ADDRESSING TAX LIENS IN ESTATE ADMINISTRATION

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I. Priority Of Government Claims. The personal representative (executor or administrator) of a decedent's estate is subject to many duties. Under federal law, the personal representative of an insolvent estate is required to pay a claim of the United States (the "***U.S.***") government (the "***Government***") first. The personal representative is at risk of personal liability if he or she pays any part of a debt of the estate before paying a claim of the Government. This risk is almost as old as the U.S. Constitution, and could potentially be realized years (and, in some cases, more than a decade) after the decedent's date of death. This risk is particularly relevant today as a result of the Internal Revenue Service (the "***Service***") ending its long-standing practice regarding estate tax closing letters.[2]

To address tax liens in estate administration, this outline sets forth the current rules for the priority of claims of the Government with respect to a decedent's estate, case summaries that show recurring patterns that have resulted in personal liability of personal representatives, and options for addressing liens and the risk of personal liability.

A. Duty To Pay Federal Taxes Of Decedent Imposed On Personal Representative. The Internal Revenue Code of 1986, as amended (the "***Code***"), imposes transfer taxes (estate, gift, and generation-skipping transfer) and income taxes. Under the Code, the personal representative is required to pay taxes of the decedent.

1. Federal Estate Tax. Section 2001 of the Code imposes an estate tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the U.S.[3] The federal estate tax is neither a property tax nor an inheritance tax. It is a tax imposed upon the transfer of the entire taxable estate and not upon any particular legacy, devise, or distributive share.[4] Section 2002 of the Code provides that the estate tax shall be paid by the executor. Section 2203 of the Code defines the term "executor" as the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified and acting within the U.S., then any person in actual or constructive possession of any property of the decedent. The federal estate tax imposed both with respect to the estates of citizens or residents and with respect to estates of nonresidents not citizens is payable by the executor or administrator of the decedent's estate.[5] This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of property which does not come within the possession of the executor or administrator (i.e., nonprobate property).[6] If there is no executor or administrator appointed, qualified, and acting in the U.S., then any person in actual or constructive possession of any property of the decedent is required to pay the entire tax to the extent of the value of the property in his possession.[7] The executor is required to file an estate tax return in all cases where

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[1] The author gratefully acknowledges assistance from Alexander R. Aills, candidate for Juris Doctor, May 2018, Southern Methodist University, Dedman School of Law.

[2] Notice 2017-12, 2017-5 I.R.B. 742 (2017) (For estate tax returns filed on or after June 1, 2015, the Service changed its policy and will issue an estate tax closing letter only at the request of an estate.).

[3] Treas. Reg. § 20.0-2(a). Additional transfer taxes are imposed. A gift tax is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident. I.R.C. § 2501(a)(1). A generation-skipping transfer tax is imposed on every generation-skipping transfer. I.R.C. § 2601.

[4] Treas. Reg. § 20.0-2(a).

[5] Treas. Reg. § 20.2002-1.

[6] *Id*.

[7] *Id*.

the gross estate at the death of a citizen or resident exceeds the basic exclusion amount in the effect under section 2010(c) of the Code for the year of the decedent's death.[8]

2. Federal Income Tax. Section 1 of the Code imposes an income tax on the taxable income of every individual who is a citizen or resident of the U.S.[9] Upon notice (Form 56) to the Service that the personal representative is acting for the decedent in a fiduciary capacity, the personal representative shall assume the duties of the decedent in respect of a tax imposed by the Code, until notice is given that the fiduciary capacity has terminated.[10] The return of the decedent shall be made by his executor, administrator, or other person charged with the property of such decedent.[11]

3. Lien For Unpaid Federal Taxes. The amount of any tax imposed by the Code shall be assessed[12] within three years after the return was filed.[13] The assessment shall be made by recording the liability of the taxpayer in the office of the Service in accordance with the rules or regulations prescribed by the Service.[14] Within sixty days of the assessment, the Service is required to give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof.[15] If the tax is properly assessed within three years, the tax may generally be collected by levy or by a proceeding in court within ten years from the date of assessment.[16]

Under section 6321 of the Code, if any person liable to pay any tax neglects or refuses to pay the same after demand, then 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 U.S. upon all property and rights to property, whether real or personal, tangible or intangible, belonging to such person.[17] The lien attaches to all property and rights to property belonging to such person at any time during the period of the lien, including any property or rights to property acquired by such person after the lien arises.[18] The lien arises 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.[19]

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[8] I.R.C. § 6018(a)(1). For gift tax returns of a deceased donor, Treas. Reg. § 25.6019-1(g) requires the executor or administrator to file the donor's gift tax return if the donor dies before filing his return.
[9] Treas. Reg. § 1.1-1(a)(1).
[10] I.R.C. § 6903(a).
[11] I.R.C. § 6012(b)(1).
[12] Assessment and deficiency are different concepts. "Deficiency" generally means the amount by which the tax imposed exceeds the excess of the sum of (i) the amount shown as tax by the taxpayer upon his return, plus (ii) the amounts previously assessed (or collected without assessment) as a deficiency. I.R.C. § 6211(a). If the Service determines that there is a deficiency of tax, the Service is authorized to send notice of such deficiency (also known as a statutory notice of deficiency) to the taxpayer by certified mail or registered mail. I.R.C. § 6212(a). Within ninety days after the notice of deficiency is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. I.R.C. § 6213(a). In general, no assessment of a deficiency in respect of any tax 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 ninety day period, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. I.R.C. § 6213(a). If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Service. I.R.C. § 6215(a). No part of the amount determined as a deficiency by the Service but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment. I.R.C. § 6215(a).
[13] I.R.C. § 6501(a).
[14] I.R.C. § 6203.
[15] I.R.C. § 6303(a).
[16] I.R.C. § 6502.
[17] Treas. Reg. § 301.6321-1.
[18] *Id*.
[19] I.R.C. § 6322.

In the case of real property, the Service is required to file a notice of federal tax lien in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such state, in which the property subject to the lien is situated (at its physical location).[20] In the case of personal property, whether tangible or intangible, the Service is required to file a notice of federal tax lien in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such state, in which the property subject to the lien is situated (at the residence of the taxpayer at the time the notice of lien is filed), except that state law merely conforming to or reenacting federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such state.[21] If the state has not by law designated one office, then the Service is required to file a notice of federal tax lien in the office of the clerk of the federal district court for the judicial district in which the property subject to the lien is situated.[22]

Under section 6324(a)(1) of the Code, if the estate tax is not paid in full, then it becomes a special lien upon the gross estate for ten years from the date of the decedent's death. Section 6324(b) of the Code provides a similar lien for unpaid gift tax. Unlike the general tax lien provided for in section 6321 of the Code (which attaches to all property belonging to a taxpayer after assessment, demand, and nonpayment of the tax and which secures the payment of all taxes, including estate taxes), the special estate tax lien under section 6324(a)(1) of the Code comes into being without assessment or notice and demand automatically on the date of death, and it attaches to all of the property the value of which is included in the gross estate whether or not the property comes into the possession of the executor or administrator.[23] It continues for ten years unless, before the end of the ten year period, the estate tax is paid in full or becomes unenforceable by expiration of the period of limitations on collection.[24] Thus, the lien comes into existence upon the decedent's death without the necessity of the Service doing anything (such as filing a special estate tax lien against nonprobate assets the value of which was included in the decedent's gross estate).[25] If part of the gross estate is used for the payment of charges against the estate and expenses of administration allowed by any court having jurisdiction thereof, then such part shall be divested of such lien.[26]

