

## Lesson 2

### GENERAL TAX LIENS & SPECIAL TAX LIENS

(March 2012)

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## I. INTRODUCTION

The general federal tax lien (FTL) is the most important tool used in the collection of federal taxes. When a taxpayer does not voluntarily pay his/her federal taxes, the FTL becomes the basis for virtually all enforced collection activity by the Service. The FTL lien applies to all of the property of the delinquent taxpayer and can preserve the Government's priority against others.

## II. OBJECTIVE

At the end of this lesson you will be able to explain the nature and duration of the FTL.

## III. LIENS IN GENERAL

### ***A. Definition of lien***

A lien is a charge or encumbrance that one person has on the property of another as security for a debt or obligation. See Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 262-63 (1999).

### ***B. Three Categories of Liens***

1. Consensual liens--arise by agreement of the parties--examples: mortgage, pledge (security interest).

2. Common law liens--arise by operation of law and depend upon possession--examples: innkeeper, warehouseman, and artisan's liens.

3. Statutory liens--created by statute--usually enactment of common law liens--examples: judgment liens, mechanic's liens and state and federal tax liens.

### **C. General v. Specific Liens**

1. General lien--the right to charge any property of the debtor as security for a debt.

2. Specific lien--a charge upon particular property for the discharge of a debt. Most consensual and common law liens are specific liens.

## **IV. GENERAL FEDERAL TAX LIEN**

### **A. Creation -- I.R.C. § 6321**

1. The FTL is characterized as a general tax lien because of its applicability to all property of the taxpayer.

2. "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" (emphasis added).

### **B. If any person**

"Person" means an individual, trust, estate, partnership, association, company, or corporation. See I.R.C. §§ 7701(a)(1) et seq.

### **C. Liable to pay any tax**

1. There must be an assessed tax and not some other federal claim.

2. Assessed Tax. When a person files a return acknowledging a liability in excess of remittances, assessment will occur almost immediately after the return is received. In its simplest form, assessment involves nothing more than the recordation of the acknowledged tax liability on a list at the service center. See I.R.C. § 6203. However, assessment other than by recording a liability from a self-assessed tax return is a technical process driven by the rules found in Chapter 63 of the Internal Revenue Code. The assessment date of a tax can be determined by the taxpayer since he is entitled, upon request, to a copy of the record of

assessment. See I.R.C. § 6203.

#### ***D. Neglects or refuses to pay the same***

1. The failure to pay the entire amount of tax due after demand constitutes a neglect or refusal. See *United States v. Wintner*, 200 F. Supp. 157, 160 (N.D. Ohio 1961), aff'd, 312 F.2d 749 (6th Cir. 1963), rev'd on other grounds, 375 U.S. 393 (1964); see also *United States v. Bess*, 357 U.S. 51, 55 (1958).
2. Payment by check which is dishonored is a neglect or refusal to pay.

#### ***E. After demand***

##### **1. I.R.C. § 6303(a)**

"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."

This notice, like the notice of deficiency under section 6212(b), must be sent to the last known address. See *United States v. Chila*, 871 F.2d 1015, 1019 (11th Cir. 1989); *Pursifull v. United States*, 849 F. Supp. 597, 601 (S.D. Ohio 1993), aff'd, 19 F.3d 19 (6th Cir. 1994). Before the issuance of Rev. Proc. 90-18, 1990-13 I.R.B. 19, (superseded by Rev. Proc. 2001-18, 2001-08 I.R.B. 708) the definition of "last known address" was an evolving standard. See, e.g., *McPartlin v. Commissioner*, 653 F.2d 1185, 1189 (7th Cir. 1981) (discussing factors to determine a last known address). Rev. Proc. 2001-18 has been superseded by Rev. Proc. 2010-16, effective June 1, 2010.

These revenue procedures explain how the Service is to be informed of a change in a taxpayer's address. Treasury Regulation section 301.6212-2(a) defines last known address as the address on the taxpayer's most recently filed and properly processed return, unless the Service has been given clear and concise notification of a different address. See *Terrell v. Commissioner*, 625 F.3d 254, 259 (5th Cir. 2010). Pursuant to Treasury Regulation section 301.6212-2(b)(2), the Service will automatically update a taxpayer's address of record based on a new address that the taxpayer provides the United States Postal Service (USPS) that is retained in the USPS's National Change of Address database.

##### **2. Treas. Reg. § 301.6303-1(a)**

". . . notice shall be given as soon as possible and within 60 days. However, the

failure to give notice within 60 days does not invalidate the notice."

