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Addressing Tax Liens In Estate Administration



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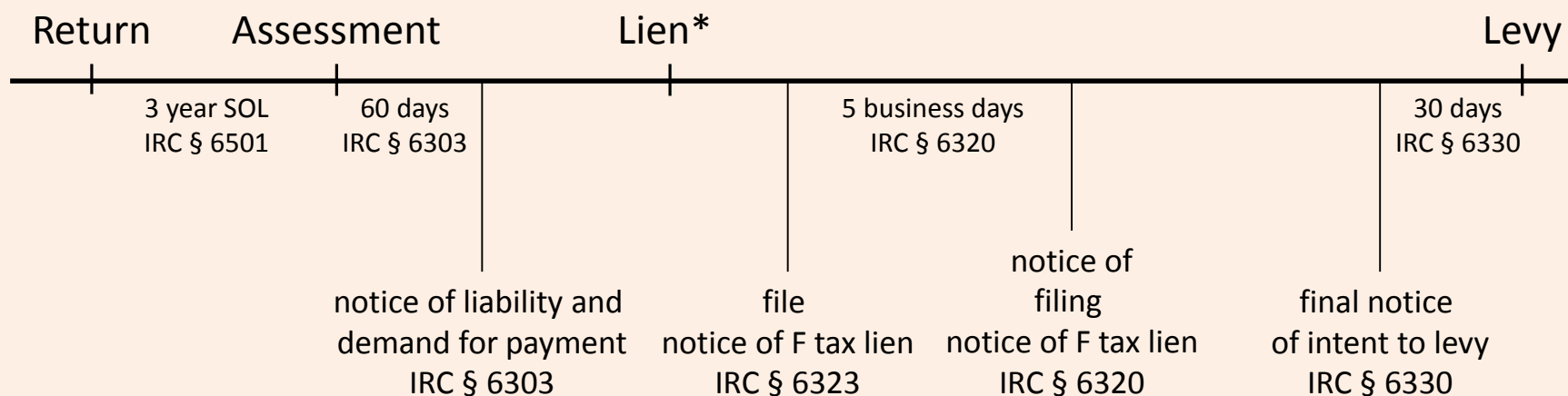
Introduction

- Personal representative
 - Executor
 - Administrator
- Duties include payment of decedent's tax
- Risk of personal liability
 - Risk realization delayed
 - Risk increased due to Service recently ending its long standing practice regarding estate tax closing letters (Notice 2017-12)

Executor's Duty To Pay Tax

- Estate Tax
 - IRC § 2001
 - Imposes estate tax
 - IRC §§ 2002 & 6018
 - Estate tax reported and paid by executor
 - IRC § 2203
 - Definition of executor
- Income Tax
 - IRC § 1
 - Imposes income tax
 - IRC §§ 6903 & 6012
 - Income tax reported and paid by executor

Collections Timeline



10 year SOL to collect by levy or court proceeding
IRC § 6502

* Lien arises at time assessment is made. IRC §§ 6321 & 6322. Special lien for estate tax arises automatically on date of death and continues for ten years. IRC § 6324

31 USC § 3713

31 U.S.C. § 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.

31 USC § 3713

- Treas. Reg. § 20.2002-1
 - Thus, if the executor pays a debt due by the decedent's estate or distributes any portion of the estate before all the estate tax is paid, he is personally liable, to the extent of the payment or distribution, for so much of the estate tax as remains due and unpaid.

31 USC § 3713

- Tax Court (Bank of the West)
 - The purpose of Section 3713 is to make those into whose hands control and possession of the decedent's assets are placed, responsible for seeing that the Government's priority is paid.

31 USC § 3713

- Supreme Court (Romani and Moore)
 - The text of Section 3713 is virtually unchanged since its enactment in 1797.
 - In 1799, Congress gave the priority statute teeth by making the administrator of any decedent's estate personally liable for any amount not paid the U.S. because he gave another creditor preference.

31 USC § 3713

- Knowledge
 - Mitigated strict liability
- Exceptions
 - Specific and perfected lien (IRC § 6323)
 - Administrative expenses
 - Family allowance

Government Approach

- Involve Chief Counsel and Department of Justice
- Preferred venue
 - Federal District Court
 - Not State Court (i.e., Probate Court)
- Provide notice to establish knowledge
 - Form 10492, Notice of Federal Taxes Due
 - Form 4490, Proof of Claim
 - Form 2373, Statement of Internal Revenue Taxes Due as an Expense of Administration of an Estate

Government Approach

- Assert personal liability when discover transfer that violates Section 3713
 - File suit against the fiduciary in federal district court (IRC § 7402)
 - Issue notice of fiduciary liability (IRC § 6901)
- File suit to foreclose federal lien

Courts Have Liberally Applied Section 3713

- Different types of executors have been held personally liable
 - Individual (Grable)
 - Corporate (Bank of West)
 - Co-Executors (Espinor)

Courts Have Liberally Applied Section 3713

- Personal representative should not ignore potential tax claim
 - Executor held personally liable where failed to store decedent's personal property (MacIntyre)
 - Executor held personally liable where made distributions approximately 9 years after executor involved in Tax Court litigation and signed Form 870 agreeing to deficiency (Bartlett)
 - Executor held personally liable where property transferred in exchange for \$1 (Tyler)

