APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 17-4083, 17-4093 & 18-4036

[Filed March 29, 2019]

UNITED STATES OF AMERICA,

Plaintiff - Appellant /
Cross-Appellee,

v.

MARY CAROL S. JOHNSON;
JAMES W. SMITH,

Defendants - Appellees /
Cross-Appellants,

and

MARIAN S. BARNWELL; BILLIE ANN S. DEVINE; EVE H. SMITH,

Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. NO. 2:11-CV-00087-CW)

Clint A. Carpenter, Attorney, Tax Division, Department of Justice (John W. Huber, United States Attorney, Of Counsel; Richard E. Zuckerman, Principal Deputy Assistant Attorney General; Arthur T. Catterall, Attorney, Tax Division, Department of Justice, with him on the briefs), Washington, D.C., for Plaintiff-Appellant/Cross-Appellee.

Thomas R. Barton, Prince, Yeates & Geldzahler (James A. Boevers, Prince, Yeates & Geldzahler; David E. Sloan and Jennifer A . Whitlock, Sloan & Sloan, P.C., with him on the briefs), Salt Lake City, Utah, for Defendants-Appellees/Cross-Appellants.

Before **TYMKOVICH**, Chief Judge, **MURPHY** and **HARTZ**, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

The three consolidated appeals currently before this court involve an action brought by the Government to collect unpaid federal estate taxes. In Appeal No. 17-4083, the Government appeals from the district court's determination that its state-law contract claim was time-barred because it was subject to a Utah state six-year state statute of limitations. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude the state-law claim is governed by the ten-year statute of limitations set out in 26 U.S.C. § 6502(a) because the Government is proceeding in its sovereign capacity.

Appeal No. 17-4093 is a cross-appeal from the district court's ruling that the Government's transferee-liability claim, brought pursuant to 16 U.S.C. § 6324(a)(2), was timely. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude the transferee-liability claim was timely filed because the limitations period applicable to the § 6324(a)(2) transferees is the same as the limitations period applicable to the estate.

In Appeal No. 18-4036, the Government appeals from the district court's order awarding attorney's fees to Appellees. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude Appellees are not entitled to attorney's fees because the Government's position in this litigation was substantially justified. *See* 26 U.S.C. § 7430(c)(4)(B).

II. Background

The issues raised in these consolidated appeals arise from the Government's attempt to collect unpaid estate taxes that were assessed against the estate of Hazel Anna S. Smith (the "Estate").[1] During her lifetime, Ms. Smith (the "Decedent") created The Anna Smith Family Trust (the "Trust") and funded it with

[1] A comprehensive recitation of the full factual background in this matter can be found in the district court's memorandum decision and order. *United States v. Johnson*, 224 F. Supp. 3d 1220 (D. Utah 2016). Only the facts relevant to the three appeals currently before this court are included in this opinion.

shares of stock in State Line Hotel, Inc. (the "Hotel"). The Hotel was a closely held corporation and the holder of a Nevada gaming license. At the time of her death, the Decedent was the sole trustee of the Trust. Two of her children, Mary Carol S. Johnson and James W. Smith, were named as successor trustees. The Decedent also executed a will naming Johnson and Smith as personal representatives of her estate. The Decedent died on September 2, 1991. Her will directed that the "rest and residue" of her estate be added to the principal of the Trust to be administered by the successor trustees.

Consistent with the terms of the trust agreement, the successor trustees filed a federal estate tax return with the Internal Revenue Service ("IRS") on June 1, 1992. The return calculated the Estate's federal estate tax liability as $6,631,448.[2] Of that total, only $4 million was paid to the IRS at the time the return was filed. The successor trustees made a valid election pursuant to 26 U.S.C. § 6166(a), deferring payment of the balance of the federal estate tax liability, because the Hotel stock accounted for more than thirty-five percent of the Decedent's adjusted gross estate. The ten annual installment payments would begin on June 2, 1997 and end on June 2, 2006. The IRS assessed the Estate for the unpaid estate taxes on July 13, 1992.

[2] In May 1995, the IRS issued a Notice of Deficiency against the Estate based on a challenge to the valuation of the Hotel stock. The parties settled the disputed amount and the Estate agreed to pay additional federal estate taxes of $240,381.

Although the assessed estate taxes remained unpaid, the successor trustees distributed Hotel stock from the Trust to the trust beneficiaries on December 31, 1992. This distribution was motivated by Nevada restrictions on casino ownership by a trust. Cognizant of the outstanding federal estate tax liability, however, the successor trustees and the trust beneficiaries executed an agreement (the "Distribution Agreement") that contained the following provision:

> Liability for Taxes. Each of the BENEFICIARIES acknowledges that the assets distributed to him or her will accomplish a complete distribution of the assets of the Trust. A portion of the total federal estate tax upon the Estate of Anna Smith is being deferred and is the equal obligation of the BENEFICIARIES to pay as the same becomes due. Likewise, if, upon audit, additional federal estate taxes or Utah inheritance taxes are found to be owing, the responsibility for any such additional taxes, interest or penalties will be borne equally by the BENEFICIARIES.

The beneficiaries identified in the Distribution Agreement were the Decedent's children: Johnson, Smith, Marian S. Barnwell, and Billie Ann S. Devine.

The Hotel filed for Chapter 11 bankruptcy in January 2002. Beginning with the annual installment payment due on June 2, 2002, the Estate ceased making payments of the deferred federal estate taxes. The IRS declared the installment agreement to be in default as of December 18, 2003. In June 2005, the IRS learned of the existence of the Distribution Agreement.

In 2011, the Government filed a complaint naming the Decedent's children—Johnson, Smith, Barnwell, and Devine—as defendants and seeking recovery of $1,569,851 in unpaid federal estate taxes.[3] The Government's original complaint raised multiple claims for relief, one of which is relevant to Appellees' cross-appeal. In the relevant claim, the Government alleged all four of the Decedent's children were liable for the Estate's unpaid federal estate taxes to the extent they received property included in the gross estate (the "§ 6324(a)(2) claim"). *See* 26 U.S.C. § 6324(a)(2). Appellees' motion to dismiss the § 6324(a)(2) claim was granted in part and denied in part. The district court determined that the Government's § 6324(a)(2) claim was not time-barred, but that it could only be asserted as to the life insurance proceeds received by Appellees. Because Appellees conceded liability as to the life insurance proceeds, the district court entered judgment in favor of the Government on the § 6324(a)(2) claim but only to the extent of those distributions.

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[3] The Decedent's children were also the beneficiaries of the Trust and the signatories to the Distribution Agreement. The wife of defendant Smith was also named as a defendant but she was dismissed from the case by the district court. Defendants Barnwell and Devine died during the pendency of this lawsuit and the Government failed to substitute their estates as defendants. Accordingly, only Johnson and Smith are the appellees and cross-appellants in this matter. They will be hereinafter referred to as "Appellees."

The Government moved to file an amended complaint in August 2012.[4] In its amended complaint, the Government sought to enforce rights as a third-party beneficiary of the Distribution Agreement (the "third-party beneficiary claim"). The district court granted judgment in favor of Appellees on the claim, concluding it was untimely under Utah law and rejecting the Government's argument that the timeliness of the claim was governed by federal law.

III. Discussion

A. Timeliness of the Third-Party Beneficiary Claim

In Appeal No. 17-4083, the Government appeals the judgment entered in favor of Appellees on its state-law claim as a third-party beneficiary of the Distribution Agreement. The Government moved for summary judgment on this claim in March 2015, arguing it was the intended beneficiary of the Distribution Agreement because the Decedent's children agreed therein to pay any estate taxes as they became due and payable. *See Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314, 1315 (Utah 1982) ("Where it appears from the promise or the contracting situation that the parties intended that a third party receive a benefit, then the third party may enforce his rights in the courts and is deemed a donee beneficiary."). In their written opposition to the Government's motion, Appellees conceded the Government is a third-party beneficiary of the Distribution Agreement but argued the claim

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[4] Although Defendants filed a written consent to the amendment, the district court did not grant the motion until July 30, 2013.

was untimely because it was not filed within the six-year Utah statute of limitations applicable to contract claims. *See* Utah Code Ann. § 78B-2-309(2).

The district court agreed with Appellees and dismissed the Government's third-party beneficiary claim as time-barred. The court rejected the Government's argument that the timeliness of the claim is governed by the ten-year federal statute of limitations applicable to an action brought to collect assessed taxes. *See* 26 U.S.C. § 6502(a). We review statute of limitations questions de novo. *United States v. Anderson*, 319 F.3d 1218, 1219 (10th Cir. 2003).

The sole question before this court is whether the six-year statute of limitations set out in Utah Code Ann. § 78B-2-309(2) or the ten-year statute of limitations set out in 26 U.S.C. § 6502(a) is applicable to the Government's third-party-beneficiary claim. The Supreme Court has previously stated that "[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." *United States v. California*, 507 U.S. 746, 758 (1993). Here, however, Supreme Court and Tenth Circuit precedent dictates the result advocated by the Government.

In *United States v. Summerlin*, the Supreme Court held that "the United States is not bound by state statutes of limitation . . . in enforcing its rights," even if the suit is brought in state court. 310 U.S. 414, 416 (1940). The Court summarized the generally applicable rule as follows: "When the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *Id.* at 417. In *United States v. Holmes*, this court applied *Summerlin* to the question of whether the ten-year limitations period set out in § 6502(a) governed the Government's attempt to collect corporate taxes from the corporation's sole shareholder, defendant Holmes. 727 F.3d 1230, 1232 (10th Cir. 2013). The taxes were assessed against the corporation but were unpaid at the time the corporation wound up its operations and made distributions to Holmes. *Id.* at 1231. The Government filed suit against Holmes, raising only state-law claims. *Id.* at 1232. Holmes argued the Government's claims were subject to a two-year state statute of limitations. *Id.* at 1233. This court ruled otherwise, concluding the Government's claims were "in every real sense a proceeding in court to collect a tax" and, thus, the Government was "acting in its sovereign capacity in an effort to enforce rights ultimately grounded on federal law." *Id.* at 1235 (quotation omitted). Appellees argue that *Holmes* is distinguishable from this matter because the shareholder's liability in that case was based on transferee liability, not a contract as it is here. This factual difference is not material.

Holmes clearly stands for the proposition that the Government is always acting in its sovereign capacity when it seeks to collect unpaid federal taxes. It is immaterial whether its claim to payment arises under federal or state statutory or common law. The only relevant question is whether the Government's suit, if successful, will result in the defendant's liability to pay federal taxes the Government has assessed against a taxpayer. If so, then the federal statute of limitations applies. Appellees' attempts to distinguish the facts in *Holmes* are unpersuasive.[5] Because the Government's third-party-beneficiary claim seeks to hold Appellees liable for the payment of unpaid estate taxes assessed against the Estate, § 6502(a) supplies the statute of limitations applicable to the Government's claim.

The Government asserts that we can grant summary judgment in its favor on the third-party-beneficiary claim because it was timely filed and Appellees have conceded liability.[6] Appellees, however, raise multiple challenges to the timeliness of the Government's claim even under the ten-year statute of limitations. Because these arguments are raised for the

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[5] The district court ruled in Appellees' favor based on its interpretation of the Supreme Court's ruling in *United States v. California*, 507 U.S. 746 (1993). In *California*, however, the Court held that the Government was not proceeding in its sovereign capacity. *Id.* at 757-58. It was, instead, attempting to proceed as a subrogee, seeking to recover *California* taxes allegedly overpaid by a federal contractor. *Id.* Accordingly, the Court held that *Summerlin* did not control the statute of limitations question. *Id.* at 758. Here, the Government is not asserting rights as a subrogee. As we conclude *supra*, it is asserting its own sovereign right to collect *federal* taxes it previously assessed. Thus, *Summerlin* controls and the analysis in *California* is inapplicable.

[6] Defendants do not challenge the Government's assertion that they have conceded liability, nor could they. Their response to the Government's motion for summary judgment states: "No payments were made, and it is undisputed that the section 6166 payment extension defaulted in 2003. Thus, all of the deferred estate tax (plus interest and penalties) became due and payable before the end of 2003. When the [Appellees] failed to pay their respective shares, each of them breached the [Distribution] Agreement."

first time in Appellees' appellate brief, they are waived and we do not address them. Attempting to avert the waiver, Appellees assert they were not required to challenge whether the Government's claim is time-barred under the ten-year statute of limitations because the Government did not argue application of the ten-year period in its motion for summary judgment.[7] This argument is based on a mistaken view of the applicable burden. A challenge to the timeliness of a claim is an affirmative defense that must be raised by the party alleging the claim is time-barred. *See Cortez v. Wal-Mart Stores, Inc.*, 460 F.3d 1268, 1276 (10th Cir. 2006). Thus, it was always Appellees' burden to show the third-party beneficiary claim was untimely.

B. Transferee Liability

The Government also asserted a claim pursuant to 26 U.S.C. § 6324(a)(2), arguing Appellees were personally liable for the estate tax to the extent of the value of the life insurance proceeds they received. In Appeal No. 17-4093, Appellees challenge the district court's conclusion that the Government's § 6324(a)(2) claim was timely filed. We review de novo the district court's ruling on the statute of limitations applicable to the Government's claim. *Anderson*, 319 F.3d at 1219.

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[7] In their response to the Government's motion for summary judgment, Appellees argued only that the third-party beneficiary claim was time barred under Utah's six-year statute of limitations. In their sur-reply in opposition to the Government's motion for summary judgment, Appellees did not mention the Government's third-party beneficiary claim even though the Government had argued in its reply that the claim was governed by the ten-year limitations period set out in 26 U.S.C. § 6502.

Under § 6324(a)(2), a person who holds or receives property included in a decedent's gross estate is personally liable for the estate tax to the extent of the date-of-death value of the property received. Appellees do not dispute that they are transferees under § 6324(a)(2) because they received life insurance proceeds includible in the Decedent's estate. The sole dispute between the parties centers on whether the Government's § 6324(a)(2) claim was timely filed.

The Government generally has ten years to collect estate taxes from a decedent's estate, either "by levy or by a proceeding in court." 26 U.S.C. § 6502(a)(1). Here, the ten-year limitations period was suspended pursuant to 26 U.S.C. § 6503(d) because the Estate made a deferment election pursuant to 26 U.S.C. § 6166. The parties agree the Estate was timely assessed on July 13, 1992, and the § 6166 election terminated on December 15, 2003, when the Estate failed to make an installment payment. *See* 26 U.S.C. § 6166(g)(3). The Government filed suit on January 21, 2011, raising the § 6324(a)(2) claim in its complaint.

Appellees argue § 6503 does not suspend the statute of limitations for § 6324(a)(2) transferees even if a valid § 6166 election suspends the limitations period for the estate. Instead, they argue, the limitations period set out in § 6901(a) governs transferee liability. Section 6901(a) provides that an assessment against a transferee shall be made within one "year after the expiration of the period of limitation for assessment against the transferor." 26 U.S.C. § 6901(c). Appellees argue the Government never timely and properly assessed them by following the procedure set out in

§ 6901(a). It is well-settled, however, that § 6901 sets out an *alternative* collection procedure applicable to transferees who receive property from a decedent's estate. *United States v. Russell* (*Russell I*), 461 F.2d 605, 606 (10th Cir. 1972). Section 6901 is inapplicable in this matter because the Government chose to bring its transferee-liability claim pursuant to § 6324(a)(2). *Holmes*, 727 F.3d at 1234 ("The collection procedures contained in § 6901 are not exclusive and mandatory, but are cumulative and alternative to the other methods of tax collection recognized and used prior to the enactment of § 6901 and its statutory predecessors." (quoting *Russell I*, 461 F.2d at 606)); *see also United States v. Geniviva,* 16 F.3d 522, 524 (3d Cir. 1994) (relying on the reasoning in *Russell I* to hold "that an individual assessment under 26 U.S.C. § 6901 is not a prerequisite to an action to impose transferee liability under 26 U.S.C. § 6324(a)(2)").

Appellees argue our settled precedent in *Holmes* and *Russell I* does not control the outcome in this matter because the Estate made a § 6166(a) election and, thus, the Government is required to follow the assessment procedures set out in § 6901. Appellees' reasoning as to why the Government must proceed under § 6901 when an estate makes a § 6166(a) election is less than clear.[8] But, regardless of its specifics,

[8] During oral argument in this matter, Appellees characterized their § 6901 argument as "pretty much the same" as the analysis set out in the dissenting opinion in *United States v. Holmes*, 727 F.3d 1230, 1240-46 (10th Cir. 2013). Whether an accurate description of their written argument or not, the *Holmes* majority held to the contrary.

Appellees' extensive argument centering on § 6901 cannot be reconciled with this court's holding in *United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002).

Defendants concede in their opening brief that "the statute of limitations against the Estate was still open when the Government brought this lawsuit in January 2011 because section 6503(d) suspended the running of the statute while the section 6166 election was in effect." This concession is relevant because we held in *Botefuhr* that "if an action could be timely commenced against a donor under the provisions of § 6501 and § 6502, an action against the donee under § 6324(b) will be considered timely." 309 F.3d at 1281. Although *Botefuhr* addressed a transferee's liability for assessed but unpaid gift taxes, its holding is equally applicable to assessed but unpaid estate taxes. *Id*. at 1276 n.9 (expressly stating that the transferee liability ruling applied to both estate and gift taxes because "the gift tax and estate tax provisions are *in pari materia* and must be construed together" (quotation omitted)). Accordingly, under *Botefuhr*, the Government's claim was timely filed because it was brought less than ten years after the Estate defaulted. *See* 26 U.S.C. § 6502(a) (setting out a ten-year statute of limitations).

Appellees make only a fleeting reference to *Botefuhr* in their opening brief. They, instead, discuss this court's holding in *United States v. Russell* (*Russell II*), 532 F.2d 175 (10th Cir. 1976), erroneously attributing the rule adopted in *Botefuhr* to *Russell II* and then attempting to distinguish the facts in *Russell II* from the facts in this matter. *See* Cross-Appellant Br. at 16 ("However, as this Court explicitly cautioned, the holding of *Russell II* applies to the particular and limited facts of that case. It should not be extended to this case, where the circumstances are critically different."). During oral argument, Appellees conceded the holding in *Botefuhr* but argued the rule adopted in that case should not be extended to transferees because 26 U.S.C. § 6503(d), which suspends the limitations period for estates that make a valid § 6166 election, is inapplicable to § 6324(a)(2) transferees.

Section § 6503(d) reads as follows: "The running of the period of limitation for collection of any tax imposed by chapter 11 [26 U.S.C. §§ 2001 et seq.] shall be suspended for the period of any extension of time for payment granted under the provisions of section . . . 6166." 26 U.S.C. § 6503(d). Appellees assert that personal liability arising under § 6324(a)(2) is not "a tax imposed by chapter 11" and, thus, § 6503(d) does not extend the limitations period as to transferees.[9] Notwithstanding Defendants' insistence to the contrary, this argument is foreclosed by *Botefuhr*.

In *Botefuhr*, this court made it very clear that the limitations period applicable to a decedent's estate also governs the limitations period applicable to transferees. 309 F.3d at 1277. The references in

[9] Appellees' argument that § 6503(d) is inapplicable to transferees would significantly worsen the situation of a transferee who receives property from an estate that makes a § 6166 election. Under Appellees' theory, in that circumstance the Government could immediately proceed to collect the unpaid (but deferred) taxes from the transferee notwithstanding the fact the deferral period had not yet run against the estate, which may have more than sufficient assets to eventually pay the tax.

§ 6503(d) to "any tax imposed by chapter 11" has no impact on that holding. Rather, § 6503(d) is relevant in the analysis only to the extent it determines the statute of limitations applicable to the estate. And, once the limitations period for the estate is determined, *Botefuhr* unambiguously holds that a § 6324 claim can be brought against a transferee within that same period. *Id*. Appellees' argument that § 6503(d) does not "extend the limitations period for transferees" ignores *Botefuhr*'s definitive holding that the limitations period for transferees is the same as the limitations period for the estate.[10] Here, Appellees concede the Government filed its § 6324(a)(2) claim before the statute of limitations ran against the Estate. Thus, the Government's claim is timely.

C. Attorney's Fees

After the district court entered judgment in favor of Appellees on the Government's third-party beneficiary claim, Appellees moved for an award for attorney's fees and costs. The district court granted the motion on January 8, 2018. In Appeal No. 18-4036, the Government asks us to reverse the award of attorney's fees, arguing the position it took in the litigation was substantially justified. *See* 26 U.S.C. § 7430(c)(4)(B). Whether the Government's position was substantially justified is an issue we review for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 559 (1988). "Under

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[10] As we stated in *United States v. Botefuhr*, 309 F.3d 1263, 1277 (10th Cir. 2002), § 6324 does not contain an explicit statute of limitations. Hence, our reasoning that the statute of limitations governing transferees must be the same as that governing the estate.

this standard of review, the district court's conclusions of law are reviewable on a *de novo* basis, and its findings of fact are to be reversed only if 'clearly erroneous'." *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1486 (10th Cir. 1984) (involving an analogous attorney's fee provision in the Equal Access to Justice Act).

In a "court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for . . . reasonable litigation costs incurred in connection with such court proceeding." 26 U.S.C. § 7430(a)(2). A party other than the Government is the "prevailing party" if that person "has substantially prevailed with respect to the amount in controversy, or has substantially prevailed with respect to the most significant issue or set of issues presented." *Id.* § 7430(c)(4)(A). Even if a party substantially prevails with respect to the amount in controversy or with respect to the most significant issue or set of issues presented, it will not be treated as the prevailing party if the Government can establish that its position "in the proceeding" was substantially justified. 26 U.S.C. § 7430(c)(4)(B)(i). Substantially justified means "justified to a degree that could satisfy a reasonable person," or in other words, having a "reasonable basis both in law and fact." *Pierce,* 487 U.S. at 565. It is the Government's burden to establish that its position was substantially justified. 26 U.S.C. § 7430(c)(4)(B)(i).

The district court's judgment awarding fees and costs to Appellees was entered after the court ruled for Appellees on the Government's third-party beneficiary claim. We have, however, reversed the district court's ruling on the third-party beneficiary claim and determined that judgment should be entered on behalf of the Government. We have also affirmed the district court's determination that Appellees are liable for the unpaid estate taxes to the extent of the life insurance proceeds they received from the Estate. It would appear, then, that Appellees are no longer the prevailing parties. Appellees dispute this, arguing their victories earlier in this litigation reduced their liability from one hundred percent to twenty-five percent.[11] It is

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[11] The district court's order on the attorney's fee issue contains a comprehensive summary of the prior proceedings on which it partially based its decision.

> On January 21, 2011, the United States filed a complaint against the children of Anna S. Smith, seeking collection of an estate tax deficiency owed by her estate as a result of her death in 1991. Defendants filed a motion to dismiss on April 1, 2011 on the grounds that the government's claims were time-barred; that 26 U.S.C. § 6324(a)(2) largely did not impose personal liability upon them as beneficiaries, other than as to their receipt of insurance proceeds; and that they are not subject to fiduciary liability under 31 U.S.C. § 3713 because the estate had sufficient assets to pay the outstanding tax liability at the time the estate proceeds were distributed to the beneficiaries via a Distribution Agreement. The court granted in part and denied in part defendants' motion to dismiss on July 29, 2013, allowing the government's section 6324 claims against the trustees and life insurance beneficiaries to proceed, and concluding that the government had stated a claim for fiduciary liability under section 3713.

unnecessary for us to address whether Appellees have substantially prevailed with respect to either the amount in controversy or the most significant issue(s)

On July 31, 2013, the United States filed an Amended Complaint, adding a claim seeking to foreclose against the Distribution Agreement as well as a claim as a third party beneficiary of the Distribution Agreement. Defendants answered the Amended Complaint on August 27, 2013, asserting defenses to include the expiration of the statute of limitations as to the government's interest as a third party beneficiary to the Distribution Agreement and that the government's section 6324(a)(2) claims are barred because the property was not included in the gross estate under any of sections 2034 through 2042 of the Tax Code. The parties filed cross motions for partial summary judgment on the government's first cause of action, namely whether Johnson and Smith, as successor trustees of the Trust, were personally liable for unpaid estate taxes under 26 U.S.C. § 6324(a)(2). The court initially granted summary judgment in favor of the government on this claim and granted defendant's motion to amend their answer.

In the Amended Answer filed October 17, 2014, defendants asserted a defense that section 3713 liability was discharged in August 1997 pursuant to 26 U.S.C. § 2204 as a result of their tender of a special lien under 26 U.S.C. § 6324A. Defendants also filed a motion asking the court to reconsider its section 6324(a)(2) summary judgment ruling in the government's favor and instead find that trust assets were included in the gross estate under 26 U.S.C. § 2033. Following significant additional briefing, the court issued its final decision on December 1, 2016, finding for the defendants on all issues except for the liability of defendants Johnson and Smith for one quarter of their mother's life insurance benefits each received.

United States v. Johnson, 2018 WL 327245, at *1 (D. Utah Jan. 8, 2018).

presented, because we conclude the Government's position was substantially justified and the district court's conclusion to the contrary was based on an erroneous methodology.

Because this matter involved multiple claims for relief, we cannot review the correctness of the district court's ruling that the Government's position was not substantially justified until we first determine whether the term "position," as used in 26 U.S.C. § 7430(c)(4)(B) means (1) the Government's overall contention as to the liability of the Decedent's children for the unpaid estate taxes or (2) the individual arguments made by the Government on each issue. The statutory language and the relevant case law counsel against the issue-by-issue analysis undertaken by the district court.

The Supreme Court has provided some guidance on the meaning of the term "position," albeit in a slightly different context. In *Commissioner v. Jean*, the Court addressed the meaning of "position" as used in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and concluded that "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." 496 U.S. 154, 161-62 (1990). As the Government concedes, *Jean* addressed the question of whether the position of the Government included pre-litigation conduct; it did not directly address the situation of multiple claims for relief raised by the government in one lawsuit. The Court's reasoning, however, is still persuasive on the question of whether the analysis of the Government's position should be conducted at the macro or micro level. Further, in *Hackett v. Barnhart*, this court implied that the substantial-justification inquiry should center on the Government's position considered as a whole, and not on "individual matters [that] may have been more or less justified." 475 F.3d 1166, 1173-74 (10th Cir. 2007) (quotation omitted) (discussing the fee provision in the EAJA). The Fourth Circuit Court of Appeals has considered the question in the context of the EAJA and concluded that the substantial-justification inquiry should focus holistically on "whether the government acted reasonably in causing the litigation or in taking a stance during the litigation." *Roanoke River Basin Assoc. v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); *see also id.* at 138 (defining the issue presented as whether courts should "focus only on the issue on which the fee petitioning party prevailed or on the entire litigation when determining whether the government's position was substantially justified"). The Fourth Circuit's in-depth analysis of the issue is persuasive and consistent with *Jean*, *Hackett*, and the statutory language of § 7340 which does not use the terms "issue" and "position" interchangeably. Accordingly, we conclude the district court erred by improperly focusing on the *correctness* of the Government's argument on each *claim for relief* rather than properly focusing on whether there was a "reasonable basis both in law and fact" for the Government's overall *position* in the litigation. *Pierce*, 487 U.S. at 565.

Under the holistic approach, the inquiry in a multi-issue lawsuit brought by the Government to collect unpaid taxes should focus "not on the government's success or failure [on a particular issue], but on the reasonableness of its position in bringing about or continuing the litigation." *Roanoke River Basin Assoc.,* 991 F.2d at 139. Further, we must keep in mind that § 7430, like the fee provision in the EAJA, constitutes a partial waiver of the Government's sovereign immunity and, thus, it should be construed narrowly in favor of the Government. *See Ardestani v. INS*, 502 U.S. 129, 137, (1991) ("EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity."); *Adamson v. Bowen*, 855 F.2d 668, 671 (10th Cir. 1988) ("We recognize that courts must construe waivers of sovereign immunity strictly."). The purpose of § 7430 is to eliminate the financial disincentives associated with defending oneself "against *unjustified* government action." *Morrison v. Comm'r*, 565 F.3d 658, 659 (9th Cir. 2009) (emphasis added). If the Government's suit, as here, raises multiple claims for relief but seeks to recover only a single tax liability, it would be incongruous to conclude that its position in bringing about the litigation was unjustified when it ultimately secures a judgment for the full amount sought. This is true even if one or more of the Government's alternative claims are dismissed, because the Government cannot recover more than the amount of the tax liability regardless of how many of its claims are successful.

Here, the Government took one position in this litigation—that the Decedent's children were liable for the unpaid estate taxes. We have ruled in favor of the Government on its claim that those individuals are liable for the full amount of the unpaid taxes because the Government is a third-party beneficiary of the

Distribution Agreement.[12] Thus, under the facts in this case, the Government's litigation position was substantially justified because it obtained a judgment for the full amount sought. Accordingly, we reverse the district court's award of fees and costs to Appellees.