A substantial body of case law touches generally on the impact of "untimely" notice and demand. In most cases, the legal issue directly presented is whether a defect (often timeliness) of the notice and demand precludes the Service from collecting by instituting a judicial action. In these cases, the courts have uniformly held that improper notice and demand does not preclude the Service from instituting judicial collection action. The rationale is that the purpose of notice and demand is to apprise the taxpayer that he owes a tax and to provide him with a warning that the Service may be about to take action to collect the tax; when no timely notice is given, the "warning" is deemed to have been given by the filing of pleadings in the civil action. See Anuforo v. Commissioner, 614 F.3d 799, 805 (8th Cir. 2010); Stevens v. United States, 49 F.3d 331, 337 (7th Cir. 1995); Purcell v. United States, 1 F.3d 932, 941 (9th Cir. 1993); United States v. McCallum, 970 F.2d 66, 69-70 (5th Cir. 1992); United States v. Chila, 871 F.2d 1015, 1018-19 (11th Cir. 1989); United States v. Berman, 825 F.2d 1053, 1060 (6th Cir. 1987); United States v. Jersey Shore State Bank, 781 F.2d 974, 981 (3d Cir. 1986), aff'd, 479 U.S. 442 (1987); United States v. Miller, No. 09-0332-WS-B, 2010 WL 2202776, at \*4 (S.D. Ala. May 28, 2010); Crowd Mgmt. Servs., Inc. v. United States, 792 F. Supp. 87, 91 (D. Or. 1992); Blackston v. United States, 778 F. Supp. 244, 247-48 (D. Md. 1991); In re Bertelt, 206 B.R. 587, 593 (Bankr. M.D. Fla. 1996); In re Dewberry, 158 B.R. 979, 982 (Bankr. W.D. Mich. 1993). One case expressly relied on the regulation in holding that timely notice and demand is not a prerequisite to a civil suit. United States v. Friedman, 739 F.2d 252, 256 (7th Cir. 1984) (in light of the regulation, section 6303(a) should be given "a practical and not technical construction").

With respect to the effect of notice and demand given more than 60 days after assessment on the Service's ability to collect administratively, several decisions have stated that "timely" notice and demand is a prerequisite to administrative collection, specifically rejecting the language of the regulation in the process. See, e.g., Koss v. United States, No. Civ.A.97-440, 1998 WL 398246, at \*1 (E.D. Pa. June 23, 1998); Behren v. United States, 764 F. Supp. 180, 183 (S.D. Fla. 1991) (addressing issue in dictum), aff'd in part, rev'd in part, 992 F.2d 328 (11th Cir. 1993) (table). In other decisions, courts have noted the apparent conflict between the statutory and regulatory language without resolving the conflict, since the issue purportedly did not need to be resolved to decide the case. Matter of Resyn Corp., 945 F.2d 1279, 1283 (3d Cir. 1991); Michael v. Commissioner, 133 T.C. 237, 244-45 (2009); McIntosh v. Commissioner, T.C. Memo. 2003-279.

### **3. No notice**

Failure to give notice at all precludes the creation of a lien. See United States v. Coson, 286 F.2d 453, 463 (9th Cir. 1961); Bauer v. Foley, 404 F.2d 1215, 1221-

22 (2d Cir. 1968), modified on rehearing by 408 F.2d 1331 (2d Cir. 1969). It does not affect the existence of the liability, and liens are not the only method of collecting liabilities. See Jenkins v. Smith, 99 F.2d 827, 827 (2d Cir. 1938) (per curiam).

#### **4. No particular form required**

No particular form for the notice is required as long as the contents satisfy the requirements of section 6303(a). See Hughes v. United States, 953 F.2d 531, 536 (9th Cir. 1992); Planned Invs., Inc., v. United States, 881 F.2d 340, 344 (6th Cir. 1989). The notice is usually in writing. There is no specific requirement that notice be in writing, but section 6303(a) implies a written notice. The receipt of the notice may be waived. See In re Baltimore Pear Hominy, 5 F.2d 553, 555 (4th Cir. 1925). Section 7522 provides that the section 6303 notice, like a notice of deficiency, must describe the basis for and identify the amount of the tax due, interest, additional amounts, additions to the tax, and assessable penalties but that an inadequate description in the notice of tax due will not in itself invalidate the notice.

a) Filing a proof of claim in bankruptcy can be considered a demand. See In re Fid. Tube Corp., 278 F.2d 776, 779-80 (3d Cir. 1960). But see In re Resyn Corp., 945 F.2d 1279, 1283-84 (3d Cir. 1991) (noting that Fidelity Tube Corp. did not involve a section 6303 notice and declining to treat a proof of claim in bankruptcy as a demand sufficient to trigger the Service's entitlement to post-petition interest on fraud penalties).

b) Demand may be the filing of a claim in the probate court. See United States v. Ettelson, 159 F.2d 193, 196 (7th Cir. 1947).

#### ***F. The amount (including any interest, additional amount, addition to tax or assessable penalty, together with any costs that may accrue in addition thereto)***

1. Interest – I.R.C. § 6601.
2. Addition to tax – I.R.C. §§ 6651-6664.
3. Assessable Penalties – I.R.C. §§ 6671-6725.
4. Other costs – lien fees.

***G. Shall be a lien...upon all property and rights to property, whether real or personal, belonging to such person.***

The determination of what is "a taxpayer's interest in property" is a state law question. See discussion in Lesson 3, infra.

***H. Duration – I.R.C. § 6322***

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."

**1. Lien arises at the time of assessment**

The section 6321 lien arises on assessment. It relates back to the date of assessment from the date of notice and refusal to pay. See I.R.C. § 6322; Harris v. United States, 764 F.2d 1126, 1128 (5th Cir. 1985).

- a) Problems for third parties can arise because of retroactive effect.
- b) Transactions may occur between assessment and notice and demand date.
  - (1) Transfer of property, e.g., gift.
  - (2) Third party would take property subject to lien not known to exist when transfer was made.

**2. Lien Remains Until Liability Satisfied or Legally Unenforceable**

The lien continues until the tax liability (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes legally unenforceable due to lapse of time. See I.R.C. § 6322.