The general lien under section 6321 of the Code and the special lien under section 6324 of the Code for estate or gift tax are not exclusive of each other, but are cumulative.[27] The special lien may exist without the general lien being in force, or the general lien may exist without the special lien being in force, or the general lien and the special lien may exist simultaneously, depending upon the facts and pertinent statutory provisions applicable to the respective liens.[28]

Congress added certain provisions as "Due Process for Liens" and "Due Process for Collections."[29] The Service must comply with those provisions after filing a notice of federal tax lien and before proceeding with a levy.[30] The Service is required to notify the taxpayer (the person liable to pay the tax due after notice and demand who refuses or neglects to pay the tax due)[31] in writing of the filing of the notice of federal tax lien.[32] Such notice is required to be given not more than five business days after the day of the filing of the

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[20] I.R.C. §§ 6323(f)(1)(A)(i) & (f)(2)(A).
[21] I.R.C. §§ 6323(f)(1)(A)(ii) & (f)(2)(B).
[22] I.R.C. § 6323(f)(1)(B).
[23] Estate of Myers v. Comm'r, T.C. Memo 2017-11, 13 (2017).
[24] *Id*.
[25] *Id*.
[26] I.R.C. § 6324(a)(1); Treas. Reg. § 301.6324-1(a)(2)(i).
[27] Treas. Reg. § 301.6324-1(d).
[28] *Id*.
[29] Medical Practice Solutions, LLC, v. Comm'r, T.C. Memo 2010-98, 573 (2010).
[30] *Id*.
[31] I.R.C. § 6321; Treas. Reg. § 301.6320-1(a)(2), Q&A-1.
[32] I.R.C. § 6320(a)(1).

notice of federal tax lien, and shall be either given in person, left at the dwelling or usual place of business of such person, or sent by certified or registered mail to such person's last known address.[33] The lien notice is intended to inform the taxpayer of the right to a fair hearing relating to the notice of federal tax lien.[34] The validity and priority of the notice of federal tax lien is not conditioned on the taxpayer receiving the lien notice.[35] The Tax Court has recognized that the plain language of the statutes and regulations do not provide a special rule to account for the death of the taxpayer.[36] A lien notice issued solely in the name of the decedent has been held valid.[37]

Similarly, before proceeding with a levy, the Service must issue a final notice of intent to levy and notify the taxpayer of the right to an administrative hearing before such levy is made.[38] Such notice is required to be given not less than thirty day before the day of the first levy with respect to the amount of the unpaid tax for the taxable period, and shall be either given in person, left at the dwelling or usual place of business of such person, or sent by certified or registered mail, return receipt requested, to such person's last known address.[39] The Service can make a levy upon a person's property subject to a tax lien only after the Service has notified such person in writing of his intention to make such a levy, and such notice must be served on the person upon whose property levy is intended no less than thirty days before the date of levy.[40]

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Service, may direct a civil action to be filed in a federal district court to enforce the lien of the U.S. with respect to such tax or liability, or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.[41] All parties having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.[42] The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the U.S. therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the U.S.[43] If the property is sold to satisfy a first lien held by the U.S., the U.S. may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Service directs.[44]

Additionally, if federal estate tax is not paid on or before the due date, the Service shall proceed to collect the tax under the provisions of general law; or appropriate proceedings in the name of the U.S. may be commenced in any court of the U.S. having jurisdiction to subject the property of the decedent to be sold under the judgment or decree of the court.[45] From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance

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[33] *Id*.
[34] Estate of Brandon v. Comm'r, 133 T.C. 83, 86 (2009).
[35] *Id*.; *citing to,* Treas. Reg. § 301.6320-1(a)(2), Q&A-12.
[36] *Brandon* at 86.
[37] *Id*.
[38] I.R.C. § 6330(a)(1).
[39] I.R.C. § 6330(a)(2).
[40] I.R.C. §§ 6331(d)(1) & (2).
[41] I.R.C. § 7403(a).
[42] I.R.C. § 7403(b).
[43] I.R.C. § 7403(c).
[44] *Id*.
[45] I.R.C. § 7404.

shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.[46]

B. Personal Representative At Risk Of Personal Liability For Unpaid Federal Taxes. The personal representative is at risk of personal liability under 31 U.S.C. § 3713 ("***Section 3713***") for unpaid federal taxes of the decedent.[47] Section 3713 is the direct descendant of sections 3466 and 3467 of the Revised Statutes, which had been codified in 31 U.S.C. §§ 191 and 192. Section 3713 is contained in title 31 of the U.S. Code – Money and Finance, rather than in title 26 of the U.S. Code – Internal Revenue Code. Section 6901 of the Code connects Section 3713 to the Code by providing a method for the collection of liability. Section 6901(a)(1)(B) of the Code provides that the liability of a fiduciary under Section 3713(b), in respect of the payment of any income, estate or gift tax from the estate of the taxpayer, the decedent, or the donor, as the case may be, shall 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. In addition to such administrative collection, the Government can also collect fiduciary liability judicially by suit under section 7402(a) of the Code. The period of limitations for assessment of a fiduciary shall be 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.[48]

1. Section 3713. Section 3713 provides for the priority of Government claims as follows:

"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.

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[46] *Id*.

[47] Treas. Reg. § 20.2002-1. Additionally, section 6324(a)(2) of the Code provides for transferee liability – 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 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.

[48] I.R.C. § 6901(c)(3).

(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."

The word "debt" includes a beneficiary's distributive share of an estate, and the term "claim of the Government" includes an estate's federal tax liability (even if unassessed).[49] 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.[50]

The burden lies with those who argue that the Government's priority does not apply to show that they are not within the provisions of Section 3713.[51] If the personal representative is found liable, then his or her liability is limited to the value of the distribution or the amount of debt owed to the U.S., whichever is the lesser amount.[52]

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.[53] Refined to bare essence, Section 3713 grants a largely unqualified priority of payment for claims due to the U.S. from the estate of a deceased debtor having insufficient assets to pay all debts.[54] Congress gave Section 3713, also known as the "priority statute" or "federal insolvency statute," teeth by making the personal representative of any decedent's estate personally liable for any amount not paid the U.S. because he or she gave another creditor preference.[55] Section 3713(b) therefore ensures that those who control the assets of a debtor's estate bear full responsibility for adhering to the Government's priority.[56]

2. History. Section 3713 is almost as old as the Constitution, and its roots reach back even further into the English common law.[57] The text of Section 3713 is virtually unchanged since its enactment in 1797.[58]

The earliest priority statute was enacted in the Act of July 31, 1789, 1 Stat. 29, which dealt with bonds posted by importers in lieu of payment of duties for release of imported goods.[59] It provided that the debt due to the U.S. for such duties shall be discharged first in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased.[60] A 1792 enactment broadened the Act's coverage by providing that the language cases of insolvency should be

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[49] Treas. Reg. § 20.2002-1; Viles v. Comm'r, 233 F.2d 376 (6th Cir. 1956); Estate of Frost, T.C. Memo 1993-94 (1993); I.R.M. 5.5.9.23.1(5) (There is no requirement that the tax be assessed before it constitutes a claim of the government. Taxes that may be due on a yet unfiled return or that are under audit, or being contested in litigation qualify as a government claim. If the executor or trustee disputes the government's claim or does not believe it to be valid, he is still required to preserve sufficient assets to pay that claim until it is resolved.).
[50] Treas. Reg. § 20.2002-1.
[51] U.S. v. Cole, 733 F.2d 651 (9th Cir. 1984).
[52] U.S. v. Estate of Dickerson, 189 F. Supp. 2d 622 (W.D. Tex. 2001).
[53] Bank of the West v. Comm'r, 93 T.C. 462, 467 (1989).
[54] U.S. v. McNicol, 829 F.3d 77, 81 (1st Cir. 2016).
[55] U.S. v. Moore, 423 U.S. 77, 81 (1975).
[56] *McNicol* at 81; *citing to,* King v. U.S., 379 U.S. 329, 337 (1964).
[57] U.S. v. Estate of Romani, 523 U.S. 517, 525 (1998); *Moore* at 80.
[58] *Romani* at 524.
[59] *Romani* at 525, n. 9; *Moore* at 81.
[60] *Romani* at 525, n. 9; *Moore* at 81.