IV. Conclusion

In Appeal No. 17-4083, we **reverse** the district court's entry of judgment in favor of Appellees as to the Government's third-party beneficiary claim and **remand** the matter to the district court with instructions to enter judgment in favor of the Government on that claim and to award damages to the Government in the amount determined on remand.

In Appeal No. 17-4093, we **affirm** the judgment entered on March 30, 2017, against appellee Johnson in the amount of $92,250 and against appellee Smith in the amount of $92,250.

In Appeal No. 18-4036, we **reverse** the award of attorney's fees and costs to Appellees.

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[12] If, on remand, the Government is unable to recover the full amount of the unpaid taxes, it is only because it failed to substitute the estates of deceased Defendants Barnwell and Devine as parties in this matter, not because of any deficiency in the government's third-party beneficiary claim.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-4083
(D.C. No. 2:11-CV-00087-CW)
(D. Utah)

[Filed March 29, 2019]

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

MARY CAROL JOHNSON;
JAMES W. SMITH,

Defendants - Appellees,

and

MARIAN S. BARNWELL; BILLIE ANN S. DEVINE; EVE H. SMITH,

Defendants.

JUDGMENT

Before **TYMKOVICH**, Chief Judge, **MURPHY** and **HARTZ**, Circuit Judges.

This case originated in the District of Utah and was argued by counsel.

The district court's entry of judgment in favor of Appellees as to the Government's third-party beneficiary claim is reversed. The case is remanded to the United States District Court for the District of Utah with instructions to enter judgment in favor of the Government on that claim and to award damages to the Government in the amount determined on remand.

Entered for the Court

/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

**Case No. 2:11-cv-00087
Judge Clark Waddoups**

[Filed January 8, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiffs.	)
	)
v.	)
	)
MARY CAROL S. JOHNSON; JAMES W. SMITH; MARIAN S. BARNWELL; BILLIE ANN S. DEVINE; and EVE H. SMITH	)
	)
Defendants.	)
	)

MEMORANDUM DECISION AND ORDER RE LITIGATION FEES AND COSTS

Defendants Mary Carol S. Johnson and James W. Smith seek recovery of reasonable litigation fees and costs pursuant to 26 U.S.C. § 7430. For the following reasons, defendants' motion is granted and defendants are awarded $285,648.06 in attorney's fees and $30,558.00 in expert witness report costs.

STATEMENT OF FACTS

On January 21, 2011, the United States filed a complaint against the children of Anna S. Smith, seeking collection of an estate tax deficiency owed by her estate as a result of her death in in 1991. Defendants filed a motion to dismiss on April 1, 2011 on the grounds that the government's claims were time-barred; that 26 U.S.C. § 6324(a)(2) largely did not impose personal liability upon them as beneficiaries, other than as to their receipt of insurance proceeds; and that they are not subject to fiduciary liability under 31 U.S.C. § 3713 because the estate had sufficient assets to pay the outstanding tax liability at the time the estate proceeds were distributed to the beneficiaries via a Distribution Agreement. The court granted in part and denied in part defendants' motion to dismiss on July 29, 2013, allowing the government's section 6324 claims against the trustees and life insurance beneficiaries to proceed, and concluding that the government had stated a claim for fiduciary liability under section 3713.

On July 31, 2013, the United States filed an Amended Complaint, adding a claim seeking to foreclose against the Distribution Agreement as well as a claim as a third party beneficiary of the Distribution Agreement. Defendants answered the Amended Complaint on August 27, 2013, asserting defenses to include the expiration of the statute of limitations as to the government's interest as a third party beneficiary to the Distribution Agreement and that the government's section 6324(a)(2) claims are barred because the property was not included in the gross estate under any of sections 2034 through 2042 of the Tax Code. The parties filed cross motions for partial summary judgment on the government's first cause of action, namely whether Johnson and Smith, as successor trustees of the Trust, were personally liable for unpaid estate taxes under 26 U.S.C. § 6324(a)(2). The court initially granted summary judgment in favor of the government on this claim and granted defendant's motion to amend their answer.

In the Amended Answer filed October 17, 2014, defendants asserted a defense that section 3713 liability was discharged in August 1997 pursuant to 26 U.S.C. § 2204 as a result of their tender of a special lien under 26 U.S.C. § 6324A. Defendants also filed a motion asking the court to reconsider its section 6324(a)(2) summary judgment ruling in the government's favor and instead find that trust assets were included in the gross estate under 26 U.S.C. § 2033. Following significant additional briefing, the court issued its final decision on December 1, 2016, finding for the defendants on all issues except for the liability of defendants Johnson and Smith for one quarter of their mother's life insurance benefits each received. On May 1, 2017, defendants filed a motion for attorney's fees and costs under 26 U.S.C. § 7430. The parties each subsequently appealed the court's December 1, 2016 memorandum decision. While the case was on appeal, the court declined to resolve the motion for attorney's fees until, at the parties' request, a status conference was held on December 13, 2017. At that time, both parties indicated it would be helpful to their appellate mediation efforts if the court decided the motion. The court now proceeds to do so.

MOTION FOR ATTORNEY'S FEES AND COSTS

Section 7430(a) provides that in a "court proceeding which is brought by . . . the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment . . . for . . . reasonable litigation costs incurred in connection with such court proceeding." A "prevailing party" is a party other than the United States, with a net worth of less than $2 million at the time the proceeding was commenced,[1] who "has substantially prevailed with respect to the amount in controversy, or has substantially prevailed with respect to the most significant issue or set of issues presented." 26 U.S.C. § 7430(c)(4)(A).

The United States does not dispute that defendants Johnson and Smith have prevailed on both the amount in controversy and on the most significant issues or set of issues presented. (U.S. Opp'n to Mot. for Atty. Fees, ECF No. 201.) The United States also does not challenge the factual allegations in the Johnson and Smith affidavits asserting that they each had a net worth of less than $2 million at the time this proceeding commenced. (*Id.*)

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[1] 28 U.S.C. § 2412(d)(2)(B) sets forth the net worth requirement for an individual, which is made applicable to the definition of prevailing party found at 18 U.S.C. § 7430(c)(4)(A)(ii).

Section 7430(c)(4)(B) provides, however, that "a party shall not be treated as the prevailing party . . . if the United States establishes that the position of the United States in the proceeding is substantially justified." The statute further goes on to state that the United States' position should be presumed "not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance . . . ." 26 U.S.C. § 7430(4)(B)(ii). Applicable published guidance is defined as "regulations, revenue rulings, revenue procedures, information releases, notices, and announcements" as well as "private letter rulings, technical advice memoranda, and determination letters" that are issued to the taxpayer." 26 U.S.C. § 7430(4)(B)(iv). In addition, the Supreme Court has defined "substantially justified" as "justified to a degree that could satisfy a reasonable person," or in other words, having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See also Anthony v. U.S.*, 987 F.2d 670, 674 (10th Cir. 1993). In making the determination about whether the United States' positions were substantially justified, "the district court must look at all facts and circumstances as well as the legal precedents relating to the case." *Pate v. U.S.*, 982 F.2d 457 (10th Cir. 1993). "The government's failure to prevail in the underlying litigation does not make its position necessarily unreasonable, but it remains a factor" for consideration. *Anthony*, 987 F.2d at 674.

A. Substantially Justified

Defendants' fee request segregates the fees according to claim. Specifically, defendants do not seek fees related to statute of limitations, transferee liability, discovery, or otherwise uncategorized issues. Instead, their fee request is limited to the following issues on which they substantially prevailed: (a) that the trust assets were not included in the gross estate of Anna S. Smith under one of 26 U.S.C. §§ 2034 to 2042, so therefore there could be no transferee liability under section 6324(a)(2); (b) that a section 6324A special lien had in fact been furnished to the IRS, which wrongfully rejected it, and therefore Carol Johnson and James Smith were entitled to discharge under section 2204 as a matter of law; and (c) that the government's attempts to enforce the Distribution Agreement and foreclose its tax lien were untimely or otherwise improper. The court will address each issue in turn as to whether the government's position was substantially justified.

1. <u>The government's position with regard to the discharge of Johnson and Smith's fiduciary liability was not substantially justified</u>.

The government argues that defendants could not have received a valid discharge of personal liability under § 2204 as a result of furnishing a valid § 6324A special lien because defendants "never made a written application for discharge," and because "the IRS never accepted the defendants' proposed § 6324A lien." (U.S. Opp'n 5-6, ECF No. 201.) The government has never been able to identify any "form, method, procedure, or policy by which a 'written application'" is properly made, nor point to "section 2204 or any applicable authorities or regulations [that] require a specific format, form, or wording to make an application for discharge." *United States v. Johnson*, 224 F. Supp.3d

1220, 1237-38 (D. Utah 2016). This is nearly fatal to the government's claim that it had a reasonable basis in law and fact for its position. The government has nevertheless repeatedly asserted that a written application other than the one it received was required and that without one the court could not find that defendants had substantially complied with the application requirement pursuant to *Baccei v. United States*, 632 F.3d 1140, 1145-46 (9th Cir. 2011).

In the court's view, the government's reading of and reliance on *Baccei* for this position is not reasonable, especially in light of its failure to otherwise identify a "proper" method of making a written application. The government cites *Baccei* for the proposition that "the doctrine of substantial compliance can have no application in the context of a clear statutory prerequisite that is known to the party seeking to apply the doctrine." *Id.* at 1145. *Baccei*, however, goes on to state that "substantial compliance with regulatory requirements may suffice when such requirements are procedural and when the essential statutory purposes are fulfilled." *Id.* Furthermore, *Baccei* clarifies that "A taxpayer may be relieved of perfect compliance with a regulatory requirement when the taxpayer has made a good faith effort at compliance . . . and (1) the regulatory requirement is not essential to the tax collection scheme but rather is an unimportant or relatively ancillary requirement or (2) the regulatory provision is so confusingly written that it is reasonably subject to conflicting interpretations." *Id.* (internal quotations omitted.) *Baccei* thus placed the government on notice that in the absence of a "clear statutory prerequisite that is known to the party seeking to apply the doctrine," combined with the government's utter inability to identify any "proper" form or method of providing a written application for discharge, its position on this point was not substantially justified.

As for its position that the IRS was substantially justified in rejecting the defendants' proposed § 6324A lien, the government still assumes that it had discretionary authority not to accept closely held stock as collateral under § 6324A. It cites the court to a footnote in a Tenth Circuit case that states that a litigation position is not necessarily unjustified based on a finding that an agency's actions have been arbitrary and capricious. *See Mid-Del Therapeutic Center, Inc. v. C.I.R.*, 30 Fed. Appx. 889 n.3 (10th Cir. 2002). This argument misses the point. Here, the court did not evaluate whether the IRS arbitrarily or capriciously rejected the defendants' proposed § 6324A lien; thus, this case law is inapplicable. The government vaguely asserts that its position that it had the discretion to reject the special lien was otherwise "supported by reference to the applicable statutes and regulations, case law, and facts," (U.S. Opp'n 8; ECF No. 201), but fails to identify what these are and provide an explanation as to why this position was reasonable. Instead, the court concluded that the government's legal arguments on these issues repeatedly contradicted its own published guidance, misinterpreted the plain language of statutes and regulations, ignored relevant provisions of other statutes and regulations, and conflicted with the undisputed purpose of section 6166. *See Johnson*, 224 F. Supp.3d at 1238-43. Because the government has not demonstrated that its position on section 2204 discharge as a result of the section 6324A special lien had a reasonable basis in fact or law, the defendants should be awarded attorney's fees for all aspects of their defense to section 3713 claims.[2] The defendants' request for the costs of Jeffery S. Pickett's expert report is directly related to these claims and should also be granted.[3] The report was necessary to establish the value of the trust assets for purposes of the insolvency test under section 3713 and to establish the value of the stock for purposes of the special lien under section 6324A.

2. The government's position with regard to Johnson and Smith's liability as trustees under section 6324(a)(2) was not substantially justified.

Although this issue was a difficult one for the court during the litigation, the court concludes that the government's position that trust assets were included in the gross estate pursuant to one of the transfer sections, §§ 2034-2041, was not substantially justified.

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[2] Regardless of any potential merit to the government's position on the underlying section 3713 claim in the absence of discharge, the fiduciaries had already been discharged as a matter of law and should not have been required to defend themselves many years later with respect to section 3713 liability.

[3] Defendants correctly point out that the United States' expert report did not meet its own burden to show that the value of the closely held stock was of insufficient or uncertain value, nor did it even attempt to offer an opinion on its value. The absence of this proof—or an attempt by the government to provide such proof—also supports the court's conclusion that the United States' position was not substantially justified.

Defendants argue that this entire issue was moot because their alleged liability under section 6324(a)(2) had already been discharged as a matter of law when they furnished the special lien. (Def.'s Mot. 4; ECF No. 198). The court did not decide this issue, however, and does not do so now. While the defendants acknowledge that "the question of the proper code section of inclusion was a novel issue," (*id.*), the government's defense of this position merely restates their litigation position, without demonstrating why their position was reasonable.

In particular, the government continues to assert that its "transfer" arguments were reasonable without addressing the court's conclusion that this position was inconsistent with the IRS statutory scheme and contradicted both IRS Technical Advice Memorandum 89-40-003 and IRS Revenue Ruling 75-553. *Johnson*, 224 F. Supp. 3d at 1232-34. 26 U.S.C. § 7430(c)(4)(B)(ii) provides that "the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance." Although the statute allows this presumption to be rebutted, the court concludes that the government's arguments fail to do so. Under the IRS statutory scheme, the only potentially applicable transfer sections (§§ 2036 and 2038) require beneficial ownership to have been given away while at the same time retaining some of the value of what has been given away. The government has not presented any factual or legal arguments that reasonably support a conclusion that Anna S. Smith divested herself of the beneficial ownership of her trust assets during her lifetime. Instead, its arguments directed the court's attention away from this critical fact. Because the government has not demonstrated that its position on trustee liability pursuant to 26 U.S.C. § 6324(a)(2) had a reasonable basis in fact or law, the defendants should be awarded attorney's fees for all aspects of their defense to these claims.

3. <u>The government's attempts to enforce the Distribution Agreement and foreclose its tax lien were not substantially justified</u>.

The government argues that it had a reasonable basis in both law and fact to seek enforcement of the terms of the Distribution Agreement and to foreclose its tax lien. In the court's view, however, the government sat too long on its right to enforce the Distribution Agreement and failed to acknowledge its own numerous mistakes in releasing its tax lien twice and improperly attempting to revoke the liens it had previously released, let alone that defendants' furnishing of a valid section 6324A lien required the IRS to release the tax lien such that there was no lien to foreclose. This parade of legal and factual errors by the government is not justified as being reasonable by simply reciting to the court the same arguments it made during the litigation. The government's position ignored that it necessarily stood in the position of a third party beneficiary to the Distribution Agreement—rather than in its sovereign capacity—in its attempt to collect the unpaid tax. Similarly, it is not reasonable for the government to argue that the responsibility for its own numerous tax lien errors and lapses should be shifted onto the taxpayer as it did here. Accordingly, the government has failed to persuade the court that its position on these issues was substantially justified as factually or legally reasonable.

B. Reasonable Litigation Costs

Defendants seek an award of $285,648.06 in attorney's fees and $30,558.00 for the cost of the Pickett report, for a total award of $316,206.06. As previously mentioned, the defendants have not sought attorney's fees for issues upon which the government may have had substantial justification for its positions, or for time spent by counsel upon which defendants received a fee discount. The fees requested have been limited to the 26 U.S.C. § 7430(c)(4) statutory billing rates for the years 2011-2017 where actual billing rates were higher than the statutory rate, and reduced to the actual billing rates where they were lower than the statutory rate.

The government argues that the attorney fees are too high for a case that did not go to trial, and that they include hours that were "unnecessary, irrelevant and duplicative," citing eight motions for permission to file an over-length brief, a motion for an extension of time, and fees for more than one attorney working on the case on the same matter. (U.S. Opp'n 10; ECF No. 201.) Other than these examples and general assertions, the government has not identified specific problematic entries or any amount of fees they believe the court should reduce.

Defendants argue that the density and complexity of the subject matter—the U.S. Tax Code—was the primary reason for the case's expense. Because of that complexity, they argue that additional pages were necessary to present their positions to the Court, upon which they ultimately prevailed. Defendants also argue that their lengthy and thorough memoranda may not have been necessary had the government not "repeatedly misunderstood, ignored, and misapplied the provisions of the Tax Code, associated regulations, and it's agency's own guidance and decisions." (Reply 8, ECF No. 211.) Defendants also argue that the government's resistance to defendants' legitimate attempts to raise meritorious theories by way of an amended answer and the submission of an expert report increased defendants' fees, as did the supplemental briefing required by the government's submission of a rebuttal report. Finally, defendants argue that their case was staffed primarily by a tax attorney and a litigator, with assistance from attorneys with lower billing rates, and that this combination was effective and efficient. In recognition of the reality that some duplication occurred, defendants point out that along the way counsel voluntarily applied significant discounts—a total of 295 hours over the course of the litigation—to reduce defendants' fees. The court finds that the attorney's fees requested were reasonably incurred over a long time period (2011-2017), have been appropriately calculated, and reasonably reduced to account for duplication. Furthermore, the actual amount defendants seek here is $253,000 less than what they actually paid their attorneys.

As for the cost of the defendant's expert witness report, the government argues that it should not be awarded because its own rebuttal report claimed the Pickett report contained "a host of fundamental flaws that make its conclusion misleading and unreliable." (U.S. Opp'n 11, ECF No. 11.) If the court does award the cost of the Pickett report, the government argues that Mr. Pickett's fees should be limited to the statutory rate cap applicable to attorneys' fees. (*Id.*) The court disagrees with the government. The report was relevant, necessary, and helpful to the court. Furthermore, the statutory rate cap does not apply to experts—as opposed to attorneys—in tax cases, and the government has not argued that Mr. Pickett's hourly rate was otherwise unreasonable.

CONCLUSION

Based on the foregoing analysis, the court grants defendants' § 7430 motion for attorney's fees and costs. Defendants are hereby awarded $285,648.06 in attorney's fees and $30,558.00 in expert witness report costs. The total award is $316,206.06.

SO ORDERED this 8th day of January, 2018.

BY THE COURT:

/s/Clark Waddoups
Clark Waddoups
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

Case No. 2:11-cv-00087
Judge Clark Waddoups

[Filed December 1, 2016]

UNITED STATES OF AMERICA,	)
	)
Plaintiffs.	)
	)
v.	)
	)
MARY CAROL S. JOHNSON; JAMES W. SMITH; MARIAN S. BARNWELL; BILLIE ANN S. DEVINE; and EVE H. SMITH	)
	)
Defendants.	)
	)

MEMORANDUM DECISION AND ORDER

This is a tax case filed by the United States to collect unpaid federal estate taxes owed by the Estate of Hazel Anna S. Smith ("Estate"). This matter is before the court on the plaintiff's Second Motion for Summary Judgment (Dkt. No. 117), defendants' Motion for Reconsideration of the court's prior order granting partial summary judgment in favor of the government (Dkt. No. 119), and defendants' Motion for Summary Judgment (Dkt. No. 122).

FACTUAL BACKGROUND

The defendants in this action include the four children of Anna S. Smith (the "Decedent"), namely Mary Carol S. Johnson, James W. Smith, Marian S. Barnwell, and Billie Ann S. Devine. During the course of this litigation, Marian S. Barnwell and Billie Ann S. Devine passed away, and their estates have not been substituted as defendants. Eve H. Smith, who was named as a fifth defendant, is the wife of James W. Smith. In its prior order in this case, the court dismissed Mrs. Smith as a party to the litigation. (Am. Mem. Decision and Order, Dkt. No. 75.)

During her lifetime, Decedent and two of her children, defendants Mary Carol S. Johnson ("Johnson") and James W. Smith ("Smith"), executed a trust agreement dated February 8, 1982 for the creation of The Anna Smith Family Trust (the "Trust"), in which Decedent, Johnson and Smith were named as co-trustees. The Trust was funded on February 9, 1982 by 11,466 shares of stock in State Line Hotel, Inc. ("Hotel"). The Hotel was the holder of a Nevada gaming license. Nearly one year later, on February 1, 1990, Decedent, Johnson and Smith executed an amended trust agreement, which removed Smith and Johnson as co-trustees and left Decedent as the sole trustee of Trust.

On May 1, 1990, Decedent executed the Second Amended Trust Agreement ("Trust Agreement") as both grantor and sole trustee, which was the agreement in effect at the time of Decedent's death on September 2, 1991. It is undisputed that the Decedent had an unlimited power to modify, alter, amend, revoke, or terminate the trust at any time during her life. It is also undisputed that the Decedent, as grantor, had the right to withdraw principal and income from the Trust as she directed during her lifetime, and that no Trust beneficiaries had an enforceable right to any distributions from the Trust during Decedent's life. The Trust Agreement named Johnson and Smith as successor trustees. Johnson and Smith were also named in the Decedent's will as personal representatives of Decedent's Estate. Neither Decedent's Estate nor the Trust have been named as defendants in this lawsuit.

Upon Decedent's death, her will directed the personal representatives to ensure that the Decedent's "debts, last illness, and funeral and burial expenses be paid as soon after [her] death as reasonably convenient." (Will ¶ II; Dkt. No. 32, Ex. A.) It further directed the personal representatives that "claims against [the] estate" may be settled and discharged in the "absolute discretion of [the] Personal Representatives," although it did not expressly direct the personal representatives to pay any federal estate tax levied against the Estate. (*Id.*) The "rest and residue" of the Estate was to be delivered to the successor trustees and added by them to the principal of the Trust to be administered as directed by the trustees. (*Id.* at ¶ IV.)

The Trust Agreement provided for the successor trustees to make specific distributions, as soon as possible after the Decedent's death, from the principal of the Trust to individuals who are not parties to this suit. (Trust Agreement, 2; Dkt. No. 32, Ex. B.) The successor trustees were then directed to

> pay any and all debts and obligations of the GRANTOR, the last illness, funeral, and burial expenses of the GRANTOR and any State and Federal income, inheritance and *estate taxes* which may then be owing or which may become due and owing as a result of the GRANTOR's death.

(*Id.*) (Emphasis added.) After these expenses were paid by the successor trustees, one third of the remaining Trust corpus (not to exceed $1,000,000) was to be divided into four equal parts to be distributed to one of the four family limited partnerships that had been established for each of the heirs. (*Id.* at 4.) Finally, the remaining principal and undistributed income of the Trust was to be distributed equally between the heirs by the successor trustees. (*Id.* at 4-5.) The heirs also received benefits valued at $369,878 from several life insurance policies belonging to the Decedent. (Dkt. No. 86-3, p. 8.)

As directed by the Trust Agreement, the successor trustees filed a federal estate tax return with the Internal Revenue Service ("IRS") on June 1, 1992. The Decedent's gross estate was valued on the return at $15,958,765, resulting in a federal estate tax liability of $6,631,448, of which $4,000,000 was paid at the time of filing. (*See* United States Estate Tax Return, Dkt.

No. 86-3.) The majority of the Decedent's gross estate consisted of 9,994 shares of stock in the Hotel, valued by a valuation expert on the return at $11,508,400. Because the Hotel was a closely held business and its value constituted more than thirty-five percent of the Decedent's adjusted gross estate, the successor trustees validly elected to defer payment of the remainder of the federal estate tax liability pursuant to 26 U.S.C. § 6166(a). Consistent with Section 6166, the election provided that the remaining balance of the tax liability would be deferred for five years, at which time the successor trustees would pay it in ten annual installments beginning on June 2, 1997 and ending on June 2, 2006. (*See* Election, Dkt. No. 32-5.) After receiving the estate tax return, the IRS properly assessed the Estate for unpaid estate taxes on July 13, 1992.

It is undisputed that Nevada gambling law limited the ability of a Trust to own stock in a casino. The Trust and the successor trustees had received special permission for ownership in the Hotel that was set to expire in January 1993. (Ltr. from Nevada Gaming Ctrl. Bd. dated July 23, 1992; Dkt. No. 139, p. 220.) The parties do not dispute that because the application process to gain permanent approval for such ownership was extensive, expensive, and ultimately uncertain, the successor trustees decided to distribute the Hotel stock from the Trust to the beneficiaries. Accordingly, on December 31, 1992, the successor trustees and the heirs executed an agreement (the "Distribution Agreement") distributing the remaining Trust assets to the heirs. (*See* Agreement; Dkt. No. 32, Ex. G.) The

Distribution Agreement indicated the following regarding the outstanding estate tax liability:

> 6. Liability for Taxes. Each of the BENEFICIARIES acknowledges that the assets distributed to him or her will accomplish a complete distribution of the assets of the Trust. A portion of the total federal estate tax upon the Estate of Anna Smith is being deferred and is the equal obligation of the BENEFICIARIES to pay as the same becomes due. Likewise, if, upon audit, additional federal estate taxes or Utah inheritance taxes are found to be owing, the responsibility for any such additional taxes, interest or penalties will be borne equally by the BENEFICIARIES.

(*Id.*) On December 28, 1992, a few days prior to signing this agreement, the Estate paid the IRS an additional $1,000,000 on the deferred tax owed. Defendants assert, and the government has provided no contrary evidence, that at the time the Distribution Agreement was signed, their combined net worth was approximately $21.1 million, whereas the estate tax liability at that time was approximately $1.46 million. From the date the Distribution Agreement was signed until 2001, it is undisputed that additional payments on the deferred tax totaling $1,399,221.87 were made to the IRS by the Hotel on behalf of the defendants, who held the majority of the ownership of the Hotel from 1992 to 2001.

On May 30, 1995, approximately two years prior to the start date of the Section 6166(a) deferred tax installment payments, the IRS issued a Notice of

Deficiency against the Estate. The IRS claimed that the 9,994 shares of Hotel stock were worth $15,500,000 rather than $11,508,400 at the time of Decedent's death. (*See* Notice of Deficiency; Dkt. No. 32, Ex. E.) According to the IRS, this adjusted valuation resulted in an alleged additional estate tax of $2,444,367. The Estate contested the Notice of Deficiency, and a settlement was ultimately reached where the Estate agreed to pay additional federal estate taxes in the amount of $240,381. The IRS assessed the Estate for the second time pursuant to that settlement on December 30, 1996.

On May 27, 1997, about a week prior to the due date of the first estate tax installment payment, Colleen Girard, an agent from the IRS, sent a letter to Johnson in her capacity as executor of the Estate, informing her "of an alternative to your continued personal liability for the unpaid estate tax . . . deferred under 26 U.S.C. Section 6166." One of the alternatives offered was for Johnson "to furnish a Special Lien for Estate Tax Deferred Under Section 6166, as described in 26 U.S.C. Section 6324A." (Ltr. from Colleen Girard dated May 27, 1997; Dkt. No. 122-2, pp. 3-4.) Accordingly, on August 4, 1997, after obtaining additional information from the IRS about the information required to submit the Section 6324A special lien, Johnson and Smith, through counsel, provided the IRS with an executed Agreement to Special Lien Under Section 6324A signed by all four children of the Decedent, an agreement restricting the sale of the Hotel stock while the lien on the stock was in effect, and the additional information about the Hotel stock requested by the IRS. (Ltr. from David Salisbury dated Aug. 4, 1997; Dkt. No. 122-2, p.

7.) It is undisputed that at no point during this exchange of information did Ms. Girard mention or attach a "notice of election" or other application form required to furnish the IRS with a special lien.

Although unknown to the defendants at the time, Ms. Girard then sought guidance from IRS District Counsel regarding the use of stock in a closely held corporation as security for a special lien under Section 6324A. (Aug. 21, 1997 IRS Memo.; Dkt. No. 122-2, p. 13.) Ms. Girard informed District Counsel that the Estate had consented to the lien and offered 4,768 shares of stock which, based on the 1996 Tax Court settlement, had a value of $1,273 per share, or a total value of $6,092,578. Given that the unpaid balance of the tax assessment was $1,899,970 and the amount of security needed was $2,192,365.20, Ms. Girard stated that "I have analyzed the security and feel a lien under IRC 6324A against the stock will adequately secure the liability for the remainder of the IRC 6166 election." (*Id.*)

Notwithstanding the foregoing, in a letter dated November 6, 1997, Ms. Girard subsequently notified Smith and Johnson that District Counsel had "advised our office that closely held stock should not be accepted as collateral by the Internal Revenue Service because the IRS cannot sell stock at a public auction as it violates securities regulations." (Ltr. from Colleen Girard dated Nov. 6, 1997; Dkt. No. 122-2, p. 15.) Through counsel, Smith and Johnson responded that if there were securities law problems with the stock held by the IRS in its Section 6324A Special Lien, "it would appear that they belong to the IRS, not to the taxpayer," and that it was their position that "if an election is made under Section 6324A and the identified property can be expected to survive the period of deferral, the requirements of the statute have been met and the application of the special lien is mandatory." (Ltr. from David Salisbury dated Jan. 13, 1998; Dkt. No. 122-2, pp. 17-18.) In any event, Ms. Girard, Smith, and Johnson all agreed to wait two years to revisit the matter in 2000. (Ltr. from Ms. Girard dated Jan. 20, 1998; Dkt. No. 122-2, pp. 19-20.) It is undisputed that neither Ms. Girard, nor anyone else at the IRS, ever contacted Smith, Johnson, or their attorneys again with respect to the Section 6324A special lien.