- a) Payment ends the lien
  - Release of lien can be issued upon acceptance of bond. See I.R.C. § 6325(a)(2).
- b) Unenforceable due to lapse of time
  - (1) I.R.C. § 6502 – 10-year collection statute, with limited statutory suspensions, discussed infra.

(2) Under the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), the authority to extend the collection statute of limitations by agreement generally ended on December 31, 1999. Any extension of the collection statute already in effect on December 31, 1999, will expire on the latest of (1) the last day of the original 10-year limitations period, (2) December 31, 2002, or (3) in the case of an extension in connection with an installment agreement, the ninetieth day after the period of extension. See P.L. 105-206, § 3461(c)(1)-(2). The current version of section 6502 is discussed infra on pages 11-12.

(3) When multiple persons owe taxes on account of the same events, the § 6502 statute of limitations governs the debt as a whole, under an “all-for-one, one-for-all” theory and not each obligor. See United States v. Galletti, 541 U.S. 114, 123 (2004); United States v. Wright, 57 F.3d 561, 563 (7th Cir. 1995) (holding the statute of limitations governs the debt, not the person against whom the tax is assessed).

For example, once a tax has been properly assessed, nothing in the Code requires the Service to duplicate its efforts by separately assessing the same tax against individuals or entities that are not the actual taxpayers but are, by reason of state law, liable for the taxpayer’s debt. See Galletti, 541 U.S. at 123 (the assessment’s consequences attach to the debt without reference to the special circumstances of the secondarily liable parties).

(4) Filing a proof of claim in a bankruptcy or a receivership proceeding is treated as the commencement of a proceeding in court under section 6502. Rev. Rul. 70-555, 1970-2 C.B. 296; In re Young, No. 1:09CV814-LG-RHW, 2010 WL 1427584, at \*4 (S.D. Miss. Apr. 8, 2010). If the Service files a claim, it can receive a distribution from the estate after the 10 year period has expired.

### **3. Reducing liability to judgment**

This usually occurs when a tax lien is about to expire and administrative remedies have been exhausted.

a) The tax lien does not merge into the judgment or judgment lien; they continue to exist independently. See United States v. Overman, 424 F.2d 1142, 1147 (9th Cir. 1970); United States v. Hodes, 355 F.2d 746, 749 (2d Cir. 1966). After judgment, a tax lien lasts until the judgment is satisfied. See I.R.C. §§ 6322, 6502(a).



- b) A tax may be collected administratively by levy or by a proceeding in court, but only if the levy is made or the proceeding begun within 10 years after the assessment of the tax. I.R.C. § 6502(a)(1). The tax liability may be collected beyond the ten-year period if it is reduced to judgment. Section 6502(a) provides that, where a timely proceeding in court for the collection of a tax is commenced, the Government is permitted to collect taxes by administrative levy action until such time as the liability for the tax, or a judgment against the taxpayer arising from such liability, is satisfied or becomes unenforceable.
- c) The FTL is the basis of virtually all tax collection since it attaches to all of a taxpayer's property, both real and personal, as well as after-acquired property.

### ***I. Effect of Federal Tax Lien***

A taxpayer is not deprived of the use of his/her property when a general tax lien has come into being. The filing of a NFTL, however, publicizes his/her financial problems to creditors, which may affect the taxpayer's ability to receive credit. NFTLs and their effect are discussed in Lesson 4 (Lien Priority) and Lesson 5 (Superpriorities).

### ***J. Value of Federal Tax Lien***

When the FTL arises, it attaches to property. If that property is later transferred, by sale or otherwise, the lien remains on the property. If the property appreciates years later and the Service decides to foreclose the lien, the Service's position is that the lien along with the property has appreciated. See United States v. Avila, 88 F.3d 229, 233 (3d Cir. 1996) (citing Han v. United States, 944 F.2d 526 (9th Cir. 1991), in which the Ninth Circuit considered the same issue and found that "[b]ecause the lien is unaffected by sale, we see no basis for fixing the amount of the lien at the time of the sale"). See also United States v. Blakeman, 997 F.2d 1084, 1092-93 (5th Cir. 1992) (rejecting defendant's argument that tax lien's value was limited to value at lien's attachment date).

Example: TP has a house worth \$100,000 as of 1/1/02. The Service files a NFTL on 2/1/02. TP's outstanding tax liability is \$500,000 as of 2/1/02. TP transfers the house on 4/1/02 to X, who does not know about the lien. X now owns the house subject to the lien. Two years later (2004) the house appreciates from \$100,000 to \$1 million. On 6/1/04 the Service decides to foreclose the lien for the full outstanding liability, which is covered by appreciated value of the property. X argues that the Service wants a windfall because when X purchased the property the lien could only be foreclosed for \$100,000.

The courts have held that the Service is entitled to recover the full liability amount. Therefore, if the property is sold for \$1 million at the foreclosure sale the Service receives the \$500,000 outstanding liability, plus costs and interest, and the remainder is

paid to X.

According to United States v. Bess, 357 U.S. 51, 57 (1958), the tax lien stays on the property after the property is transferred. The Supreme Court has long held that “[t]he transfer of property subsequent to the attachment of the lien does not affect the lien, for ‘it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere....’” Id. (quoting Burton v. Smith, 38 U.S. (13 Pet.) 464, 483 (1839)). “Fixing the value of the lien at the time the taxpayer transfers the property certainly ‘affect[s] the lien,’ and therefore Bess prohibits it.” Avila, 88 F.3d at 233.

