election must be made by the later of the time, including extensions thereof, prescribed by law for filing income tax returns for such taxable year or March 8, 1977.

(2) *Category (2)*. A taxpayer may make an election under any section referred to in paragraph (a)(2) for the first taxable year for which the election is allowed or for the taxable year selected by the taxpayer when the choice of the taxable year is optional. The election must be made (i) for any taxable year ending before December 31, 1976, for which a return has been filed before January 31, 1977, by filing an amended return, provided that the period of limitation for filing claim for credit or refund of overpayment of tax, determined from the time the return was filed, has not expired or (ii) for all other years by filing the income tax return for the year for which the election is made not later than the time, including extensions thereof, prescribed by law for filing income tax returns for such year.

(c) *Certain other elections*. The elections described in this paragraph shall be made in the manner and within the time prescribed herein and in paragraph (d) of this section.

(1) The following elections under the Tax Reform Act of 1976 shall be made:

(i) Section 207(c)(3) of Act; change from static value method of accounting; all taxable years beginning after December 31, 1976.

by filing Form 3115 with the National Office of the Internal Revenue Service before October 5, 1977.

(ii) Section 604 of Act; travel expenses of State legislators; all taxable years beginning before January 1, 1976.

by filing an amended return for any taxable year for which the period for assessing or collecting a deficiency has not expired before October 4, 1976, by the last day for filing a claim for refund or credit for the taxable year but in no event shall such day be earlier than October 4, 1977.

(iii) Section 804(e)(2) of Act; retroactive applications of amendments to property described in section 50(a) of Code; certain taxable years beginning before January 1, 1975.

by filing amended returns before October 5, 1977, for all taxable years to which applicable for which the period of limitation for filing claim for credit or refund for overpayment of tax has not expired.

(iv) Section 1608(d)(2) of Act; election as a result of determination as defined in section 859(c) of the Code; determinations made after October 4, 1976.

by filing a statement with the district director for the district in which the taxpayer maintains its principal place of business within 60 days after such determination.

(v) Section 2103 of Act; treatment of certain 1972 disaster losses. Any taxable year in which payment is received or indebtedness is foregiven.

by filing a return for the taxable year or an amended return by the last day for making a claim for credit or refund for the taxable year but in no event shall such day be earlier than October 4, 1977.

(2) [Reserved]

(3) The election provided for in section 167(e)(3) of the Code shall be made in accordance with § 1.167(e)–1(d) except that the election shall be applicable for the first taxable year of the taxpayer beginning after December 31, 1975.

(d) *Manner of making election*. Unless otherwise provided in the return or in a form accompanying a return for the taxable year, the elections described in paragraphs (a) and (c) (except paragraphs (c)(1)(i), and (c)(5)) shall be made by a statement attached to the return (or amended return) for the taxable year. The statement required when making an election pursuant to this section shall indicate the section under which the election is being made and shall set forth information to identify the election, the period for which it applies, and the taxpayer's basis or entitlement for making the election.

(e) *Effect of election*—(1) *Consent to revoke required*. Except where otherwise provided by statute or except as provided in subparagraph (2) of this paragraph, an election to which this section applies made in accordance with this section shall be binding unless consent to revoke the election is obtained from the Commissioner. An application for consent to revoke the election will not be accepted before the promulgation of the permanent regulations relating to the section of the Code or Act under which the election is made. Such regulations will provide a reasonable period of time within which taxpayers will be permitted to apply for consent to revoke the election.

(2) *Revocation without consent*. An election to which this section applies, made in accordance with this section, may be revoked without the consent of the Commissioner not later than 90 days after the permanent regulations relating to the section of the Code or Act under which the election is made are filed with the Office of the Federal Register, provided such regulations grant taxpayers blanket permission to revoke that election within such time without the consent of the Commissioner. Such blanket permission to revoke an election will be provided by the permanent regulations in the event of a determination by the Secretary or his delegate that such regulations contain provisions that may not reasonably have been anticipated by taxpayers at the time of making such election.

(f) *Furnishing of supplementary information required*. If the permanent regulations which are issued under the section of the Code or Act referred to in this section to which the election relates require the furnishing of information in addition to that which was furnished with the statement of election filed pursuant to paragraph (d) of this section, the taxpayer must furnish such additional information in a statement addressed to the district director, or the director of the regional service center, with whom the election was filed. This statement must clearly identify the election and the taxable year for which it was made. If such information is not provided the election may, at the discretion of the Commissioner, be held invalid.

(Sec. 191(b), Internal Revenue Code of 1954 (90 Stat. 1916, 26 U.S.C. 191(b))

[T.D. 7459, 42 FR 1469, Jan. 7, 1977]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 301.9100–12T, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 301.9100–14T Individual's election to terminate taxable year when case commences.

(a) *Scope*. The regulations prescribed in this section provide rules for making the election under section 1398(d)(2) to terminate the taxable year of an individual taxpayer.

(b) *Availability of election*. This election is available to an individual taxpayer in a case commenced after March 24, 1981, under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code. If the case is dismissed, the taxpayer cannot make the election, and an election previously made will be void. For purposes of this section, a partnership is not treated as an individual. If the taxpayer making the election is married (within the meaning of section 143), the election is available to the taxpayer's spouse, but only if the spouse is eligible to file, and does file, a joint return with the taxpayer for the taxable year ended as a result of the election.

(c) *Effect of election*. The election terminates the taxable year of the taxpayer (and of a spouse who joins in the election) on the day before the commencement date of the case. A new taxable year begins on the commencement date and (unless terminated earlier) ends on the date on which the taxpayer's taxable year in which the case commenced would have ended if the election had not been made.