taken to include cases in which a debtor makes a voluntary assignment for the benefit of creditors, and the other situations that Section 3713 now covers.[61]

The Act of March 3, 1797, § 5, 1 Stat. 515, provided that where any revenue officer, or other person becoming indebted to the U.S., by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the U.S. shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.[62]

Then in 1799, Congress gave the priority statute teeth by making the administrator of any insolvent or decedent's estate personally liable for any amount not paid the U.S. because he gave another creditor preference.[63]

The 1797 and 1799 Acts have survived to this day essentially unchanged as Section 3713.[64]

The priority statute serves the same public policy as the Crown's common-law prerogative.[65] The priority proceeds from motives of public policy, in order to secure an adequate revenue to sustain the public burthens and discharge the public debts.[66] As that policy has mainly a reference to the public good, there is no reason for giving to the statute a strict and narrow interpretation.[67] For nearly two centuries the U.S. Supreme Court (the "***Supreme Court***") has applied the statute with this policy in mind.[68] Indeed, under the decisions of the Supreme Court, only the plainest inconsistency would warrant a finding of an implied exception to the operation of so clear a command as that of Section 3713.[69]

3. Knowledge. The Service recognizes that courts have mitigated strict liability under Section 3713.[70] Although not expressly stated in the statute, the Tax Court has stated that in order to render a fiduciary personally liable under Section 3713, he must first be chargeable with knowledge or notice of the debt due to the U.S.[71] The knowledge requirement may be satisfied by either actual knowledge of the liability or notice of such facts as would put a reasonably prudent person on inquiry as to the existence of the unpaid claim of the U.S.[72] The Fifth Circuit Court of Appeals (the "***Fifth Circuit***") has stated that liability under Section 3713 requires that (i) a fiduciary; (ii) distributed the estate's assets before paying a claim of the Government; and (iii) knew or should have known of the Government's claim.[73] Other courts have also addressed the knowledge requirement. First, the personal representative must have transferred assets of the

[61] *Romani* at 525, n. 9; *Moore* at 81.
[62] *Romani* at 525, n. 8.
[63] *Moore* at 81.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Moore* at 81-82.
[68] *Moore* at 82.
[69] *Moore* at 82-83.
[70] PLR 8843011 (Although a literal reading of Section 3713 and its predecessors, sections 191 and 192, imply that strict liability is imposed on a fiduciary who makes a distribution which leaves the estate with insufficient funds to pay the tax owed the U.S., such a rigid interpretation has been mitigated to some extent by courts.).
[71] Leigh v. Comm'r, 72 T.C. 1105, 1109 (1979).
[72] *Leigh* at 1110.
[73] U.S. v. Marshall, 798 F.3d 296, 312 (5th Cir. 2015).

estate before paying a claim of the U.S.[74] Liability may attach even if the transferred funds were not used to pay a debt; the dispositive question is whether the personal representative depleted the assets of the estate by distributing them to herself or others.[75] The second and third requirement – insolvency and notice – do not appear in the text of Section 3713(b).[76] Nevertheless, courts have routinely read these requirements into the statutes to soften what would otherwise be a strict liability regime.[77] The insolvency requirement demands that an indebted estate be insolvent at the time that the personal representative effects a transfer of assets.[78] The notice requirement demands that the personal representative must have had knowledge of the debt owed by the estate to the U.S. or notice of facts that would lead a reasonably prudent person to inquire as to its existence.[79]

4. Exceptions. Although Section 3713, on its face and taken alone, is absolute, the Supreme Court has recognized several exceptions to the general priority rule the statute dictates.[80]

The first exception is for a specific and perfected lien.[81] For a lien to be sufficiently specific and perfected to be excepted from the operation of Section 3713, title to or possession of the debtor's property must have been conveyed to the lienor before the right of preference accrued to the U.S.[82] The "title or possession" requirement for this exception was reaffirmed where the Supreme Court explained that the U.S. has no claim against property no longer in the possession of the debtor.[83]

The Supreme Court has held that an unrecorded federal tax lien did not have priority over a judgment lien that had been perfected under state law.[84] In so doing, the Supreme Court held that the general rule that the U.S. shall be paid first established by Section 3713 was superseded by the Tax Lien Act of 1966 (section 6323(a) of the Code), which establishes that a federal tax lien shall not be valid against purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.[85] Because the judgment creditor had perfected its lien on the debtor's real property before the debtor's death and before the U.S. served notice of its tax liens, the Supreme Court concluded that the unrecorded federal tax liens could not claim priority over the earlier recorded judgment under state law.[86]

The Service itself acknowledges that there are exceptions to the priority created by Section 3713(a), including:[87]

(i) Prior Interests. Section 3713(a) does not give a federal tax claim priority over a prior perfected interest in property or an interest in property that otherwise has priority under section 6323 of the Code. *Estate of Romani*, 523 U.S. 517 (1998).

(ii) Administrative Expenses. These are expenses incurred for the general welfare of creditors, and include court costs and expenses incurred to collect and preserve assets. Funeral expenses

[74] *McNicol* at 81.
[75] *Id*.; *citing to*, U.S. v. Coppola, 85 F.3d 1015, 1020 (2nd Cir. 1996).
[76] *McNicol* at 81.
[77] *Id*.; U.S. v. Renda, 709 F.3d 472, 480 (5th Cir. 2013).
[78] *McNicol* at 81; *Renda* at 480.
[79] *McNicol* at 81; *Coppola* at 1020.
[80] Straus v. U.S., 196 F.3d 862 (7th Cir. 1999).
[81] *Id*.
[82] *Id*.; *citing to*, Thelusson v. Smith, 15 U.S. 396, 426 (1817).
[83] *Straus*; *citing to*, U.S. v. Gilbert Associates, 345 U.S. 361, 366 (1953) (holding that the U.S.'s liens cannot trump another party's liens where that party has gained possession or title to the debtor's property).
[84] *Straus*; *citing to, Romani*.
[85] *Id*.
[86] *Id*.
[87] I.R.M. 34.4.1.7(2).

are deemed to be costs of administration. Administrative expenses may be subject to a standard of reasonableness or specific dollar limitations; therefore, state law should be consulted. Note that the expense of last illness is not entitled to priority. *See* Rev. Rul. 80-112.

(iii) Family Allowance. A widow's allowance or family allowance is generally construed as a charge against the estate and, thus payable before payment of the debts of the decedent. These expenses are given priority over the federal tax claim if in a reasonable amount. *See* Rev. Ruls. 79-399 and 80-112.