In January 2002, the Hotel filed for Chapter 11 bankruptcy in the state of Nevada. It is undisputed that as a result of the bankruptcy proceedings, the beneficiaries were instructed to stop making any more distributions to pay the estate tax. The defendants did apply for an extension of time to pay the next installment due under Section 6166 and notified the IRS that the Hotel was in bankruptcy proceedings. (Dkt. No. 139, pp. 164-166.) By May 2002, the bankruptcy court approved the sale of all Hotel assets free of liens, claims, and encumbrances. As shareholders, the heirs received no value for their Hotel ownership interests in the bankruptcy.

Over a year after the conclusion of the Hotel bankruptcy, the IRS sent Smith and Johnson delinquent billing notices for the outstanding estate taxes dated August 28 and December 2, 2003. The latter notice stated that if the payment due was not received by the IRS by December 15, 2003, the "installment agreement will be in danger of defaulting. If this occurs, the whole balance due on the account will be due immediately and turned over for collection." (2nd Delinquent Installment Billing-2003, Dkt. No. 139, p. 163.) The installment payment was not made in 2003. In 2005, the Estate, through counsel, communicated with Byron Broda at the IRS about the inability of the Estate to pay its outstanding estate taxes. Counsel sent Mr. Broda an explanation of the Estate's distribution of assets in 1992, the financial difficulties of the Hotel and the bankruptcy, as well as a copy of the Distribution Agreement. (Dkt. No. 139, pp. 168-183.) The parties agree that the IRS then sent Smith and Johnson notices of their intent to levy unspecified assets in approximately July 2005. (Gov. Opp. Mem. to Second Mot. Summ. J.; Dkt. No. 138, p. 14.) On July 8, 2005, the IRS sent the Estate a Notice of Federal Tax Lien, and indicated it had been filed with the County Recorder of Salt Lake and Tooele counties in Utah. The notice included a statement that said:

> **IMPORTANT RELEASE INFORMATION:** For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

The last refiling date listed in column (e) of this notice listed "N/A" with respect to the 1992 estate tax assessment, and January 29, 2007 with respect to the 1996 estate tax assessment. (2005 Notice of Federal Tax Lien; Dkt. No. 139, pp. 197-199.) The assessment was for a total of $1,569,9671.67 which appeared to be attributable in full to the 1996 tax assessment. (*Id.*)

On or about September 12, 2005, the IRS sent a Notice of Levy to each of the individual defendant children, Smith, Johnson, Bille Ann S. Devine, and Marian S. Barnwell. The notices stated, "This levy attaches assets includible in the gross estate of Hazel Anna S. Smith, which were distributed or transferred to you, including but not limited to cash and life insurance proceeds." (Notices of Levy; Dkt. No. 139, pp. 206-209.) Thereafter, on November 15, 2005, Mr. Broda recommended that the government pursue a civil suit against the Estate, Johnson, and Smith for transferee liability for the estate tax. This lawsuit was not filed until January 21, 2011.

On or about January 9, 2007, the IRS sent the Estate a corrected Notice of Federal Tax Lien, which was also filed in Salt Lake and Tooele counties. This notice claimed it was "filed to correct the amount due on the original lien," but that otherwise the "information on the original notice filed is correct and that instrument remains in full force and effect." (2007 Notice of Federal Tax Lien; Dkt. No. 139, pp. 200-202.) This notice apportioned the tax owed between the 1992 assessment ($1,164,490.94) and the 1996 assessment ($405,220.73). (*Id.*) The IRS did not re-file their Notice of Federal Tax Lien by January 29, 2007, the deadline identified on the original and corrected notices. Rather, the IRS issued Certificates of Release for both the 2005 and 2007 liens on February 18, 2007, which stated that "the lien provided by Code section 6321 for these taxes and additions has been released." (Certificate of

Release of Federal Tax Lien; Dkt. No. 139, pp. 210-213.) These certificates were filed in both Salt Lake and Tooele counties. (*Id.*)

Several months later on March 27, 2007, the IRS mailed the Estate a Revocation of Certificate of Release of Federal Tax Lien with respect to both the 1992 and 1996 assessments filed in both Salt Lake and Tooele counties, stating that "we mistakenly allowed Notices of Federal Tax Lien filed against Hazel Anna S. Smith Estate to be released" and that the releases "are revoked and the liens are reinstated, as provided under Internal Revenue Code, Section 6325(f)(2)." (Revocations, Dkt. No. 139, pp. 214-217.) The IRS admits that the revocation notice was not filed with the Salt Lake county recorder's office as required by statute. (Decl. of Jennifer Graham ¶ 3, Dkt. No. 148.) Similarly, the IRS admits that on October 12, 2012 it again filed Certificates of Release of Federal Tax Lien with respect to both the 1992 and 1996 assessments in Salt Lake county. (*Id.* at ¶ 4.) However, on May 15, 2015, the IRS finally filed its Revocation of those releases with the Salt Lake county recorder's office, along with a new Notice of Federal Tax Lien against the Estate, stating that the government now has until August 12, 2025 to refile its lien for the 1992 assessment and until December 30, 2025 to refile its lien for the 1996 assessment. (*Id.* at Ex. 8, Dkt. No. 148-2.)

PROCEDURAL BACKGROUND

The government filed this action on January 21, 2011 in an effort to collect the estate's outstanding tax liability, asserting a cause of action against all defendants for trustee, transferee, and beneficiary liability under 26 U.S.C. § 6324(a)(2), and against the personal representatives under 31 U.S.C. § 3713. (Compl., Dkt. No. 2.) Defendants filed a motion to dismiss the complaint. (Dkt. No. 31.) Following a hearing on that motion, the court determined that the government had adequately stated a claim that the trustees of the Trust may be personally liable for the unpaid estate tax to the extent of the value of the property in the Trust at the time of Decedent's death pursuant to 26 U.S.C. § 6324(a)(2). (*See* Am. Mem. and Decision, Dkt. No. 75.) The court dismissed the government's claim, on the other hand, that each heir should be individually liable for the unpaid estate taxes as a transferee of Trust assets pursuant to that statute. (*Id.*) Similarly, the court determined that the government's claim regarding each heir's potential individual liability for the estate's taxes as a beneficiary of Trust assets under Section 6324(a)(2) should be limited to the extent of the distributions they received from the Decedent's life insurance policies. (*Id.*) Finally, the court determined that the government had adequately stated a claim that the personal representatives may have individual fiduciary liability for the estate taxes under 31 U.S.C. § 3713, although it revised its reasoning as to why after resolving defendants' first motion to reconsider. (*Id.*)

After the court ruled on defendants' motion to dismiss, the defendants answered the government's Amended Complaint, which was filed on July 31, 2013 and included for the first time causes of action related to the Distribution Agreement. (Dkt. No. 79.) Subsequently, the parties filed cross motions for partial summary judgment on the government's first cause of action, namely whether Johnson and Smith, as successor trustees of the Trust, were personally liable for unpaid estate taxes under 26 U.S.C. § 6324(a)(2) because that section only makes trustees liable up to the value of assets included in decedent's gross estate under 26 U.S.C. §§ 2034 to 2042, inclusive.[1] Oral argument was heard on these motions on October 1, 2014, after which the court ruled on the record in favor of the government that the successor trustees were personally liable for the estate tax because the Trust

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[1] For purposes of the prior motion to dismiss, defendants did not dispute that "trustees" were "transferees" that fall within the scope of Section 6324(a)(2). In this motion for summary judgment, defendant trustees argued that they can only be liable as transferees under this statute if the Trust assets were included in Decedent's gross estate under Sections 2034-2042, a position that was not at issue in the previous motion. *See* Section 2, *infra*. The court finds that this clarification of defendants' position was not clearly inconsistent with their position in the prior motion to dismiss, nor was their prior position calculated to mislead the court, nor did this clarification give defendants an unfair advantage. *See Hansen v. Harper Excavating, Inc.,* 641 F.3d 1216, 1227 (10th Cir. 2011). Defendants stated this position as their Fifteenth Defense in their Answer to Amended Complaint filed on August 27, 2013; the discovery deadline was still several months away when defendants clarified their position; and the government has always had the burden of proving that it has met all elements of its Section 6324(a)(2) claim. Because Section 6324(a)(2) is a strict liability statute that imposes liability based not on a trustee's improper acts, but on the status of being a trustee, receiving property, and having unpaid federal estate taxes, it is necessary for the court to fully consider each of the statute's elements and defendants' arguments without being constrained by prior statements when these questions were not directly at issue previously.

assets were included in the Decedent's gross estate under a relevant section, namely 26 U.S.C. § 2036(a). Defendants have challenged this ruling in a Motion to Reconsider, which is now before the court. (Dkt. No. 119.)

At the October 1 hearing, the court also granted defendants' motion for leave to amend their answer to include the affirmative defense that the government's claims against Smith and Johnson as personal representatives and fiduciaries are barred because they were effectively discharged from personal liability in August 1997 as a result of their tender of a special lien under 26 U.S.C. § 6324A. Shortly before the deadline for dispositive motions, defendants moved for an extension of time to submit an expert report from Jeffrey S. Pickett to support that the value of the Hotel stock pledged as collateral at or near the time of their § 6324A election was more than sufficient to pay the remaining amount of the federal estate tax that had been deferred under 26 U.S.C. § 6166. Their motion was granted and defendants filed their second motion for partial summary judgment on the grounds that Smith and Johnson were discharged from personal liability pursuant to their furnishing of the § 6324A special lien. This motion is before the court. (Dkt. No. 122.)

For its part, on March 17, 2015, the government timely filed its second motion for summary judgment on the remaining counts of its amended complaint, and part of this motion is now before the court. (Dkt. No. 117.) On July 21, 2015, the court held a hearing on the parties' second motions for summary judgment, defendants' motion for reconsideration, and defendants' motion for extension of time to submit expert reports. The court granted defendants' motion for an extension of time to submit expert reports. The court granted the government's second motion for summary judgment as to the defendants' personal liability for estate tax attributable to the life insurance proceeds received from the decedent. The court took the claims regarding the successor trustees' personal liability under submission. Defendants' motion for reconsideration and second motion for partial summary judgment were also taken under submission.

After both parties submitted expert reports and supplemental briefing regarding the expert reports and defendants' claims that Smith and Johnson should be discharged from personal liability as a result of satisfying the requirements for a special lien pursuant to § 6324A and thus obtaining a discharge pursuant to § 2204 such that they are not personally liable pursuant to § 3713, the court held a final hearing on the briefing on June 23, 2016. After consideration of the parties' extensive briefing, the relevant law, and the oral arguments by the parties, the court now rules on the following motions: United States' Second Motion for Summary Judgment (Dkt. No. 117), Defendants' Motion to Reconsider (Dkt. No. 119), and defendant's Motion for Partial Summary Judgment (Dkt. No. 122).

ANALYSIS

1. Failure to Substitute Estates as Defendants Requires the Court to Dismiss Defendants Marian S. Barnwell and Billie Ann S. Devine

As a preliminary matter, the court begins by addressing the government's claims against the two deceased defendants. Notice of the September 1, 2015 death of defendant Billie Ann S. Devine was filed on September 21, 2015. (Dkt. No. 172.) Notice of the April 17, 2016 death of Defendant Marian S. Barnwell was filed on May 16, 2016. (Dkt. No. 190.) Rule 25(a)(1) of the Federal Rules of Civil Procedure governs the substitution of a party for claims that are not extinguished by a party's death. In this case, the government's claims against these two deceased heirs as the beneficiaries of Trust assets under Section 6324(a)(2) to the extent of the distributions they received from the Decedent's life insurance policies is not necessarily extinguished by their deaths and could potentially have survived against their estates. Rule 25, however, requires a motion for substitution of a party to be "made within 90 days after service of a statement noting the death." Fed. R. Civ. P. 25(a)(1). For Devine, that time expired in December 2015. For Barnwell, that time expired in August 2016. When a party—here the government—has failed to make a timely motion for substitution of a party, "the action by or against the decedent must be dismissed." *Id.* There has been no motion for substitution of either defendant here; accordingly, the court dismisses all of the government's claims against defendants Devine and Barnwell.

2. Motion to Reconsider Whether Trust Assets Were Included in Decedent's Gross Estate Under 26 U.S.C. § 2033

The court now turns to defendants' motion to reconsider its decision to grant partial summary judgment to the government on the question of whether Smith and Johnson as successor trustees are personally liable for the unpaid estate tax to the extent of the value of the property in the Trust under section 6324.

As successor trustees of the Trust, Johnson and Smith can be personally liable for unpaid estate taxes up to the value of the Trust assets under 26 U.S.C. § 6324(a)(2) only if the Trust assets were included in decedent's gross estate under 26 U.S.C. §§ 2034 to 2042, inclusive.[2] In their motion for partial summary judgment, defendants argued that Decedent's assets were included in her Estate under 26 U.S.C. § 2033,[3] rather than under 26 U.S.C. § 2036 or 26 U.S.C. § 2038, because the Decedent retained full beneficial ownership of all Trust assets during her lifetime and there was no transfer to any other Trust beneficiary

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[2] The parties agree that the only possibly relevant sections within this range are section 2036 and section 2038.

[3] Section 2033 refers to property in which the decedent has an interest, and states:

> The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

26 U.S.C. § 2033.

until the time of her death. (Def.'s Mot. for Summ. J. 7, Dkt. No. 86.) By contrast, the government's motion for summary judgment on this claim argued that decedent's assets were either included in her estate under 26 U.S.C. § 2036(a) because they were transfers with a retained life estate,[4] or under 26 U.S.C. § 2038 because the Decedent retained the power to alter, amend, revoke, or terminate the Trust.[5] (Gov. Mot. for

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[4] Section 2036 states:

> (a) General rule. The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
> (1) the possession or enjoyment of, or the right to the income from, the property, or
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

26 U.S.C. § 2036.

[5] Section 2038 states in pertinent part:

> (a) In general. The value of the gross estate shall include the value of all property—
> (1) Transfers after June 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer . . . *by trust* or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent . . . to alter, amend, revoke, or terminate, or where any such

Summ. J. 13-19, Dkt. No. 88.) After oral argument on October 1, 2014, the court denied defendants' motion and granted summary judgment to the government on the claim that Smith and Johnson were personally liable for the unpaid estate tax as successor trustees of the Trust. (Dkt. No. 108.) The court concluded that the assets in the Trust, a fully revocable grantor trust, were included in Decedent's gross estate under 26 U.S.C. § 2036(a)(2) because as a result of the creation of the Trust and the designation of the beneficiaries therein, "at the instant of death the beneficiaries in this property had a legally enforceable interest." (Hr'g Tr. dated Oct. 1, 2014 49; Dkt. No. 113.)

Defendants have asked the court to reconsider this decision, arguing that the critical question for their claim that the Trust assets were included in the gross estate under 26 U.S.C. § 2033 is not whether the beneficiaries obtained a legally enforceable interest at the moment of Decedent's death, but rather *what interest the Decedent held* at the moment of her death. (Dft.'s Mot. to Reconsider 3, Dkt. No. 119.) Defendants argue that the court's analysis of 26 U.S.C. § 2036 was in error because it incorrectly focused on the interests held by the beneficiaries immediately after the moment of death, rather than on the interests held by the Decedent during her life. (*Id.* at 7.) From a temporal standpoint, in other words, the transfer envisioned by the fully revocable grantor trust executed by the

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> power is relinquished during the 3-year period ending on the date of the decedent's death.

26 U.S.C. § 2038 (emphasis added).

Decedent during her lifetime only occurred as a result of Decedent's death, and thus the assets remained beneficially owned by her during her lifetime and were includable in the Estate pursuant to 26 U.S.C. § 2033 rather than § 2036 or § 2038. They further argue that this temporal analysis was not originally briefed as to section 2036, *id.* at 3, although the court notes that the parties did present arguments on temporal considerations as to section 2038. The government argues that the court should not reconsider defendants' motion because it merely restates the position defendants took in their initial motion. (Gov.'s Opp'n Mem., Dkt. No. 143.) Thus, the court first evaluates the legal standard required to grant a motion to reconsider.

A. Legal Standard on a Motion to Reconsider

Rule 54(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b).

The government argues that although Rule 54(b) allows a court to revisit any order that rules on less than all of the claims in a case, a motion to reconsider is not appropriate when it merely restates the party's position taken in the initial motion. *See Servants of the*

Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (A motion for reconsideration is an "inappropriate vehicle[] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion."). While defendants agree that "[a] motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed," *United States v. Huff*, 782 F.3d 1221, 1224 (10th Cir. 2015), they note and the court agrees that the Tenth Circuit encourages a court to reconsider an interlocutory ruling "where error is apparent." *Warren v. Am. Bankers Ins.*, 507 F.3d 1239, 1243 (10th Cir. 2007). Furthermore, "[a] district court always has the inherent power to reconsider its interlocutory rulings." *Id.*

The court agrees with the defendants that the key language of section 2033 requires the court to focus its analysis on what was "beneficially owned by the decedent at the time of his death," 26 C.F.R. 20.2033-1, rather than on the interests owned by the beneficiaries immediately after decedent's death, which it did at the October 1, 2014 hearing. Accordingly, based on the foregoing standard and to prevent clear error, the court proceeds to reconsider whether the Trust assets were included in Decedent's gross estate under 26 U.S.C. § 2033.

B. Decedent Had Full Beneficial Ownership of All Trust Property During Her Lifetime; Thus Trust Assets Were Included in Her Gross Estate Under 26 U.S.C. § 2033

The court's focus during the October 1, 2014 oral argument for summary judgment on this issue was on how it should interpret the meaning of the term "transfer" for purposes of these estate tax statutes. (Hr'g Tr. dated Oct. 1, 2014 4; Dkt. No. 113.) While the court's analysis still revolves around the meaning of that term, the court erred by not also keeping in mind the overall estate tax statutory scheme. Upon reconsideration, the court finds that an evaluation of estate tax liability first requires the inclusion in the gross estate, under section 2033, of "the value of all property, whether real or personal, tangible or intangible, and wherever situated, beneficially owned by the decedent at the time of his death." 26 C.F.R. 20.2033-1. Other sections then apply to include in the gross estate certain gifts and/or transferred assets purportedly given away during decedent's lifetime where the decedent retained "strings" of control, whereas section 2033 "taxes property which has never really been given away at all." *Estate of Tully v. U.S.,* 528 F.2d 1401, 1403 (Ct. Cl. 1976).

Consistent with this statutory structure, the court must first analyze whether the Trust assets were ever "given away" such that Decedent lost the beneficial ownership of them during her lifetime, or in other words, whether a "transfer" for purposes of sections 2036 and 2038 did or did not occur prior to Decedent's death. To do so, the court considers first the "legal interests and rights created [by the Trust] under [s]tate law," and then decides "whether the interests and rights so created are sufficient to justify including the property in the gross estate" under section 2033. *Estate of Watson v. Comm'r*, 94 T.C. 262, 270-71 (1990). Under Utah law, "[a] trust is a form of ownership in which the legal title to property is vested in a trustee." *Flake v. Flake (In re Estate of Flake)*, 2003 UT 17 ¶ 12, 71 P.3d 589. Trust creation also requires a settler's intent "to confer a beneficial interest in the property in some other person," *id.* at ¶ 11, although those beneficial interests can take effect via inter vivos or testamentary transfers. Thus, under the proper temporal analysis, a revocable grantor trust can potentially be included or not in a decedent's gross estate under section 2033, depending on its terms.[6]

Here, the grantor of the Trust was the Decedent. (Dkt. No. 86-2 ¶ 1.) The Decedent was also the sole trustee of the Trust before her death, having previously exercised her right to revoke prior trust agreements that named co-trustees. (*Id.*) The Decedent, as grantor, had unlimited power to revoke, modify, alter, or amend

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[6] Merely reporting the Trust's assets on Schedule G of the Estate tax return is insufficient to cause the inclusion of Trust assets in the gross estate under sections 2035, 2036, 2037, or 2038, notwithstanding that Schedule G appears to assume it. IRS instructions require assets to be listed on Schedule G if a decedent created any trusts during his or her lifetime. (Def.'s Mot. Summ. J. 39-42, Dkt. No. 86.) Nor is the court willing to decide questions of trustee liability under section 6324 based on the correctness of a taxpayer's preparation of a form rather than on proper application of the code sections themselves.

the Trust at any time.[7] (*Id.* at 11 ¶ 12.) It is undisputed that during the Decedent's lifetime, she did not resign as trustee or become incapacitated such that a successor trustee served in her place. The income and principal of the Trust could be withdrawn without restriction by the Decedent only, as grantor, during her lifetime.[8] (*Id.* ¶ 5A.) Only upon the grantor's death were the Trust assets to be distributed for the payment of expenses and debts and for distribution to the various beneficiaries of the Trust. (*Id.* ¶ 5B.)

Defendants do not dispute that Decedent's creation of the Trust changed the legal title of the Trust assets from ownership by Decedent personally to ownership by Decedent as the trustee of the Trust. While that is

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[7] While Decedent's power to "alter, amend, revoke, or terminate" the Trust tracks the plain language of section 2038, it is not proper to conflate the plain language with the required initial analysis of beneficial ownership under section 2033. Section 2038 interests require that the benefits—not just the legal title—first be given away subject to these retained powers. Section 2033, on the other hand, is the provision by which the government "taxes property over which the owner has kept so much control that he has never really transferred it." *Tully*, 528 F.2d. at 1405, n. 11. Without a valid transfer, property never leaves the section 2033 gross estate. Were it otherwise, the plain language of section 2038 would swallow section 2033 in contravention of the estate tax structure.

[8] The court is not persuaded by the government's argument that the Decedent's withdrawals were limited by her fiduciary duties as trustee because, as defendants point out, "a self-imposed duty to hold and manage assets for your own benefit is no duty at all." (Def.'s Combined Opp'n Mem. 25, Dkt. No. 97.) As a result, her fiduciary duties as trustee did not result in an inter vivos transfer that would take Trust assets out of Decedent's section 2033 gross estate.

true, the beneficial ownership of the Trust assets never changed during Decedent's lifetime. "Actual command over the property taxed," as opposed to mere "refinements of title" are key to questions of "the actual benefit for which the [estate] tax is paid." *Burnet v. Guggenheim*, 288 U.S. 280, 283 (1933). Here, not only did the transfer of title to the Decedent as trustee not change Decedent's beneficial ownership of the Trust assets during her lifetime, but the beneficiaries of the Trust merely had a "hope and expectation" of inheriting a beneficial interest in the Trust assets, rather than any actual ownership interests during Decedent's lifetime.[9] *See Estate of Spruill v. Comm'r*, 88 T.C. 1197, 1222 (T.C. 1987). The government's argument focused heavily on the Trust's testamentary transfer of assets to the successor trustees—rather than to Decedent's estate—at the moment of death, claiming that "[t]he language of § 2033 reaches interests in property held by a decedent at his death (i.e., his estate), not beforehand." (Gov. Opp'n Memo 22, Dkt. No. 88.) Upon reconsideration, however, the court concludes that unless Decedent transferred beneficial ownership of

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[9] The court rejects the government's argument that the beneficiaries owned "vested interests" in the trust during Decedent's lifetime because of a provision relating to the rule against perpetuities. Similarly, the court does not find a transfer for purposes of section 2033 because the Trust language provided that the beneficiaries could designate one or more of their own heirs to receive Trust assets that a beneficiary would have been entitled to receive had he or she been alive at Decedent's death. None of the beneficiaries exercised this special power of appointment, and even if they had, their appointee(s) would have received nothing more than the beneficiaries had, which—during Decedent's lifetime—was only an expectancy.

Trust assets during her lifetime, how or to whom they transferred upon her death—no matter how "instantaneous"—simply plays no part in the section 2033 analysis. (Gov. Reply 4-7, Dkt. No. 98.) *See* 26 C.F.R. 20.2033-1.

Defendants cite to an IRS Technical Advice Memorandum and an IRS Revenue Ruling to support the conclusion that a trust arrangement of this type does not transfer the beneficial ownership away from the decedent for purposes of section 2033. In IRS Technical Advice Memorandum 89-40-003, dated June 30, 1989, the IRS stated:

> In the present case, X was directed to invest the principal deposited by A and *distribute income and corpus as directed by A.* At A's death, any assets remaining were to be distributed to A's personal representative. The trustee's discretion was limited to investment decisions. Thus, the assets held in Trust Arrangement Y were held *solely for the benefit of A during A's lifetime* and were payable to A's estate on A's death. *Since there is no third party involved in the Trust Arrangement A is properly treated as the owner of the assets held in the Trust Arrangement at the time of her death. Accordingly, the assets held in the Trust Arrangement at the time of A's death are properly includible in A's gross estate under section 2033 and not section 2038 of the Code.*

I.R.S. Tech. Adv. Mem. 89-40-003 (June 30, 1989) (emphasis added). (Dkt. No. 86-4.) The focus of this IRS ruling is not on the fact that technically, a legal transfer of assets to trustee X took place. Instead, the focus is on the fact that the sole economic and ownership benefit of these assets during A's lifetime was held by A. Compared to this analysis, defendants' case for inclusion of Trust assets under section 2033 is even stronger than the taxpayer in the memorandum because Decedent's creation of the Trust did not transfer title to a third party trustee, such as X in the example above. Instead, it transferred title solely to herself during her lifetime, in her dual roles as grantor and trustee.[10]

Similarly, in IRS Revenue Ruling 75-553, the decedent created a fully revocable trust during her lifetime, with trust assets to be distributed to her estate upon her death. The issue the IRS considered was whether the bank trustee would be liable under 6324(a)(2) for any unpaid estate taxes. The IRS said "no" and stated:

> Although sections 2036, 2037, and 2038 of the Code include in a decedent's gross estate the value of any interest in property transferred by the decedent, in trust or otherwise, where a life estate, reversionary interest, or power to alter, amend or revoke is retained by the decedent,

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[10] In the cases cited by the government suggesting that a transfer for estate tax purposes takes place regardless of the transferee having dual roles, the court notes that in those cases, the transferees were not the same persons as the grantors, and the interpretations of sections 2033 and 2036 were not at issue. *See Bell v. Comm'r*, 82 F.2d 499, 500 (3d Cir. 1936); *Agnes McCue, Addressed as the Transferee of the Estate of John J. Nolan v. Comm'r*, 1946 Tax Ct. Memo LEXIS 248, *127-*128 (T.C. 1946).

> *these provisions of the Code do not become operative unless someone other than the decedent receives a beneficial interest in the transferred property. The transfer of property to a trustee acting as agent for the transferor, without a third party receiving any interest in the property, would not fall within the scope of sections 2036, 2037, and 2038.* In the instant case the trust corpus is payable to the decedent's estate and is property of the decedent within the meaning of section 2033 and is includible in the gross estate only under that section.
>
> *Accordingly, the trustee is not subject to transferee liability for estate tax pursuant to section 6324(a)(2) of the Code since the corpus of the trust was not includible in the decedent's estate under sections 2036, 2037, or 2038, but was includible under section 2033 exclusively.*

Rev. Ruling 75-553 (emphasis added). Here, again, the IRS was not focused on the fact of a technical transfer of title to a bank trustee, but rather on whether someone other than the decedent received a beneficial interest in the transferred property during the decedent's lifetime. Like the decedent in Revenue Ruling 75-553, the Decedent here beneficially owned all of the Trust assets up until the time of her death. Additionally, the IRS was not focused on the fact that upon the Revenue Ruling decedent's death, trust assets were distributed to his estate, as opposed to a beneficiary or to a testamentary trust. It is true that here, Decedent's Trust arrangement meant that Trust assets avoided probate and allowed retention of control over a closely held business after Decedent's death. But Trust asset passage through probate—or any other after-death process or event—is not relevant to what beneficial ownership of the property the Decedent held during her lifetime. The court finds that these IRS interpretations of the Code and its regulations are reasonable and are entitled to "substantial judicial deference."[11] *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001).