(d) *Time and manner*. A taxpayer to whom the election is available makes the election by filing a return for the short taxable year ending the day before commencement of the case (the ''first short taxable year'') on or before the 15th day of the fourth full month following the end of that first short taxable year. The spouse of such a taxpayer makes the election by making a

joint return with the taxpayer for that first short taxable year within the time prescribed in the preceding sentence. To facilitate processing, the taxpayer should write ''Section 1398 Election'' at the top of the return. A taxpayer may also make the election by attaching a statement of election to an application for extension of time for filing a return that satisfies the requirements under section 6081 for the first short taxable year. The application for extension must be submitted under section 6081 on or before the due date of the return for the first short taxable year. The statement must state that the taxpayer elects under section 1398(d)(2) to close his or her taxable year as of the day before commencement of the case. If the taxpayer's spouse elects to close his or her taxable year, the spouse must join in the application for extension and in the statement of election. If a joint return is not filed for the first short taxable year, the election of the spouse made with the application is void.

(e) *Irrevocability of election.* The election is irrevocable.

(f) *Subsequent bankruptcy case of debtor's spouse.* If a case under chapter 7 or chapter 11 of title 11 of the United States Code commences with respect to the spouse of a debtor to whom an election under this section was available, the spouse can make an election under this section even if the spouse's case commences in the same taxable year in which the debtor's case commences. The spouse can make the election whether or not the spouse previously joined in the debtor's election. If the spouse joined in the debtor's election, or if the debtor did not make the election, the debtor may join in the spouse's election, assuming the debtor is otherwise eligible to file a joint return with the spouse.

(g) *Examples.*

*Example.* (1) Assume that husband and wife are calendar-year taxpayers, that a bankruptcy case involving only the husband commences on March 1, 1982, and that a bankruptcy case involving only the wife commences on October 10, 1982.

(2) If the husband does not make an election, his taxable year would not be affected; *i.e.,* it does not terminate on February 28. If the husband does make an election, his first short taxable year would be January 1 through February 28; his second short taxable year would begin March 1. The tax return for his first short taxable year would be due on June 15. The wife could join in the husband's election, but only if they file a joint return for the taxable year January 1 through February 28.

(3) The wife could elect to terminate her taxable year on October 9. If she did, and if the husband had not made an election or if the wife had not joined in the husband's election, she would have two taxable years in 1982—the first from January 1 through October 9, and the second from October 10 through December 31. The tax return for her first short taxable year would be due on February 15, 1983. If the husband had not made an election to terminate his taxable year on February 28, the husband could join in an election by his wife, but only if they file a joint return for the taxable year January 1 through October 9. If the husband had made an election but the wife had not joined in the husband's election, the husband could not join in an election by the wife to terminate her taxable year on October 9, since they could not file a joint return for such year.

(4) If the wife makes the election relating to her own bankruptcy case, and had joined the husband in making an election relating to his case, she would have two additional taxable years with respect to her 1982 income and deductions—the second short taxable year would be March 1 through October 9, and the third short taxable year would be October 10 through December 31. The husband could join in the wife's election if they file a joint return for the second short taxable year. If the husband joins in the wife's election, they could file joint returns for the short taxable year ending December 31, but would not be required to do so.

[T.D. 7775, 46 FR 25292, May 6, 1981; 46 FR 30495, June 9, 1981. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–15T Election to use retroactive effective date.

(a) *Scope.* The regulations prescribed in this section provide rules for making the election to use a retroactive effective date under section 7(f) of the Bankruptcy Tax Act of 1980.

(b) *Availability of election.* The election is available to the debtor (or debtors) in a case under title 11 of the United States Code (or a receivership, foreclosure, or similar proceeding in a Federal or State court) that commences after September 30, 1979, and before January 1, 1981. The court must approve the election. For purposes of this paragraph (b), a receivership, foreclosure, or similar proceeding before a

Federal or State agency involving a financial institution to which section 585 or 593 applies shall be treated as a proceeding before a court.

(c) *Effect of election*—(1) *In general*. An election under this section changes the effective date of certain amendments to the Code made by the Bankruptcy Tax Act of 1980. The amendments affected by an election under this section are listed in paragraph (c) (2) and (3) of this section. If the election is made, all of the amendments listed in paragraph (c) (2) and (3) of this section apply to all transactions in the case (or similar proceeding) and to all parties in respect of all transactions in the case (or similar proceeding). Thus, the debtor may not elect to have only certain of the amendments apply to transactions in the case (or similar proceeding) and may not elect to have the amendments apply only to certain transactions in the case (or similar proceeding). An election under this section will not make the amendments listed in paragraph (c) (2) and (3) applicable to transactions occurring prior to commencement of the case (or similar proceeding) or transactions not in the case (or similar proceeding).

(2) *Amendments affected*. An election under this section changes the effective date of the amendments to the following sections:

(i) 111, relating to recovery of bad debts, prior taxes, and delinquency amounts,

(ii) 302, relating to the repeal of special treatment for certain railroad redemptions,

(iii) 312, relating to the effect of debt discharge on earnings and profits,

(iv) 337, relating to the application of the 12-month liquidation rule,

(v) 351, relating to certain transfers to controlled corporations,

(vi) 354 (other than the amendment made by section 6(i)(2) of the Bankruptcy Tax Act of 1980), 355, 357, 368, and 381, relating to corporate reorganizations,

(vii) 382, relating to special limitations on net operating loss carryover,

(viii) 542, relating to the personal holding company tax, and

(ix) 703, relating to elections of partnerships.

(3) *Other amendments affected in part*. Subject to the transitional rule of section 7(a)(2) of the Bankruptcy Tax Act of 1980, an election under this section changes the effective date of the amendments to sections 108 and 1017, relating to the tax treatment of discharge of indebtedness.

(4) *Substitution of effective dates*. The election under this section changes the effective date of the amendments listed in paragraph (c) (2) and (3) of this section by substituting ''September 30, 1979'' for ''December 31 1980'' wherever it appears in section 7(a), (c), and (d) of the Bankruptcy Tax Act of 1980.

(d) *Time and manner*—(1) *Time and place*. A debtor makes the election under this section by filing the written statement and evidence of court approval required under paragraph (d) (2) and (3) of this section on or before November 2, 1981, with the District Director or the Director of the Internal Revenue Service Center with whom an income tax return for the debtor would be filed if it were due on the date the election is filed. The election shall be considered to be made on the date on which the written statement and evidence of court approval is filed. The debtor should attach a copy of the statement and evidence of court approval to the next income tax return filed on or after the date the election is made.