C. Government's Approach To Asserting Personal Liability Under Section 3713. The Government views working accounts on deceased taxpayers as one of the more complex and challenging tasks.[88] Decedent accounts involve tax liabilities that accrued before the death of the taxpayer and remain unpaid.[89] Typically, the unpaid taxes result from assessments for income tax (Form 1040).[90] Estate taxes are levied on assets comprising the gross estate which are required to be reported on the U.S. Estate (and Generation–Skipping Transfer) Tax Return (Form 706) ("***Form 706***").[91] The income earned by assets of the estate must be reported on Form 1041.[92]

Personal liability under Section 3713(b) is the "muscle" behind the federal priority under Section 3713(a).[93] Under Section 3713(b), the fiduciary must first pay known priority debts of the U.S. or risk personal liability.[94]

1. Involve Chief Counsel And Department Of Justice. Under Section 7803(b)(1) of the Code, there is established in the Department of the Treasury the Office of General Counsel and the office of an Assistant General Counsel, who serves as Chief Counsel to the Service.[95] The Chief Counsel is the chief law officer for the Service.[96] The primary function of the SB/SE Operating Division Counsel, and Area and Associate Area Counsel, is to represent the Service in cases before the U.S. Tax Court.[97]

The Department of Justice ("***DOJ***") generally through its staff of attorneys in the Tax Division, and the U.S. Attorneys in the field, are the Government's representatives in most courts of the federal and state judicial systems and, as such, represent the Service.[98] The Chief Counsel's office furnishes such assistance as may be necessary, including recommendations on offers in settlement, suit and defense letters in support of the Service's position on pertinent issues, and recommendations with respect to appeal or certiorari of a court's decision, often conferring with Justice Department attorneys on various matters.[99]

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[88] I.R.M. 5.5.1.2(1).
[89] I.R.M. 5.5.1.2(2).
[90] *Id*.; I.R.M. 5.5.2.4(1) (If Notice of Federal Tax Lien has been recorded against a taxpayer during his lifetime, its priority is preserved after death and valid against other creditors (except as provided in section 6323 of the Code), including future beneficiaries whose claims come into existence subsequent to the Federal tax lien (they are debts of the ***estate***).); I.R.M. 5.5.2.4(2) (The death of the debtor does not extinguish the federal tax lien, nor affect the priority among multiple security interests in the debtor's property.).
[91] I.R.M. 5.5.1.2(5).
[92] I.R.M. 5.5.1.2(9).
[93] I.R.M. 5.17.13.7(8).
[94] *Id*.
[95] I.R.M. 5.17.1.3.1(1).
[96] I.R.M. 5.17.1.3.1(2).
[97] I.R.M. 5.17.1.4.2(1); I.R.M. 5.17.1.6(1).
[98] I.R.M. 5.17.1.6(1).
[99] I.R.M. 5.17.1.6(2).

SB/SE attorneys in the field are responsible for handling cases involving the collection of federal taxes in non-bankruptcy insolvency proceedings, including proceedings for decedents' estates.[100] When a controversy arises concerning the legal position or the claim of the U.S. for taxes in a non-bankruptcy insolvency proceeding, Field Counsel usually will work directly with the appropriate U.S. Attorney's office.[101] Not every claim of the U.S. or every action taken by Field Counsel in insolvency matters is within the province of the U.S. Attorney.[102] In order to be within the U.S. Attorney's province there should be an actual controversy in the case.[103] This controversy might be a formal opposition to the claim of the U.S. on its merits, an opposition to its claimed priority, the award of improper priority to another claim, or opposition by the U.S. to action taken in the proceedings, such as the payment of fees, the allowance of other claims, inordinate delay, and so forth.[104] Generally, a matter will be referred to the DOJ: (i) as soon as an objection has been filed to a U.S. claim for taxes in a proceeding; (ii) whenever an issue requires a written or oral communication with the court on behalf of the U.S. (other than the filing of the proof of claim or the adjustment of a claim); (iii) whenever an adversary proceeding or a contested matter arises in which the U.S. is or should be a party or any matter arises in which the interest of the U.S. should be represented in court by counsel.[105]

In deciding whether to refer a probate matter to the Tax Division or the U.S. Attorney, counsel should consider the following:[106] (i) The U.S. Attorney usually defends the merits of a claim priority in probate. The U.S. Attorney may in turn call on the Tax Division for help. If the claim is disallowed in whole or in part and further action to collect the tax is necessary, Field Counsel may need to write a suit authorization letter to the Tax Division, e.g., some states provide that if a claim is not allowed, suit must be brought on the claim within 90 days or the claim is forever barred. (ii) If a contest develops or if it becomes necessary to compel the personal representative to act on a claim, Field Counsel generally may communicate directly with the U.S. Attorney and attempt to obtain compliance without the necessity of a formal petition.

Settlement of claims in non-bankruptcy insolvency proceedings generally will be within the jurisdiction of the DOJ.[107] Because the case will have been referred to DOJ for defense or prosecution, Field Counsel should write to the Tax Division setting forth a recommendation.[108]

2. Preferred Venue Is Federal District Court Rather Than Probate Court. The Service highly recommends federal district court for venue.[109] It is generally not in the Service's interests for a state court to rule on the merits of a tax liability.[110] Time is of the essence when seeking to remove any dispute regarding the merits of a federal tax assessment to federal district court.[111] It is essential that disputes regarding the merits of a tax assessment be litigated in federal district courts whenever possible.[112]

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[100] I.R.M. 34.4.1.1(1).
[101] *Id*.
[102] I.R.M. 34.4.1.3(2).
[103] *Id*.
[104] I.R.M. 34.4.1.3(2).
[105] I.R.M. 34.4.1.3(3).
[106] I.R.M. 34.4.1.3(5).
[107] I.R.M. 34.4.1.6(2).
[108] *Id*.
[109] I.R.M. 5.5.4.6(10) ("Federal courts do have jurisdiction on actions to determine validity, priority and amount of claims against a decedent's estate. Filing suit in federal court is highly recommended in circumstances when the assessment lien or recorded lien has been established prior to death to determine priority of payment of taxes due.").
[110] I.R.M. 5.17.13.6(3).
[111] *Id*., Note.
[112] *Id*.

With respect to a probate court proceeding, to share in distribution from the probate estate, a timely claim against the estate must be filed because most probate courts will not consider payment of a debt unless a timely claim is submitted.[113] Thus, the Service will file a proof of claim within the time specified by state law to avoid litigation and ensure that taxes will be considered in distribution of estate assets.[114] Once the U.S. files a proof of claim in a judicial proceeding, such as a probate proceeding, the court arguably has jurisdiction to determine the merits of the tax liability.[115] A disadvantage to the Government of filing a proof of claim is the possibility that the state court may adjudicate the merits of the claim.[116] Where it is determined that filing a proof of claim will be disadvantageous to the Service, the following alternatives to filing a claim may be taken by the Service:[117] (i) the Government can give notice to the fiduciary of the tax liability by sending Form 10492, Notice of Federal Taxes Due, and rely on the fiduciary's personal liability under Section 3713 to encourage them to pay the claim; (ii) the U.S. may bring suit to reduce the tax assessments to judgment in federal district court (to the extent that the federal court enters a final order before a state court does, the state court will be bound by the federal court's order); and (iii) the Service may be able to assert transferee liability against the recipient of assets from an insolvent estate.