## ***K. Release of Federal Tax Lien***

The Secretary must issue a certificate of release of any lien no later than 30 days after: (1) the liability is satisfied or deemed legally unenforceable, or (2) a bond securing payment is accepted by the Secretary. See I.R.C. § 6325(a). The certificate of release is conclusive evidence that the lien is extinguished provided that the release is filed in the same office as any notice of lien. See I.R.C. § 6325(f)(1)(a). The release of a lien can be revoked under appropriate circumstances. See I.R.C. § 6325(f)(2). Lien releases are discussed in Lesson 7 (Release and Discharge).

## ***L. Statute of Limitations on Collection***

### **1. Service generally has 10 years**

Under I.R.C. § 6502(a), the Service generally has 10 years to collect a properly assessed tax.

### **2. Foreclosure suit**

The Government may collect by filing suit to foreclose a tax lien on the taxpayer’s property. Such an action must be brought within the 10-year collection period. See I.R.C. § 6502(a)(1). The running of the ten-year period is suspended during the pendency of the foreclosure suit. See United States v. Worldwide Labor Support of Ill., Inc., No. 1:10cv70-LG-RHW, 2011 WL 148196, at \* 1 (S.D. Miss., Jan. 18, 2011).

### **3. Suspensions**

The ten-year period may also be suspended by the following:

- a) Collection due process hearings and appeals therefrom under sections

6320(c) and 6330(e).

- b) Innocent spouse claims and appeals from innocent spouse determinations under section 6015(e)(2).
- c) The pendency of an offer in compromise or installment agreement under section 6331(k)(3)(B).
- d) The taxpayer's bankruptcy under section 6503(h).
- e) Section 7811(d) can also suspend the statute of limitations where a Taxpayer Assistance Order is sought by a taxpayer and/or issued.
- f) Additional suspensions can be found in Code sections 6503, 7508, and 7508A.

#### **4. Extensions**

Prior to RRA98, the statute of limitations could be extended by agreement between the taxpayer and the Service in a variety of situations. RRA98, however, limited the Service's ability to obtain such extensions to two situations. First, under section 6502(a)(2)(A), the statute of limitations for collection may be extended at the same time an installment agreement is entered into.

Second, under section 6502(a)(2)(B), if there has been a levy on a taxpayer's property prior to the expiration of the collection period and if the extension is agreed upon in writing prior to the release of the levy under section 6343, the collection period may be extended.

To avoid the expiration of the collection period, the Government may, prior to the expiration date, file a proceeding in court to collect the tax. As noted earlier, the issuance of a judgment extends the period during which the tax may be collected by levy until the liability or a judgment arising from the liability is satisfied or becomes unenforceable.

## **V. SPECIAL TAX LIENS**

### **A. INTRODUCTION**

Federal estate tax that is not paid when it is due (whether arising out of a filed return with an unpaid tax or a subsequently determined deficiency) triggers a tax lien, which arises as of the date of death. I.R.C. § 6324(a). The lien continues for a period of 10 years from the date of death, unless the tax is paid or becomes unenforceable by lapse of time. There is no requirement for assessment, notice, or demand of the tax liability for the lien to

come into existence. There is no notice of FTL filed with respect to this lien. This special estate tax lien is in addition to the regular I.R.C. § 6321 FTL which arises upon assessment of the tax and a failure to pay it after notice and demand.

A gift tax lien is created by the making of a taxable gift by a donor and the nonpayment of the federal gift tax. The lien covers all property gifted during the period for which the gift tax return was or should have been filed. The lien continues for a period of 10 years from the date of the gift, unless the tax is paid or becomes unenforceable by lapse of time. I.R.C. § 6324(b). This special gift tax lien is in addition to the regular FTL which arises upon assessment of the tax and a failure to pay it after notice and demand.

## ***B. OBJECTIVES***

At the end of this lesson you will be able to:

- Understand estate tax liens and the nature of transferee liability.
- Understand gift tax liens and the personal liability of the donee.

# **VI. ESTATE TAX LIEN – I.R.C. § 6324(a)**

## ***A. Creation of Estate Tax Liens***

Unlike a general tax lien which arises under section 6321 when a person liable to pay taxes refuses or neglects to do so after demand, a special estate tax lien under section 6324 attaches at the time of the decedent's death before the tax is determined. See Detroit Bank v. United States, 317 U.S. 329, 332 (1943).

## ***B. Property Subject to Lien***

The property subject to the lien is the gross estate for estate tax purposes, whether or not every part of the gross estate is part of the probate estate. See Treas. Reg. § 301.6324-1(a)(1). This includes:

### **1. Section 2033 property**

Under I.R.C. § 2033, "[t]he 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."

### **2. Nonprobate property**

Sections 2034-2042 property -- This is property which is included in the gross estate for federal estate tax purposes but does not pass through probate--e.g., property held in joint tenancy with right of survivorship with the decedent. See I.R.C. § 2040.