The court's original ruling erred in determining that the specific language of section 2036 was broad enough to make Decedent's creation of the Trust and transfer of legal title from the Decedent as grantor to the Decedent as trustee a "transfer" for estate tax purposes. (Hr'g Tr. dated Oct. 1, 2014 48; Dkt. No. 113.) The court also erred in determining that at the "instant of death" the beneficiaries had a legally enforceable interest such that Trust assets were properly includable in the estate pursuant to section 2036, *id.* at 48-50, because it was persuaded by the government's argument that sections 2036 and 2038

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[11] Additionally, while the court is persuaded by defendants' arguments that (1) the determination of what is included in the gross estate should be harmonized with how that property is valued under the tax code, and (2) that section 2035 can inform the court regarding why sections 2036 and 2038 do not apply to the Trust at issue here, it does not make its ruling on the basis of those arguments. (Def.'s Mot. to Reconsider 9, 16; Dkt. No. 119.) It is worth noting, however, that the IRS interpretations above are consistent with a statutory tax scheme that functions as set forth by defendants in their motion to reconsider, and that nothing in the government's response persuades the court otherwise. (Gov.'s Opp'n Mem. 8, Dkt. No. 143.)

are "transfer provisions" intended to capture "all incomplete transfers, which includes transfers taking effect at death via revocable trusts." (Gov. Reply 6, Dkt. No. 98.) Upon reconsideration and for the reasons stated above, the court finds that Trust assets were never "given away" such that Decedent lost the beneficial ownership of them during her lifetime, and thus that there was no transfer—incomplete or not—for purposes of sections 2036 and 2038 prior to Decedent's death. As a result, the court concludes that Trust assets were included in the gross estate pursuant to section 2033, which precludes Smith and Johnson's liability as trustees for the estate tax under 26 U.S.C. § 6324. The court vacates its prior grant of partial summary judgment to the government as to trustee liability, (Dkt. No. 108), and grants defendants' motion for partial summary judgment on this claim. (Dkt. No. 86.)

3. Second Cross-Motions for Summary Judgment

The remaining claims for which the government seeks summary judgment are (1) that Smith and Johnson have fiduciary liability under 31 U.S.C. § 3713(b) for the unpaid estate tax in their capacities as personal representatives of the Estate, or, as alternatives, (2) that the government as a third party beneficiary may enforce the Distribution Agreement against the defendants or (3) that the government may foreclose its federal tax lien against the Distribution Agreement. Meanwhile, the defendants have moved for partial summary judgment on the grounds that Smith and Johnson were discharged from personal fiduciary liability for any unpaid estate tax under section 3713(b) because they furnished a section 6324A special lien agreement sufficient to pay the deferred taxes. The court begins with the legal standard for summary judgment.

A. Summary Judgment Legal Standard

Rule 56 of the Federal Rules of Civil Procedure governs the standard for summary judgment. Under Rule 56(c), the court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1160 (10th Cir. 1999). "One of the purposes of a motion for summary judgment is to pierce the pleadings and to assess the proof in order to ascertain whether there exists a genuine need for trial." *Metro Oil Co. v. Sun Refining & Marketing Co.*, 936 F.2d 501, 504 (10th Cir. 1991). "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial." *Sally Beauty Co., Inc. v. Beautyco, Inc.,* 304 F.3d 964, 971 (10th Cir. 2002). "An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 972 (internal punctuation omitted). If a reasonable jury could not return a verdict for the nonmoving party, summary judgment is appropriate. *See MacPherson v. Brinecell*, 98 F.3d 1241, 1246 (10th Cir. 1996).

B. Defendants Smith and Johnson Furnished a Valid Section 6324A Special Lien That Discharged Their Personal Liability under Section 2204 and Precludes Section 3713 Personal Liability

Having determined that defendants Smith and Johnson are not personally liable for the unpaid estate taxes in their capacities as trustees of the Estate, the court next turns to the question of whether Smith and Johnson are personally liable for the unpaid estate taxes in their capacities as personal representatives of the Estate. Because the government's claim for section 3713 liability will be rendered moot if the court determines that Smith and Johnson's personal liability was discharged under section 2204 as a result of furnishing a valid section 6324A special lien, the court begins with the requirements for discharge under section 2204 and then considers the question of whether defendants furnished a valid special lien under section 6324A.

i. Defendants Made an Effective Application for Discharge Under 26 U.S.C. § 2204

The general rule that allows fiduciaries such as executors or personal representatives of an estate to be discharged from personal liability for unpaid federal estate tax is that the fiduciary either pays the estate tax owed as determined and notified by the IRS, or, in the case of assessed tax payments deferred under section 6166, by "furnishing any bond which may be required for any amount for which time for payment is extended." 26 U.S.C. § 2204(a). The IRS regulation goes on to clarify that furnishing a bond for purposes of this section is met by furnishing a valid special lien agreement under 26 U.S.C. § 6324A.[12] Smith and Johnson argue that they furnished a valid special lien agreement to the IRS under 26 U.S.C. § 6324A; therefore, whether or not the IRS formally acknowledged or provided receipt stating their personal liability was discharged, their personal liability for the Estate's federal tax was nevertheless discharged as a matter of law. (Def.'s 2nd Mot. Summ. J., Dkt. No. 122.) The government argues that discharge under 26 U.S.C. § 2204(a) requires, as a prerequisite, a written application for discharge, which it claims the defendants failed to provide. (Gov.'s Opp'n, Dkt. No. 135.)

Notwithstanding the government's insistence that a written application is required for discharge, it has entirely failed to demonstrate that section 2204 or any applicable authorities or regulations require a specific format, form, or wording to make an application for discharge. While section 2204 provides that a taxpayer may make a "written application . . . for determination of the amount of the tax and discharge from personal liability therefor," the government has only identified that the application should be made to "the applicable

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[12] Specifically, 26 U.S.C. § 2204(c) provides that:

> [An] agreement which meets the requirements of section 6324A [26 USCS § 6324A] (relating to special lien for estate tax deferred under section 6166 [26 USCS § 6166] shall be treated as the furnishing of a bond with respect to the amount for which the time for payment has been extended under section 6166 [26 USCS § 6166].

internal revenue officer with whom the estate tax return is required to be filed." 26 C.F.R. § 20-2204-1. The purpose of the application, according to the text of the statute and regulations, is for the government to provide the fiduciary with a determination of the amount owed. *See id.*; 26 U.S.C. § 2204(a). Discharge, however, is conditioned only on payment of the amount owed or the furnishing of an appropriate lien or bond. *Id.*

In this case, as a result of the prior tax court proceeding about the value of the Hotel shares and the second tax assessment in 1996 based on that settlement, both parties were already fully aware of the amount of the tax owed by the Estate in August 1997 when the defendants furnished their special lien. There is no dispute on that point. The court is not persuaded that a separate written application is a substantive requirement of section 2204 because it appears that its essential purposes are fulfilled not by a written application but by the payment of the tax assessed or the furnishing of an appropriate bond. *See Baccei v. United States*, 632 F.3d 1140, 1145 (9th Cir. 2011) ("Substantial compliance with regulatory requirements may suffice when such requirements are procedural and when the essential statutory purposes have been fulfilled.") (internal punctuation omitted). Because a separate written application is not a substantive prerequisite, the court concludes that if the defendants furnished a valid special lien under section 6324A, as a matter of law their personal liability as fiduciaries was discharged.

Even if the court is incorrect and section 2204 requires a written application as a prerequisite to discharge, the court finds that the written communication between defendants and the government leading up to defendants furnishing the special lien agreement constitutes a written application pursuant to section 2204. The government initiated this communication. The first sentence of Ms. Girard's May 27, 1997 letter states that "The purpose of this letter is to inform you of an alternative to your continued personal liability for the unpaid estate tax of the Estate of Hazel Anna S. Smith that was deferred under 26 U.S.C. Section 6166." (Ltr. from Ms. Girard to Johnson dated May 27, 1997; Dkt. No. 122-2.) The government claims that the letter was sent to protect its interest in the deferred tax payments, and it is true that later in the first paragraph, the letter states that "This letter is being sent at this time because the government's interest must be adequately protected during the remaining period of your Section 6166 installment election." (*Id.*) Having so stated, however, the letter goes on to state that "In order to insure protection of the government's interest *and to terminate your personal liability,* you as personal representative of the estate may elect . . . [among other things] to furnish a Special Lien for Estate Tax Deferred Under Section 6166, as described in 26 U.S.C. Section 6324A." (*Id.*) (Emphasis added.) The next two paragraphs of the letter go on to describe in detail the requirements for electing a special lien, something the agent does not do with respect to the other options she suggested. The letter also specifically states that "We have attached information to assist you in completion of the *application* to elect the special lien." (*Id.*)

(Emphasis added.) The information attached to the letter was an agreement form for the Agreement to Special Lien under IRC 6324A, which the defendants completed and submitted prior to the IRS's deadline.

These facts are undisputed. In light of them, along with the government's failure to identify any other form, method, procedure, or policy by which a "written application" is otherwise properly made (assuming that a written application is a prerequisite), the court concludes in the alternative that Smith and Johnson properly made a written application for discharge under section 2204 when they timely followed the directions provided to them by the IRS, who demonstrably understood that it was offering defendants a discharge of personal fiduciary liability, even if in so doing it did not explicitly reference section 2204.[13] Having thus concluded that the parties understood that an application for discharge was both suggested by the IRS and made by the defendants, the court next evaluates whether defendants made a valid special lien election.

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[13] Section 2204 also provides a special rule in the case of estate tax deferred under section 6166, namely, that the government may provide the personal representative or executor a statement of the bond (or lien) required "to be furnished within 9 months after receipt of the application," but "if no notification is received, the executor is discharged at the end of such 9 month period from personal liability for the tax the payment of which has been extended." 26 CFR § 20.2204-1. It is undisputed here that the government did not provide any notice of any additional lien or bond amount it required at any time following receipt of defendants' special lien agreement.

ii. Defendants Smith and Johnson Furnished a Valid Section 6324 Special Lien

When a personal representative elects to defer estate tax payments under 26 U.S.C. § 6166, he or she can furnish a special lien on certain property in favor of the United States. If the three requirements for a valid special lien under 26 U.S.C. § 6324A are met, the IRS must accept the special lien in lieu of a general lien under section 6324, 26 U.S.C. § 6324A(d)(4), and "the deferred amount . . . shall be a lien in favor of the United States on the section 6166 lien property." 26 U.S.C. § 6324A(a).

The first requirement to furnish a lien under section 6324A is for the personal representative to make an election. The Code of Federal Regulations states that "the election is made by applying to the Internal Revenue Service office where the estate tax is filed" before the tax and interest are paid in full. 26 CFR § 301.6324A-1(a). The government does not dispute that the timeliness requirement was met here. The regulations go on to state that the "application is to be a notice of election requesting the special lien . . . and is to be accompanied by the [Agreement to lien]." *Id.* The government has also not disputed that defendants made a notice of election requesting the special lien and that it was accompanied by the lien agreement document. Accordingly, this requirement was met.

The second requirement to furnish a lien under section 6324A is for the personal representative to file a proper agreement that contains (1) signatures by all parties having an interest in the property consenting to the lien, (2) decedent's name and Social Security number, (3) the amount of the lien, (4) the fair market value of the property subject to the lien on the date of decedent's death as well as on the date of the election, (5) the amount of encumbrances to the property on both dates, as above, (6) a clear description of the property subject to the lien, and (7) designation of an agent for the beneficiaries of the estate and parties consenting to the lien for all dealings with the IRS. 26 CFR § 301.6324A-1(b). It is undisputed that the Agreement to Special Lien Under IRC Section 6324A filed by the defendants in August 1997 met the above requirements. Although the government implies that the subsequent encumbrance of the Hotel stock in 1999 or 2000 creates a dispute that the defendants did not treat the stock as if was subject to a special lien, this is not a genuine dispute of material fact for two reasons. First, at the time the agreement was submitted to the IRS, defendants correctly noted that the stock was unencumbered. It only became encumbered several years after the agreement was filed. Second, special lien property is not required to start out as or remain unencumbered under section 6324A; in fact, section 6324A(b)(2)(B) anticipates that the initial valuation of lien property should take into account any encumbrances, and section 6324A(d)(3) provides instructions as to the priorities of security interests. Furthermore, the statute allows the IRS to accelerate the deferred payments if at any time it determines the value of the special lien property is not adequate. 26 U.S.C. § 6324A(d)(5). As a result, the fact that defendants subsequently used the Hotel stock as collateral does not invalidate the previous creation of a proper lien and the second requirement has been met.

The third and final requirement to furnish a lien under section 6324A is that the section 6166 lien property (i.e. the collateral) must satisfy the requirements of the statute. The statute requires the lien property to be an interest "in real and other property to the extent such interests can be expected to survive the deferral period, and are designated in the agreement." 26 U.S.C. § 6324A(b)(1). And, although the IRS cannot require the lien property to have more than a maximum value consisting of the deferred tax amount plus the required interest, the statute does not require the lien property to have a minimum value to create a special lien in the property. *Id.* at (b)(2). While the government does not dispute that the Hotel stock was properly designated in the agreement, it disputes whether the stock was expected to survive the deferral period and whether its value was sufficient. The court does not find that either claim is a genuine dispute of material fact and addresses them separately below.

(a) Survival

The government disputes the Report of Jeffrey S. Pickett, defendants' expert, as to the history of the business and its claim that the Hotel had been in operation for decades without interruption or financial stress, which supports the survivability of its stock. (Gov.'s Opp'n 9, Dkt. No. 135.) The government also claims that the internal memorandum statement of its agent, Ms. Girard, that "I have analyzed the security and feel a lien under IRC 6324A against the stock will adequately secure the liability **for the remainder of the IRC 6166 election**" is not binding on the government. (IRS Memo. dated Aug. 21, 1997; Dkt. No. 122-2, p. 13.) (Emphasis added.)

With respect to defendants' expert report, the court reiterates that while it is defendants' burden to come forth with evidence to support its motion for summary judgment, once they have done so, the burden shifts to the government to "set forth specific facts showing that there is a genuine issue for trial." *Sally Beauty Co.*, 304 F.3d at 971. After the court granted defendants' motion to submit its expert's report, it authorized the government to submit its own expert report. The government's expert report does not set forth any specific facts suggesting that the Hotel's financial stability or history were not as represented. (Expert Review Report of Don M. Drysdale, Dkt. No. 176-1.) In fact, the report states only that Mr. Pickett's report should have included additional information about facilities, organizational structure, management team, classes of equity interests and rights attached thereto, products or services offered, and strategy and future plans to assist the government in assessing risk. (*Id.* at 11-13.) The government argues that a jury could infer from its expert's report that the defendants failed to meet their burden to come forth with evidence supporting the survivability of the lien property. The court disagrees. Without specific facts showing a genuine dispute as to the parties' expectations about the survivability of the Hotel stock, it is the government who has failed to meet its burden.[14]

[14] Furthermore, as to survivability, the IRS Office of Chief Counsel has provided internal guidance that although

Perhaps more importantly, however, Ms. Girard's statement constitutes a party admission by the government that it had, in fact, evaluated the survivability of the Hotel stock for the duration of the deferral and found it to be adequate at the time it was offered. The government argues that an IRS agent's statement cannot bind the agency and for support refers the court to *Sidell v. Comm'r*, 225 F.3d 103, 111 (1st Cir. 2000); *Connecticut Gen. Life Ins. Co. v. Comm'r*, 177 F.3d 136, 145 (3d Cir. 1999); *Armco, Inc. v. Comm'r*, 87 T.C. 865, 867 (T.C. 1986); and *Honeywell, Inc. v. United States*, 661 F.2d 182, 185-86 (Ct. Cl. 1981). These cases, however, reference individual agent views about or interpretations of IRS regulations and policies. As a result, they do not apply here to Ms. Girard's statement about her factual

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> "[t]here is a risk that the Service may err in its conclusion [about the survivability of closely held stock] . . . Congress intended that the Service bear such a risk. Comm. on Ways and Means, 94th Cong., Background Materials on Federal Estate and Gift Taxation 302, (Comm. Print 1969) ("[t]he Government will not only permit the deferral of taxes, but will bear part of the risk that the illiquid asset may decline in value during the deferral period"). If Congress had intended that the Service be assured payment, Congress would have required that a bond be provided to the Service for deferred estate taxes.

IRS CCA 200747019 (IRS 2007). (Dkt. No. 122-1, p. 21.) Although letter rulings and memoranda such as this are not precedent, courts commonly rely on such statements because they "reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." *Estate of Roski v. Comm'r,* 128 T.C. 113, 120 (T.C. 2007)*; Thurman v. Comm'r*, T.C. Memo 1998-233 (T.C. 1998); *Hanover Bank v. Comm'r*, 369 U.S. 672, 686 (1962).

evaluation that the Hotel stock would survive the deferral period, which is neither a regulation nor a policy. As a result, Ms. Girard's admission persuades the court that there is no genuine dispute of fact that defendants met the survivability requirement for a special lien.

(b) Value

Although the parties' biggest apparent dispute about the special lien requirements is whether the value of the Hotel stock was sufficient, the court finds this dispute to be nonmaterial. First, section 6324A does not require a minimum value to be met for a special lien to arise. Taxpayer election of lien property expected to survive the deferral period and designated in an appropriate agreement "*shall be a lien* in favor of the United States on the section 6166 property." 26 U.S.C. § 6324A(a) (emphasis added). Thus, the government's contention that it properly rejected the lien property because of "uncertain market value" is not well taken. If the value of lien property is too low, is does not mean that the special lien did not arise, it just means that the government is under-secured. The government's remedy for insufficient value to secure deferred tax obligations is to accept a bond in the amount of the shortfall, 26 U.S.C. § 6324A(b)(3), or to require the addition of property to the special lien agreement. 26 U.S.C. § 6324A(d)(5). It is undisputed that rather than making such specific requests, the government instead purported to reject the Hotel stock as collateral. But, because section 6324A is a taxpayer election, nothing in the statute authorizes the government to reject the election. It must be consented to not by the government, but by "all parties having any interest on the property" that creates the lien, as it was here. 26 CFR § 301.6324A-1(b).

Furthermore, the court is not persuaded that the government's attempt to reject the stock was based on consideration of its value as opposed to consideration of its nature. As explained above, Ms. Girard's letters and memoranda constitute party admissions. Ms. Girard's rejection letter dated November 6, 1997 states "Thank you for the information you provided. As I stated, this District has not accepted closely held stock as security for the remainder of IRC 6166 elections." (Dkt. No. 122-2, p. 15.) After informing defendants that she had sought guidance from District Counsel, Ms. Girard went on to state that "They have advised our office that closely held stock should not be accepted as collateral by the Internal Revenue Service because the IRS can not sell stock at a public auction as it violates securities regulations." (*Id.*) A review of Ms. Girard's internal memorandum seeking guidance from District Counsel shows that she reported that "The four Smith children are offering 4,768 shares of stock giving the security pledged a value of $6,092,578" for an unpaid assessment of $1,889,970 and an amount of security required of $2,192,365.20. (*Id.*) She then stated that "I have analyzed the security **and feel a lien under IRC 6324A against the stock will adequately secure the liability** for the remainder of the IRC 6166 election." (Emphasis added.) Ms. Girard then went on to state that "The District does not have any IRC 6324A liens against stock" and asked for guidance regarding security consisting of stock in a closely held corporation. (*Id.*) Ms. Girard's concern, then, was not value, as she appeared to find it adequate, but rather the nature of the property.[15]

Nothing about the nature of closely held businesses permits rejection of the security by the IRS. The IRS has previously accepted special liens under section 6324A in closely held businesses. *IRS v. Skiba* (In re Roth), 301 B.R. 451 (W.D. Pa. 2003) (286 shares in closely held car dealership); *Center Heights Lumber Co. v. United States*, 1999 U.S. Dist. LEXIS 7495 (S.D. Ind. 1999) (1995 creation of 6324A lien on closely held stock). Nothing in the plain language of section 6324A provides a mechanism for the IRS to reject the section 6166 collateral if it meets the requirements of the statute. Furthermore, the title of section 6166 specifically contemplates acceptance of liens in closely held businesses: "Extension of time for payment of estate tax where estate consists largely of interest in closely held business." Case law discussing the purpose of section 6166 suggests that the government's argument that it cannot (or should not) accept stock in closely held businesses for special liens to secure taxes deferred under section 6166 is unsupported. *Roski,* 128 T.C. at 129-130 (stating that section 6166 was enacted because existing law was "inadequate to deal with the

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[15] The government also argues that Ms. Girard's follow-up letter dated January 20, 1998 is a discussion about the IRS's concerns about the fair market value of the closely held stock as opposed to a discussion of its nature. Even if the government is correct, a special lien in the Hotel stock offered by defendants' agreement still arose, and could not be rejected because the government failed in its obligation to value the stock at the time of the election and make a request for a specific amount of additional property or bond it believed it required as security.

liquidity problems experienced by estates in which a substantial portion of the assets consist of a closely held business."); *Estate of Bell v. Comm'r*, 928 F.2d 901, 902 (9th Cir. 1991) ("The purpose of section 6166 is to prevent the forced liquidation of closely held businesses because substantial estate taxes must be paid."). And, according to IRS Chief Counsel, the IRS must accept the collateral if it meets the requirements and has no authority to reject it because it prefers alternative collateral.[16] IRS CCA 2008030016 (IRS 2007). (Dkt. No. 122-1, p. 32.)

To the extent that the government's argument about the stock's value is not that the special lien did not arise, but rather that the discharge under section 2204 would not have automatically occurred had the lien been insufficient to cover the unpaid tax and interest, the court refers again to the applicable burden of proof. Defendants have presented evidence that at

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[16] Specifically, the memorandum states:

> If the three requirements under I.R.C. § 6324A are met, the I.R.C. § 6324A special lien arises and *the collateral must be accepted* by the Service. The Service does not have the authority to reject collateral proffered by the Estate on the grounds that it would be burdensome for the Service to determine the value. *Nor does the Service have the authority to reject collateral proffered by the Estate because the Service would prefer other collateral.* Congress gave the Service a very limited role in the creation of the I.R.C. § 6324A special lien: the Service determines whether the statutory requirements have been met. *If the statutory requirements have been met, the special estate tax lien arises under the statute and the Service must accept the Interest.*

IRS CCA 2008030016 (IRS 2007). (Emphases added.)

the time they applied for the special lien, the value of the offered stock was nearly triple the amount of unpaid tax and interest.[17] (Agreement to Special Lien Under IRC Section 6324A, Dkt. 122-2, p. 9.) Defendants have also presented Ms. Girard's party admission that the stock would "adequately secure the liability."[18] (Dkt. No. 122-2, p. 15.) In addition to this, the defendants have presented evidence from their expert witness that on the two relevant dates, the stock pledged as collateral was worth $4,710,000 as of June 2, 1992 and $5,800,000 at the time of the furnishing of the Special Lien Agreement on August 4, 1997. (*See* Dkt. No. 122 ¶ 18, pp. 10, 22; and Pickett Report (Ex. 10 thereto) at 032-038.) In response to this evidence, the government's expert, Mr. Drysdale, has only opined that Mr. Pickett overvalued the Hotel stock, but he has failed to provide his own valuation. Just as with the government's argument about survivability, the government argues that a jury could infer from Mr. Drysdale's report that the defendants failed to meet their burden to come forth with evidence supporting

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[17] The $1,273 value per share was based upon the settlement reached with the IRS in the tax court case in 1996.

[18] While Ms. Girard's January 20, 1998 letter subsequently raised questions about whether this value for purposes of the estate tax assessment was the appropriate value for security purposes, it never actually valued the stock. (Ltr. from Ms. Girard dated Jan. 20, 1998; Dkt. No. 122-2, pp. 19-20.) The IRS is the party with the duty to value the stock if it disagreed with defendants' valuation, and it failed to perform this duty. Neither is the court persuaded by the government's argument now that Ms. Girard's subsequent letter represents that she believed the stock had no value, or at least a value less than the amount of tax and interest owed.

the sufficiency of the value of the lien property. The court disagrees. Without specific contrary facts from which a jury could find that the stock value was less than the amount owed—and not just lower than Mr. Pickett's valuation—it is again the government who has failed to meet its burden to rebut the defendants' evidence. *MacPherson*, 98 F.3d at 1245 ("[M]ore than a mere "scintilla" of evidence is needed to create a genuine issue of material fact.").

For the foregoing reasons, the court finds that the three requirements for a valid special lien are met under 26 U.S.C. § 6324A. Therefore, the IRS had no discretion to reject the special lien, and that lien constitutes the bond required pursuant to the discharge statute. 26 U.S.C. § 2204. Consequently, Johnson and Smith's fiduciary liability as personal representatives of the Estate for the unpaid estate tax was discharged as a matter of law and the government's claim for fiduciary liability under 31 U.S.C. § 3713(b) is moot.

4. Statute of Limitations Expired on Contract Enforcement Claim

The court now turns to the government's claim seeking to enforce the terms of the Distribution Agreement against the defendants, which was raised for the first time in the government's Amended Complaint filed July 31, 2013.[19] (Am. Compl. 12, Dkt. No. 77.) The government claims that the December 31, 1992 agreement between Smith and Johnson in their

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[19] In the Amended Complaint, the contract enforcement claim is the government's fourth cause of action. (Dkt. No. 77.)

capacities as trustees of the Trust and personal representatives of the Estate and the four defendant beneficiaries is a contract to which they are third party beneficiaries. The government seeks one quarter of the unpaid estate tax and interest due from each beneficiary as a result of this language in the contract:

> A portion of the total federal estate tax upon the Estate of Anna Smith is being deferred and is the equal obligation of the BENEFICIARIES to pay as THE SAME becomes due. Likewise, if, upon audit, additional federal estate taxes . . . are found to be owing, the responsibility for any such additional taxes, interest or penalties will be borne equally by the BENEFICIARIES.[20]

(Agreement ¶ 6, p. 2; Dkt. No. 32-8.)

Defendants do not dispute that the Distribution Agreement is a contract and that the government is a third party beneficiary with rights under the agreement. Defendants argue, instead, that the government's rights are time barred due to the applicable six year state statute of limitations on contract claims. Utah Code. Ann. § 78B-2-309(2). The "statute of limitations ordinarily begins to run when the breach occurs." *Butcher v. Gilroy*, 744 P.2d 311, 313 (Utah Ct. App. 1987). When a party refuses to perform under a contract, the limitation period begins to run. *See S&G Inc. v. Intermountain Power Agency*, 913 P.2d

[20] Because the deceased beneficiaries have been dismissed from this case, at best the government's claim is for one quarter of the unpaid estate tax and interest due each from Smith and Johnson as the surviving beneficiary parties to the contract.

735, 740-41 (Utah 1996). The facts are undisputed. The deferred tax owing as a result of the section 6166 election was about $1.5 million, interest payments on which were paid until the Hotel's bankruptcy proceedings in 2002. At that time, Smith and Johnson requested a one year extension to pay the next estate tax installment due. When no payments were made thereafter, the IRS sent delinquent billing notices dated August 28 and December 2, 2003, the latter of which demanded payment by December 15, 2003 and stated that if payment was not received, "the whole balance of the account will be due immediately." It is undisputed that no payments were made and that the section 6166 payment extension defaulted as of December 15, 2003. When the beneficiaries failed to pay their respective shares of the tax due as of that date, each of them breached the Distribution Agreement. This breach, according to the defendants, initiated the running of the state statute of limitations for contracts that expired six years later on December 15, 2009. It is also undisputed, the court notes, that the IRS did not become fully aware of the Distribution Agreement and its terms until June 2005, when counsel for defendants sent a copy to the IRS. Even if the court uses June 2005 as the date triggering the running of the statute of limitations, without deciding that it must, it had expired no later than June 2011, which is two years prior to the government filing its Amended Complaint containing the breach of contract claims.

For its part, the government claims that the applicable statute of limitations is not the state statute of limitations for contracts, but the federal statute of limitations on collections of tax assessments pursuant to 26 U.S.C. § 6502.[21] (United States' Reply Mem. 18, Dkt. No. 146.) ("When the United States uses a state law remedy to collect taxes, its ability to do so is not governed or shortened by state procedural rules or state law limitations. Instead § 6502 of the Internal Revenue Code and any applicable federal extensions control limitations.") Upon review of the relevant case

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[21] Section 6502(a) provides the following limitations period as to collections after assessment of tax:

> (a) Length of period. Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) Within 10 years after the assessment of the tax, or
>
> (2) if
>
> (A) There is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into; or
>
> (B) There is a release of levy under section 6343 after such 10-year period, prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before such release.
>
> If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

law, the court concludes that the government is incorrect on the facts of this case.