3. Provide Notice To Establish Knowledge Before Transfer. Knowledge of a potential claim of the Government imposes a duty on the fiduciary to make an inquiry to the proper Government office regarding the potential claim; merely conducting a unilateral investigation into the legitimacy of the Government's claim does not insulate a fiduciary if he could have resolved the question by contacting such Government office.[118]

Three forms are used to notify the estate administrator or the probate court of taxes due:[119] (i) Form 10492, Notice of Federal Taxes Due; (ii) Form 4490, Proof of Claim; and (iii) Form 2373, Statement of Internal Revenue Taxes Due as an Expense of Administration of an Estate. The ICS history is documented to reflect the date on which a form is sent to an estate administrator to establish when they were put on notice of taxes due.[120] Consideration is given to sending the forms by certified mail and with a copy maintained with the case file.[121]

Form 10492 is prepared by revenue officers and advisors to show the taxes accrued by the taxpayer prior to the taxpayer's death.[122] This form also cautions administrators of potential personal liability if taxes are not paid.[123] Generally state probate court will not accept this form as a substitute for a creditor claim presented for payment.[124] This form is sent to the estate administrator or a successor administrator as soon as the Service learns who has authority over estate assets.[125]

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[113] I.R.M. 5.17.13.6(1), Note; I.R.M. 34.4.1.5(1).
[114] I.R.M. 5.17.13.6(2), Note; I.R.M. 34.4.1.5(3).
[115] I.R.M. 5.17.13.6(3); I.R.M. 34.4.1.4(1).
[116] I.R.M. 5.17.13.6(5); I.R.M. 5.5.4.6.1(2) ("Filing a [proof of claim] *may* subject the claim to action by the court where the proceeding is conducted. In a probate action, a state court can rule on the merits of a claimed federal tax liability. Do not file a [proof of claim] in jurisdictions where there is a **history of adverse decisions.**").
[117] I.R.M. 5.17.13.6(5); I.R.M. 34.4.1.4(2).
[118] I.R.M. 5.5.9.23.1(7).
[119] I.R.M. 5.5.2.3(1).
[120] I.R.M. 5.5.2.3(5).
[121] *Id*.; CCA 200923045 ("As we understand, you had a telephone conversation with the attorney for the personal representative of the estate informing him of the Service's substantial claims. While this conversation may in itself be sufficient to put the personal representative on notice, we concur with your suggestion of confirming the conversation by letter. We note that IRM 5.5.1.6 contemplates that notice include service of Form 4490, Proof of Claim for Internal Revenue Taxes, or Form 10492, Notice of Federal Taxes Due.").
[122] I.R.M. 5.5.2.3(2).
[123] *Id*.
[124] *Id*.
[125] *Id*.

Form 4490 is a proof of claim.[126] It is a written statement that sets forth a claim against the probate estate of a deceased debtor for tax liabilities accrued prior to death.[127] This form is prepared and monitored by advisors.[128] State statutes will specify if the claim should be filed with the court or mailed/presented to the estate administrator.[129] Generally a proof of claim is sent to the estate administrator and also filed with the court in all probate proceedings unless the local law guide specifies otherwise.[130]

Form 2373 is used to show taxes that have accrued after the probate proceeding has commenced.[131] Typically taxes reflected on this form result from estate income tax (Form 1041).[132] This form is filed with the court.[133]

The Service prepares a timeline to determine who had knowledge, and when and what happened to estate assets once knowledge was established.[134] Below are points used to complete the timeline of events:[135] (i) Who filed the Form 706 and when did the fiduciary have knowledge of tax due at filing? (ii) If an audit was conducted, who worked with the Service? Was a deficiency assessed? (iii) Was there a challenge to the tax in the Tax Court? (iv) To whom were past due tax notices or audit correspondence addressed, and when? (v) Was a tax lien recorded? Who received notice of the lien? (vi) Were assets sold or distributed after notice of tax due or of a pending audit? (vii) Who received estate assets and when? (viii) Were any sale proceeds paid to the Service? (ix) Were the sold/distributed assets reported on the Form 706 and under the control of the fiduciary?

4. Assert Personal Liability When Discover Transfer That Violates Section 3713. If the Service determines during its research that the fiduciary distributed assets of the estate and taxes were not paid, then it will:[136] (i) Determine if and when the fiduciary had knowledge of the balance due or unfiled returns. Documents submitted in probate proceedings or accountings may provide this information. (ii) Determine if a claim or other notification was made for taxes due, either by proof of claim, Form 10492 or recorded notice of federal tax lien. (iii) Determine who received assets and the value of these assets.

The Service asserts personal liability against a fiduciary by either:[137] (i) filing a suit under section 7402(a) of the Code against the fiduciary in a federal district court; or (ii) issuing a notice of fiduciary liability to the fiduciary under section 6901(a)(1)(B) of the Code, which gives the fiduciary the right to challenge the determination in the Tax Court. Under section 6901(c)(3) of the Code, the statute of limitations for issuing a notice of fiduciary liability to the fiduciary is the later of one year after the fiduciary liability arises or the expiration of the statute of limitations for collecting the underlying tax liability.[138]

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[126] I.R.M. 5.5.2.3(3).
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] I.R.M. 5.5.2.3(4).
[132] *Id*.
[133] *Id*.
[134] I.R.M. 5.5.9.23.1(8).
[135] *Id*.
[136] I.R.M. 5.5.3.9(3).
[137] I.R.M. 5.17.13.8(1).
[138] I.R.M. 5.17.13.8(3); I.R.M. 5.5.3.9(4) (The Statute of Limitations for suit against a fiduciary under Section 3713 is normally ten years from the date the tax was assessed. A suit referral should be made as early as possible to allow Counsel time to review the case and authorize the DOJ to file suit. DOJ needs time to prepare and take litigation action.).

The Service anticipates certain defenses to such a claim against the fiduciary. A fiduciary's defense to liability under Section 3713(b) include:[139] (i) the fiduciary had no knowledge of the federal tax debt; (ii) the estate was solvent when the distribution was made; (iii) the statute of limitations on collection of the underlying tax and for asserting liability under section 6901 of the Code has expired; and (iv) the distribution made by the fiduciary were for claims over which the U.S. did not have priority.

5. File Suit To Foreclose Federal Lien. Another collection avenue is a suit to foreclose the federal tax lien.[140] This is particularly advisable by the Service if there are unknown heirs that may have in interest in a property the Service is considering for seizure and sale action.[141] The Service recognizes that in many cases, it is common for the estate or heirs to pay all or a substantial portion of the tax just because DOJ filed a suit.[142]

If the Service finds real property that the estate tax, gift tax, or general lien attaches has been transferred without the Government's lien interest being paid, it will: [143] (i) Put any title company involved in the transfer on notice that the lien was not satisfied. (ii) If the title company does not pay in accordance with the title policy it issued, the Service may proceed with levy and seizure (after appropriate final notice to the estate) of the property. (iii) If these actions do not result in payment, the Service can prepare a suit referral to the DOJ to foreclose the lien under section 7403 of the Code. A suit under section 7403 of the Code is used to enforce any of the tax liens through foreclosure and sale.[144] The court will have discretion on whether to order foreclosure and sale, the timing of the sale and the terms of the sale.[145] The Service recognizes that most courts will order foreclosure and sale.[146] It will be necessary to join all parties claiming any interest in the property.[147] This suit can be brought even if the tax liens are subordinate to the claims of others – provided there is sufficient equity in the property to make it worthwhile.[148] The suit will resolve the priority of claims to the property.[149] Once the property is sold, the court will order distribution of the net proceeds to the claims against the property in order of their priority.[150]

When the ten year estate or gift tax liens are involved, the DOJ will file a suit to foreclose the tax lien a minimum of three years before that ten year tax lien expires.[151] Because filing the suit does not suspend the ten year life of the lien, the DOJ needs to complete the suit and sell the property before the lien expires.[152] It may take that long to litigate the case, resolve any appeals, and sell the property before the lien expires.[153] Depending on the case and the court, it can take between one and two years to reach a trial.[154] If an appeal is filed, it may take another year or more before the property can be sold.[155]

II. Broad Application Of Section 3713. Courts have liberally applied Section 3713 and its predecessor statutes to hold executors and administrators personally liable, with few exceptions. The following cases

[139] I.R.M. 5.17.13.8(5).
[140] I.R.M. 5.5.3.9(7).
[141] *Id*.
[142] I.R.M. 5.5.9.24(2).
[143] I.R.M. 5.5.9.26(1).
[144] I.R.M. 5.5.9.26(2).
[145] *Id*.
[146] *Id*.
[147] I.R.M. 5.5.9.26(3).
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] I.R.M. 5.5.9.26(4).
[152] *Id*.
[153] *Id*.
[154] I.R.M. 5.5.9.26(5).
[155] *Id*.

illustrate typical fact patterns that have resulted in personal liability of the personal representative under Section 3713.