### ***C. Duration of Lien –10 years***

The lien expires 10 years from the date of death. See I.R.C. § 6324(a). The 10-year period generally cannot be extended. See, e.g., United States v. Kulhanek, 755 F. Supp. 2d 659, 663 (W.D. Pa. 2010)

1. The majority of courts have held that the 10-year period provided for in section 6324(a) is a period of absolute duration and is not a period of limitation that can be tolled merely by the filing of a suit to foreclose the lien. See United States v. Davis, 52 F.3d 781, 782 (8th Cir. 1995) (government's appeal dismissed because it was filed more than 10 years after death; estate tax lien had to be enforced during 10-year period); United States v. Potemken, 841 F.2d 97, 100 (4th Cir. 1988); United States v. Cleavenger, 517 F.2d 230, 234-35 (7th Cir. 1975). See also New England Acceptance Corp. v. United States, 35 F. Supp. 2d 53, 56 (D.N.H. 1997).
2. Some courts have held that the time period is limitational and the 10-year period can be extended. See United States v. Harrell, No. 87-714 CIV-T-10(C), 1997 WL 49363, at \*2 (M.D. Fla. Dec. 11, 1987); United States v. Saleh, 514 F. Supp. 8, 12 (D.N.J. 1980).
3. The Service follows the majority view. The lien will lapse unless the judgment is obtained prior to the expiration of the 10-year period. See Cleavenger, 517 F.2d at 235.
4. The Government can enforce its estate tax lien beyond the ten-year period when it serves a valid notice of levy and demand in accordance with the requirements of section 6331 prior to the expiration of the 10-year period. See Chevron, U.S.A. v. U.S., 705 F.2d 1487, 1489 (9th Cir. 1983). Keep in mind that even if the 10-year special estate tax lien has expired the section 6321 general tax lien may still be effective since this assessment and notice and demand will generally be made at the time the estate tax return is filed which is after the date of death. While the reach of the general tax lien may not be as broad as that of the special estate tax lien (the general tax lien reaches only the taxpayer's property while the estate tax lien reaches all property, probate and non-probate, included in the gross estate), it will provide some means for collecting the outstanding tax and should be considered.
5. The United States may seek enforcement of the special estate tax lien to collect an estate tax from a transferee even though the statute of limitations on assessment bars assessment of an estate tax against an estate. The limitations period for making an assessment against a transferee is one year after the expiration of the normal assessment period. See I.R.C. § 6901(c).

## ***D. Discharge of Lien***

The estate tax lien can be discharged under I.R.C. § 7425 prior to the 10-year period provided for in section 6324(a). See Treas. Reg. § 301.7425-1(c)(3). The regulation provides the following example:

On January 10, 1969, B dies testate and devises Blackacre to C. At B's death, Blackacre is subject to a first mortgage held by D. Realty is subject to administration as part of a decedent's estate under the laws of State X. However, C takes possession of Blackacre with the assent of E, the executor of B's estate. On January 5, 1970, D commences a foreclosure action on the mortgage. Under the law of X, junior liens on real property are discharged by a judicial sale pursuant to a judgment in a foreclosure action. After commencement of the proceedings, an assessment for estate taxes is made and, thereafter, a notice of lien is filed in accordance with section 6323. The special lien on Blackacre, arising at the date of B's death, for estate taxes under section 6324(a) will be discharged by the judicial sale because there are no provisions for filing a notice thereof under law and junior liens are discharged by the sale under local law. The lien is discharged even though the executor failed to obtain a discharge of his personal liability under section 2204. Furthermore, the general lien on Blackacre under section 6321 will be discharged by the judicial sale because the foreclosure action was commenced prior to the time that a notice of lien was filed. Treas. Reg. § 301.7425-1(c)(3)(ii) ex. 2)

## ***E. Administrative Expenses***

1. Property used to satisfy charges against the estate or administrative expenses can be divested of the estate tax lien. I.R.C. § 6324(a)(1). Note: This automatic divestiture provision only applies where the expenditures are allowed by a court of competent jurisdiction. See *Kleine v. United States*, 539 F.2d 427, 431 (5th Cir. 1976).

2. Reasonable expenses incurred in contesting an estate tax deficiency reduce the tax collectible under the special estate tax lien. See *Porter v. Commissioner*, 52 T.C. 515, 520 (1969).

## ***F. Priority of Estate Tax Lien***

There is no requirement that a lien notice with respect to the section 6324 estate tax lien be filed to obtain priority over purchasers, security interests, and judgment lien creditors.

Accordingly, the estate lien generally takes priority over all subsequent lien claims. However, the estate tax lien is not valid against mechanic's liens and superpriorities described in section 6323(b). See I.R.C. § 6324(c)(1).

The special estate tax lien attaches at decedent's death and only becomes a lien at that time; it does not take priority over pre-existing liens such as for mortgages or pledges which attached during the decedent's lifetime. See *In re Decker's Estate*, 49 A.2d 714,

719 (Pa. 1946). See also Detroit Bank, 317 U.S. at 337 ; United States v. Vohland, 675 F.2d 1071, 1074-75 (9th Cir. 1982).

State law giving liens for state and local taxes priority over all other unrecorded liens does not govern the priority accorded federal estate tax liens under federal law. See Michigan v. United States, 317 U.S. 338, 340 (1943).

## ***G. Liability of Transferees - Nonprobate Assets***

If property is included in the calculation of the gross estate under sections 2034 through 2042 (nonprobate assets), the transferee 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, such property, becomes personally liable for the estate tax to the extent of the value of such property at the time of decedent's death, and a lien attaches to his or her interest in that property. See I.R.C. § 6324(a)(2).