(2) *Statement*. The written statement must be signed by the debtor (or a person duly authorized to sign the income tax return of the debtor) and must contain the following:

(i) The name, address, and taxpayer identification number of the debtor,

(ii) A statement that the debtor is making the election under section 7(f) of the Bankruptcy Tax Act of 1980, and

(iii) Information (including the date of commencement) sufficient to identify the bankruptcy case or similar proceeding.

(3) *Evidence of court approval*. The evidence of court approval (or of approval of an agency in certain proceedings described in paragraph (b) of this section) must be a copy of an order or other document properly signed by the judge or other presiding officer. In addition to information identifying the debtor and the case or proceeding over which

the officer presides, the order or other document must state that the court (or agency, as the case may be) approves the election of the debtor under section 7(f) of the Bankruptcy Tax Act of 1980.

(e) *Revocability*. An election under this section may be revoked only with the consent of the Commissioner. A request for revocation can be made only with approval of the court (or agency).

[T.D. 7775, 46 FR 25292, May 6, 1981. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–16T Election to accrue vacation pay.

(a) *In general*. Section 463 provides that taxpayers whose taxable income is computed under an accrual method of accounting may elect without the consent of the Commissioner, to deduct certain amounts with respect to vacation pay which, because of contingencies, would not otherwise be deductible. Such election must apply to the liability for all vacation pay accounts maintained by the taxpayer within a single trade or business if the liability is contingent when vacation pay is earned.

(b) *Time for making election*. (1) In the case of a taxpayer who established or maintained a vacation pay account pursuant to I.T. 3956 and who continued to maintain such account pursuant to section 97 of the Technical Amendments Act of 1958, as amended, for its last taxable year ending before January 1, 1973, the election must be made for each trade or business for which such account was maintained on or before the later of (i) July 21, 1975, or (ii) the due date for filing the income tax return (determined with regard to any extensions of time granted the taxpayer for filing such return) for the first taxable year beginning after December 31, 1973. The election pursuant to this paragraph shall be effective with respect to an account described in this paragraph (b)(1) for taxable years ending after December 31, 1972. Failure to file such election shall constitute a change in the method of accounting for vacation pay for the first taxable year ending after December 31, 1972. Such change in accounting method will be considered a change initiated by the taxpayer.

(2) In the case of a trade or business of a taxpayer to which paragraph (b)(1) does not apply, the election provided for in this section may be made for any taxable year beginning after December 31, 1973, by making the election not later than (i) July 21, 1975, or (ii) the due date for filing the income tax return (determined with regard to any extensions of time granted the taxpayer for filing such return) for the first taxable year for which the election is made.

(3) A taxpayer who elects under section 463 to treat vacation pay as provided in this section and who wishes to revoke such election may only do so with the consent of the Commissioner. Such revocation shall constitute a change in the method of accounting.

(c) *Manner of making election*. (1) Except as otherwise provided in paragraph (c)(2) of this section, the election provided for in this section must be made by means of a statement attached to a timely filed income tax return. The statement shall indicate that the taxpayer is electing to apply the provisions of section 463, and shall contain the following information:

(i) The taxpayer's name and a description of each vacation pay plan to which the election is to apply.

(ii) A schedule with appropriate explanations showing—

(A) In the case of a vacation pay account established or maintained pursuant to I.T. 3956 and section 97 of the Technical Amendments Act of 1958, as amended,

(*1*) The balance of each such vacation pay account maintained by the taxpayer, and

(*2*) The amount, determined as if the taxpayer had maintained a vacation pay account for the last taxable year ending before January 1, 1973, representing the taxpayer's liability for vacation pay earned by employees, before the close of the taxable year and payable during such taxable year or within 12 months following the close of such taxable year.

(B) In the case of other vacation pay accounts, the amount of the closing balances the taxpayer would have had for the taxpayer's 3 taxable years immediately preceding the taxable year for which the election was made, had

the taxpayer maintained an account representing the taxpayer's liability for vacation pay earned by the employees before the close of the taxable year and payable during the taxable year or within 12 months following the close of the taxable year throughout the 3 immediately preceding taxable years.

(iii) The amounts accrued and deducted for prior years for vacation pay but not paid at the close of the taxable year preceding the year for which the election is made.

(2) Where a taxpayer has filed its return for a taxable year beginning after December 31, 1973 prior to July 21, 1975, and has not made the election pursuant to this section, the election may be made by filing an amended return (showing adjustments, in any) for such year and attaching the statement required by paragraph (c)(1) of this section on or before July 21, 1975.

(d) The time for making the election may be illustrated by the following examples:

*Example (1).* X, whose taxable year begins on February 1, files, its return based on the accrual method of accounting. X has continuously accrued and deducted for income tax purposes contingent amounts of vacation pay, pursuant to I.T. 3956. Pursuant to section 463 and these regulations, in order for X to continue accruing and deducting its vacation pay amounts, X must elect to account for vacation pay under section 463 by attaching the election to its timely filed return for its taxable year ending on January 31, 1975, or if X has already filed such return by July 21, 1975, without such election, by filing the election statement with an amended return by July 21, 1975. If X does not make the election under section 463, X will be treated as having initiated a change in its method of accounting for vacation pay in its taxable year ending on January 31, 1973.

*Example (2).* Y, a calendar year taxpayer files its returns based on the accrual method of accounting. Y deducted its vacation pay amounts only when paid since such amounts were contingent when earned and Y was not entitled to the benefits of I.T. 3956, Y may elect for its taxable year ending on December 31, 1974, to deduct certain amounts with respect to contingent vacation pay which were not otherwise deductible, by filing an election pursuant to these regulations with its timely filed income tax return for such year or if such return was already filed by [insert date 90 days after publication of this document as a Treasury decision], without such election, by filing the election with an amended return filed by July 21, 1975. If Y does not make the election for its taxable year ending on December 31, 1974, Y may make the election with respect to any subsequent taxable year by filing an election with its return for such year.