The government points the court to *U.S. v. Summerlin*, a 1940 case where the United States was the assignee of a creditor's claim against the estate of a decedent. 310 U.S. 414 (1940). In *Summerlin*, the Supreme Court reversed a determination that a Florida state statute of limitations applied when the United States, acting in its governmental capacity, becomes entitled to a claim and asserts its claim in that right. *Id.* at 417. To foreclose any argument that § 6502(a) is not the relevant statute of limitations here, the government cites *U.S. v. Galletti* for the proposition that "the limitations period resulting from a proper assessment governs the extent of time for the enforcement of the tax liability." 541 U.S. 114, 123 (2004) (internal punctuation omitted) (citing *U.S. v. Updike*, 281 U.S. 489 (1930)). The Tenth Circuit followed these precedents in a case where the government sought to collect a tax assessment against the sole shareholder distributee of a now-defunct corporation taxpayer in *U.S. v. Holmes*, 727 F.3d 1230 (10th Cir. 2013). The shareholder defended on the basis of a Colorado state statute of limitations for collections by creditors of a dissolved partnership. *Id.* at 1232. The Tenth Circuit stated that determining "[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question," but that in *Holmes*, notwithstanding that the government was "invoking a provision of state law" to hold the shareholder accountable for the liability of the taxpayer corporation, the reality was that "the present suit, though not against the corporation but against its transferee to subject assets in his hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax." *Id.* at 1235. As a result, the Tenth Circuit determined that federal law, not the state statute of limitations, governed the time limit on collections enforcement. *Id.*

The court also located a 1965 Sixth Circuit case that appears to have applied *Summerlin* in circumstances factually similar to those at issue here. In *U.S. v. Parker House Sausage Co.*, 344 F.2d 787 (1965), defendant Parker House entered into a sales contract to purchase real estate subject to a tax lien for the seller's withholding taxes. The contract provided that the purchaser would assume and pay the tax liabilities. The government filed suit for payment of the tax as a third party beneficiary of the sales contract requiring Parker House as purchaser to pay the liability. Defendants pled the Michigan six-year statute of limitations for contracts as a defense, claiming that the government's action did not seek to enforce a tax liability against it (as it was not the taxpayer), but was instead a civil action for breach of contract and thus subject to the state statute of limitations. Without analysis, but citing to *Summerlin*, the Sixth Circuit rejected the defense and stated that "[t]he United States is not barred in an action brought to enforce its claim by a state statute of limitations." *Id.* at 788.

Based on a subsequent U.S. Supreme Court ruling, however, the court concludes that *Parker House* was decided incorrectly. In *U.S. v. California*, 507 U.S. 746 (1993), the Supreme Court indicated that a more robust analysis of the cause of action under which the government is proceeding is required before simply relying on the general assertion in *Summerlin* and related cases that the government is not bound by state statutes of limitations. *U.S. v. California* involved the government's attempt to recover taxes it paid that it alleges were wrongfully assessed against one of its private contractors under California law. The initial cause of action it asserted was a federal common law cause of action for "money had and received," an implied-in-law contract. *Id.* at 749. The Supreme Court first determined that the government did not have a federal cause of action for an implied contract because its position in the proceeding was essentially that of a subrogor of the private contractor's claims against California. *Id.* at 756. The private contractor's rights as subrogee had lapsed under the state statute of limitations and its claims were barred; thus, under traditional subrogation principles, the United States' claims would also be time barred. *Id.* The government argued that its claims were not limited by the state's statute of limitations on the basis, among other cases, of *Summerlin*'s statement that "[w]hen the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *Summerlin, supra,* at 417. The Supreme Court disagreed. It proceeded to distinguish *Summerlin* and the other cases relied on by the government on the basis that, first, in those cases the rights upon which the government were proceeding were "obtained by the Government through, or created by, a federal statute," and second, because in those proceedings, "[t]he government was proceeding in its sovereign capacity." *Id.* at 757. While the Court ultimately did not provide a definitive answer as to "[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations," it did determine that *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), provided guidance, namely, that if "the proof demonstrated that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor," then "[e]ven if the United States had a right to be free from the statute of limitations, it was deprived of no right on these facts." *U.S. v. California* at 758. In other words, "[b]ecause the Government waited until after the state statute of limitations had run against [its private contractor] to bring suit, the Government was not subrogated to a right free of a pre-existing infirmity." *Id.* at 758-59 (internal punctuation omitted).

U.S. v. California, then, requires this court to first evaluate the nature of the government's claim to determine whether it was obtained through or created by a federal statute, and second, to determine whether it is pursuing the claim in its sovereign capacity. Only if it meets those requirements has it acquired a right not barred by the state statute of limitations. Here, the parties all agree that the nature of the government's claim is as a third-party beneficiary to the contract entered into by Smith and Johnson as trustees of the Trust and personal representatives of the Estate with the four defendant children. While the underlying estate tax debt was created by federal statute, the government's breach of contract claim was not obtained through, or created by a federal statute, but by virtue of the government being an intended third-party beneficiary of a contract governed by state law. *See U.S. v. California* at 757. This fact means that the state statute of limitations period, not the federal limitations period, applies to the breach of contract claim. The government also cannot meet the second requirement to avoid being subject to the state statute of limitation, because to prevail in the breach of contract claim, it must proceed as a third-party beneficiary rather than in its sovereign capacity.[22] *See id.* As a third-party beneficiary, the government stands in the shoes of and "takes on the rights *and limitations*" that Smith and Johnson have as trustees and/or personal representatives to enforce the right of contribution against the beneficiaries, "one limitation being a time limit for filing civil suits." *See Flying Phoenix Corp. v. Creative Packaging Mach., Inc.*, 681 F.3d 1198, 1201 (10th Cir. 2012). *See also Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497 (Utah 1980) (stating that third party beneficiaries are not entitled to greater rights than the actual parties to a contract). In the language of *U.S. v. California*, the government

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[22] Notwithstanding the Tenth Circuit's language in *Holmes* that "the present suit . . . is in every real sense a proceeding in court to collect a tax," the facts here are distinguishable from those in *Holmes* and require a different result. *Holmes* at 1232. The difference is that the government in *Holmes* was acting in its sovereign capacity to collect a tax debt against the sole shareholder of a defunct corporation on the basis of a state law that permitted debt collections against shareholder distributees of dissolved corporations. *Id.* Here, the government cannot act on the contract claim *unless* it acts in the capacity of a third-party beneficiary as opposed to a sovereign.

acquired a right with a "pre-existing infirmity," i.e. the state statute of limitations. *U.S. v. California* at 759. After stepping into Smith and Johnson's shoes as a third-party beneficiary, the government then waited until after the limitations period had run to bring suit against the contract beneficiaries. Accordingly, the court finds that the government's claim for breach of contract is time barred.

5. The Government Cannot Foreclose Its Section 6321 Lien Against an Expired Asset

The government's final claim[23] seeks to foreclose its federal tax lien, which arose pursuant to 26 U.S.C. § 6321 at the time the tax was assessed, against any rights which were created by the Distribution Agreement. The parties each raise numerous arguments for and against this claim, but the court finds that two of them are both simple and dispositive.[24] First, pursuant to 26 U.S.C. § 2204(c), a special lien agreement that meets all of the requirements of section 6324A "shall be treated as the furnishing of bond." Following that, section 6325(a) provides that the IRS "shall issue a certificate of release of any lien imposed" within 30 days of being timely furnished an acceptable bond for the assessed tax. 26 U.S.C. § 6325. The court determined in section 3, *supra*, that defendants furnished a special lien

[23] This claim is asserted as the third cause of action in the Amended Complaint. (Dkt. No. 77.)

[24] As a result of finding that the following two points are dispositive on this issue, the court declines to address the parties' remaining arguments.

agreement that met all of the requirements of section 6324A and that the IRS was required to accept, and it is thus a bond under section 2204(c). As a result, the government's various tax liens under section 6321 were required to be released within 30 days of being furnished, and there is no section 6321 general lien remaining upon which the government can foreclose.

Second, although the government subsequently filed a Notice of Tax Lien in 2005 and a corrected notice in 2007, presumably because the Estate defaulted on its section 6166 payments, the government released these liens in both 2007 and in 2012, including after filing its lawsuit in this matter. While it is true that 26 U.S.C. § 6325(f)(2) authorizes the IRS to revoke lien releases—whether released mistakenly or not—the Revocations filed by the government were not effective. The 2007 Revocation was ineffective because it is undisputed that the government failed to file it in the Salt Lake County recorder's office as required by statute. 26 U.S.C. § 6325(f)(2)(B). The 2012 Revocation was ineffective because by the time the government properly refiled it in the Salt Lake county recorder's office on May 20, 2015, the asset it sought to attach—the Distribution Agreement—was no longer a "right to property" held by the taxpayer Estate because the statute of limitations allowing it to be enforced against defendants had expired.[25] The "property" or "right to property" to which a lien can attach is defined by state law. In *Gardner v. U.S.*, 34 F.3d 985 (10th Cir. 1994), the Tenth Circuit stated:

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[25] This conclusion also assumes that the government's failure to name the Estate as a party is not in itself fatal to its claim here.

> Additionally, although federal law delineates the standard for determining when a federal tax lien attaches, [t]he threshold question in this case, as in all cases where the Federal Government asserts its tax lien, *is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach.* In answering that question, both federal and state courts must look to state law, for it has long been the rule that in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.

(internal punctuation omitted) (emphasis added). The Tenth Circuit also observed "[i]t has been aptly noted that the Government's rights can rise no higher than those of the taxpayer to whom the property belongs. . . Moreover, the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out." *Id.* (internal punctuation omitted), *citing* 4 B. Bittker, *Federal Taxation of Income, Estates, and Gifts* paragraph 111.5.4, at 111-102 (1981); and *U.S. v. Rodgers*, 461 U.S. 677, 690-91 (1983). Here, because the taxpayer Estate's rights to enforce the Distribution Agreement had been long expired by 2015, the government is barefoot with respect to its section 6321 tax lien. There is nothing to which its 2015 Revocation or its newly filed 2015 Notice of Tax Lien could attach. Because the taxpayer Estate no longer has "property" or "rights to property" to which its lien could attach in

2015, the government's action to foreclose the lien against the Distribution Agreement must fail.[26]

CONCLUSION

For all of the foregoing reasons, the court GRANTS defendants' Motion to Reconsider (Dkt. No. 119), VACATES its previous grant of summary judgment on the government's Motion for Summary Judgment (Dkt. No. 87) and GRANTS summary judgment on defendants' Motion for Partial Summary Judgment (Dkt. No. 86) finding that the trustees of the Trust are not liable for the unpaid federal estate tax and interest under section 6324(a)(2) because Trust assets are included in the gross estate under section 2033.

In addition, the court GRANTS defendants' Motion for Summary Judgment (Dkt. No. 122) and finds that the trustees of the Trust were discharged from personal liability for the unpaid federal estate tax under section 2004 because they properly furnished a special lien under section 6324A.

The court previously granted in part the United States' Second Motion for Summary Judgment (Dkt.

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[26] 26 U.S.C. § 6322 provides that the government's section 6321 tax lien arises at the time the taxes are assessed and continues "until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time." Contrary to the government's position, the court finds that the language "or becomes unenforceable by reason of lapse of time" must have some meaning that precludes its ability to extend the lien indefinitely, in this case, at least 20 to 24 years from the date of assessment. The government had ample time during that period to protect its rights and failed to do so.

No. 117) on the Amended Complaint's first claim for relief that defendants are liable, pursuant to 26 U.S.C. § 6324(a)(2), for the unpaid estate tax liabilities to the extent of the proceeds they received as beneficiaries of Decedent's life insurance policies. The court now clarifies that because this decision dismisses defendants Barnwell and Devine from this action, the government's recovery is limited to life insurance proceeds received by defendants Smith and Johnson. The government should file a motion requesting judgment in the appropriate amount on this claim.

Finally, as to the remainder of the government's Second Motion for Summary Judgment (Dkt. No. 117), the court DENIES the remainder of the government's first claim for relief in the Amended Complaint for trustee or transferee liability under Section 6324(a)(2); finds MOOT the government's second claim for relief for fiduciary liability under 31 U.S.C. § 3713; DENIES the government's third claim for relief for foreclosure of federal tax lien against rights created by the Distribution Agreement; and DENIES the government's fourth claim for relief for breach of contract as a third party beneficiary to the Distribution Agreement. The Clerk of Court is directed to dismiss defendants Barnwell and Devine from this action and enter Judgment as above, with the exception of the court's partial grant of relief on plaintiff's first cause of action, which remains to be resolved by the court.

SO ORDERED this 1st day of December, 2016.

BY THE COURT:

/s/Clark Waddoups
Clark Waddoups
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH,
CENTRAL DIVISION

Case No. 2:11-cv-00087
Judge Clark Waddoups

[Filed July 29, 2013]

UNITED STATES OF AMERICA,	)
	)
Plaintiffs.	)
	)
v.	)
	)
MARY CAROL S. JOHNSON;	)
JAMES W. SMITH; MARIAN S.	)
BARNWELL; BILLIE ANN S.	)
DEVINE; and EVE H. SMITH	)
	)
Defendants.	)
	)

AMENDED MEMORANDUM
DECISION AND ORDER

INTRODUCTION

The United States has brought this action against Defendants for the collection of an estate tax deficiency owed by the estate of Anna S. Smith. Defendants have moved to dismiss the case pursuant to Federal Rule of

Civil Procedure 12(b)(6), arguing that the Government has failed to state a claim upon which relief can be granted. (Dkt. No. 31.) For the reasons discussed below, the court grants in part and denies in part Defendants' motion to dismiss.[1]

FACTUAL BACKGROUND

Anna S. Smith ("Decedent") died testate on September 2, 1991. She was survived by her children Mary Carol S. Johnson ("Johnson"), James W. Smith ("Smith"), Marian S, Barnwell ("Barnwell"), and Billie Ann S. Devine ("Devine"). The surviving children are the Decedent's Heirs and Defendants in this action.2 Prior to her death, the Decedent executed a Last Will and Testament and established the Anna Smith Family Trust (the "Trust"). Johnson and Smith are named as the personal representatives of the Decedent's Estate and are also the trustees of the Trust (hereinafter the "Personal Representatives" or "Trustees").

The Will directed the Personal Representatives to ensure that the Decedent's "debts, last illness, and funeral and burial expenses be paid as soon after [her] death as reasonably convenient." Will, ¶ II (Dkt. No. 32, Ex. A). While the Will did not expressly direct the Personal Representatives to pay any federal estate tax levied against the Estate, it stated that "claims against [the] estate" may be settled and discharged in the "absolute discretion of [the] Personal Representatives."

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[1] Pursuant to Federal Rule of Civil Procedure 54(b), this Amended Memorandum Decision and Order supersedes the court's previous memorandum decision issued on May 23, 2012. Only section III of the court's ruling has been amended.

Id. The Will finally directed that the "rest and residue" of the Estate be delivered to the Trustees to be added to the principal of the Trust and administered in accordance with the provisions of the trust agreement. *Id.* ¶ V.

The Trust was governed by the Second Amended Trust Agreement (the "Trust Agreement"). According to the Trust Agreement, the Trustees were to make certain specific distributions from the trust principal to several individuals, who are not parties to this suit, as soon as possible after the Decedent's death. Trust Agreement,[2] (Dkt. No. 32, Ex. B). The Trustees were also directed to

> pay any and all debts and obligations of the GRANTOR, the last illness, funeral, and burial expenses of the GRANTOR and any State and Federal income, inheritance and *estate taxes* which may then be owing or which may become due and owing as a result of the GRANTOR's death.

Id. (emphasis added). After these distributions had been made, the Trustees were to divide a third of the remaining trust corpus (not to exceed $1,000,000) into four equal parts to be distributed to four family limited partnerships one of which had been established for each of the Heirs. *Id*. at 4. Finally, the Trustees were

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[2] Eve H. Smith is the wife of James W. Smith. She also was named as a defendant in this matter. As discussed further below, the Government has failed to state a valid claim against her. The court therefore does not include her in its analysis of the liability of the other defendants.

directed to distribute the remaining principal and undistributed income of the trust equally to the Heirs. *Id*. at 4-5. The Heirs also received benefits valued at nearly $370,000 from several life insurance policies belonging to the Decedent.

In accordance with the Trust Agreement, the Trustees filed a federal estate tax return with the Internal Revenue Service ("IRS") on June 1, 1992. The return valued the Decedent's gross estate at $15,958,765, with a federal estate tax liability of $6,631,448. *See* United States Estate Tax Return (Dkt. No. 32, Ex. C). The bulk of the Estate consisted of 9,994 shares of stock in State Line Hotel, Inc. (the "Hotel") valued at $11,508,400. When the return was filed, the Trustees elected to defer payment of a portion of the federal estate tax liability.[3] The deferred tax liability was to be paid in ten annual installments beginning on June 2, 1997 and ending on June 2, 2006. After receiving the estate tax return, the IRS properly assessed the Estate for unpaid estate taxes on July 13, 1992.

On December 31, 1992, the Trustees and Heirs executed an agreement (the "Distribution Agreement") distributing all the remaining trust assets to the Heirs. *See* Agreement (Dkt. No. 32, Ex. G). With regard to the outstanding federal estate tax liability, the Distribution Agreement states as follows:

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[3] The Estate made this election pursuant to 26 U.S.C. § 6166(a). The provision allows an estate to defer paying part of its estate tax if more than thirty-five percent of an adjusted gross estate consists of an interest in a closely held business.

> 6. Liability for Taxes. Each of the BENEFICIARIES acknowledges that the assets distributed to him or her will accomplish a complete distribution of the assets of the Trust. A portion of the total federal estate tax upon the Estate of Anna Smith is being deferred and is the equal obligation of the BENEFICIARIES to pay as the same becomes due. Likewise, if, upon audit, additional federal estate taxes or Utah inheritance taxes are found to be owing, the responsibility for any such additional taxes, interest or penalties will be borne equally by the BENEFICIARIES.

Id. at ¶ 6.

On May 30, 1995 the IRS issued a Notice of Deficiency against the Estate, determining that the Hotel shares were worth $15,000,000 at the time of the Decedent's death. The adjusted valuation resulted in an alleged additional estate tax of $2,444,367. The Estate contested the Notice of Deficiency, and a settlement was ultimately reached where the Estate agreed to pay additional federal estate taxes in the amount of $240,381. Thus, the total federal estate tax was $6,871,829.

In January 2002, the Hotel filed for Chapter 11 bankruptcy in the state of Nevada, and shortly thereafter, the court approved the sale of all the Hotel's assets to a third party free and clear of all liens, claims, and encumbrances. The Heirs received no value for their Hotel shares, but each received $126,000 annually for signing a two-year non-compete agreement. The Heirs also have each reported losses in excess of $1,000,000 in connection with their ownership of the Hotel stock, which have been used to offset taxable income.

In 2003, the Estate defaulted on its federal estate tax liability, after having paid $5,000,000 of the total amount due. In 2005, the IRS sent a notice and demand for payment of the tax liability to the Estate and the Personal Representatives. Despite this notice and demand, the Personal Representatives have failed to fully pay the assessments made against the Estate. The IRS has made efforts to collect the taxes due through levies against the Estate, the Trust, and Defendants but has failed to yield any collections. The action currently before the court is a further attempt by the Government to collect the outstanding tax liability against the Estate.

LEGAL STANDARD

When evaluating a motion to dismiss under Rule 12(b)(6), the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996) (quotations and citations omitted). The court need not, however, consider allegations which are conclusory, or that "do not allege the factual basis" for the claim. *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995); *see also Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.").

Moreover, the court is not bound by a complaint's legal conclusions, deductions, and opinions couched as facts. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

Although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains "'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). Under this standard, a claim need not be probable, but there must be facts showing more than a "sheer possibility" of wrongdoing. *Id*.

ANALYSIS

I. PERSONAL LIABILITY UNDER 26 U.S.C. § 6234(a)(2)

The Government claims that each Heir is liable for the Estate tax pursuant to 26 U.S.C. § 6324(a)(2). Section 6324(a)(2) imputes personal liability for federal estate taxes to certain individuals who receive property from an estate at the time of a decedent's death. The first sentence of section 6324(a)(2) states:

> (2) Liability of transferees and others. If the estate tax imposed by chapter 11 is not paid when due, then 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*, who receives, or has on the date of the decedent's death, property included in the gross estate . . . to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax.

26 U.S.C. § 6324(a)(2) (2010) (emphasis added). The section lists six distinct categories of individuals who may be personally liable. The categories that have relevance in this case are "transferee," "trustee," and "beneficiary." For ease of reference, when the court collectively refers to these categories, the court will refer to them as a "Distributee" or "Distributees."

The Trustees admit they fall within the scope of section 6324(a)(2). Likewise, the Heirs admit that as beneficiaries of the Decedent's life insurance proceeds, they also fall within the scope of section 6324(a)(2) to the extent of the value of the insurance proceeds. The Heirs deny, however, that they became Distributees when property from the trust corpus was distributed to them. They therefore deny all liability arising from their status as trust beneficiaries.

A. Transferee Liability

i. Transferees Under Utah Law

The Government argues the Heirs are transferees based on common law and Utah law. Under common law, a transferee is anyone "to whom a property interest is conveyed." *Black's Law Dictionary* (7th ed.

1999). Utah law specifies "'the creation of a trust involves the transfer of property interests in the trust subject-matter to the beneficiaries.'" *See Banks v. Means*, 2002 UT 65, ¶ 9, 52 P.3d 1190, *overruled on other grounds by* Utah Code Ann. § 75-7-605 (2012) (quoting George G. Bogert & George T. Bogert, *Trusts & Trustees* § 998 (2d ed. rev. 1983)). Hence, according to the Government, the Heirs are transferees because a property interest in the Trust corpus was conveyed to them upon the mere creation of the Trust, and that property interest was held by the Heirs at the time of the Decedent's death.

The Supreme Court has held that courts should look to state law to determine the scope of liability under some other sections of the tax law. *See Comm'r v. Stern*, 357 U.S. 39, 44-45 (1958); *see also Bergman v. Comm'r*, 66 T.C. 887, 892 (1976); *Magill v. Comm'r*, 43 T.C.M. (CCH) 859 (1983). The same is not true for section 6324(a)(2). Instead, federal "courts have developed a uniform body of federal law defining the nature and effects of [section 6324(a)(2)] liability." *Schuster v. Comm'r*, 312 F.2d 311, 315 (9th Cir. 1962). This makes "an examination of state law unnecessary." *Magill*, 43 T.C.M. (CCH) 859; s*ee also Baptiste v. Comm'r*, 29 F.3d 1533, 1538 (11th Cir. 1994) (stating "section 6324(a)(2) is an independent federal source of liability[,] . . . so there is no reason to look to state law"); *Groetzinger v. Comm'r*, 69 T.C. 309, 316 (1977) ("[S]ection 6324 provides for the substantive liability of the transferees of estates with respect to the estate tax without regard to State law."). While the Government may be correct in its statement of Utah law, it is improper to rely on state law to define the term "transferee" for purposes of section 6324(a)(2). The court therefore concludes the Heirs did not become transferees merely because they were named as trust beneficiaries when the Trust was created.

ii. Timing of Trust Distributions

The Government also contends that the Heirs are personally liable for the Estate tax because they became transferees when property from the trust corpus was distributed to them. The Heirs argue they cannot be transferees because such property was not distributed to them immediately upon the date of the Decedent's death.

In *Englert v. Commissioner*, the United States Tax Court held that a transferee "can only mean the person who 'on the date of the decedent's death' receives or holds the property of a transfer made in contemplation of, or taking effect at, death."[4] 32 T.C. 1008, 1016 (1959). *See also Garrett v. Comm'r*, 67 T.C.M. (CCH) 2214, *41 (1994) ("We concluded that, for purposes of section 827(b), the term 'transferee' applied only to the person who on the date of decedent's death receives or holds the property of a transfer made in contemplation of, or taking effect at, death."). The *Englert* court recognized that the language of the statute could be read in multiple ways, *see Englert*, 32 T.C. at 1015-16, because it imputes personally liability to a person "who *receives*, or *has* on the date of the decedent's death,

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[4] *Englert* addressed section 827(b), which is the predecessor to section 6324(a)(2) and courts have consistently construed them as having the same substantive content. *See Garrett v. Comm'r*, 67 T.C.M. (CCH) 2214, *35 (1994).

property included in the gross estate," 26 U.S.C. § 6324(a)(2) (emphasis added). The syntax of the clause might suggest that Congress intended any transferee who receives property that had been in the gross estate, regardless of the time when he or she receives it, to be personally liable under section 6324(a)(2). The *Englert* court held, however, that "Congress used the word 'receives' to take care of property received by persons solely because of decedent's death such as insurance proceeds or property which was not in the possession of one of the persons described in section 827(b), . . . at the moment of the decedent's death, but who immediately received such property solely because of the decedent's death." *Id.* at 1016.

Where there is ambiguity as to the meaning of a tax statute, the court must resolve the issue in favor of the taxpayer. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 508 (1932) ("It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers."); *Duke Energy Natural Gas Corp. v. Comm'r*, 172 F.3d 1255, 1260 n.7 (10th Cir. 1999) ("[I]f doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer.") (quotations and citation omitted); *Higley v. Comm'r*, 69 F.2d 160, 162-63 (8th Cir. 1934) ("[T]he beneficiary is entitled to a favorable construction because liability for taxation must clearly appear."). Because section 6324(a)(2) may be interpreted in multiple ways, it is ambiguous and must be interpreted in favor of the Heirs. The court concludes that in order for a person to be a transferee under section 6324(a)(2), the person must have or receive property from the gross estate immediately upon the date of decedent's death rather than at some point thereafter.

iii. Trustees Received the Trust Corpus Upon Decedent's Death

Applying this interpretation, case law supports that personal liability for an estate tax does not typically extend to trust beneficiaries because it is the trustee who receives the property on the date of a decedent's death. *See Englert*, 32 T.C. at 1015 ("It was the 'trustee' of the 1941 trust who 'on the date of the decedent's death' held the property in question and not the [trust beneficiary]."); *Garrett*, 67 T.C.M. (CCH) 2214, *43 ("[The trustee] was personally liable for the payment of the Federal estate tax under section 6324(a)(2). It was the trustee who received the property included in the decedent's gross estate and it had the legal title, control, and possession of such property."); *see also Higley*, 69 F.2d at 162-63 ("[T]he application of 'transferee' to trust beneficiaries is at least doubtful and the statute in that respect ambiguous. In such a situation the beneficiary is entitled to a favorable construction because liability for taxation must clearly appear."); *United States v. Detroit Bank & Trust Co.*, No. 20937, 1962 U.S. Dist. LEXIS 5184, at *5 (E.D. Mich. Feb. 28, 1962) (holding that a beneficiary of a testamentary trust was not liable under section 6324(a)(2)).

The Government tries to distinguish *Englert*, *Garrett*, and *Higley* from the case at hand on the ground that the cited cases deal only with trust beneficiaries who were entitled to income from the trust on the date of the settlor's debt, as opposed to property belonging to the trust corpus itself.[5] While the distinction made by the Government is worthy of notice, there is nothing in the cited cases to suggest that such a distinction was relevant to the courts when determining the scope of liability imposed on transferees. In fact, none of the cases make the distinction at all.

The Government suggests that because the Eighth Circuit in *Higley* noted that trust beneficiaries are often only entitled to income from the trust, it was limiting its rationale to those circumstances. To the contrary, the Eighth Circuit specifically recognized that trust beneficiaries may be entitled to both the income and principal of the trust. *Higley*, 69 F.2d at 163 (noting that a trust beneficiary "may or may not" have "legal title, control, and possession as would afford opportunity to dispose of the property primarily liable for the payment of the tax"). The court held that even though some trust beneficiaries may have an interest in the trust corpus itself, Congress has chosen to avoid having to determine which trust beneficiaries could bear the burden of personal liability for an estate tax by "placing upon the trustee a personal liability." *Id*. at 163.

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[5] The government correctly characterizes the petitioners in *Englert*, *Garrett*, and *Higley* as income beneficiaries, rather than principal beneficiaries, of the trusts in question. However, at least one district court has found it appropriate to extend the same reasoning to principal beneficiaries as well. *See Detroit Bank & Trust Co.*, 1962 U.S. Dist. LEXIS 5184, at *5.

Like the petitioner in *Englert*, here the immediate right to the trust corpus belonged to the Trustees upon the Decedent's death, not to the Heirs. *See Englert*, 32 T.C. at 1010, 1015. Whatever inchoate property interest the Heirs may have received upon the death of the Decedent did not put them in a significantly better position to bear the burden of being personally liable for the estate tax than the trust beneficiaries in the cases cited above. Contrary to the suggestion of the Government, the Trust Agreement did not give the Heirs an "immediate right to the balance of the corpus of the trust." Pl.'s Opp'n to Mot. to Dismiss, 15 (Dkt. No. 39).[6] Instead, the Trustees were required to pay the expenses, debts, and obligations of the Decedent, including any federal estate tax obligation, prior to any distribution of the trust property to the Heirs. *See* Trust Agreement, 2 (Dkt. No. 32, Ex. B). In addition, the Trust Agreement directed the Trustees to make several substantial distributions to specified third parties and to four family partnerships prior to distributing any property to the Heirs. *Id*. at 2-4.