1. The statute of limitations applicable to the personal liability established by section 6324(a)(2) is not the 10-year period from the date of death set forth in section 6324(a)(1); rather, it is 10 years from the date the assessment is made against the estate upon the filing of the estate tax return in accordance with section 6502(a). The section 6324(a)(2) personal liability arises independently from the estate tax lien; accordingly, it may be collected within the ordinary collection period of 10 years from the date of assessment. A separate assessment against the transferees is not required. See United States v. Bevan, No. 2:07-CV-1944 MCE JFM PS, 2008 WL 5179099, at \*6 (E.D. Cal. Dec. 10, 2008); United States v. Degroft, 539 F. Supp. 42, 44 (D. Md. 1981); Estate of Mangiardi v. Commissioner, T.C. Memo. 2011-24.

2. Another method that can be utilized to collect the estate tax liability from a transferee-beneficiary of the estate is to make a separate assessment against such transferees under the procedures contained in section 6901. The collection procedures applying to transferees contained in section 6901 are not exclusive and mandatory, but are cumulative and alternative to other methods of tax collection. See United States v. Geniviva, 16 F.3d 522, 524 (3d Cir. 1994); United States v. Russell, 461 F.2d 605, 607 (10th Cir. 1972); Degroft, 539 F. Supp. at 44.

3. Non-probate assets included in the taxable estate that are transferred by a transferee to a purchaser or holder of a security interest are divested of the special estate tax lien, and a like lien attaches to all of the transferee's property, including all after-acquired property. I.R.C. § 6324(a)(2). This rule also applies to a transferee of a transferee. The special estate tax lien attaches to any consideration received from the purchaser or secured lender, even though the fiduciary may

have obtained a discharge from personal liability under section 2204. See I.R.C. § 6324(a)(3); Treas. Reg. § 301.6324-1(a)(2)(iii).

- a) Accordingly, if a beneficiary or donee of a decedent's nonprobate assets transfers such an asset and divests the estate tax lien, then all of that beneficiary's or donee's property, though never a part of the decedent's estate, is subject to the lien.
- b) The beneficiary's or donee's personal liability is limited to the date-of-death value of the nonprobate assets received.

## ***H. Probate Assets***

If property is included in the estate under section 2033 (probate assets), it is divested of the lien upon transfer to a purchaser or holder of a security interest only if the estate's executor has been discharged from personal liability pursuant to I.R.C. § 2204. See I.R.C. § 6324(a)(3); United States v. Vohland, 675 F.2d 1071, 1075 (9th Cir. 1982); United States v. Estate of Young, 592 F. Supp. 1478, 1486 (E.D. Pa. 1984). See also Rev. Rul. 69-23, 1969-1 C.B. 302.

- 1. As noted previously, the special estate tax lien imposed by section 6324 operates independently of the general lien arising from unpaid taxes which is imposed by section 6321. Therefore, even if a tax lien under section 6321 is inferior to a purchaser's acquired interest of section 2033 (probate) property, the special lien under section 6324 provides the United States a superior claim unless the purchaser falls under the specific protections in section 6324. See Rev. Rul. 69-23, 1969-1 C.B. 302.
- 2. The procedure and conditions for discharge of an executor under section 2204 are described in Treas. Reg. § 20.2204-1.

## ***I. Deferred Estate Taxes – (I.R.C. § 6324A)***

Section 6324A creates a special lien for deferred payments of the estate tax liability for interests in a closely held business.

- 1. If an estate qualifies and elects to defer the payment of estate tax pursuant to I.R.C. § 6166, the Service must evaluate whether a bond should be required as security for deferral. See I.R.C. § 6165; Estate of Roski v. Commissioner, 128 T.C. 113, 123 (2007). The Service's decision to require a bond can be appealed to the Tax Court. See I.R.C. § 7479(a), Roski, 128 T.C. at 127. See Notice 2007-90, 2007-46 I.R.B. 1003 regarding the factors the Service will consider in deciding whether to require security.



2. If the Service requires a bond pursuant to I.R.C. § 6165 to secure deferral of estate tax pursuant to I.R.C. § 6166, the estate may elect to provide a lien pursuant to I.R.C. § 6324A in lieu of the bond.
3. The lien is created by the executor's election, after an election has been made under section 6166 to defer the payment of estate tax up to 15 years. See I.R.C. § 6166(a). The lien election is then made by filing an agreement signed by all parties with interests in the property. See Treas. Reg. § 301.6324A-1(b)(1). See also Roth v. Skiba (In re Roth), No. 03-385 Erie, 2004 WL 716743, \*4 (W.D. Pa. Apr. 1, 2004); Noble v. Soler, No. C2-95-1008, 1997 WL 873539, at \*4 (S.D. Ohio Dec. 17, 1997) (describing I.R.C. § 6324A(c) agreement referred to in § 6324A(a)); Evelpis Properties v. United States, No. C-2-95-1118, 1997 WL 382122, at \*2-3 (S.D. Ohio Apr. 15, 1997).
4. The amount of the lien is the unpaid tax, plus additions, payment of which is deferred. See I.R.C. §§ 6324A(b)(2) and 6324A(e)(1)-(2).
5. Any property can be designated by the signed agreement if it is expected to survive the deferral period. See I.R.C. § 6324A(b)(1); Treas. Reg. §§ 20.6324A-1(b). The property offered in the 6324A agreement does not have to be property of the estate. As long as the property is expected to survive the deferral period, is of an adequate amount, and is designated in the agreement, the Service may not reject the agreement based on the type of property offered. See I.R.C. § 6324A(b).
6. The lien arises at the discharge of the executor, under section 2204, or earlier if notice is filed, and continues until the deferred amount is paid or becomes unenforceable through lapse of time. See I.R.C. § 6324A(d)(2). See section 6503(d) for the suspension of the period of limitations for collection in cases that have elected the extended payout provided by section 6166.
7. This lien replaces the § 6324 lien on covered property. See I.R.C. § 6324A(d)(4). See also Noble, 1997 WL 873539, \*4 (quoting § 6324(d)(4): “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”). However, the section 6324A lien divests the § 6324(a) lien only with respect to property designated in the section 6324A lien agreement. IRS CCA 200645027, 2006 WL 3291711 (July 31, 2006).
8. Notice of the lien must be filed to compete with section 6323(a) interests but no refiling is necessary. See I.R.C. § 6324A(d)(1). Priority over this lien is accorded, however, even if notice is filed, to some liens and security interests in real property. See I.R.C. § 6324A(d)(3).
9. Lien protection can exist for the Service when no section 6324A lien was