[T.D. 7353, 40 FR 17554, Apr. 21, 1975; 40 FR 25590, June 17, 1975. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

## § 301.9100–17T Procedure applicable to certain elections.

(a) *Elections covered by temporary rules.* The sections of the Internal Revenue Code of 1954, or of the Tax Reform Act of 1969, to which paragraph (b) of this section applies and under which an election or notification may be made pursuant to the procedures prescribed in such paragraph are as follows:

| Section | Description of election | Availability of election |
|---|---|---|
| (1) First category: | | |
| 231(d)(2) of Act ..... | Moving expenses ..... | Expenses paid or incurred before July 1, 1970, if employee was notified of move by employer on or before Dec. 19, 1969. |
| 503(c)(2) of Act ..... | Carved-out mineral production payments ..... | All mineral production payments carved out of mineral properties after beginning of last taxable year ending before Aug. 7, 1969. |
| 516(d)(3) of Act ..... | Contingent payments by transferee of franchise, trademark, or trade name. | Payments made in taxable years ending after Dec. 31, 1969, and beginning before Jan. 1, 1980, on transfers made before Jan. 1, 1970. |
| 642(c)(1) of Code .. | Charitable contributions of estates or trusts paid in following year. | Amounts paid in any taxable year beginning after Dec. 31, 1969. |
| 1251(b)(4) of Code | No additions to excess deductions account of taxpayers electing to compute taxable income from farming in certain manner. | Any taxable year beginning after Dec. 31, 1969. |
| (2) Second category: | | |
| 184(b) of Code ..... | Amortization of qualified railroad rolling stock | Any taxable year beginning after Dec. 31, 1969, in which rolling stock was placed in service (or succeeding taxable year). |
| (3) Third category: | | |
| 504(d)(2) of Act ..... | Notification not to have sec. 615(e) election treated as a sec. 617(a) election. | Exploration expenditures paid or incurred after Dec. 31, 1969. |

(b) *Manner of making election or serving notice*—(1) *In general.* (i) Except as provided in subparagraph (2) of this paragraph, a taxpayer may make an election under any section referred to in paragraph (a) (1) or (2) of this section for the first taxable year for which the election is required to be made or for the taxable year selected by the taxpayer when the choice of a taxable year is optional. The election must be made not later than (*a*) the time, including extensions thereof, prescribed by law for filing the income tax return for such taxable year or (*b*) 90 days after the date on which the regulations in this section are filed with the Office of the Federal Register, whichever is later.

(ii) The election shall be made by a statement attached to the return (or an amended return) for the taxable year, indicating the section under which the election is being made and setting forth information to identify the election, the period for which it applies, and the facility, property, or amounts to which it applies.

(2) *Additional time for certain elections.* An election under section 503(c)(2) of the Act or section 642(c)(1) of the Code must be made in accordance with subparagraph (1) of this paragraph but not later than (i) the time, including extensions thereof, prescribed by law for filing the income tax return for the taxable year following the taxable year for which the election is made or (ii) 90 days after the date on which the regulations in this section are filed with the Office of the Federal Register, whichever is later.

(3) *Notification as to section 615(e) election.* (i) The notification referred to in paragraph (a)(3) of this section in respect of an election under section 615(e) which was made before the date on which the regulations in this section are filed with the Office of the Federal Register shall be made in a statement attached to the taxpayer's income tax return for the first taxable year in which expenditures are paid or incurred after December 31, 1969, which would be deductible by the taxpayer under section 617 if he so elects. The statement shall indicate the first taxable year for which such election was effective and the district director, or the director of the regional service center, with whom the election was filed.

(ii) The notification referred to in paragraph (a)(3) of this section, in respect of an election under section 615(e) which is made on or after the date on which the regulations in this section are filed with the Office of the Federal Register, shall be made in the statement of election required by paragraph (a)(2) of § 15.1–1 of this chapter (Temporary Income Tax Regulations Relating to Exploration Expenditures in the Case of Mining).

(iii) The serving of notice pursuant to this subparagraph shall not preclude the subsequent making of an election under section 617(a). A failure to serve notice pursuant to this subparagraph shall be treated as an election under section 617(a) and paragraph (a)(1) of § 15.1–1 of this chapter with respect to exploration expenditures paid or incurred after December 31, 1969, whether or not the taxpayer subsequently revokes his election under section 615(e) with respect to exploration expenditures paid or incurred before January 1, 1970.

(iv) For rules relating to the revocation of an election under section 615(e), including such an election which is treated pursuant to this subparagraph as an election under section 617(a), see paragraph (a) of § 15.1–2 of this chapter (T.D. 6907, C.B. 1967–1, 531, 535).

(c) *Effect of election*—(1) *Revocations*—(i) *Consent to revoke required.* Except as provided in subdivision (ii) of this subparagraph, an election made in accordance with paragraph (b)(1) of this section shall be binding unless consent to revoke the election is obtained from the Commissioner. An application for consent to revoke the election will not be accepted before the promulgation of the permanent regulations relating to the section of the Code or Act under which the election is made. Such regulations will provide a reasonable period of time within which taxpayers will be permitted to apply for consent to revoke the election.

(ii) *Revocation without consent.* An election made in accordance with paragraph (b)(1) of this section may be revoked without the consent of the Commissioner not later than 90 days after the permanent regulations relating to

the section of the Code or Act under which the election is made are filed with the Office of the Federal Register, provided such regulations grant taxpayers blanket permission to revoke that election within such time without the consent of the Commissioner. Such blanket permission to revoke an election will be provided by the permanent regulations in the event of a determination by the Secretary or his delegate that such regulations contain provisions that may not reasonably have been anticipated by taxpayers at the time of making such election.