Courts Have Liberally Applied Section 3713

- Personal representative remains at risk of personal liability even if enters into agreement with beneficiaries or receives judicial discharge
 - Executor held personally liable where entered into agreement with beneficiaries and made distribution two years before received notice of deficiency (Coppola)

Courts Have Liberally Applied Section 3713

- Personal representative held personally liable where entered into agreement with beneficiaries, made distributions of stock, and such stock subsequently became worthless due to bankruptcy (Johnson [Utah])
- Executor held personally liable where received judicial discharge (Weisburn)

Courts Have Liberally Applied Section 3713

- Broad language under Section 3713 requiring absolute priority of US results in conflict of laws
- Conflict with IRC § 6323
 - Supreme Court harmonized Section 3713 and IRC § 6323 so that secret lien does not have priority (Romani)
 - Claim of ex-wife and children under divorce agreement secondary to claim of the Government (Schick)

Courts Have Liberally Applied Section 3713

- Conflict with State priority statute
 - Chapter 355 of Texas Estates Code
 - Section 355.102 of the Texas Estates Code provides that Class 3 claims include a tax lien
 - Fifth Circuit recognized that conflict of laws remains open (Johnson [5th Cir.])
 - Conflict of laws has been resolved under certain circumstances by treating administration expenses as debts of the estate, rather than debts of the decedent
 - First Circuit declined to apply equitable exception (McNicol)

Courts Have Liberally Applied Section 3713

- Reliance on attorney
 - Administrator held personally liable where relied on attorney to pay estate tax reflected on amended Form 706 and failed to confirm that attorney made such payment (Leigh; Stiles)
 - Executor not held personally liable because lacked knowledge of tax claim where consulted attorney who advised that no tax was due (Little)

Courts Have Liberally Applied Section 3713

- Executor held personally liable where believed tax claim was not valid after consulting attorney who advised that tax claim could potentially be asserted (MacIntyre)

Addressing Risk of Personal Liability Under Section 3713

- Request transcript or copy of prior return
 - IRC § 6103(e)(3)
 - Form 4506-T, Request for Transcript of Tax Return
 - Form 4506, Request for Copy of Tax Return
- Request prompt assessment
 - IRC § 6501(d)
 - Assessment within 18 months of written request (rather than within 3 years of filing return)
 - Form 4810, Request for Prompt Assessment Under Internal Revenue Code Section 6501(d)

Addressing Risk of Personal Liability Under Section 3713

- Request release of lien for error
 - IRC § 6326
 - Appeal made in writing within 1 year after the taxpayer becomes aware of the erroneously filed tax lien
- Request hearing with appeal (“CDP hearing”)
 - IRC § 6320
 - Must request hearing within 30 day period that commences the day after the end of the five business day period within which the Service is required to provide the taxpayer with notice of the filing of the notice of federal tax lien
 - Form 12153, Request for a Collection Due Process or Equivalent Hearing

Addressing Risk of Personal Liability Under Section 3713

- Request withdrawal of lien
 - IRC § 6323
 - Form 12277, Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien
- Request release of lien or discharge of property
 - IRC § 6325
 - Form 14135, Application for Certificate of Discharge of Property from Federal Tax Lien
 - Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien

Addressing Risk of Personal Liability Under Section 3713

- Request discharge of executor
 - IRC § 2204
 - Discharge from estate tax
 - IRC § 6905
 - Discharge from income and gift tax
 - Form 5495, Request for Discharge from Personal Liability under Internal Revenue Code Section 2204 or 6905
 - Treas. Reg. §§ 20.2204-1(a) & 301.6905-1(a)
 - If no such notification is received, the executor is discharged at the end of such nine month period from personal liability for any deficiency thereafter found to be due.
 - Different from request for an estate tax closing letter

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Matthew S. Beard is a partner with Meadows, Collier, Reed, Cousins, Crouch, and Ungerman, L.L.P. Mr. Beard's practice is focused on federal taxation. In his estate planning and probate practice, Mr. Beard designs and implements estate and business succession plans with an emphasis on federal tax issues. On transactional matters, Mr. Beard provides advice on tax issues for partnerships, limited liability companies, and corporations, and for transactions involving such entities. Mr. Beard is the author of "Annotated Tax Provisions for Limited Liability Companies," published annually by Practising Law Institute in their Partnership Tax Practice Series.

Mr. Beard is an adjunct law professor for federal income taxation at Southern Methodist University, Dedman School of Law. He actively serves as a member of the estate and gift tax committee for the State Bar of Texas, Tax Section, by providing comments on new tax laws. In December 2016, Mr. Beard testified before Treasury regarding proposed valuation regulations under section 2704 of the Code. In law school, Mr. Beard served as an extern with the Office of Chief Counsel. Mr. Beard has also had the privilege of serving on the executive board for Dallas Summer Musicals.

Education

LL.M. in Taxation, Southern Methodist University Dedman School of Law, 2006

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B.B.A. in Economics, Baylor University, 2002

Teaching

Southern Methodist University, Dedman School of Law, Adjunct Law Professor,
Federal Income Taxation, 2014-2019

Awards

Texas Rising Stars in Tax, Texas Monthly and Texas Super Lawyers, 2017-2019

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