elected with the section 6166 extended estate tax payout, even though the 10-year section 6324(a) lien expires before the 15-year payout period is complete. The section 6324A lien provides additional security for the 5-year additional payout period under section 6166 that continues after the section 6324 lien would otherwise have expired. However, the Service may have other means of security for that 5-year period, even if the section 6324A lien is not elected. These other means include a general lien provided by section 6321 and the personal liability of the executor.

10. The section 6324A special lien is discretionary with the executor, and, generally, acquisition of such requires the involvement of the Examination Division (at the time the section 6166 extended payout is requested for the estate with the filing of the estate tax return). The Service may require a bond, however, as a condition of granting the section 6166 election. See I.R.C. § 6166(k)(1).

11. Acquisition of the section 6324A lien must be weighed against the forced termination of the 10-year "secret" lien created by section 6324(a) and the termination of the executor's personal liability. See I.R.C. §§ 6324A(d)(4), 2204. As a result, in many cases the 15-year payout is approved without acquisition of the section 6324A special lien.

12. The general lien provided by section 6321 can provide protection after expiration of the 10-year secret lien under section 6324(a), but notice must be filed to obtain priority. See I.R.C. §§ 6323.

13. The executor's continued personal liability under section 2002 and 31 U.S.C. § 3713(b) can also provide a source of recovery.

14. Reliance upon section 6321 and an executor's personal liability can be problematic, however. First, the Service loses priority against all post-death creditors taking security interests in the estate property upon expiration of the "secret" estate tax lien under section 6324(a). Second, depending on the executor to be alive and solvent after 10 years is not without risk.

15. The special estate tax lien under section 6324A can still be obtained upon the expiration of the section 6324(a), 10-year lien, if the executor is still authorized to act for the estate. The application for the special lien can be made "at any time prior to payment of the full amount of estate tax and interest due." See Treas. Reg. § 301.6324A-1(a).

## ***J. "Special Use" Value (I.R.C. § 6324B)***

Section 6324B creates a special lien for the pending additional estate tax attributable to the estate's election to use a "special use value" for certain "qualified" property for estate tax calculation purposes.

1. The lien is created by an election under section 2032A (valuation of farm real property and certain real property used in family businesses).
2. The amount of the lien is an amount equal to the "adjusted tax difference" attributable to the property interest. See I.R.C. § 6324B(a). Generally, this is the difference between the estate tax calculated using the fair market value of the property and the estate tax calculated using the special use value of the property.
3. The property covered by this lien is the interest in qualified real property. See I.R.C. § 6324B(c)(2).
4. The lien arises at the election under section 2032A and continues until satisfied, becomes unenforceable through lapse of time, or the Secretary is satisfied no further liability will arise. See I.R.C. § 6324B(b)(1), (2).
5. By the agreement filed by the heirs with the "special use" treatment election, the 10-year statute of limitations for collection of the "additional estate tax" against the heirs does not begin until 6 months after the "triggering" disposition or cessation of qualified use. See I.R.C. § 2032A(c)(4). This period governs the "unenforceable through lapse of time" provision.
6. This lien incorporates the provisions of section 6324A(d)(1), (3), and (4), discussed supra in section J.

### ***K. Section 2057(i)(3)(P) "QFOBI" Lien***

Section 2057 provides that the value of a taxable estate shall be determined by deducting from the value of the gross estate the adjusted value of the qualified family-owned business interests (QFOBI) of the decedent, as described in section 2057(b)(2).

1. QFOBI is defined in section 2057(e).
2. Additional estate tax liability may be imposed under section 2057(f) upon the occurrence of certain enumerated events within 10 years of the decedent's death. For example, additional estate tax liability will be imposed upon the failure of family members to "materially participate" in the QFOBI business.
3. In order to provide security to the Service in the event of the imposition of additional estate tax liability, section 2057(i)(3)(P) provides that "rules similar" to the rules of section 6324B shall apply. Accordingly, section 2057(i)(3)(P) provides for a special estate tax lien which operates analogously to the section 6324B special estate tax lien. Unlike the section 6324B lien, however, the section

2057(i)(3)(P) lien may be secured by real or personal property.

### ***L. Tax Court – case closings***

Before a Tax Court docketed estate tax case is closed, notification must be made by Associate Area Counsel to the appropriate Service office (possibly through the Appeals Office transmittal) to file the appropriate section 6324A and section 6324B liens.