(iii) *Election treated as tentative.* Until the expiration of the reasonable period referred to in subdivision (i) of this subparagraph or the 90-day period referred to in subdivision (ii) of this subparagraph, an election under section 433(d)(2) of the Act will be considered a tentative election, subject to revocation under the provisions of such subdivisions.

(iv) *Place for filing revocations.* A revocation under subdivision (i) or (ii) of this subparagraph shall be made by filing a statement to that effect with the district director, or the director of the regional service center, with whom the election was filed.

(2) *Termination without consent.* An election which is made in accordance with paragraph (b)(1) of this section under a section referred to in paragraph (a)(2) of this section and is not revoked pursuant to subparagraph (1) of this paragraph may, without the consent of the Commissioner, be terminated at any time after making the election by filing a statement to that effect with the district director, or the director of the regional service center, with whom the election was filed. This statement giving notice of termination must be filed before the beginning of the month specified in the statement for which the termination is to be effective. If pursuant to this subparagraph the taxpayer terminates an election made under any such section, he may not thereafter make a new election under that section with respect to the facility, property, or equipment to which the termination relates.

(d) *Furnishing of supplementary information required.* If the permanent regulations which are issued under the section of the Code or Act referred to in paragraph (a) (1) or (2) of this section to which the election relates require the furnishing of information in addition to that which was furnished with the statement of election filed pursuant to paragraph (b)(1) of this section, the taxpayer must furnish such additional information in a statement addressed to the district director, or the director of the regional service center, with whom the election was filed. This statement must clearly identify the election and the taxable year for which it was made.

(e) *Other elections.* Elections under the following sections of the Code may not be made pursuant to paragraph (b)(1) of this section but are to be made under regulations, whether temporary or permanent, which will be issued under amendments made by the Act. If necessary, such regulations will provide a reasonable period of time within which taxpayers will be permitted to make elections under these sections for taxable years ending before the date on which such regulations are filed with the Office of the Federal Register:

| Section | Description |
|---|---|
| 167(k)(1) | Expenditures to rehabilitate low-income rental housing. |
| 167(l)(4) | Post-1969 property of certain utilities representing growth in capacity. |
| 170(b)(1)(D)(iii) | Special limitation with respect to contributions of certain capital gain property. |
| 453(c) | Revocation of election to report income on installment basis. |
| 507(b)(1)(B)(ii) | Notice of termination of private foundation status. |
| 1564(a)(2) | Allowance of certain amounts to component member of controlled group of corporations. |
| 4942(h)(2) | Deficient distributions of private foundations for prior taxable years. |
| 4943(c)(4)(E) | Determination of holdings of a private foundation in a business enterprise where substantial contributors hold more than 15 percent of voting stock. |

(f) *Cross reference.* For temporary regulations under sections 57(c) and 163(d)(7) of the code, relating to elections with respect to net leases of real property, see §12.8 of the regulations in this part (Temporary Income Tax Regulations Under the Revenue Act of 1971).

(83 Stat. 487, 85 Stat. 522, 523; 26 U.S.C. 1 nt., 57(c)(4), 163(d)(7))

[T.D. 7032, 35 FR 4330, Mar. 11, 1970]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 301.9100–17T, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 301.9100–18T Election to include in gross income in year of transfer.

(a) *In general.* Under section 83(b) of the Internal Revenue Code of 1954 any person who performs services in connection with which property is transferred which at the time of transfer is not transferable by the transferee and is subject to a substantial risk of forfeiture may elect to include in his gross income for the taxable year in which such property is transferred, the excess of the fair market value of such property at the time of transfer (determined without regard to any restriction other than a restriction which by its terms will never lapse) over the amount (if any) paid for such property. If this election is made section 33(a) does not apply with respect to such property, and any subsequent appreciation in the value of the property is not taxable as compensation. However, if the property is later forfeited, no deduction is allowed to any person with respect to such forfeiture. This election is not necessary in the case of property which is transferred subject only to a restriction which by its terms will never lapse.

(b) *Manner of making election.* The election referred to in paragraph (a) of this section is made by filing two copies of a written statement with the internal revenue officer with whom the person who performed the services files his return.

(c) *Additional copies.* The person who performed the services shall also submit a copy of the statement referred to in paragraph (b) of this section to the person for whom the services are performed, and, in addition, if the person who performs the services in connection with which restricted property is transferred and the transferee of such property are not the same person, the person who performs the services shall submit a copy of such statement to the transferee of the property.

(d) *Content of statement.* The statement shall indicate that it is being made under section 83(b) of the Code, and shall contain the following information:

(1) The name, address, taxpayer identification number and the taxable year (For example, ''Calendar year 1969'' or ''Fiscal year ending May 31, 1970'') of the person who performed the services;

(2) A description of each property with respect to which the election is being made;

(3) The date or dates on which the property is transferred;

(4) The nature of the restriction or restrictions to which the property is subject;

(5) The fair market value at the time of transfer (determined without regard to any restriction other than a restriction which by its terms will never lapse) of each property with respect to which the election is being made; and

(6) The amount (if any) paid for such property.

(e) *Time for making election.* The statement referred to in paragraph (b) of this section shall be filed not later than 30 days after the date the property was transferred (or, if later, January 29, 1970). Any statement filed before February 15, 1970, may be amended not later than 30 days after the publication of this Treasury decision in the FEDERAL REGISTER in order to make it conform to the requirements of paragraph (d) of this section (January 17, 1970).

(f) *Revocability of election.* An election under section 83(b) may not be revoked except with the consent of the Commissioner.

[T.D. 7021, 35 FR 626, Jan. 17, 1970; 35 FR 889, Jan. 22, 1970. Redesignated by T.D. 8435, 57 FR 43895, Sept. 23, 1992]

### § 301.9100–19T Election relating to passive investment income of electing small business corporations.

(a) *In general.* Section 3(a) of the Act of April 14, 1966 (Pub. L. 89–389) amends section 1372(e)(5) of the Internal Revenue Code of 1954 (relating to passive investment income of electing small business corporations). This amendment, which applies to taxable years of electing small business corporations ending after April 14, 1966, provides, in general, that an election of a small business corporation under section 1372(a) of the Code shall not terminate

for a taxable year of the corporation in which it has gross receipts more than 20 percent of which is passive investment income, if—

(1) Such taxable year is the first taxable year in which the corporation commenced the active conduct of any trade or business or the next succeeding taxable year; and

(2) The amount of passive investment income for such taxable year is less than $3,000.