A. Individual, Corporate, and Co-Executors Held Personally Liable Under Section 3713. Courts have imposed personal liability on individual and corporate executors, and joint and several liability on co-executors.

1. Individual Executor. The relevant facts of *Grable*[156] begin with a Tax Court judgment. In October 1984, the Tax Court entered a decision that found that there were deficiencies in income taxes due from a mother for 1979 and 1980. In November 1984, the IRS made an assessment against the mother for the income tax deficiencies found due the U.S. pursuant to the Tax Court decision. Notices of the assessments and demand for payment thereon were mailed to the mother. No payments were made with respect to the income tax deficiencies.

In August 1986, the mother died with a balance due and owing the U.S. of $48,536.97, plus statutory additions. The mother's estate initially listed the total fair market value of its property as $151,600. In January 1987, mother's son was appointed as independent personal representative of the mother's estate. The son was aware of the Tax Court decision against his mother, and also knew of her income tax liabilities prior to her death. However, the son, as personal representative of the estate, either directly disbursed or transferred assets from the estate, or authorized their disbursal or transfer, but never paid or authorized payment to the U.S. After distribution, the value of the properties of the estate was well below the total tax liabilities of the estate.

The Government argued that the son, as the personal representative of his mother's estate, should be held personally liable for the outstanding tax liabilities of the mother under Section 3713. The son, in response, only argued one point: that the estate is not liable for any taxes.

The federal district court found that the mother's estate falls within Section 3713(a)(1)(B), and that the son is liable under Section 3713(b).[157] In support of this finding, the court relied on the following facts: the son was named personal representative of the mother's estate; in this capacity, the son was responsible for, among other things, disbursing or transferring the assets of the estate to pay its creditors or to comply with the will of his deceased mother; the mother's estate was indebted to the U.S. for unpaid income tax liabilities for the 1979 and 1980 tax years; the son knew of this unpaid liability prior to his mother's death; in spite of this knowledge, the son admitted that he paid creditors other than the U.S.; the mother's estate's income tax liabilities were not contingent, but rather, the obligations were fixed and independent of events after insolvency with only the precise amount of that obligation awaiting future events.[158] Accordingly, the court held that all distributions and disbursements of assets from the mother's estate by, or authorized by, the son in payment of creditors other than the U.S., or for no consideration make him individually liable.[159]

2. Corporate Executor. In *Bank of the West*,[160] the Tax Court held a corporate executor personally liable for income taxes under Section 3713 even though the corporate executor followed the typical probate process of filing a Form 706 and obtaining judicial approval of a final account and discharge. In that case, the decedent died in October 1977. The decedent's will named First National Bank of San Jose, California (later Bank of the West), as executor. The bank served as executor through the close of the probate

[156] U.S. v. Grable, 71 A.F.T.R. 2d 93-303 (W.D. Mich. 1992).
[157] *Id*. at 93-307.
[158] *Id*.
[159] *Id*.
[160] Bank of the West v. Comm'r, 93 T.C. 462 (1989).

of the estate. The will made certain specific bequests to the decedent's wife, and left the residue of the estate to the bank in trust for the benefit of the wife for the rest of her life.

After obtaining two extensions of time for filing a Form 706, the bank filed an untimely Form 706 in January 1979. The return showed an estate tax liability of $102,536, and reported fractional interests in real estate together with other assets. The return was accompanied by a payment of $10,235.60, representing ten percent of the estate tax reported to be due. The return was also accompanied by a letter that contained the following paragraph:

> "As referenced above, this estate consists primarily of unimproved real property and there is at present insufficient cash with which to satisfy the estate tax liability. I therefore request approval to pay the tax due in ten annual installments, the first of which is attached."[161]

In October 1981, the bank filed in the superior court of California a second and final account requesting an order authorizing the payment of executor and attorneys' fees and the final distribution of the estate, reserving $15,000 for the payment of any unpaid estate taxes. The court entered an order authorizing the payment of fees and the final distribution of the estate.

Approximately seven years later, in June 1988, the Service mailed the bank a notice of liability for an assessment plus interest. The notice stated that the assessment constitutes the bank's personal liability as fiduciary for estate tax due from the estate.

The Tax Court recognized that, for the sake of completeness, it has long been held that in order to render a fiduciary liable under Section 3713(b), the fiduciary must be chargeable with knowledge or notice of the debt due the U.S. at a time when the estate had sufficient assets from which to pay the debt.[162] In this case, the bank was executor and charged with the duty of filing a return and paying the estate tax.[163] The bank had knowledge of the unpaid tax, the delinquent filing of the estate tax return, and the failure to pay the tax shown on the return.[164] The court stated that "quite obviously," the bank was in possession of such facts that faithful and fair discharge of its duty would have put it on inquiry and, thus, entered decision for the Government.[165]

3. Co-Executors. In *Espinor*,[166] the decedent died testate in October 2004. The decedent's will contained a pour over clause directing that residuary assets were to be transferred to a trust and distributed in accordance with its terms. The trust directed the trustee to set aside sufficient assets to be used to pay federal estate tax debts and obligations of either of the grantors due and owing. The successor co-trustees were two individuals, Michael and Toni.

Michael and Toni also served as co-executors. They administered the estate informally and without court supervision. They took actions without court approval, including the distribution of property to themselves and other persons. Michael and Toni filed a Form 706 that reflected a total estate value of $5,120,869. In June 2006, Michael filed an election to defer payment of the estate tax five years and pay the remaining tax liability in ten annual installments. In this election, Michael admitted that the estate tax liability totaled $1,586,551, of which the estate elected to defer $622,563.

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161 *Id*. at 463.
162 *Id*. at 474.
163 *Id*.
164 *Id*..
165 *Id*. at 474-75.
166 U.S. v. Estate of Espinor, 117 A.F.T.R. 2d 2016-2142 (E.D. Cal. 2016).

In June 2012, approximately eight years after the date of death and after several extensions to make payment, the Service declared the estate to be in default of the installment agreement and terminated it. In November 2012, the Service sent notice and demand for payment. The estate tax that remained due and owing amounted to $621,850.85. The Government alleged that the liability of the co-executors extends to the value of all estate property they distributed in violation of their fiduciary duty to pay federal estate taxes due pursuant to Section 3713.

The federal district court found that the Government's complaint is both factually and legally sufficient to support judgment.[167] Section 3713(b) indisputably establishes the Government's right to recover unpaid taxes from the executors.[168] Michael and Toni, as co-executors and co-trustees, distributed property of the estate prior to fully paying the federal estate tax liability.[169] They were aware of the estate's tax liabilities.[170] They did not seek and were not granted discharge from personal liability under section 2204 of the Code.[171] Accordingly, Michael and Toni were held jointly and severally liable for the full $817,944.66 in unpaid estate taxes pursuant to Section 3713.[172]

B. Personal Representative Should Not Ignore Potential Tax Claim. Cases exist where the personal representative appears to have actual knowledge of a potential federal tax claim when he or she transferred estate property before satisfying the claim. Under such facts, the courts have held the personal representative personally liable under Section 3713.