## **VII. GIFT TAX LIEN - I.R.C. § 6324(b)**

### ***A. Nature of the Gift Tax***

1. The gift tax is a tax imposed on the donor and historically was intended to prevent avoidance of the estate tax. The Tax Reform Act of 1976 "unified" the rates and calculations of the federal estate and gift taxes. See I.R.C. §§ 2001, 2010, 2502. For gifts made during 2010, when there was no estate tax, the gift tax rate is established solely by section 2502.
2. The gift tax is imposed on the donor who makes a gift of money or other property to the extent that the value of the gift exceeds the amount of the exclusions authorized by section 2503 and the deductions authorized by sections 2522 and 2523. See I.R.C. § 2501(a); Treas. Reg. §§ 25.2501-1(a), 25.2511-1(a). It does not apply to transfers by corporations or persons other than individuals. See Treas. Reg. § 25.2501-1(b). But a corporate gift may be treated as a gift by the shareholders. See Treas. Reg. § 25.2511-1(h)(1). See also J. George Spitz Trust v. Commissioner, T.C. Memo. 1971-8.
3. The donor is taxed even though the recipient of the gift (donee) is a corporation or any other person. The donor is taxed when the gift is completed even if at that time the identity of the donee isn't known or ascertainable. See Treas. Reg. § 25.2511-2(a).
4. The gift tax return is now due annually, except for the gift tax return due for the year of the decedent's death. See I.R.C. §§ 6019 & 6075(b).

### ***B. Creation of the Gift Tax Lien***

The gift tax lien is created by the making of a taxable gift by a donor. A FTL for unpaid gift tax applies to all gifts made in the calendar year, including nontaxable gifts (e.g., gifts entirely within the annual exclusion). See Baur v. Commissioner, 2 T.C. 1016, 1018-19 (1943), aff'd, 145 F.2d 338 (3d Cir. 1944).

### ***C. Property Subject to the Lien***

The lien covers all property gifted during the period for which the gift tax return was filed or is due. If the donee transfers property to a purchaser or holder of a security interest, the property is divested of the lien and a like lien attaches to all property of the donee, including after-acquired property, to the extent of the gift's value. See I.R.C. § 6324(b).

### ***D. Personal Liability of the Donee – Recipient of the Gift***

The donee is personally liable by statute for the gift tax. This liability can be assessed under section 6901. However, a separate assessment against the transferees is not required. See United States v. Degroft, 539 F. Supp. 42, 44-45 (D. Md. 1981).

1. The donee may be liable, not only for tax on the gift, but also for the entire gift tax liability of the donor, up to the value of the gift received. See I.R.C. § 6324(b); See also United States v. Botefuhr, 309 F.3d 1263, 1276 (10th Cir. 2002). Moreover, while section 6324(b) limits the maximum amount of the transferee/donee's tax liability, it does not limit or restrict interest which may be added on to that liability. A transferee/donee is liable for interest until the liability is paid, at the statutory rate found in section 6621, which includes interest from and after the issuance of the notice of transferee liability. See I.R.C. § 6601(a). Compare Baptiste v. Commissioner, 29 F.3d 1533, 1541 (11th Cir. 1994) (holding that a transferee's liability is distinct from that of the transferor and thus interest is not limited to the value of the transferred property) with Poinier v. Commissioner, 86 T.C. 478, 487-90 (1986), rev'd in part by Poinier v. Commissioner (Poinier II), 858 F.2d 917 (3d Cir. 1988) (holding that a transferee's total liability, including liability for interest, is limited to the value of the gift received by that donee), cert. denied, 490 U.S. 1019 (1989), and Baptiste v. Commissioner, 29 F.3d 433, 437-38 (8th Cir. 1994) (same holding with respect to interest on underlying estate taxes).
2. The donee may be entitled to recovery from other liable donees but not from the donor.
3. The statute of limitations applicable to the personal liability established by section 6324(b) is not the 10-year period from the date the gifts are made set forth in the section; rather, it is 10 years from the date the assessment is made against the donor. See Botefuhr, 309 F.3d at 1277-79. The section 6324(b) personal liability arises independently from the gift tax lien; accordingly, it may be collected within the ordinary collection period of 10 years from the date of assessment.
4. The liability of the donee is based on federal law not state law, and the solvency of the transferor is irrelevant. See Poinier II, 858 F.2d at 919-20.

5. The Tax Court lacks jurisdiction to offset any gift tax deficiencies and transferee liabilities by refunds claimed due from previously paid estate and income taxes. See I.R.C. § 6214(b). See also Poinier, 86 T.C. at 490-91. It also lacks jurisdiction to offset individual refunds claimed by transferees (donees) against their transferee liabilities. See Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418, 419-20 (1943).

### ***E. Duration***

The gift tax lien lasts 10 years from date of gift. See I.R.C. § 6324(b). The gift tax lien is durational, not limitational, and thus, the Government is required to enforce the special gift tax lien within 10 years of its creation. See New England Acceptance Corp. v. United States, 35 F. Supp. 2d 53, 56 (D.N.H. 1997).

### ***F. Priority of Gift Tax Lien***

This special lien, like the special estate tax lien, is secret (i.e., effective without a NFTL), but priority is limited as with the special estate tax lien. See I.R.C. § 6324(c).