Section 3(b) of the Act of April 14, 1966, provides that the amendment made by section 3(a) thereof shall also apply to taxable years of a corporation beginning after December 31, 1962, and ending before April 15, 1966, if the corporation elects to have the amendment apply to such years, and all persons (or their personal representatives) who were shareholders of such corporation at any time during any of such years consent to such election and the application of the amendment. This section prescribes the time for, and manner of, making such election and consents, and also extends the time within which certain new shareholders may consent to an election under section 1372(a) of the Code.

(b) *Application of amendment to taxable years beginning after December 31, 1962, and ending before April 15, 1966*—(1) *In general*. An election by a corporation under section 1372(a) of the Code shall not be treated as terminated under section 1372(e)(5) of the Code for any taxable year of the corporation beginning after December 31, 1962, and ending before April 15, 1966, if—

(i) Such taxable year is the first taxable year in which the corporation commenced the active conduct of any trade or business, or the next succeeding taxable year;

(ii) The amount of passive investment income for such taxable year is less than $3,000;

(iii) The corporation makes an election, within such time and in such manner as provided in subparagraph (2) of this paragraph; and

(iv) All persons (or their personal representatives) who were shareholders of the corporation at any time during any taxable year of the corporation beginning after December 31, 1962, and ending before April 15, 1966, consent to such election, within such time and in such manner as provided in subparagraph (3) of this paragraph.

If an election by a corporation under section 1372(a) of the Code is not treated as terminated for a taxable year of the corporation as a result of an election and consents under this paragraph, such election under section 1372(a) of the Code shall be treated as being in effect with respect to all subsequent taxable years of the corporation unless it is otherwise terminated or revoked for any such subsequent year pursuant to section 1372(e) of the Code.

(2) *Election by corporation*. An election by a corporation pursuant to subparagraph (1)(iii) of this paragraph shall be filed with the district director with whom the corporation was required to file its return of income (see section 6037 of the Code and the regulations thereunder) for the earliest of its taxable years beginning after December 31, 1962, and ending before April 15, 1966, for which an election terminated under section 1372(e)(5) of the Code. Such election shall be filed within 3 years after the date prescribed by law (not including any extension thereof) on which such return was required to be filed, or within 90 days from February 28, 1967, whichever is later. (However, credit or refund of any overpayment attributable to the election may not be allowed or made if claim therefor has not been filed within the time prescribed by law; and, see subparagraph (3) of this paragraph providing that the statutory period for assessment of certain deficiencies against shareholders may not have expired on the date the election and consents under this paragraph are filed.) Such election shall be in the form of a statement, signed by a person authorized to sign the corporation's return of income, which shall expressly provide that the corporation elects the application of section 1372(e)(5) of the Internal Revenue Code, as amended by Pub. L. 89–389, with respect to its taxable years beginning after December 31, 1962, and ending before April 15, 1966. The statement shall set forth the name, address, and employer identification number of the

corporation; the internal revenue officer with whom the corporation's returns of income have been filed for each of its taxable years beginning after December 31, 1962; the names and addresses of all persons who have been shareholders of the corporation at any time during each of its taxable years beginning after December 31, 1962; computations showing the amount of the corporation's overpayment or deficiency of tax for any taxable year which is attributable to the election under this paragraph; and computations showing each shareholder's portion of the undistributed taxable income (determined as provided in section 1373(b) of the Code) or net operating loss (determined as provided in section 1374(c) of the Code) for each taxable year of the corporation beginning after December 31, 1962, unless such computations were made on the corporation's returns of income for each of such years. In order for an election under this paragraph to be effective, it must be accompanied by the consents of certain shareholders as provided in subparagraph (3) of this paragraph.

(3) *Consents by shareholders.* An election by a corporation pursuant to this paragraph must be accompanied by the consent of each person who was a shareholder of the corporation at any time during any taxable year of the corporation beginning after December 31, 1962, and ending before April 15, 1966. This includes persons who may not be shareholders on the date the election is filed. Where stock of the corporation was owned by a husband and wife as community property (or the income from which was community property), or was owned by tenants in common, joint tenants, or tenants by the entirety, each person who had a community interest in such stock and each tenant in common, joint tenant, and tenant by the entirety must consent to the election. The consent of a minor shall be made by the minor or by his legal guardian, or by his natural guardian if no legal guardian has been appointed. The consent of an estate shall be made by the executor or administrator thereof. If a person who is required to file a consent under this subparagraph is deceased, the executor or administrator of such person's estate, or other person charged with the property of such person, shall file the required consent. The consent of each shareholder shall be in the form of a statement signed by the shareholder in which he states that he consents to the election by the corporation under this paragraph. Each of such statements shall set forth the name and address of the corporation and of the shareholder; the number of shares of stock of the corporation owned by such shareholder at any time during any taxable year of the corporation beginning after December 31, 1962; the date (or dates) on which such stock was acquired, and, if disposed of, the date (or dates) of disposition; and the internal revenue officer with whom the shareholder's income tax returns have been filed for each of such taxable years in which he owned any such stock. In addition, a consent under this paragraph is not effective unless (i) the statutory period for assessment of any deficiency for each taxable year for which there would be a deficiency attributable to the election and consents under this paragraph has not expired on the date the election and consents under this paragraph are filed, and (ii) there is included in, or attached to, the statement of consent a written consent that the statutory period for assessment of any deficiency for any taxable year (to the extent that such deficiency is attributable to the election and consents under this paragraph) shall not expire before the expiration of 1 year after the date the election and consents under this paragraph are filed. Each of the statements of consent under this subparagraph shall be filed with the corporation's election under this paragraph. The consents of all shareholders may be incorporated in one statement.