1. Executor Held Personally Liable Where Failed To Store Decedent's Personal Property. The Texas Estates Code generally requires the personal representative to possess and protect personal property of the decedent. The executor or administrator of an estate shall take care of estate property as a prudent person would take of that person's own property.[173] Immediately after receiving letters testamentary or of administration, the personal representative of an estate shall collect and take possession of the estate's personal property, record books, title papers, and other business papers.[174] The personal representative is required to deliver the property, books, and papers that are in the representative's possession to the person or persons legally entitled to the property, books, and papers when the administration of the estate is closed.[175]

In *MacIntyre*,[176] the U.S. brought claims against the executor for personal liability under Section 3713 for distributions from the estate to lower priority creditors and for failure to preserve sufficient funds to pay the decedent's tax liability. The U.S. alleged that the executor distributed the decedent's personal property, including the proceeds from the sale of the decedent's car, to the executor and his brothers as the decedent's heirs. The executor argued that the cost of storing the personal items would violate his duty to take care of the property of the estate as a prudent man would take care of his own property under section 230 of the Texas Probate Code (now section 351.101 of the Texas Estates Code). If he stored these items, then the estate would have had to pay the cost of storage, amounting to more than the items were worth.

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[167] *Id*. at 2016-2145.
[168] *Id*.
[169] *Id*. at 2016-2146.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] Tex. Est. Code Ann. § 351.101.
[174] Tex. Est. Code Ann. § 351.102(a).
[175] Tex. Est. Code Ann. § 351.102(b)(1).
[176] U.S. v. MacIntyre, 110 A.F.T.R. 2d 2012-5151 (S.D. Tex. 2012).

The federal district court disagreed with the executor.[177] First, the proceeds from the sale of the decedent's car did not require storage.[178] They could have been held in the estate's account.[179] Second, there is no indication that the personal property distributed by the executor was somehow exempt under the Texas Probate Code.[180] Therefore, those items should have been kept available to pay the debts of the decedent.[181] The items could have been sold – perhaps to family members as in the case of the car – and the proceeds put into the estate for the satisfaction of the decedent's debts.[182] Accordingly, the executor was held individually liable for the value ($14,091) of the personal property he distributed.[183]

On appeal to the Fifth Circuit,[184] the executor argued that the Government did not present enough evidence to hold him personally liable for distributing personal property from the donee's estate. He claimed that the district court wrongly discredited his statement that had he not sold the personal property, the decedent's estate would have been charged to store it. The Fifth Circuit held that the district court did not err in finding the executor personally liable.[185] The executor's primary argument – that he had to sell the property in order to avoid having to make expenditures to store it – does not change his liability under Section 3713.[186] The Fifth Circuit stated that the district court correctly observed that the proceeds from the sale of the decedent's car did not require storage and could have been held in the decedent's estate's account.[187] The executor was not found liable under Section 3713 merely because he sold the personal property; instead, he was found liable for distributing the personal property to others before paying the debt to the Government.[188] Thus, the court held the executor individually liable for the value of the personal property he distributed from the decedent's estate.[189]

2. Executor Held Personally Liable Where Made Distributions Approximately Nine Years After Executor Involved In Tax Court Litigation And Signed Form 870 Agreeing To Deficiency. In *Bartlett*,[190] the decedent died testate in December 1980. In January 1981, the decedent's will was admitted to probate in Illinois. The decedent's wife was appointed executor. A Form 706 was subsequently filed. In June 1984, the Service sent a notice of deficiency with respect to property that should have been included in the decedent's gross estate. The deficiency was challenged in the Tax Court. In April 1989, the Tax Court entered a decision that found a deficiency of $159,054 in estate taxes owed by the estate. In August 1989, the estate tax deficiency was assessed against the estate.

In June 1984, the Service also sent a notice of deficiency with respect to gift tax of $164,087.43 for a gift made by the decedent's father in 1979. The deficiency was challenged in the Tax Court. In November 1985, the decedent's father died while the Tax Court case was still pending. In August 1987, the Tax Court agreed with the Service. In July 1988, the decision was upheld by the Seventh Circuit Court of Appeals. Prior to the decision of the Seventh Circuit, the executor quit-claimed to her family trust all of her interest in real property devised to her under the decedent's will. The executor testified that she established the family

[177] *Id*. at 2012-5155.
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] U.S. v. Marshall, 798 F.3d 296 (5th Cir. 2015).
[185] *Id*. at 313.
[186] *Id*.
[187] *Id*.
[188] *Id*. at 313-14.
[189] *Id*. at 314.
[190] U.S. v. Bartlett, 186 F. Supp. 2d 875 (C.D. Ill. 2002).

trust "to get away from will and probate … and avoid all this mess we're in now."[191] Executor then signed a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, accepting liability as transferee of the decedent's father's gift tax deficiency. As a result of this acceptance, the transferee gift tax liability of $160,136 and interest in the amount of $298,082.12 were assessed against the decedent's estate. Notice of the assessment and a demand for payment was made upon the executor for gift tax and interest.

With regard to the estate tax liability, no proof of claim was filed by the Service. With respect to the gift tax liability, in April 1989, the Service filed a proof of claim with the probate court in the amount of $458,218.72 for the transferee gift tax liability and interest. The executor testified that she saw the proof of claim filed by the Service and immediately called her attorney. In September 1989, the probate court entered an order allowing the Service's claim for the transferee gift tax liability and interest.

The revenue officer testified that the Service did not actively seek collection of the allowed claim. Rather, the case was monitored by the Service's Insolvency Unit and Special Procedures Branch of the Collection Division. The agent testified that monitoring the case consists of pulling the case for periodic reviews to insure that the case is still pending in the probate court and sending periodic status letters to the probate attorney asking of the status of the proceedings. According to the agent, no collection efforts were made because the Service cannot enforce collection after the claim is filed in the probate court. The Service simply waits to be paid through the distribution of the assets of the estate once probate is complete.

In April 1998, which was approximately nine years after the executor signed the Form 870, approximately nine years after the probate court allowed the claim for gift tax, and eighteen years after the decedent's date of death, the attorney for the executor requested a hearing for a final accounting of the probate estate. In October 1998, the executor filed a Motion for Leave to File Final Accounting and Report Without All Corresponding Documentation, which made no reference to the allowed claim for gift taxes. In that same month, the probate court granted the executor's motion, discharging her as executor and closing the estate. An employee of the DOJ Tax Division later testified that she was unable to locate a final accounting of the estate after reviewing the complete probate file with the assistance of the clerk's office. The employee was also unable to locate any notice of hearing service on the U.S. with respect to a hearing on the motion to close the estate. In March 1999, the executor remitted to the Service a payment in the amount of $160,136 (gift tax; but not interest), requesting that this amount be applied to the gift tax liability. In April 1999, the U.S. filed a Verified Petition for Relief from Order and to Reopen the Probate Estate and Reinstate the executor. After a hearing, the probate court ordered the probate estate reopened. As of June 2000, the amount due from the estate consisted of assessed interest in the amount of $298,082.12, accrued interest in the amount of $772,467.98, and accrued penalty of $40,034.15. In August 2000, the U.S. filed an amended complaint in federal district court seeking to collect the amount owed by foreclosing liens that arose in favor of the U.S. and selling property, and to hold the executor personally liable for the debt.