Only after the debts and obligations of the Estate were satisfied, and the specific distributions were made, were the Trustees directed to distribute the "remaining principal and undistributed income" of the trust to the Heirs in equal shares. *Id*. at 4. It was not certain that the Heirs would receive any property under the Trust Agreement. Had the Trust corpus been insufficient to meet the debts and obligations of the

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[6] When referring to the page numbering of a party's brief, the court is referring to the number at the bottom of the memorandum rather than the number assigned by cm/ecf at the top of the page.

Estate and the specific distributions described in the Trust Agreement, the Heirs would have received nothing from the Trust. This supports the Heirs are not transferees.

iv. Subsequent Transferees

The Heirs final argument as to why they are not transferees pertains to the statutory construct of section 6324(a)(2). The above analysis addresses the first sentence of the section. The second sentence of the section addresses special estate tax liens, which are not at issue in this case. The second sentence is nevertheless relevant because it provides meaning about who a transferee is under the first sentence. The second sentence of section 6324(a)(2) states:

> Any part of such property transferred by (or *transferred by a transferee of*) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, *or transferee of any such person*, except any part transferred to a purchaser or a holder of a security interest.

26 U.S.C. § 6324(a)(2) (2010) (emphasis added).

The Heirs argue that because Congress referred to "transferees of transferees" in the second sentence of section 6324(a)(2) and not the first sentence, that such subsequent transferees were not intended to be liable under the first sentence. Case law supports this interpretation. *See Garrett*, 67 T.C.M. (CCH) 2214, at *41 (rejecting "liability-by-secondary-transfer argument" under section 6324(a)(2)); *Englert*, 32 T.C. at 1016.

While it is conceivable that a "transferee" in the first sentence could be defined to mean an initial transferee of a decedent and any subsequent transferees, such a construction would render references to the "transferees of any such person" in the second sentence of the statute superfluous. Courts favor interpreting the terms of a statute so as to avoid rendering any terms or phrases superfluous. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.") (quotations and citation omitted); *Moskal v. United States*, 498 U.S. 103, 109 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute.") (quotations and citations omitted); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("[A] statute should be interpreted so as not to render one part inoperative.") (quotations and citation omitted); *Lamb v. Thompson*, 265 F.3d 1038, 1051 (10th Cir. 2001) ("[I]t is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section.") (quotations and citations omitted).

Were the court to read the term "transferee" in the first sentence of section 6324(a)(2) to mean both initial and subsequent transferees, references to "transferees of any such person" in the second sentence would be meaningless and superfluous. Congress understood how to refer to a subsequent transferee when they enacted section 6324(a)(2). They did so in the second sentence of the statute at issue. If they intended "transferees of transferees" to be personally liable for an estate tax under the first sentence of the section, they would have made that clear using the same language they used in the second sentence. Because they did not use that language, it is not proper for this court to expand the meaning of the language that was used. The court therefore concludes that the term "transferee" in the first sentence of section 6324(a)(2) does not apply to subsequent transferees who receive property from a Distributee following a decedent's death. Accordingly, the Heirs are not transferees under section 6324(a)(2).

B. Beneficiaries

The Government also asserts that Defendants are "beneficiaries" under section 6324(a)(2). The Defendants concede they are beneficiaries of the Decedent's life insurance policies, and therefore liable for the value of the insurance proceeds distributed to them. They argue, however, that the term "beneficiary" should not be interpreted broadly to mean any recipient of property from the Decedent's gross estate. While the Government asserts that the more common and widely accepted meaning of "beneficiary" is "a person for whose benefit property is held in trust," Black's Law Dictionary (9th Ed. 2009), they do not contest the fact that multiple courts have interpreted "beneficiary" narrowly, such that it only applies to insurance policy beneficiaries. *Garrett*, 67 T.C.M. (CCH) 2214, at *39 ("[T]he personal liability imposed upon beneficiaries referred only to specific beneficiaries of life insurance."); *Englert*, 32 T.C. at 1014 ("[I]t is obvious the use of the word 'beneficiary' in this section applies only to insurance policy beneficiaries."); *Higley*, 69 F.2d at 162.

As the Tax Court outlined in *Garrett*, the legislative history of section 6324(a)(2) and its predecessors show that Congress was only referring to insurance beneficiaries when it used the term "beneficiary" in the statute. *See Garrett*, 67 T.C.M. (CCH) 2214, at *35-40. Section 827(b) of the Internal Revenue Act of 1939, a predecessor to section 6324(a)(2), states:

> if *insurance* passes under a contract executed by the decedent in favor of a specific *beneficiary* . . . then the . . . *beneficiary* shall be personally liable for such [estate] tax.

Internal Revenue Code, ch. 3, § 827(b), 53 Stat. 1, 128 (1939) (current version at 26 U.S.C. § 6324(a)(2) (2010)) (emphasis added). In 1942, Congress amended section 827(b) of the Internal Revenue Act of 1939, adopting language that is nearly identical to the language currently encoded in section 6324(a)(2). *See* Revenue Act of 1942, Pub. L. No. 77-753, sec. 411, § 827(b), 56 Stat. 798, 950 (1942). In making the amendment, a House Report accompanying the bill stated:

> Section 827(b), as it now appears in the Code, in imposing personal liability for the tax refers only to transfers in

> contemplation of death or intended to take effect in possession or enjoyment at or after death, and *life insurance in favor of a specific beneficiary.*

Englert, 32 T.C. at 1015 (quoting H.R. Rep. No. 77-2333 (1942)); s*ee also* S. Rep. No. 77-1631 (1942).

It is clear that the term "beneficiary" was only meant to refer to insurance beneficiaries under section 6324(a)(2) and not beneficiaries of a trust. Because all of the Heirs did receive proceeds from various life insurance policies held by the Decedent upon her death, they are each subject to personal liability under section 6324(a)(2) to the extent of the distributions they received from the policies.

The Government finally argues that if the personal liability assigned by section 6324(a)(2) did not extend to trust beneficiaries, endless abuse and estate tax evasion would ensue. These concerns appear overstated. There is no question that trustees are personally liable under section 6324(a)(2) when property included in a decedent's gross estate is transferred to a trust. Consequently, a trustee would have every incentive to ensure that an estate tax owed by the estate was paid prior to distributing all the assets of the trust. The trustee's potential liability should help curb the abuses envisioned by the Government.

C. Eve H. Smith

The Government asserts that Eve H. Smith "is sued because she was a beneficial transferee of certain assets distributed to her from the Estate through the

Trust and [as] a partner of the James W. Smith Family Limited Partnership." Complaint, ¶ 9 (Dkt. No. 2). It also asserts that Ms. Smith "is a beneficiary or transferee of the Estate because she received distributions of cash and other assets included in the Decedent's gross estate, personally" and as a partner of in two limited partnerships. *Id.* ¶ 32. Although the Government asserts that Ms. Smith received cash and assets, it does not identify any of them. Nor do the Will and Trust show that Ms. Smith received cash or assets. Furthermore, she was not a party to the Distribution Agreement. Finally, the assertion that Ms. Smith should bear liability because she was a partner of certain limited partnerships is an even more attenuated argument than that made against the Heirs and direct beneficiaries of the Trust.

During oral argument on the motion to dismiss, the court asked the Government to identify what evidence it had that Ms. Smith was a Distributee. The Government stated that it needed to conduct discovery to determine her involvement in the limited partnerships. The law is clear that a party "may not use discovery as a fishing expedition." *Anthony v. United States*, 667 F.2d 870, 880 (10th Cir. 1981); *see also Szymanski v. Benton*, 289 Fed. Appx. 315, 320-21 (10th Cir. 2008); *Martinez v. True*, 128 Fed. Appx. 714, 716 (10th Cir. 2005). Moreover, the Government did not sue the limited partnerships. It sued Ms. Smith in her individual capacity. The Government has therefore failed to state sufficient facts to show it has a cognizable claim against Ms. Smith at this stage of the litigation. Accordingly, Ms. Smith is hereby dismissed without prejudice.

D. Summary of Defendants' Liability Under Section 6324(a)(2)

As conceded, the Trustees fall within the scope of section 6324(a)(2) to the extent of the value of the property in the trust at the time of the Decedent's death. Furthermore, the Heirs are "beneficiaries" under section 6324(a)(2) to the extent of the value of the life insurance proceeds they received by virtue of the Decedent's death. Such beneficiary status does not extend to any other property the Heirs received under the Trust Agreement. Moreover, the Heirs do not meet the definition of "transferees" under section 6324(a)(2). Consequently, the defendants are not liable as *trust* beneficiaries or as transferees.

II. STATUTE OF LIMITATIONS

A. Tax Assessment Against an Estate

Although Defendants concede the Trustees and beneficiaries of the life insurance proceeds would otherwise be subject to liability under section 6324(a)(2), they nevertheless contend the Government is time-barred from pursuing a collection action against them.[7] To bring an action to collect an estate tax from a decedent's estate, the IRS must first assess the estate for the amount due. *See* 26 U.S.C. § 6501(a) (2012). The

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[7] Defendants likewise contend that even if Defendants were liable as transferees under section 6324(a)(2), the Government would be time-barred from pursing a claim against them. The court notes that its analysis about the statute of limitations applies regardless of whether a Distributee is as a trustee, beneficiary, or transferee.

assessment must be made within three years after the estate's tax return was filed. *Id.*

Following a timely assessment, the IRS can collect the estate tax by levy or by a proceeding in court if the levy or proceeding is initiated within ten years after the assessment. *See id.* § 6502(a). The statutes of limitations for assessment imposed by section 6501 and for collection imposed by section 6502 are suspended "for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court . . . and for 60 days thereafter." *Id.* § 6503(a)(1). Thus, when an estate makes an election to extend the time for payment of an estate tax, the statute of limitations is tolled during the extension period. *See id.* § 6503(d).

In this case, the Estate filed a tax return on June 1, 1992. The IRS timely assessed the Estate on July 13, 1992. Typically, the IRS would then have had ten years (that is until July 13, 2002) to collect the assessed taxes. This period, though, was extended when the Estate elected to defer payment pursuant to 26 U.S.C. § 6166(a). Under that section, an estate may choose to pay the tax liability over ten annual installments, with the first installment commencing five years after the deferral election is made. As a result, the statute of limitations may be tolled for as long as fifteen years from the date of election. The Estate elected this option on the same date it filed its tax return. Rather than tolling the statute of limitations until 2007, however, the statute commenced running again in 2003 when the Estate defaulted in making its annual payment. The Government therefore has until 2013 to commence an action against the Estate to collect the unpaid estate taxes. For purposes of this motion, Defendants do not dispute this conclusion. Mem. in Supp. of Mot. to Dismiss, 22 (Dkt. No. 32).

B. Tax Assessments Against a Distributee

i. Section 6901's Applicability

Notably, the present action is not against the Estate. It is against Distributees of the Estate, whom the Government has never assessed. Section 6901 of the Internal Revenue Code outlines the method and procedure for collecting taxes from transferees who received transferred assets from an estate. For purposes of section 6901, the term "transferee" is defined as "donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, also includes *any* person who, under section 6324(a)(2), is personally liable for any part of such tax." 26 U.S.C. § 6901(h) (emphasis added). The term "transferee" is therefore broader under section 6901 than it is under section 6324(a)(2), and it encompasses the Trustees and the life insurance beneficiaries in this case.

Section 6901(a) states that the method of assessing and collecting tax from a transferee shall be done "in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred." *Id.* § 6901(a). In other words, because a transferee's liability for estate tax is derived from the transferor estate, courts will look to the tax rules that govern the estate when determining liability of the transferee. *See McKowen v. IRS*, 370 F.3d 1023, 1026-27 (10th Cir. 2004). The section therefore implies that to collect tax liability from the Trustees and life insurance beneficiaries, the Government must first have assessed them in the same manner it assessed the Estate. Section 6901(a) further provides that for initial transferees, which the Trustees and beneficiaries are in this case, "[t]he period of limitations for *assessment* of any such liability of a transferee . . . shall be . . . within 1 year after the expiration of the period of limitation for *assessment* against the transferor." 26 U.S.C. § 6901(c) (emphasis added).

Upon an initial reading, section 6901 appears to mandate how the IRS may assess and collect taxes from those personally liable under section 6324(a)(2). The Tenth Circuit, however, has stated that section 6901 is only one method of collecting against transferees because "the collection procedures of § 6901 are cumulative and alternative - - not exclusive or mandatory." *United States v. Russell*, 461 F.2d 605, 607 (10th Cir. 1972) (citations omitted). As a result, "an individual assessment under 26 U.S.C. § 6901 is not a prerequisite to an action to impose transferee liability under 26 U.S.C. § 6324(a)(2)." *United States v. Geniviva*, 16 F.3d 522, 525 (3d Cir. 1994).

Stated differently, the Government can elect whether to bring an action under section 6324(a)(2) or section 6901. If it elects to bring it under section 6324(a)(2), it is not subject to the limitation period stated in section 6901. Instead, section 6502's limitation period applies. *United States v. Russell*, No. KC-2953, 1974 U.S. Dist. LEXIS 6241, at *7-8 (D. Kan. Oct. 17, 1974) (unpublished), *aff'd*, 532 F.2d 175 (10th

Cir. 1976) (stating "§ 6502 is the applicable statute of limitations to actions brought under § 6324(a)(2)"). The effect of this election is that the Government can bring an action against a Distributee at any time during the limitations period for collecting against an estate, even where the Government has not made a timely assessment against the person pursuant to section 6901(c). *See Geniviva*, 16 F.3d at 525; *United States v. Botefuhr*, 309 F.3d 1263, 1281 (10th Cir. 2002) ("[I]f an action could be timely commenced against a donor under the provisions of § 6501 and § 6502, an action against the donee under § 6324(b)[8] will be considered timely.").

ii. Section 6503 Interaction with Section 6901

Defendants acknowledge the Tenth Circuit's interpretation of the statute, but they nevertheless contend the law is distinguishable, as applied to them, because the Tenth Circuit has never expressly extended its interpretation to apply to section 6166 deferrals. According to Defendants, when the Estate made a section 6166(a) election, and thus tolled section 6502's limitation period, section 6901 became mandatory and exclusive. To support its argument, Defendants cite to section 6503. Section 6503(d) tolls the statute of limitations for collecting an estate tax

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[8] Section 6324(b) imposes personal liability for an overdue gift tax on donees to the extent of the value of a gift they received. Courts have determined the personal liability imposed by section 6324(a)(2) and section 6324(b) to be *in pari materia*, and that the two subsections should be construed together. *See Botefuhr*, 309 F.3d at 1276 n. 9 (citing *Estate of Sanford v. Comm'r*, 308 U.S. 39, 44 (1939) (other citations omitted)).

"for the period of any extension of time for payment granted under [section 6166]." 26 U.S.C. § 6503(d). Section 6503(k)(3) includes a cross reference that states, "For suspension in case of . . . [c]laims against transferees and fiduciaries, see chapter 71." Chapter 71 of the Internal Revenue Code includes section 6901 through section 6905. Section 6901 is the only section in chapter 71 that addresses any tolling provisions for collecting against a transferee. Thus, Defendants argue that when the Estate elected to defer paying taxes under section 6166(a), section 6503 mandated that the IRS follow the rules under section 6901 rather than 6324(a)(2) for collecting taxes against them.

As previously discussed, section 6901 requires that a transferee be assessed "within 1 year after the expiration of the period of limitation for assessment against the transferor," and provides for a suspension of the period of limitations on assessment for any "period during which the Secretary is prohibited from making the assessment." 26 U.S.C. § 6901(c)(1), (f). Therefore, according to Defendants, the Government is barred from bringing an action against them under section 6324(a)(2) because the assessment period imposed by section 6901 has run.

Interpreting section 6503 to mean that section 6901 becomes mandatory when a section 6166(a) election is made would yield an anomalous result. In an ordinary case, where a section 6166(a) election is *not* made, the Government may bring a collection action against a section 6324(a)(2) Distributee as long as an action may be brought against the estate itself. Assuming a timely assessment was made against the estate, and no other deferrals occurred, a collection action could be brought against a Distributee up to thirteen years after the estate tax return was filed.[9] This is true regardless of whether the Distributee has been independently assessed or not.

Under Defendant's theory, however, when a section 6166(e) election is made, section 6901 would require an independent assessment of a Distributee within four years of the filing of the estate tax return. If no assessment were made against the Distributee, the Government would be barred from bringing a collection action from that point forward. There is no reason, and Defendants have offered no reason, to suspect that Congress intended a section 6324(a)(2) Distributee, who has not been independently assessed, to be subject to a collection action for up to thirteen years in an ordinary case, but only four years where a section 6166(e) election is made.

Furthermore, Defendants reliance on a cross-reference is indicative of the weakness of their argument that section 6503(k)(3) makes section 6901 the mandatory method of collecting against a Distributee. Statutory cross-references are typically less helpful in conveying meaning than the substantive language of a statute. Indeed, nothing in the language of the cross-reference indicates that Congress had in

[9] Section 6501 requires the assessment to be made against the estate within three years of when the tax return was filed. Section 6502(a)(1) requires a collection action to be brought against a taxpayer within ten years after the tax assessment.

mind the situation currently facing the court when it adopted section 6503(k)(3).

iii. Section 6503 Tolling Provision

Next, Defendants argue that even if section 6503 does not make section 6901 mandatory, section 6503(d) should not be read to toll the limitations period for section 6324(a)(2) Distributees. Instead, section 6503(d) should be read only to toll the period for collecting the estate tax because section 6324(a)(2) is a derivative liability and not a tax itself. Section 6503(d) states:

> The running of the period of limitation for *collection of any tax imposed by chapter 11* shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

26 U.S.C. § 6503(d) (emphasis added). Chapter 11 is the section of the tax code that relates to the taxation of estates. Defendants are correct that section 6324(a)(2) makes Distributees liable for an estate tax, but such liability is not itself a tax. *See Baptiste v. Comm'r*, 29 F.3d 1533, 1542 (11th Cir. 1994) ("Baptiste's liability under section 6324(a)(2) . . . is not a tax liability, but is an independent personal obligation which . . . may be collected in a manner similar to that employed in collecting tax liabilities."); s*ee also United States v. Russell*, 532 F.2d 176 (10th Cir. 1976) ("*Russell II*") ("The government's suit is, in reality, no more than a simple action in debt."); c*f. Hamar v. Comm'r*, 42 T.C. 867, 877 (1964) (suggesting

that while transferee liability "is a liability for a tax," it "may not be a tax liability in the ordinary sense").

Again, however, Tenth Circuit precedent is clear that as long as the period of time is open for collecting against an estate, it is open for collecting against a section 6324(a)(2) Distributee. Thus, even if section 6503(d) does only toll the limitations period for collecting the estate tax, it nevertheless leaves open that period. Because it is undisputed that the period for collecting against the Estate has not run in this case, the IRS may still pursue collection against the Trustees and life insurance beneficiaries.

iv. Due Process

Finally, Defendants urge the court to adopt their reasoning based on principles of equity and due process. In *Russell II*, the Tenth Circuit cautioned the Government that failure to assess a Distributee may not always be excused simply because an estate received notice. *Russell*, 532 F.2d at 177. Moreover, in *United State v. Schneider*, the District of North Dakota rejected the holding in the *Russell* cases because it determined that adopting "the government's position denies taxpayers the fundamental due process that the assessment provisions of the Internal Revenue Code were meant to afford." No. A1-89-197, 1992 U.S. Dist. LEXIS 21588, at *2-3, 7 (D.N.D. June 8, 1992). Such concerns are enhanced when a section 6166(a) deferral could allow the Government to seek collection of an estate tax against a Distributee up to twenty-five years after an estate tax return was filed.

Hence, a question remains whether equity or due process can militate against collecting taxes from a Distributee. The court does not reach this issue, however, because the facts of this case support that Defendants had clear and early notice that the Estate's taxes had not been fully paid and that they may be personally liable. Defendants acknowledged this obligation in a binding contract. Due process is therefore not at issue. Nor do principles of equity demand that the risk Defendants undertook be shifted to the Government in this case. Accordingly, the court hereby denies Defendants' motion to dismiss the first cause of action against the Trustees and life insurance beneficiaries.

III. FIDUCIARY LIABILITY UNDER 31 U.S.C. § 3713

The Government's final claim is that Johnson and Smith, as personal representatives of the Estate, are liable for the Estate tax at issue, pursuant to 31 U.S.C. § 3713(b). Section 3713(b) states:

> A representative of a person or an estate . . . paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

31 U.S.C. § 3713(b) (2010). Consequently, when an estate is insolvent or has insufficient assets to pay its debts, a personal representative must give priority to the United States and pay that liability first. If it does not do so, the representative may be personally liable.

Because of the "statute's broad purpose of securing adequate revenue for the United States Treasury, courts have interpreted it liberally." *United States v. Coppola*, 85 F.3d 1015, 1020 (2d Cir. 1996). The statute has been applied even when a distribution from an estate "is not, strictly speaking, the payment of a debt." *Id.* "Thus, if an executor . . . distributes any portion of the estate before all of its tax is paid, he or she is personally liable, to the extent of the payment or distribution, for so much of the tax that remains due and unpaid." *United States v. First Midwest Bank/Illinois, N.A.*, No. 94-C-7365, 1997 U.S. Dist. LEXIS 16913, at *56 (N.D. Ill. Oct. 27, 1997) (quotations and citation omitted) (hereinafter "*First Midwest*").

Here, Johnson and Smith admit they distributed assets from the Estate prior to satisfying the Government's tax claim. They contend, however, that they are not personally liable because the Estate had sufficient assets to pay the tax at the time the distributions were made. Johnson and Smith point to the Distribution Agreement to support their contention because the Heirs agreed, under that document, to pay the Estate tax as it became due. Since the Estate had this "right of contribution" from the Heirs, Johnson and Smith claim this constitutes a sufficient asset for them to avoid liability. They cite *Schwartz v. Commissioner of Internal Revenue*, 560 F.2d 311 (8th Cir. 1977) to support their contention.

In *Schwartz*, the Tax Court had evaluated the assets and liabilities of an estate and concluded that the estate was insolvent at the time the executor made distributions from it. When discussing the estate's liabilities, the Tax Court failed to account for the right of contributions from third parties for the payment of notes owed by the estate. Third parties had made payments on the notes, so "the right of contribution was of some value." *Id.* at 317. In that context, the Eighth Circuit stated, "[i]t is well settled that the obligation of a third party, which the estate has agreed to pay or has given collateral for, is a liability of the estate with any right of contribution from the third party representing an asset of the estate." *Id.*

Contrary to this rule, the Tax Court had counted the notes as an obligation of the estate, but failed to offset that liability by the third parties' contributions to pay off that liability. *Id.* The Eighth Circuit therefore reversed the Tax Court because it found the court had "both understated the amount of the estate's assets and overstated the amount of its liabilities." *Id.* at 317. Notably, the estate did not assume the liabilities in an effort to divest itself of all assets. When the estate assumed the liabilities, it also received the third party contributions. Moreover, the estate had recourse against the third parties for payment on the notes.

In contrast, the Distribution Agreement states that most of the assets of the estate had already been transferred before the agreement was ever entered. The remaining assets consisted of about $523,016.90 in cash; a note for $18,500; and real estate valued at $199,170 for estate tax purposes. Distribution Agreement, at 1. Rather than applying these assets to the tax liability, Johnson and Smith distributed the assets to themselves and two relatives, with the acknowledgment that the distribution would "accomplish a complete distribution of the assets of the Trust." *Id.* ¶ 6. Even payments on the note were distributed to the Heirs and not the Estate.

Furthermore, the Distribution Agreement is ambiguous as to whether the Estate was a party and had recourse against the Beneficiaries as third party contributors. Although the Distribution Agreement stated that Johnson and Smith were acting as Trustees and Personal Representatives, the document was signed by them only as Trustees and Beneficiaries. They did not sign as Personal Representatives of the Estate. Thus, it is not clear whether the Estate has the right to enforce the Distribution Agreement or whether only Johnson and Smith have the right to enforce the agreement.

If the Estate does not have the right to enforce the Distribution Agreement, then the agreement may be properly interpreted as a "hold harmless agreement" to protect Johnson and Smith, as Trustees, from personal tax liability should the Heirs fail to pay the estate tax. This uncertainty creates an issue of fact that must be further developed and dismissing the claim under Rule 12(b)(6) would be improper because all factual inferences must be drawn in favor of the Government. Finally, even though the agreement states the Heirs would bear the responsibility to pay the taxes, this is not the "right of contribution" contemplated by *Schwartz*. Indeed, other courts have found such agreements to be immaterial when determining liability under section 3713(b).

In *United States v. Coppola*, 85 F.3d 1015 (2d Cir. 1996), an estate had been assessed estate taxes. Rather than paying the estate taxes, an executor distributed the estate's assets to himself and two other relatives. As part of the distribution, the parties entered into an agreement that required each of them "to pay any estate taxes due in proportion to the value of the assets each received." *Id.* at 1017. Nevertheless, the trial court held that the executor was personally liable because the distributions depleted the estate's assets in violation of section 3713(b). *Id.* at 1018. The Second Circuit agreed. *Id.* at 1020.

Similarly, in *First Midwest*, an executor argued it was not personally liable because it had been a party to a settlement agreement wherein an heir had assumed responsibility to pay the outstanding estate taxes. *First Midwest*, 1997 U.S. Dist. LEXIS 16913, at *17-18. When the heir failed to pay the taxes, the Government brought an action against the executor. The executor argued the settlement agreement had released the executor from liability because it had made "adequate provision for the payment of the taxes." *Id.* at *58. The court disagreed. Moreover, it noted that "[n]o other court has found under any circumstance that such an agreement relieves an executor of liability for unpaid taxes." *Id.* at *58-59. The court also stated that the duty to pay estate taxes was not delegable under section 2002. *Id.* at *53 (citation omitted). Previously this court addressed this duty to pay estate taxes and stated that insolvency is viewed from the perspective of whether the estate impermissibly attempted to delegate tax obligations. It is unnecessary, however, for this court to determine whether the obligation of the

Estate to pay taxes could properly be delegated by the fiduciaries in this case.

There remains a factual dispute for the fact finder to determine whether the Distribution Agreement is a viable asset sufficient in value to offset liabilities and whether the Distribution Agreement provided the Estate with proper recourse to enforce payment of estate taxes. If the Distribution Agreement leaves the Estate with insufficient assets, then the liabilities would exceed the assets of the Estate and it would be considered insolvent according to a "balance sheet" test. Thus, the Government has made a plausible claim that the Estate was rendered insolvent by the Distribution Agreement, which is all that is necessary to survive a Rule 12(b)(6) motion to dismiss.

In this case, the individuals who distributed the Estate's assets accepted the risk that the Heirs may fail to pay the tax. Now that the risk has been realized, the Government may proceed on its claim against the Personal Representatives. Because the Government has stated a cognizable claim under section 3713(b),[10] the court denies the motion to dismiss this cause of action.

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[10] In a footnote, Defendants argue the Government's section 3713(b) claim must be limited in scope because the Complaint only asserts a claim against Johnson and Smith in their capacity as personal representatives and not as trustees. Because this argument has not been fully developed, the court will not address it as this time. The court notes, however, that the Government has been put on notice about this potential deficiency.

CONCLUSION

For the reasons stated above, the court hereby GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss.[11] The court dismisses Eve H. Smith without prejudice. Additionally, the court dismisses any action against the remaining Defendants as transferees or *trust* beneficiaries under section 6324(a)(2). The court denies the motion to dismiss the first cause of action, however, against the Trustees and against the life insurance beneficiaries to the extent of the value they received under the insurance policies. The court also denies the motion to dismiss the second cause of action.

DATED this 29th day of July, 2013.

BY THE COURT:

/s/Clark Waddoups
Clark Waddoups
United States District Judge

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[11] Dkt. No. 31.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I

Article I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

U.S. Const. amend. V

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C. Title 26, §2033. Property in which the decedent had an interest

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

U.S.C. Title 26, §2035. Adjustments For Certain Gifts Made Within 3 Years Of Decedent's Death

(a) Inclusion of certain property in gross estate. --If--

(1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death, and

(2) the value of such property (or an interest therein) would have been included in the decedent's gross estate

under section 2036 , 2037 , 2038 , or 2042 if such transferred interest or relinquished power had been retained by the decedent on the date of his death, the value of the gross estate shall include the value of any property (or interest therein) which would have been so included.

(b) Inclusion of gift tax on gifts made during 3 years before decedent's death. --The amount of the gross estate (determined without regard to this subsection) shall be increased by the amount of any tax paid under chapter 12 by the decedent or his estate on any gift made by the decedent or his spouse during the 3-year period ending on the date of the decedent's death.