(4) *Election and consents are binding.* The election and consents under this paragraph are binding and may not be withdrawn.

(c) *New shareholders.* Section 1372(e)(1) of the Code provides that an election by a corporation under section 1372(a) of the Code shall terminate if certain new shareholders do not consent to such election within the time prescribed by regulations. New shareholders of a corporation which makes

an election under paragraph (b) of this section may not have consented to the corporation's election under section 1372(a) of the Code within such prescribed time as a result of a termination of such election under section 1372(e)(5) of the Code prior to the enactment of Pub. L. 89–389. Therefore, notwithstanding the provisions of section 1372(e)(1) of the Code, and the regulations thereunder, an election by a corporation under section 1372(a) of the Code shall not be treated as terminated for the failure of any new shareholder to file a timely consent under section 1372(e)(1) of the Code, for any of the taxable years of the corporation between and including the earliest taxable year determined under subparagraph (1) of this paragraph, and the taxable year during which the corporation files an election under paragraph (b) of this section, if—

(1) The corporation's election under section 1372(a) of the Code would have terminated for a taxable year under section 1372(e)(5) of the Code in the event it had not made an election under paragraph (b) of this section, and

(2) A proper consent under section 1372(e)(1) of the Code is filed by such new shareholder with the corporation's election under paragraph (b) of this section.

[T.D. 6912, 32 FR 3343, Feb. 28, 1967. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–20T Election to treat certain distributions as made on the last day of the taxable year.

(a) *In general.* Section 233(b) of the Revenue Act of 1964 (78 Stat. 112) amends the Internal Revenue Code of 1954 by adding to section 1375 a new subsection (e) (relating to certain distributions after close of taxable year). Section 1375(e) provides that a corporation, with the consent of its shareholders, may elect, for purposes of chapter 1 of the Code, to treat a distribution of money made after the close of the taxable year as made, and as received by its shareholders, on the last day of such taxable year if the following conditions are satisfied:

(1) The corporation makes a distribution of money to its shareholders on or before the 15th day of the third month following the close of a taxable year with respect to which it was an electing small business corporation within the meaning of section 1371(b);

(2) Such distribution is made pursuant to a resolution of the corporation's board of directors, adopted before the close of such taxable year, to distribute to its shareholders all or a part of the proceeds of one or more sales of capital assets, or of property described in section 1231(b), made during such taxable year; and

(3) Each shareholder on the day such distribution is received—

(i) Owns the same proportion of the stock of the corporation on such day as he owned on the last day of such taxable year, and

(ii) Consents to such election. Section 1375(e) applies only with respect to taxable years of corporations beginning after December 31, 1957.

(b) *Time and manner for making election*—(1) *Taxable years ending after February 26, 1964.* For taxable years ending after February 26, 1964, an election under section 1375(e) with respect to a taxable year shall be made by attaching to the corporation income tax return for such taxable year, filed not later than the time (including extensions thereof) prescribed by law, the following documents:

(i) A statement that the corporation elects the application of section 1375(e) and the date and amount of each distribution to which the election applies;

(ii) A copy of the resolution of the board of directors referred to in paragraph (a)(2) of this section; and

(iii) A statement of the consent of each shareholder of the corporation containing the information required by, and filed in the manner provided in, paragraph (c) of this section.

(2) *Taxable years beginning after December 31, 1957, and ending on or before February 26, 1964.* For taxable years beginning after December 31, 1957, and ending on or before February 26, 1964, an election under section 1375(e) with respect to a taxable year shall be made on or before June 25, 1964, by either attaching the documents described in subparagraph (1) of this paragraph to its income tax return for such taxable year, or by filing such documents with the district director with whom the corporation has filed, or intends to file,

its income tax return for such taxable year.

(3) *Election is binding*. An election under subparagraph (1) or (2) of this paragraph is binding and may not be withdrawn.

(c) *Shareholders' consent*. The consent of a shareholder to an election under section 1375(e) shall be in the form of a statement signed by the shareholder in which such shareholder consents to the election of the corporation. Such shareholder's consent is binding and may not be withdrawn after a valid election is made by the corporation. Each person who is a shareholder of the electing corporation must consent to the election; thus, where stock of the corporation is owned by a husband and wife as community property (or the income from which is community property), or is owned by tenants in common, joint tenants, or tenants by the entirety, each person having a community interest in such stock and each tenant in common, joint tenant, and tenant by the entirety must consent to the election. The consent of a minor shall be made by the minor or by his legal guardian, or his natural guardian if no legal guardian has been appointed. The consent of an estate shall be made by the executor or administrator thereof. The statement shall set forth the name, address, and account number of the corporation and of the shareholder, the date the distribution is received, the number and proportion of the shares of stock of the corporation owned by him on the date the distribution is received, and the number and proportion of such shares owned by him on the last day of the taxable year of the corporation with respect to which the election is made. The consents of all shareholders may be incorporated in one statement.

[T.D. 6719, 29 FR 4771, Apr. 3, 1964. Redesignated by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

### § 301.9100–21 References to other temporary elections under various tax acts.

Regulations regarding elections under various other tax acts are found at the following sections in title 26 of the Code of Federal Regulations:

| Section of 26 CFR | Description of election |
|---|---|
| 5c.168(f)(8)–2 | Election to characterize transaction as a section 168(f)(8) lease, under the Economic Recovery Tax Act of 1981. |
| 5c.1256–1 | Election with respect to property held on June 23, 1981, under section 508(c) of the Economic Recovery Tax Act of 1981. |
| 5c.1256–2 | Election with respect to taxable years beginning before June 23, 1981, and ending after June 22, 1981, under section 509 of the Economic Recovery Tax Act of 1981. |
| 7.48–1 | Election to have investment credit for movie and television films determined in accordance with previous litigation, under the Tax Reform Act of 1976. |
| 7.48–2 | Election of forty-percent method of determining investment credit for movie and television films placed in service in a taxable year beginning before January 1, 1975, under the Tax Reform Act of 1976. |
| 7.48–3 | Election to apply the amendments made by sections 804 (a) and (b) of the Tax Reform Act of 1976 to property described in section 50(a) of the Code. |
| 7.57(d)–1 | Election with respect to straight line recovery of intangibles, under the Tax Reform Act of 1976. |
| 11.402(a)(4)(B)–1 | Election to treat an amount as a lump sum distribution, under the Employee Retirement Income Security Act of 1974. |
| 11.410–1 | Election by church to have participation, vesting, funding, etc., provisions apply, under the Employee Retirement Income Security Act of 1974. |
| 11.412(c)–7 | Election to treat certain retroactive plan amendments as made on the first day of the plan year, under the Employee Retirement Income Security Act of 1974. |
| 11.412(c)–11 | Election with respect to bonds, under the Employee Retirement Income Security Act of 1974. |
| 11.415(c)(4)–1 | Special elections for section 403(b) annuity contracts purchased by educational institutions, hospitals and home health service agencies, under the Employee Retirement Income Security Act of 1974. |
| 12.4 | Election of Class Life Asset Depreciation Range System (ADR), under the Revenue Act of 1971. |
| 12.7 | Election to be treated as a DISC, under the Revenue Act of 1971. |
| 12.8 | Elections with respect to net leases of real property, under the Revenue Act of 1971. |
| 12.9 | Election to postpone determination with respect to the presumption described in section 183(d), under the Revenue Act of 1971. |
| 15.1–1 | Elections to deduct, relating to exploration expenditures in the case of mining. |
| 15.1–2 | Revocation of election to deduct, relating to exploration expenditures in the case of mining. |
| 15.1–3 | Elections as to methods of recapture, relating to exploration expenditures in the case of mining. |

| Section of 26 CFR | Description of election |
|---|---|
| 18.1361–1 | Election to treat qualified subchapter S trust as a trust described in section 1361(c)(2)(A)(i), under the Subchapter S Revision Act of 1982. |
| 18.1362–1 | Election to be an S corporation, under the Subchapter S Revision Act of 1982. |
| 18.1362–3 | Revocation of election, under the Subchapter S Revision Act of 1982. |
| 18.1362–5 | Election not to have new passive income rules apply during 1982, under the Subchapter S Revision Act of 1982. |
| 18.1371–1 | Election to treat distributions as dividends during certain post-termination transition periods, under the Subchapter S Revision Act of 1982. |
| 18.1377–1 | Election to terminate year, under the Subchapter S Revision Act of 1982. |
| 18.1379–2 | Special rules for all elections, consents, and refusals, under the Subchapter S Revision Act of 1982. |
| 22.0 | Certain estate taxes elections under the Economic Recovery Tax Act of 1981. |
| 23.1 | Election and eligibility to treat interests in property held jointly on December 31, 1976, as qualified joint interests, under the Revenue Act of 1978. |

[T. D. 8435, 57 FR 43894, Sept. 23, 1992]

# PART 302—TAXES UNDER THE INTERNATIONAL CLAIMS SETTLEMENT ACT, AS AMENDED AUGUST 9, 1955

Sec.

302.1 Statutory provisions and Executive order; section 212 of the International Claims Settlement Act, and Executive Order 10644.
302.1–1 Definitions.
302.1–2 Application of regulations.
302.1–3 Protection of internal revenue prior to tax determination.
302.1–4 Computation of taxes.
302.1–5 Payment of taxes.
302.1–6 Interest and penalties.
302.1–7 Claims for credit or refund.

AUTHORITY: Sec. 7805, I.R.C. 1954; 68A Stat. 917; 26 U.S.C. 7805, and sec. 212 of the International Claims Settlement Act of 1949, as added by the Act of Aug. 9, 1955, Pub. L. 285, 84th Cong., 69 Stat. 562.

SOURCE: T.D. 6470, 25 FR 6470, July 9, 1960, unless otherwise noted.

## § 302.1 Statutory provisions and Executive order; section 212 of the International Claims Settlement Act, and Executive Order 10644.

SEC. 212. (a) The vesting in any officer or agency designated by the President under this title of any property or the receipt by such designee of any earnings, increment, or proceeds thereof shall not render inapplicable any Federal, State, Territorial, or local tax for any period before or after such vesting.

(b) The officer or agency designated by the President under this title shall, notwithstanding the filing of any claim or the institution of any suit under this title, pay any tax incident to any such property, or the earnings, increment, or proceeds thereof, at the earliest time appearing to him to be not contrary to the interest of the United States. The former owner shall not be liable for any such tax accruing while such property, earnings, increment, or proceeds are held by such designee, unless they are returned pursuant to this title without payment of such tax by the designee. Every such tax shall be paid by the designee to the same extent, as nearly as may be deemed practicable, as though the property had not been vested, and shall be paid only out of the property, or earnings, increment, or proceeds thereof, to which they are incident or out of other property acquired from the same former owner, or earnings, increment, or proceeds thereof. No tax liability may be enforced from any property or the earnings, increment, or proceeds thereof while held by the designee except with his consent. Where any property is transferred otherwise than pursuant to section 207(a) or 207(b) hereof, the designee may transfer the property free and clear of any tax, except to the extent of any lien for a tax existing and perfected at the date of vesting, and the proceeds of such transfer shall, for tax purposes, replace the property in the hands of the designee.

(c) Subject to the provisions of subsection (b) of this section, the manner of computing any Federal taxes, including without limitation by reason of this enumeration, the applicability in such computation of credits, deductions, and exemptions to which the former owner is or would be entitled, and the time and manner of any payment of such taxes and the extent of any compliance by the designee with provisions of Federal law and regulations applicable with respect to Federal taxes, shall be in accordance with regulations prescribed by the Secretary of the Treasury to effectuate this section. Statutes of limitations on assessments, collection, refund, or credit of Federal taxes shall be suspended with respect to any vested