(c) Other rules relating to transfers within 3 years of death. --

(1) In general. --For purposes of--

(A) section 303(b) (relating to distributions in redemption of stock to pay death taxes),

(B) section 2032A (relating to special valuation of certain farms, etc., real property), and

(C) subchapter C of chapter 64 (relating to lien for taxes), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.

(2) Coordination with section 6166. --An estate shall be treated as meeting the 35 percent of adjusted gross estate requirement of section 6166(a)(1) only if the

estate meets such requirement both with and without the application of subsection (a).

(3) Marital and small transfers. --Paragraph (1) shall not apply to any transfer (other than a transfer with respect to a life insurance policy) made during a calendar year to any donee if the decedent was not required by section 6019 (other than by reason of section 6019(2)) to file any gift tax return for such year with respect to transfers to such donee.

(d) Exception. --Subsection (a) and paragraph (1) of subsection (c) shall not apply to any bona fide sale for an adequate and full consideration in money or money's worth.

(e) Treatment of certain transfers from revocable trusts. --For purposes of this section and section 2038, any transfer from any portion of a trust during any period that such portion was treated under section 676 as owned by the decedent by reason of a power in the grantor (determined without regard to section 672(e)) shall be treated as a transfer made directly by the decedent.

U.S.C. Title 26, §2036. Transfers with retained life estate

(a) General rule

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) Voting rights

(1) In general

For purposes of subsection (a)(1), the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property.

(2) Controlled corporation

For purposes of paragraph (1), a corporation shall be treated as a controlled corporation if, at any time after the transfer of the property and during the 3-year period ending on the date of the decedent's death, the decedent owned (with the application of section 318), or had the right (either alone or in conjunction with any person) to vote, stock possessing at least 20 percent of the total combined voting power of all classes of stock.

(3) Coordination with section 2035

For purposes of applying section 2035 with respect to paragraph (1), the relinquishment or cessation of voting rights shall be treated as a transfer of property made by the decedent.

(c) Limitation on application of general rule

This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

U.S.C. Title 26, §2038. Revocable transfers

(a) In general

The value of the gross estate shall include the value of all property—

(1) Transfers after June 22, 1936

To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3 year period ending on the date of the decedent's death.

(2) Transfers on or before June 22, 1936

To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power during the 3 year period ending on the date of the decedent's death. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph.

(b) Date of existence of power

For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

U.S.C. Title 26, §2042. Proceeds of life insurance

The value of the gross estate shall include the value of all property--

(1) *Receivable by the executor*. --To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) *Receivable by other beneficiaries.* --To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary. In

determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

U.S.C. Title 26, §2204. Discharge of fiduciary from personal liability

(a) General rule

If the executor makes written application to the Secretary for determination of the amount of the tax and discharge from personal liability therefor, the Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount the time for payment of which is extended under sections 6161, 6163, or 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

(b) Fiduciary other than the executor

If a fiduciary (not including a fiduciary in respect of the estate of a nonresident decedent) other than the executor makes written application to the Secretary for determination of the amount of any estate tax for which the fiduciary may be personally liable, and for discharge from personal liability therefor, the Secretary upon the discharge of the executor from personal liability under subsection (a), or upon the expiration of 6 months after the making of such application by the fiduciary, if later, shall notify the fiduciary (1) of the amount of such tax for which it has been determined the fiduciary is liable, or (2) that it has been determined that the fiduciary is not liable for any such tax. Such application shall be accompanied by a copy of the instrument, if any, under which such fiduciary is acting, a description of the property held by the fiduciary, and such other information for purposes of carrying out the provisions of this section as the Secretary may require by regulations. On payment of the amount of such tax for which it has been determined the fiduciary is liable (other than any amount the time for payment of which has been extended under section 6161, 6163, or 6166), and on furnishing any bond which may be required for any amount for which the time for payment has been extended, or on receipt by him of notification of a determination that he is not liable for any such tax, the fiduciary shall be discharged from personal liability for any deficiency in such tax thereafter found to be due and shall be entitled to a receipt or writing evidencing such discharge.

(c) Special lien under section 6324A

For purposes of the second sentence of subsection (a) and the last sentence of subsection (b), an agreement which meets the requirements of section 6324A (relating to special lien for estate tax deferred under section 6166) shall be treated as the furnishing of bond with respect to the amount for which the time for payment has been extended under section 6166.

(d) Good faith reliance on gift tax returns

If the executor in good faith relies on gift tax returns furnished under section 6103(e)(3) for determining the decedent's adjusted taxable gifts, the executor shall be discharged from personal liability with respect to any deficiency of the tax imposed by this chapter which is attributable to adjusted taxable gifts which—

(1) are made more than 3 years before the date of the decedent's death, and

(2) are not shown on such returns.

U.S.C. Title 26, §3505. Liability of third parties paying or providing for wages

(a) Direct payment by third parties

For purposes of sections 3102, 3202, 3402, and 3403, if a lender, surety, or other person, who is not an employer under such sections with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.

(b) Personal liability where funds are supplied

If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

(c) Effect of payment

Any amounts paid to the United States pursuant to this section shall be credited against the liability of the employer.

U.S.C. Title 26, §6166. Extension of time for payment of estate tax where estate consists largely of interest in closely held business

(a) 5-year deferral; 10-year installment payment

(1) In general

If the value of an interest in a closely held business which is included in determining the gross estate of a decedent who was (at the date of his death) a citizen or resident of the United States exceeds 35 percent of the adjusted gross estate, the executor may elect to pay part or all of the tax imposed by section 2001 in 2 or more (but not exceeding 10) equal installments.

(2) Limitation

The maximum amount of tax which may be paid in installments under this subsection shall be an amount which bears the same ratio to the tax imposed by section 2001 (reduced by the credits against such tax) as—

(A) the closely held business amount, bears to

(B) the amount of the adjusted gross estate.

(3) Date for payment of installments

If an election is made under paragraph (1), the first installment shall be paid on or before the date selected by the executor which is not more than 5 years after the date prescribed by section 6151(a) for payment of the tax, and each succeeding installment shall be paid on or before the date which is 1 year after the date prescribed by this paragraph for payment of the preceding installment.

(b) Definitions and special rules

(1) Interest in closely held business

For purposes of this section, the term "interest in a closely held business" means—

(A) an interest as a proprietor in a trade or business carried on as a proprietorship;

(B) an interest as a partner in a partnership carrying on a trade or business, if—

(i) 20 percent or more of the total capital interest in such partnership is included in determining the gross estate of the decedent, or

(ii) such partnership had 45 or fewer partners; or

(C) stock in a corporation carrying on a trade or business if—

(i) 20 percent or more in value of the voting stock of such corporation is included in determining the gross estate of the decedent, or

(ii) such corporation had 45 or fewer shareholders.

(2) Rules for applying paragraph (1)

For purposes of paragraph (1)—

(A) Time for testing

Determinations shall be made as of the time immediately before the decedent's death.

(B) Certain interests held by husband and wife

Stock or a partnership interest which—

(i) is community property of a husband and wife (or the income from which is community income) under the applicable community property law of a State, or

(ii) is held by a husband and wife as joint tenants, tenants by the entirety, or tenants in common, shall be treated as owned by one shareholder or one partner, as the case may be.

(C) Indirect ownership

Property owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries. For purposes of the preceding sentence, a person shall be treated as a beneficiary of any trust only if such person has a present interest in the trust.

(D) Certain interests held by members of decedent's family

All stock and all partnership interests held by the decedent or by any member of his family (within the meaning of section 267(c)(4)) shall be treated as owned by the decedent.

(3) Farmhouses and certain other structures taken into account

For purposes of the 35-percent requirement of subsection (a)(1), an interest in a closely held business which is the business of farming includes an interest in residential buildings and related improvements on the farm which are occupied on a regular basis by the owner or lessee of the farm or by persons employed by such owner or lessee for purposes of operating or maintaining the farm.

(4) Value

For purposes of this section, value shall be value determined for purposes of chapter 11 (relating to estate tax).

(5) Closely held business amount

For purposes of this section, the term "closely held business amount" means the value of the interest in a closely held business which qualifies under subsection (a)(1).

(6) Adjusted gross estate

For purposes of this section, the term, "adjusted gross estate" means the value of the gross estate reduced by the sum of the amounts allowable as a deduction under section 2053 or 2054. Such sum shall be determined on the basis of the facts and circumstances in existence on the date (including extensions) for filing the return of tax imposed by section 2001 (or, if earlier, the date on which such return is filed).

(7) Partnership interests and stock which is not readily tradable

(A) In general

If the executor elects the benefits of this paragraph (at such time and in such manner as the Secretary shall by regulations prescribe), then—

(i) for purposes of paragraph (1)(B)(i) or (1)(C)(i) (whichever is appropriate) and for purposes of subsection (c), any capital interest in a partnership and any non-readily-tradable stock which (after the application of paragraph (2)) is treated as owned by the decedent shall be treated as included in determining the value of the decedent's gross estate,

(ii) the executor shall be treated as having selected under subsection (a)(3) the date prescribed by section 6151(a), and

(iii) for purposes of applying section 6601(j), the 2-percent portion (as defined in such section) shall be treated as being zero.

(B) Non-readily-tradable stock defined

For purposes of this paragraph, the term "non-readily-tradable stock" means stock for which, at the time of the decedent's death, there was no market on a stock exchange or in an over-the-counter market.

(8) Stock in holding company treated as business company stock in certain cases

(A) In general

If the executor elects the benefits of this paragraph, then—

(i) Holding company stock treated as business company stock

For purposes of this section, the portion of the stock of any holding company which represents direct ownership (or indirect ownership through 1 or more other holding companies) by such company in a business company shall be deemed to be stock in such business company.

(ii) 5-year deferral for principal not to apply

The executor shall be treated as having selected under subsection (a)(3) the date prescribed by section 6151(a).

(iii) 2-percent interest rate not to apply

For purposes of applying section 6601(j), the 2-percent portion (as defined in such section) shall be treated as being zero.

(B) All stock must be non-readily-tradable stock

(i) In general

No stock shall be taken into account for purposes of applying this paragraph unless it is non-readily-tradable stock (within the meaning of paragraph (7)(B)).

(ii) Special application where only holding company stock is non-readily-tradable stock

If the requirements of clause (i) are not met, but all of the stock of each holding company taken into account is non-readily-tradable, then this paragraph shall apply, but subsection (a)(1) shall be applied by substituting "5" for "10".

(C) Application of voting stock requirement of paragraph (1)(C)(i)

For purposes of clause (i) of paragraph (1)(C), the deemed stock resulting from the application of subparagraph (A) shall be treated as voting stock to the extent that voting stock in the holding company owns directly (or through the voting stock of 1 or more other holding companies) voting stock in the business company.

(D) Definitions

For purposes of this paragraph—

(i) Holding company

The term “holding company” means any corporation holding stock in another corporation.

(ii) Business company

The term “business company” means any corporation carrying on a trade or business.

(9) Deferral not available for passive assets

(A) In general

For purposes of subsection (a)(1) and determining the closely held business amount (but not for purposes of subsection (g)), the value of any interest in a closely held business shall not include the value of that portion of such interest which is attributable to passive assets held by the business.

(B) Passive asset defined

For purposes of this paragraph—

(i) In general

The term “passive asset” means any asset other than an asset used in carrying on a trade or business.

(ii) Stock treated as passive asset

The term “passive asset” includes any stock in another corporation unless—

(I) such stock is treated as held by the decedent by reason of an election under paragraph (8), and

(II) such stock qualified under subsection (a)(1).

(iii) Exception for active corporations

If—

(I) a corporation owns 20 percent or more in value of the voting stock of another corporation, or such other corporation has 45 or fewer shareholders, and

(II) 80 percent or more of the value of the assets of each such corporation is attributable to assets used in carrying on a trade or business, then such corporations shall be treated as 1 corporation for purposes of clause (ii). For purposes of applying subclause (II) to the corporation holding the stock of the other corporation, such stock shall not be taken into account.

(10) Stock in qualifying lending and finance business treated as stock in an active trade or business company

(A) In general

If the executor elects the benefits of this paragraph, then—

(i) Stock in qualifying lending and finance business treated as stock in an active trade or business company

For purposes of this section, any asset used in a qualifying lending and finance business shall be treated as an asset which is used in carrying on a trade or business.

(ii) 5-year deferral for principal not to apply

The executor shall be treated as having selected under subsection (a)(3) the date prescribed by section 6151(a).

(iii) 5 equal installments allowed

For purposes of applying subsection (a)(1), “5” shall be substituted for “10”.

(B) Definitions

For purposes of this paragraph—

(i) Qualifying lending and finance business

The term “qualifying lending and finance business” means a lending and finance business, if—

(I) based on all the facts and circumstances immediately before the date of the decedent’s death, there was substantial activity with respect to the lending and finance business, or

(II) during at least 3 of the 5 taxable years ending before the date of the decedent’s death, such business had at least 1 full-time employee substantially all of whose services were the active management of such business, 10 full-time, nonowner employees substantially all of whose services were directly related to such business, and $5,000,000 in gross receipts from activities described in clause (ii).

(ii) Lending and finance business

The term “lending and finance business” means a trade or business of—

(I) making loans,

(II) purchasing or discounting accounts receivable, notes, or installment obligations,

(III) engaging in rental and leasing of real and tangible personal property, including entering into leases and purchasing, servicing, and disposing of leases and leased assets,

(IV) rendering services or making facilities available in the ordinary course of a lending or finance business, and

(V) rendering services or making facilities available in connection with activities described in subclauses (I) through (IV) carried on by the corporation rendering services or making facilities available, or another corporation which is a member of the same affiliated group (as defined in section 1504 without regard to section 1504(b)(3)).

(iii) Limitation

The term "qualifying lending and finance business" shall not include any interest in an entity, if the stock or debt of such entity or a controlled group (as defined in section 267(f)(1)) of which such entity was a member was readily tradable on an established securities market or secondary market (as defined by the Secretary) at any time within 3 years before the date of the decedent's death.

(c) Special rule for interest in 2 or more closely held businesses

For purposes of this section, interest in 2 or more closely held businesses, with respect to each of which there is included in determining the value of the decedent's gross estate 20 percent or more of the total value of each such business, shall be treated as an interest in a single closely held business. For purposes of the 20-percent requirement of the preceding sentence, an interest in a closely held business which represents the surviving spouse's interest in property held by the decedent and the surviving spouse as community property or as joint tenants, tenants by the entirety, or tenants in common shall be treated as having been included in determining the value of the decedent's gross estate.

(d) Election

Any election under subsection (a) shall be made not later than the time prescribed by section 6075(a) for filing the return of tax imposed by section 2001 (including extensions thereof), and shall be made in such manner as the Secretary shall by regulations prescribe. If an election under subsection (a) is made, the provisions of this subtitle shall apply as though the Secretary were extending the time for payment of the tax.

(e) Proration of deficiency to installments

If an election is made under subsection (a) to pay any part of the tax imposed by section 2001 in installments and a deficiency has been assessed, the deficiency shall (subject to the limitation provided by subsection (a)(2)) be prorated to the installments payable under subsection (a). The part of the deficiency so prorated to any installment the date for payment of which has not arrived shall be collected at the same time as, and as a part of, such installment. The part of the deficiency so prorated to any installment the date for payment of which has arrived shall be paid upon notice and demand from the Secretary. This subsection shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(f) Time for payment of interest

If the time for payment of any amount of tax has been extended under this section—

(1) Interest for first 5 years

Interest payable under section 6601 of any unpaid portion of such amount attributable to the first 5 years after the date prescribed by section 6151(a) for payment of the tax shall be paid annually.

(2) Interest for periods after first 5 years

Interest payable under section 6601 on any unpaid portion of such amount attributable to any period after the 5-year period referred to in paragraph (1) shall be paid annually at the same time as, and as a part of, each installment payment of the tax.

(3) Interest in the case of certain deficiencies

In the case of a deficiency to which subsection (e) applies which is assessed after the close of the 5-year period referred to in paragraph (1), interest attributable to such 5-year period, and interest assigned under paragraph (2) to any installment the date for payment of which has arrived on or before the date of the assessment of the deficiency, shall be paid upon notice and demand from the Secretary.

(4) Selection of shorter period

If the executor has selected a period shorter than 5 years under subsection (a)(3), such shorter period shall be substituted for 5 years in paragraphs (1), (2), and (3) of this subsection.

(g) Acceleration of payment

(1) Disposition of interest; withdrawal of funds from business

(A) If—

(i)(I) any portion of an interest in a closely held business which qualifies under subsection (a)(1) is distributed, sold, exchanged, or otherwise disposed of, or

(II) money and other property attributable to such an interest is withdrawn from such trade or business, and

(ii) the aggregate of such distributions, sales, exchanges, or other dispositions and withdrawals equals or exceeds 50 percent of the value of such interest, then the extension of time for payment of tax provided in subsection (a) shall cease to apply, and the unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Secretary.

(B) In the case of a distribution in redemption of stock to which section 303 (or so much of section 304 as relates to section 303) applies—

(i) the redemption of such stock, and the withdrawal of money and other property distributed in such redemption, shall not be treated as a distribution or withdrawal for purposes of subparagraph (A), and

(ii) for purposes of subparagraph (A), the value of the interest in the closely held business shall be considered to be such value reduced by the value of the stock redeemed.

This subparagraph shall apply only if, on or before the date prescribed by subsection (a)(3) for the payment of the first installment which becomes due after the date of the distribution (or, if earlier, on or before the day which is 1 year after the date of the distribution), there is paid an amount of the tax imposed by section 2001 not less than the amount of money and other property distributed.

(C) Subparagraph (A)(i) does not apply to an exchange of stock pursuant to a plan of reorganization described in subparagraph (D), (E), or (F) of section 368(a)(1) nor to an exchange to which section 355 (or so much of section 356 as relates to section 355) applies; but any stock received in such an exchange shall be treated for purposes of subparagraph (A)(i) as an interest qualifying under subsection (a)(1).

(D) Subparagraph (A)(i) does not apply to a transfer of property of the decedent to a person entitled by reason of the decedent's death to receive such property under the decedent's will, the applicable law of descent and distribution, or a trust created by the decedent. A similar rule shall apply in the case of a series of subsequent transfers of the property by reason of death so long as each transfer is to a member of the family (within the meaning of section 267(c)(4)) of the transferor in such transfer.

(E) Changes in interest in holding company

If any stock in a holding company is treated as stock in a business company by reason of subsection (b)(8)(A)—

(i) any disposition of any interest in such stock in such holding company which was included in determining the gross estate of the decedent, or

(ii) any withdrawal of any money or other property from such holding company attributable to any interest included in determining the gross estate of the decedent, shall be treated for purposes of subparagraph (A) as a disposition of (or a withdrawal with respect to) the stock qualifying under subsection (a)(1).

(F) Changes in interest in business company

If any stock in a holding company is treated as stock in a business company by reason of subsection (b)(8)(A)—

(i) any disposition of any interest in such stock in the business company by such holding company, or

(ii) any withdrawal of any money or other property from such business company attributable to such stock by such holding company owning such stock, shall be treated for purposes of subparagraph (A) as a disposition of (or a withdrawal with respect to) the stock qualifying under subsection (a)(1).

(2) Undistributed income of estate

(A) If an election is made under this section and the estate has undistributed net income for any taxable year ending on or after the due date for the first installment, the executor shall, on or before the date prescribed by law for filing the income tax return for such taxable year (including extensions thereof), pay an amount equal to such undistributed net income in liquidation of the unpaid portion of the tax payable in installments.

(B) For purposes of subparagraph (A), the undistributed net income of the estate for any taxable year is the amount by which the distributable net income of the estate for such taxable year (as defined in section 643) exceeds the sum of—

(i) the amounts for such taxable year specified in paragraphs (1) and (2) of section 661(a) (relating to deductions for distributions, etc.);

(ii) the amount of tax imposed for the taxable year on the estate under chapter 1; and

(iii) the amount of the tax imposed by section 2001 (including interest) paid by the executor during the taxable year (other than any amount paid pursuant to this paragraph).

(C) For purposes of this paragraph, if any stock in a corporation is treated as stock in another corporation by reason of subsection (b)(8)(A), any dividends paid by such other corporation to the corporation shall be treated as paid to the estate of the decedent to the extent attributable to the stock qualifying under subsection (a)(1).

(3) Failure to make payment of principal or interest

(A) In general

Except as provided in subparagraph (B), if any payment of principal or interest under this section is not paid on or before the date fixed for its payment by this section (including any extension of time), the unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Secretary.

(B) Payment within 6 months

If any payment of principal or interest under this section is not paid on or before the date determined under subparagraph (A) but is paid within 6 months of such date—

(i) the provisions of subparagraph (A) shall not apply with respect to such payment,

(ii) the provisions of section 6601(j) shall not apply with respect to the determination of interest on such payment, and

(iii) there is imposed a penalty in an amount equal to the product of—

(I) 5 percent of the amount of such payment, multiplied by

(II) the number of months (or fractions thereof) after such date and before payment is made.

The penalty imposed under clause (iii) shall be treated in the same manner as a penalty imposed under subchapter B of chapter 68.

(h) Election in case of certain deficiencies

(1) In general

If—

(A) a deficiency in the tax imposed by section 2001 is assessed,

(B) the estate qualifies under subsection (a)(1), and

(C) the executor has not made an election under subsection (a), the executor may elect to pay the deficiency in installments. This subsection shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(2) Time of election

An election under this subsection shall be made not later than 60 days after issuance of notice and demand by the Secretary for the payment of the deficiency, and shall be made in such manner as the Secretary shall by regulations prescribe.

(3) Effect of election on payment

If an election is made under this subsection, the deficiency shall (subject to the limitation provided by subsection (a)(2)) be prorated to the installments which would have been due if an election had been timely made under subsection (a) at the time the estate tax return was filed. The part of the deficiency so prorated to any installment the date for payment of which would have arrived shall be paid at the time of the making of the election under this subsection. The portion of the deficiency so prorated to installments the date for payment of which would not have so arrived shall be paid at the time such installments would have been due if such an election had been made.

(i) Special rule for certain direct skips

To the extent that an interest in a closely held business is the subject of a direct skip (within the meaning of section 2612(c)) occurring at the same time as and as a result of the decedent's death, then for purposes of this section any tax imposed by section 2601 on the transfer of such interest shall be treated as if it were additional tax imposed by section 2001.

(j) Regulations

The Secretary shall prescribe such regulations as may be necessary to the application of this section.

(k) Cross references

(1) Security

For authority of the Secretary to require security in the case of an extension under this section, see section 6165.

(2) Lien

For special lien (in lieu of bond) in the case of an extension under this section, see section 6324A.

(3) Period of limitation

For extension of the period of limitation in the case of an extension under this section, see section 6503(d).

(4) Interest

For provisions relating to interest on tax payable in installments under this section, see subsection (j) of section 6601.

(5) Transfers within 3 years of death

For special rule for qualifying an estate under this section where property has been transferred within 3 years of decedent's death, see section 2035(c)(2).

U.S.C. Title 26, §6203. Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

U.S.C. Title 26, §6212. Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency

(1) Income and gift taxes and certain excise taxes

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if 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 return

In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further deficiency letters restricted

(1) General rule

If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax, (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63(e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4).

For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(d) Authority to rescind notice of deficiency with taxpayer's consent

The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

U.S.C. Title 26, §6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(b) Exceptions to restrictions on assessment

(1) Assessments arising out of mathematical or clerical errors

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors

(A) Request for abatement

Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection

In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) Assessments arising out of tentative carryback or refund adjustments

If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of amount paid

Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(5) Certain orders of criminal restitution

If the taxpayer is notified that an assessment has been or will be made pursuant to section 6201(a)(4)—

(A) such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and

(B) subsection (a) shall not apply with respect to the amount of such assessment.

(c) Failure to file petition

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of restrictions

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes

The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4955 (relating to taxes on political expenditures), 4958 (relating to private excess benefit), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e).

(f) Coordination with title 11

(1) Suspension of running of period for filing petition in title 11 cases

In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.

(2) Certain action not taken into account

For purposes of the second and third sentences of subsection (a), the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions

For purposes of this section—

(1) Return

The term "return" includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44.

(2) Mathematical or clerical error

The term "mathematical or clerical error" means—

(A) an error in addition, subtraction, multiplication, or division shown on any return,

(B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return,

(C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return,

(D) an omission of information which is required to be supplied on the return to substantiate an entry on the return,

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42, 43, or 44, if such limit is expressed—

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction,

and if the items entering into the application of such limit appear on such return,

(F) an omission of a correct taxpayer identification number required under section 32 (relating to the earned income credit) to be included on a return,

(G) an entry on a return claiming the credit under section 32 with respect to net earnings from self-employment described in section 32(c)(2)(A) to the extent the tax imposed by section 1401 (relating to self-employment tax) on such net earnings has not been paid,

(H) an omission of a correct TIN required under section 21 (relating to expenses for household and dependent care services necessary for gainful employment) or section 151 (relating to allowance of deductions for personal exemptions),

(I) an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return,

(J) an omission of a correct TIN required under section 25A(g)(1) (relating to higher education tuition and related expenses) to be included on a return,

(K) an omission of information required by section 32(k)(2) (relating to taxpayers making improper prior claims of earned income credit) or an entry on the return claiming the credit under section 32 for a taxable year for which the credit is disallowed under subsection (k)(1) thereof,

(L) the inclusion on a return of a TIN required to be included on the return under section 21, 24, or 32 if—

(i) such TIN is of an individual whose age affects the amount of the credit under such section, and

(ii) the computation of the credit on the return reflects the treatment of such individual as being of an age different from the individual's age based on such TIN,

(M) the entry on the return claiming the credit under section 32 with respect to a child if, according to the Federal Case Registry of Child Support Orders established under section 453(h) of the Social Security Act, the taxpayer is a noncustodial parent of such child,

(N) an omission of any increase required under section 36(f) with respect to the recapture of a credit allowed under section 36,

(O) the inclusion on a return of an individual taxpayer identification number issued under section 6109(i) which has expired, been revoked by the Secretary, or is otherwise invalid,

(P) an omission of information required by section 24(g)(2) or an entry on the return claiming the credit under section 24 for a taxable year for which the credit is disallowed under subsection (g)(1) thereof, and

(Q) an omission of information required by section 25A(b)(4)(B) or an entry on the return claiming the American Opportunity Tax Credit for a taxable year for which such credit is disallowed under section 25A(b)(4)(A).

A taxpayer shall be treated as having omitted a correct TIN for purposes of the preceding sentence if information provided by the taxpayer on the return with respect to the individual whose TIN was provided differs from the information the Secretary obtains from the person issuing the TIN.

(h) Cross references

(1) For assessment as if a mathematical error on the return, in the case of erroneous claims for income tax prepayment credits, see section 6201(a)(3).

(2) For assessments without regard to restrictions imposed by this section in the case of—

(A) Recovery of foreign income taxes, see section 905(c).

(B) Recovery of foreign estate tax, see section 2016.

(3) For provisions relating to application of this subchapter in the case of certain partnership items, etc., see section 6230(a).

U.S.C. Title 26, §6302. Mode or time of collection

(a) Establishment by regulations

If the mode or time for collecting any tax is not provided for by this title, the Secretary may establish the same by regulations.

U.S.C. Title 26, §6303. Notice And Demand For Tax

a) General rule

Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, 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 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.

(b) Assessment prior to last date for payment

Except where the Secretary believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date.

U.S.C. Title 26, §6321. 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, belonging to such person.

U.S.C. Title 26, §6324. Special liens for estate and gift taxes

(a) Liens for estate tax

Except as otherwise provided in subsection (c)—

(1) Upon gross estate

Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) Liability of transferees and others

If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' 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, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

(3) Continuance after discharge of fiduciary

The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

(b) Lien for gift tax

Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such 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 shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach 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.

(c) Exceptions

(1) The lien imposed by subsection (a) or (b) shall not be valid as against a mechanic's lienor and, subject to the conditions provided by section 6323(b) (relating to protection for certain interests even though notice filed), shall not be valid with respect to any lien or interest described in section 6323(b).

(2) If a lien imposed by subsection (a) or (b) is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to any item described in section 6323(e) (relating to priority of interest and expenses) to the extent that, under local law, such item has the same priority as the lien or security interest to which it relates.

U.S.C. Title 26, §6324A. Special lien for estate tax deferred under section 6166

(a) General rule

In the case of any estate with respect to which an election has been made under section 6166, if the executor makes an election under this section (at such time and in such manner as the Secretary shall by regulations prescribe) and files the agreement referred to in subsection (c), the deferred amount (plus any interest, additional amount, addition to tax, assessable penalty, and costs attributable to the deferred amount) shall be a lien in favor of the United States on the section 6166 lien property.

(b) Section 6166 lien property

(1) In general

For purposes of this section, the term "section 6166 lien property" means interests in real and other property to the extent such interests-

(A) can be expected to survive the deferral period, and

(B) are designated in the agreement referred to in subsection (c).

(2) Maximum value of required property

The maximum value of the property which the Secretary may require as section 6166 lien property with respect to any estate shall be a value which is not greater than the sum of-

(A) the deferred amount, and

(B) the required interest amount.

For purposes of the preceding sentence, the value of any property shall be determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11 and shall be determined by taking into account any encumbrance such as a lien under section 6324B.

(3) Partial substitution of bond for lien

If the value required as section 6166 lien property pursuant to paragraph (2) exceeds the value of the interests in property covered by the agreement referred to in subsection (c), the Secretary may accept bond in an amount equal to such excess conditioned on the payment of the amount extended in accordance with the terms of such extension.

(c) Agreement

The agreement referred to in this subsection is a written agreement signed by each person in being who has an interest (whether or not in possession) in any property designated in such agreement-

(1) consenting to the creation of the lien under this section with respect to such property, and

(2) designating a responsible person who shall be the agent for the beneficiaries of the estate and for the persons who have consented to the creation of the lien in dealings with the Secretary on matters arising under section 6166 or this section.

(d) Special rules

(1) Requirement that lien be filed

The lien imposed by this section shall not be valid as against any purchaser, holder of a security interest, mechanic's lien, or judgment lien creditor until notice thereof which meets the requirements of section 6323(f) has been filed by the Secretary. Such notice shall not be required to be refiled.

(2) Period of lien

The lien imposed by this section shall arise at the time the executor is discharged from liability under section 2204 (or, if earlier, at the time notice is filed pursuant to paragraph (1)) and shall continue until the liability for the deferred amount is satisfied or becomes unenforceable by reason of lapse of time.

(3) Priorities

Even though notice of a lien imposed by this section has been filed as provided in paragraph (1), such lien shall not be valid-

(A) Real property tax and special assessment liens

To the extent provided in section 6323(b)(6).

(B) Real property subject to a mechanic's lien for repairs and improvement

In the case of any real property subject to a lien for repair or improvement, as against a mechanic's lienor.

(C) Real property construction or improvement financing agreement

As against any security interest set forth in paragraph (3) of section 6323(c) (whether such security interest came into existence before or after tax lien filing).

Subparagraphs (B) and (C) shall not apply to any security interest which came into existence after the date on which the Secretary filed notice (in a manner similar to notice filed under section 6323(f)) that payment of the deferred amount has been accelerated under section 6166(g).

(4) Lien to be in lieu of section 6324 lien

If there is a lien under this section on any property with respect to any estate, there shall not be any lien under section 6324 on such property with respect to the same estate.

(5) Additional lien property required in certain cases

If at any time the value of the property covered by the agreement is less than the unpaid portion of the deferred amount and the required interest amount, the Secretary may require the addition of property to the agreement (but he may not require under this paragraph that the value of the property covered by the agreement exceed such unpaid portion). If property having the required value is not added to the property covered by the agreement (or if other security equal to the required value is not furnished) within 90 days after notice and demand therefor by the Secretary, the failure to comply with the preceding sentence shall be treated as an act accelerating payment of the installments under section 6166(g).

(6) Lien to be in lieu of bond

The Secretary may not require under section 6165 the furnishing of any bond for the payment of any tax to which an agreement which meets the requirements of subsection (c) applies.

(e) Definitions

For purposes of this section-

(1) Deferred amount

The term "deferred amount" means the aggregate amount deferred under section 6166 (determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11).

(2) Required interest amount

The term "required interest amount" means the aggregate amount of interest which will be payable over the first 4 years of the deferral period with respect to the deferred amount (determined as of the date prescribed by section 6151(a) for the payment of the tax imposed by chapter 11).

(3) Deferral period

The term "deferral period" means the period for which the payment of tax is deferred pursuant to the election under section 6166.

(4) Application of definitions in case of deficiencies

In the case of a deficiency, a separate deferred amount, required interest amount, and deferral period shall be determined as of the due date of the first installment after the deficiency is prorated to installments under section 6166.

U.S.C. Title 26, §6330. Notice and opportunity for hearing before levy

(d) Proceeding after hearing

(1) Petition for review by Tax Court

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter.

(3) Jurisdiction retained at IRS Office of Appeals

The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding-

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

U.S.C. Title 26, §6501. Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) Time return deemed filed

(1) Early return

For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 4, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) Return of certain employment and withholding taxes

For purposes of this section, if a return of tax imposed by chapter 3, 4, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) Return executed by Secretary

Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) Return of excise taxes

For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of 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.

(4) Extension by agreement

(A) In general

Where, before the expiration of the time prescribed for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(B) Notice to taxpayer of right to refuse or limit extension

The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

(5) Tax resulting from changes in certain income tax or estate tax credits

For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) Termination of private foundation status

In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) Special rule for certain amended returns

Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) Failure to notify Secretary of certain foreign transfers

(A) In general

In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

(B) Application to failures due to reasonable cause

If the failure to furnish the information referred to in subparagraph (A) is due to reasonable cause and not willful neglect, subparagraph (A) shall apply only to the item or items related to such failure.

(9) Gift tax on certain gifts not shown on return

If any gift of property the value of which (or any increase in taxable gifts required under section 2701(d) which) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item which is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(10) Listed transactions

If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2)) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of—

(A) the date on which the Secretary is furnished the information so required, or

(B) the date that a material advisor meets the requirements of section 6112 with respect to a request by the Secretary under section 6112(b) relating to such transaction with respect to such taxpayer.

(11) Certain orders of criminal restitution

In the case of any amount described in section 6201(a)(4), such amount may be assessed, or a proceeding in court for the collection of such amount may be begun without assessment, at any time.

(12) Certain taxes attributable to partnership adjustments

In the case of any partnership adjustment determined under subchapter C of chapter 63, the period for assessment of any tax imposed under chapter 2 or 2A which is attributable to such adjustment shall not expire before the date that is 1 year after—

(A) in the case of an adjustment pursuant to the decision of a court in a proceeding brought under section 6234, such decision becomes final, or

(B) in any other case, 90 days after the date on which the notice of the final partnership adjustment is mailed under section 6231.

(d) Request for prompt assessment

Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1)(A) such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;

(2)(A) such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or

(3) a dissolution has been completed at the time such written request is made.

(e) Substantial omission of items

Except as otherwise provided in subsection (c)—

(1) Income taxes

In the case of any tax imposed by subtitle A—

(A) General rule

If the taxpayer omits from gross income an amount properly includible therein and—

(i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or

(ii) such amount—

(I) is attributable to one or more assets with respect to which information is required to be reported under section 6038D (or would be so required if such section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and

(II) is in excess of $5,000, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(B) Determination of gross income

For purposes of subparagraph (A)—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services;

(ii) An understatement of gross income by reason of an overstatement of unrecovered cost or other basis is an omission from gross income; and

(iii) In determining the amount omitted from gross income (other than in the case of an overstatement of unrecovered cost or other basis), there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(C) Constructive dividends

If the taxpayer omits from gross income an amount properly includible therein under section 951(a), the tax may be assessed, or a proceeding in court for the collection of such tax may be done without assessing, at any time within 6 years after the return was filed.

(2) Estate and gift taxes

In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in 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. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(3) Excise taxes

In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, 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 is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) Personal holding company tax

If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth—

(1) the items of gross income and adjusted ordinary gross income, described in section 543, received by the corporation during such year, and

(2) the names and addresses of the individuals who owned, within the meaning of section 544 (relating to rules for determining stock ownership), at any time during the last half of such 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 of such tax may be begun without assessment, at any time within 6 years after the return for such year was filed.

(g) Certain income tax returns of corporations

(1) 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, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.

(2) 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 such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

(3) DISC

If a corporation determines in good faith that it is a DISC (as defined in section 992(a)) and files a return as such under section 6011(c)(2) and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) 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 carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), 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.

(i) Foreign tax carrybacks

In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) (relating to carryback and carryover of excess foreign taxes) or under section 907(f) (relating to carryback and carryover of disallowed foreign oil and gas taxes), such deficiency may be assessed at any time before the expiration of one 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(c) or 907(f) which result in such carryback.

(j) Certain credit carrybacks

(1) In general

In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused credit which results in such carryback may be assessed, or with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit 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.

(2) Credit carryback defined

For purposes of this subsection, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(k) Tentative carryback adjustment assessment period

In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection

(a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be.

(l) Special rule for chapter 42 and similar taxes

(1) In general

For purposes of any tax imposed by section 4912, by chapter 42 (other than section 4940), or by section 4975, the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940, such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) Certain contributions to section 501(c)(3) organizations

In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in section 4942(g)(3) (relating to certain contributions to section 501(c)(3) organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3), such deficiency may be assessed at any time before the expiration of 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.

(3) Certain set-asides described in section 4942(g)(2)

In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii), such deficiency may be assessed at any time before the expiration of 2 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.

(m) Deficiencies attributable to election of certain credits

The period for assessing a deficiency attributable to any election under section 30B(h)(9), 30C(e)(4), 30D(e)(4), 35(g)(11), 40(f), 43, 45B, 45C(d)(4), 45H(g), or 51(j) (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(n) Cross reference

For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4).

Section 277(a) of the Revenue Act of 1926 (predecessor to U.S.C. Title 26, §6501):

SEC. 277. (a) Except as provided in section 278— (1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(4) In the case of income received during the lifetime of a decedent, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, but not after the expiration of the period prescribed for the assessment of the tax in paragraph (1), (2), or (3) of this subdivision.

(5) If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. Nothing in section 283 shall be construed as making the provisions of this paragraph applicable to any tax imposed by a prior Act of Congress.

U.S.C. Title 26, §6502. Collection after assessment

(a) Length of period

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax, or

(2) if—

(A) there is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into; or

(B) there is a release of levy under section 6343 after such 10-year period, prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before such release.

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

(b) Date when levy is considered made

The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

Section 278(d) of the Revenue Act of 1926 (predecessor to U.S.C. Title 26, §6502):

SEC. 278. (d) Where the assessment of any income, excess-profits, or warprofits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

U.S.C. Title 26, §6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency

(1) General rule

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return

If a notice under section 6212(a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations provided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of taxpayer in control or custody of court

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States

The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax

The running of the period of limitation for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

(e) Extensions of time for payment of tax attributable to recoveries of foreign expropriation losses

The running of the period of limitations for collection of the tax attributable to a recovery of a foreign expropriation loss (within the meaning of section 6167(f)) shall be suspended for the period of any extension of time for payment under subsection (a) or (b) of section 6167.

(f) Wrongful seizure of or lien on property of third party

(1) Wrongful seizure

The running of the period under section 6502 shall be suspended for a period equal to the period from the date property (including money) of a third party is wrongfully seized or received by the Secretary to the date the Secretary returns property pursuant to section 6343(b) or the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter. The running of such period shall be suspended under this paragraph only with respect to the amount of such assessment equal to the amount of money or the value of specific property returned.

(2) Wrongful lien

In the case of any assessment for which a lien was made on any property, the running of the period under section 6502 shall be suspended for a period equal to the period beginning on the date any person becomes entitled to a certificate under section 6325(b)(4) with respect to such property and ending on the date which is 30 days after the earlier of—

(A) the earliest date on which the Secretary no longer holds any amount as a deposit or bond provided under section 6325(b)(4) by reason of such deposit or bond being used to satisfy the unpaid tax or being refunded or released; or

(B) the date that the judgment secured under section 7426(b)(5) becomes final.

The running of such period shall be suspended under this paragraph only with respect to the amount of such assessment equal to the value of the interest of the United States in the property plus interest, penalties, additions to the tax, and additional amounts attributable thereto.

(g) Suspension pending correction

The running of the periods of limitations provided in sections 6501 and 6502 on the making of assessments or 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 Secretary has extended the time for making correction under section 4963(e).

(h) Cases under title 11 of the United States Code

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

(i) Extension of time for payment of undistributed PFIC earnings tax liability

The running of any period of limitations for collection of any amount of undistributed PFIC earnings tax liability (as defined in section 1294(b)) shall be suspended for the period of any extension of time under section 1294 for payment of such amount.

(j) Extension in case of certain summonses

(1) In general

If any designated summons is issued by the Secretary to a corporation (or to any other person to whom the corporation has transferred records) with respect to any return of tax by such corporation for a taxable year (or other period) for which such corporation is being examined under the coordinated examination program (or any successor program) of the Internal Revenue Service, the running of any period of limitations provided in section 6501 on the assessment of such tax shall be suspended—

(A) during any judicial enforcement period—

(i) with respect to such summons, or

(ii) with respect to any other summons which is issued during the 30-day period which begins on the date on which such designated summons is issued and which relates to the same return as such designated summons, and

(B) if the court in any proceeding referred to in paragraph (3) requires any compliance with a summons referred to in subparagraph (A), during the 120-day period beginning with the 1st day after the close of the suspension under subparagraph (A).

If subparagraph (B) does not apply, such period shall in no event expire before the 60th day after the close of the suspension under subparagraph (A).

(2) Designated summons

For purposes of this subsection—

(A) In general

The term "designated summons" means any summons issued for purposes of determining the amount of any tax imposed by this title if—

(i) the issuance of such summons is preceded by a review of such issuance by the regional counsel of the Office of Chief Counsel for the region in which the examination of the corporation is being conducted,

(ii) such summons is issued at least 60 days before the day on which the period prescribed in section 6501 for the assessment of such tax expires (determined with regard to extensions), and

(iii) such summons clearly states that it is a designated summons for purposes of this subsection.

(B) Limitation

A summons which relates to any return shall not be treated as a designated summons if a prior summons which relates to such return was treated as a designated summons for purposes of this subsection.

(3) Judicial enforcement period

For purposes of this subsection, the term "judicial enforcement period" means, with respect to any summons, the period—

(A) which begins on the day on which a court proceeding with respect to such summons is brought, and

(B) which ends on the day on which there is a final resolution as to the summoned person's response to such summons.

(k) Cross references

For suspension in case of—

(1) Deficiency dividends of a personal holding company, see section 547(f).

(2) Receiverships, see subchapter B of chapter 70.

(3) Claims against transferees and fiduciaries, see chapter 71.

(4) Tax return preparers, see section 6694(c)(3).

(5) Deficiency dividends in the case of a regulated investment company or a real estate investment trust, see section 860(h).

U.S.C. Title 26, §6504. Cross references

For limitation period in case of—

(1) Adjustments to accrued foreign taxes, see section 905(c).

(2) Change of treatment with respect to itemized deductions where taxpayer and his spouse make separate returns, see section 63(e)(3).

(3) Involuntary conversion of property, see section 1033(a)(2)(C) and (D).

(4) Application by fiduciary for discharge from personal liability for estate tax, see section 2204.

(5) Insolvent banks and trust companies, see section 7507.

(6) Service in a combat zone, etc., see section 7508.

(7) Claims against transferees and fiduciaries, see chapter 71.

(8) Assessments to recover excessive amounts paid under section 6420 (relating to gasoline used on farms), 6421 (relating to gasoline used for certain nonhighway purposes or by local transit systems), or 6427 (relating to fuels not used for taxable purposes) and assessments of civil penalties under section 6675 for excessive claims under section 6420, 6421, or 6427, see section 6206.

(9) Assessment and collection of interest, see section 6601(g).

(10) Assessment of civil penalties under section 6694 or 6695, see section 6696(d)(1).

U.S.C. Title 26, §6901. Transferred assets

(a) Method of collection

The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes

(A) Transferees

The liability, at law or in equity, of a transferee of property—

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes), in respect of the tax imposed by subtitle A or B.

(B) Fiduciaries

The liability of a fiduciary under section 3713(b) of title 31, United States Code, in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

(2) Other taxes

The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a).

(b) Liability

Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

(c) Period of limitations

The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

(1) Initial transferee

In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor;

(2) Transferee of transferee

In the case of the liability of a transferee of a transferee, within 1 year after the expiration of the period of limitation for assessment against the preceding transferee, but not more than 3 years after the expiration of the period of limitation for assessment against the initial transferor; except that if, before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the initial transferor or the last preceding transferee, respectively, then the period of limitation for assessment of the liability of the transferee shall expire 1 year after the return of execution in the court proceeding.

(3) 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

If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the Secretary and the transferee or fiduciary have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. For the purpose of determining the period of limitation on credit or refund to the transferee or fiduciary of overpayments of tax made by such transferee or fiduciary or overpayments of tax made by the transferor of which the transferee or fiduciary is legally entitled to credit or refund, such agreement and any extension thereof shall be deemed an agreement and extension thereof referred to in section 6511(c).

(2) Extension of time for 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, then in applying the limitations under section 6511(c) on the amount of the credit or refund, the periods specified in section 6511(b)(2) shall be increased by the period from the date of such expiration to the date of the agreement.

(e) Period for assessment against transferor

For purposes of this section, if any person is deceased, or is a corporation which has terminated its existence, the period of limitation for assessment against such person shall be the period that would be in effect had death or termination of existence not occurred.

(f) Suspension of running of period of limitations

The running of the period of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 6212 (relating to income, estate, and gift taxes), be suspended for the period during which the Secretary is prohibited from making the assessment in respect of the 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.

(g) Address for notice of liability

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, any notice of liability enforceable under this section required to be mailed to such person, shall, if mailed to the person subject to the liability at his last known address, be sufficient for purposes of this title, even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(h) Definition of transferee

As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, also includes any person who, under section 6324(a)(2), is personally liable for any part of such tax.

(i) Extension of time

For extensions of time by reason of armed service in a combat zone, see section 7508.

Section 311 of the Revenue Act of 1928 (predecessor to U.S.C. Title 26, §6901):

SEC. 311. TRANSFERRED ASSETS. (a) Method of collection.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) TRANSFEREES.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

(2) FIDUCIARIES.—The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) Period of limitation.—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer, within one year after the expiration of the period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer, within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer; except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun

against the taxpayer or last preceding transferee, respectively, then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary, not later than one 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.

(c) Period for assessment against taxpayer.—For the purposes of this section, 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.

(d) Suspension of running of statute of limitations.—The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 272(a), SEVENTIETH CONGRESS. SESS. I. CH. 852. 1928. 861 be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the 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 Board, until the decision of the Board becomes final), and for 60 days thereafter.

(e) Address for notice of liability.—In the absence of notice to the Commissioner under section 312 (b) of the existence of a fiduciary relationship, notice of liability enforceable under this section in respect of a tax imposed by this title, if mailed to the person subject to the liability at his last known address, shall be sufficient for the purposes of this title even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(f) Definition of "transferee".—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

Section 280 of the Revenue Act of 1926 (predecessor to U.S.C. Title 26, §6901):

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability m ay be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, 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.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

U.S.C. Title 26, §6902. Provisions of special application to transferees

(a) Burden of proof

In proceedings before the Tax Court the burden of proof shall be upon the Secretary 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.

(b) Evidence

Upon application to the Tax Court, a transferee of property of a taxpayer shall be entitled, under rules prescribed by the Tax Court, to a preliminary examination of books, papers, documents, correspondence, and other evidence of the taxpayer or a preceding transferee of the taxpayer's property, if the transferee making the application is a petitioner before the Tax Court for the redetermination of his liability in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer. Upon such application, the

Tax Court may require by subpoena, ordered by the Tax Court or any division thereof and signed by a judge, the production of all such books, papers, documents, correspondence, and other evidence within the United States the production of which, in the opinion of the Tax Court or division thereof, is necessary to enable the transferee to ascertain the liability of the taxpayer or preceding transferee and will not result in undue hardship to the taxpayer or preceding transferee. Such examination shall be had at such time and place as may be designated in the subpoena.

U.S.C. Title 26, §7430. Awarding of costs and certain fees

(a) In general

In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for—

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

(2) Only costs allocable to the United States

An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party.

(3) Costs denied where party prevailing protracts proceedings

No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(4) Period for applying to IRS for administrative costs

An award may be made under subsection (a) by the Internal Revenue Service for reasonable administrative costs only if the prevailing party files an application with the Internal Revenue Service for such costs before the 91st day after the date on which the final decision of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party.

(c) Definitions

For purposes of this section—

(1) Reasonable litigation costs

The term "reasonable litigation costs" includes—

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished—

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $125 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise, justifies a higher rate.

In the case of any calendar year beginning after 1996, the dollar amount referred to in clause (iii) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting "calendar year 1995" for "calendar year 2016" in subparagraph (A)(ii) thereof. If any dollar amount after being increased under the preceding sentence is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

(2) Reasonable administrative costs

The term "reasonable administrative costs" means—

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B), except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(C) of the awarding of reasonable administrative costs is made by the Internal Revenue Service.

Such term shall only include costs incurred on or after whichever of the following is the earliest: (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; (ii) the date of the notice of deficiency; or (iii) 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.

(3) Attorneys' fees

(A) In general

For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services

The court may award reasonable attorneys' fees under subsection (a) in excess of the attorneys' fees paid or incurred if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) Prevailing party

(A) In general

The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)—

(i) which—

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Exception if United States establishes that its position was substantially justified

(i) General rule

A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance

For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues

In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance

For purposes of clause (ii), the term "applicable published guidance" means—

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party

Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or—

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court.

(D) Special rules for applying net worth requirement

In applying the requirements of section 2412(d)(2)(B) of title 28, United States Code, for purposes of subparagraph (A)(ii) of this paragraph—

(i) the net worth limitation in clause (i) of such section shall apply to—

(I) an estate but shall be determined as of the date of the decedent's death, and

(II) a trust but shall be determined as of the last day of the taxable year involved in the proceeding, and

(ii) individuals filing a joint return shall be treated as separate individuals for purposes of clause (i) of such section.

(E) Special rules where judgment less than taxpayer's offer

(i) In general

A party to a court proceeding meeting the requirements of subparagraph (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 a qualified offer of the party under subsection (g).

(ii) Exceptions

This subparagraph shall not apply to—

(I) any judgment issued pursuant to a settlement; or

(II) 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 this title, and any action to restrain disclosure under section 6110(f).

(iii) Special rules

If this subparagraph applies to any court proceeding—

(I) the determination under clause (i) shall be made by reference to the last qualified offer made with respect to the tax liability at issue in the proceeding; and

(II) reasonable administrative and litigation costs shall only include costs incurred on and after the date of such offer.

(iv) Coordination

This subparagraph shall not apply to a party which is a prevailing party under any other provision of this paragraph.

(5) Administrative proceedings

The term "administrative proceeding" means any procedure or other action before the Internal Revenue Service.

(6) Court proceedings

The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Court of Federal Claims).

(7) Position of United States

The term "position of the United States" means—

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of 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.

(d) Special rules for payment of costs

(1) Reasonable administrative costs

An award for reasonable administrative costs shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(2) Reasonable litigation costs

An award for reasonable litigation costs shall be payable in the case of the Tax Court in the same manner as such an award by a district court.

(e) Multiple actions

For purposes of this section, in the case of—

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court, such actions or cases shall be treated as 1 court proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated.

(f) Right of appeal

(1) Court proceedings

An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs under subsection (a) in a court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.

(2) Administrative proceedings

A decision granting or denying (in whole or in part) an award for reasonable administrative costs under subsection (a) by the Internal Revenue Service shall be subject to the filing of a petition for review with the Tax Court under rules similar to the rules under section 7463 (without regard to the amount in dispute). If the Secretary sends by certified or registered mail a notice of such decision to the petitioner, no proceeding in the Tax Court may be initiated under this paragraph unless such petition is filed before the 91st day after the date of such mailing.

(3) Appeal of Tax Court decision

An order of the Tax Court disposing of a petition under paragraph (2) shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(g) Qualified offer

For purposes of subsection (c)(4)—

(1) In general

The term "qualified offer" means a written offer which—

(A) is made by the taxpayer to the United States during the qualified offer period;

(B) specifies the offered amount of the taxpayer's liability (determined without regard to interest);

(C) is designated at the time it is made as a qualified offer for purposes of this section; and

(D) 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) Qualified offer period

For purposes of this subsection, the term "qualified offer period" means the period—

(A) beginning 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, and

(B) ending on the date which is 30 days before the date the case is first set for trial.

U.S.C. Title 26, §7441. Status

There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court. The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.

U.S.C. Title 26, §7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10–87), or by laws enacted subsequent to February 26, 1926.

U.S.C. Title 31, §3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when-

(A) a person indebted to the Government is insolvent and-

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

Utah Code §78B-2-309. Within six years -- Mesne profits of real property -- Instrument in writing -- Fire suppression

(1) An action may be brought within six years:

(a) for the mesne profits of real property;

(b) subject to Subsection (2), upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78B-2-311; or

(c) to recover fire suppression costs or other damages caused by wildland fire.

(2) For a credit agreement, as defined in Section 25-5-4, the six-year period described in Subsection (1) begins the later of the day on which:

(a) the debt arose;

(b) the debtor makes a written acknowledgment of the debt or a promise to pay the debt; or

(c) the debtor or a third party makes a payment on the debt.

US Treasury Regulation § 31.3505-1(d)(1). Procedure For Payment.

A lender, surety, or other person may satisfy the personal liability imposed upon him by section 3505 by executing Form 4219 and filing it, accompanied by payment of the amount of tax and interest due the United States, in accordance with the instructions for the form. In the event that the lender, surety, or other person does not satisfy the liability imposed by section 3505, the United States may collect the liability by appropriate civil proceedings commenced within 10 years after assessment of the tax against the employer.

US Treasury Regulation §301.6901-1(a)(1). Applicable Provisions.

301.6901-1(a) Method Of Collection

301.6901-1(a)(1) Income, Estate, And Gift Taxes. —
The amount for which a transferee of property of--

301.6901-1(a)(1)(i) —
A taxpayer, in the case of a tax imposed by subtitle A of the Code (relating to income taxes),

301.6901-1(a)(1)(ii) —
A decedent, in the case of the estate tax imposed by chapter 11 of the Code, or

301.6901-1(a)(1)(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.

IRS Internal Revenue Manual 5.17.14.4.4, no. 4 (01-24-2012). Establishing Transferee or Fiduciary Liability by Suit

1. The United States may establish transferee or fiduciary liability by filing a suit in district court pursuant to IRC § 7402 and 28 USC §§ 1340 and 1345. This suit is brought against the transferee or fiduciary and results in a judgment against the third party, permitting collection from any of the transferee's or fiduciary's assets.

2. Since a suit to establish transferee or fiduciary liability is a collection suit, the ten-year statute of limitations in IRC § 6502 for suits to collect taxes applies. The ten-year statute of limitations provided for in IRC § 6324 from the date of death or the date of the gift applies for collection of estate and gift taxes if the suit is based on IRC § 6324 transferee liability.

3. A suit to establish transferee or fiduciary liability is not limited to certain types of taxes as are the assessment procedures of IRC § 6901. All types of taxes, including employment and excise taxes, can be collected in a transferee suit.

4. A suit to impose transferee liability may be necessary when the procedures of IRC § 6901 are not available because the statute of limitations for assessment has expired.

5. A suit to impose transferee liability may be preferable to assessment when:

- the transferred property has depreciated in value;

- the transferee has concealed, disposed of, or converted the transferred property; or

- the transferee has commingled the transferred property with other property.

Note: Where the value of the property has decreased following the transfer, the amount of any personal judgment against the transferee ordinarily cannot exceed the value of the property at the time of the transfer.

6. Where liability is sought to be imposed on a third-party for another's tax by way of a suit brought by the United States in a district court, the burden of proof is on the United States as the petitioning party. When a transferee files a refund suit, the burden of proof remains with the transferee.

7. The government may also bring a suit to collect against the transferred property in the hands of the transferee, also called a suit to set aside a fraudulent transfer. See IRM 5.17.14.4.6, Suit to Set Aside a Fraudulent Transfer.

Tax Court Rule 13(a)

RULE 13. JURISDICTION
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(a) Notice of Deficiency or of Transferee or Fiduciary Liability Required: Except in actions for declaratory judgment, for disclosure, for readjustment or adjustment of partnership items, for administrative costs, for review of failure to abate interest, for redetermination of employment status, for determination of relief from joint and several liability, for lien and levy, for review of whistleblower awards, or for certification actions with respect to passports (see Titles XXI, XXII, XXIV, and XXVI through XXXIV), the jurisdiction of the Court depends: (1) In a case commenced in the Court by a taxpayer, upon the issuance by the Commissioner of a notice of deficiency in income, gift, or estate tax or, in the taxes under Code Chapter 41, 42, 43, or 44 (relating to the excise taxes on certain organizations and persons dealing with them), or in the tax under Code Chapter 45 (relating to the windfall profit tax), or in any other taxes which are the subject of the issuance of a notice of deficiency by the Commissioner; and (2) in a case commenced in the Court by a transferee or fiduciary, upon the issuance by the Commissioner of a notice of liability to the transferee or fiduciary. See Code secs. 6212, 6213, 6901.