The federal district court held the executor personally liable under Section 3713 for the unpaid debt of the decedent's estate to the extent of the value of the distribution she made.[192] The first and fourth elements were not in dispute.[193] The executor of an estate has a fiduciary duty to act with the highest degree of fidelity and utmost good faith in handling estate assets.[194] Furthermore, there is a debt owed to the U.S. in unpaid transferee gift tax liability plus statutory additions.[195] With regard to the second element, the executor

[191] *Id*. at 878.
[192] *Id*. at 888.
[193] *Id*. at 885.
[194] *Id*.
[195] *Id*. at 886.

established a family trust naming herself as trustee and sole beneficiary.[196] The executor made a distribution by quit-claiming to the trust her interest in the real property devised to her under the decedent's will.[197] This real property was valued at $956,035.94 on the death of the decedent.[198] Furthermore, she retained $50,000 per year in annual rental payments from the real property.[199]

The third and fifth elements are likewise met.[200] The executor was clearly aware of the Tax Court cases which dealt with the issue of tax liability because she references the cases in her reports to the probate court concerning the decedent's estate.[201] In three of these reports, the executor states that until final determination is made in said federal estate and gift tax cases, nothing further can be done to proceed to close the estate.[202] However, prior to the Tax Court decisions, the executor established the family trust, making herself trustee and sole beneficiary.[203] She established the trust "to get away from will and probate … and avoid all of this mess we're in now."[204] It is therefore apparent that she had knowledge of the debt due to the Government at the time when the estate had sufficient assets with which to satisfy the debt.[205] Furthermore, after distributing the estate assets, there were insufficient assets to pay the U.S.'s claims.[206]

The executor argued that she made significant inquiry regarding the tax liability of the decedent's estate, had no reason to know that the claim against the estate was not resolved with the estate tax issue, and, citing to *Little* (discussed below), relied mostly on the advice of her attorney with regard to the handling of estate matters.[207] The court stated that it is convinced that the executor had actual knowledge of the debt owed to the U.S.[208] The executor signed a Form 870 acknowledging that the estate was liable for the transferee gift tax.[209] The executor also advised the probate court between 1984 and 1986 that potential tax liability arising from Tax Court litigation prevented the estate from being closed.[210] After she learned of the decision of the Tax Court, the executor did not take steps to pay the debt.[211] Rather, she transferred the real property to the family trust.[212] The record did not indicate that the executor did not know about the viability of the U.S.'s claim and blindly relied upon the advice of counsel, particularly in light of the fact that she signed a form acknowledging liability for the tax.[213]

3. Executor Held Personally Liable Where Property Transferred In Exchange For $1. In *Tyler*,[214] a husband died in August 2006. Prior to death, the Service notified the husband in January 2002 that he owed the Service $436,849 in income taxes for 1992 through 1998, which the decedent failed to pay. The husband and his wife owned real property in Pennsylvania as tenants by the entireties. The property was the only asset of which the Service was aware that could have been used to satisfy the husband's unpaid tax liabilities. In August 2003, the husband and wife executed an indenture transferring the property

[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*. at 886.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*.
[205] *Id*. at 886.
[206] *Id*.
[207] *Id*.
[208] *Id*.at 887.
[209] *Id*.
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Id*.
[214] U.S. v. Tyler, 528 F. Appx. 193 (3d Cir. 2013).

to the wife for the total consideration of $1. The realty transfer tax statement of value listed the fair market value as $326,128. The indenture was recorded in September 2003 as a tax exempt transfer from a husband and wife to wife. In March 2004, the Service filed a notice of federal tax lien on the property.

After the husband's death, the wife died in June 2007 leaving a will that names their son as a co-executor and sole heir of the wife's estate. In September 2007, the Service sent letters to the son asserting that a federal tax lien securing the husband's unpaid tax liabilities had attached to the property before legal title had been transferred to the wife, and stating that the son, as a co-executor of the estate, was obligated to satisfy the lien out of the assets of the estate. The Service warned that it would, if necessary, take legal action to collect on the tax liabilities. In November 2008, despite the lien, the executors conveyed the property to the son for $1. The son then sold the property for $524,000, netting $313,206. The son did not pay any of the proceeds to the Government, but instead invested all of it in the stock market, except for $10,000 that he paid to the other co-executor. The son claimed that the proceeds "pretty much got blown away in the market."

The Government brought suit against the executors in a federal district court for Pennsylvania seeking to set aside what it deemed fraudulent conveyances of the property and to satisfy its tax lien. The district court held that by disposing of the lien encumbered property without providing the Government with a one-half share of the proceeds, the executors violated Section 3713, for which they became personally liable as fiduciaries of the estate.

The Third Circuit Court of Appeals agreed.[215] It held that the Government established the necessary elements of Section 3713 to hold the executors liable as fiduciaries of the estate.[216] The executors were placed on notice by the Service of a federal tax lien that encumbered one-half of the property.[217] The lien established a claim of the Government to one-half of the proceeds of any sale of the property.[218] And by conveying the property to the son for a nominal amount, the executors paid him (by distributing the property to him) before paying the Government its proportional interest in the property.[219]

The executors argued that the Government cannot maintain any claims against them regarding the husband's estate because they were not executors of his estate.[220] Their argument is based on the assertion that the Government has no claims against the wife's estate, a premise that is fundamentally flawed.[221] The court accordingly rejected such argument.[222]

Judgment was entered against the executors jointly and severally pursuant to Section 3713(b) in the amount of $156,603 – one-half of the $316,206 the son netted from the sale of the property.[223] The executors argued that such amount grossly overstates the son's net proceeds.[224] They contended that the Government presented no competent evidence to show that the property was worth $313,206.[225] That sum, according to the executors, is not an accurate valuation because it fails to take into account the mortgages and state and county tax liens already on the property as well as the condition of the property, which required renovations before it could be sold.[226] The executors, however, did not provide any evidence suggesting an alternative

[215] *Id*. at 202.
[216] *Id*. at 201.
[217] *Id*.
[218] *Id*.
[219] *Id*.
[220] *Id*. at 201-02.
[221] *Tyler* at 202.
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] *Id*. at 202.
[226] *Id*.

value of the property, and the son explicitly stated that he received cash proceeds of $313,206.[227] On this record, the Government satisfactorily established the amount of net proceeds realized by the son when he sold the property.[228]

C. Personal Representative Remains At Risk of Personal Liability Even If Enters Into Agreement With Beneficiaries Or Receives Judicial Discharge. Personal representatives frequently enter into written agreements with estate beneficiaries regarding the settlement and final distribution of an estate. Although the agreement may include a release and/or indemnification of the personal representative by the beneficiaries, courts have stated that such an agreement is immaterial when determining liability under Section 3713.[229] For example, in *First Midwest*,[230] an executor argued that it was not personally liable because it had been a party to an agreement wherein an heir had assumed responsibility to pay the outstanding estate taxes. When the heir failed to pay the taxes, the Government brought an action against the executor. The executor argued the agreement had released the executor from liability because it had made adequate provision for the payment of the taxes. 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."[231] The court also stated that the duty to pay estate taxes was not delegable under Section 2002 of the Code.[232]

A personal representative may also seek a judicial discharge. After an estate has been administered and if there is no further need for an independent administration of the estate, the independent executor of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent executor from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed.[233] On or before filing such an action, the independent executor must distribute to the distributees of the estate any of the remaining assets or property of the estate that remains in the independent executor's possession after all of the estate's debts have been paid, except for a reasonable reserve of assets that the independent executor may retain in a fiduciary capacity pending court approval of the final account.[234] The court may review the amount of assets on reserve and may order the independent executor to make further distributions.[235] Further, the court is required to enter an order discharging a personal representative from the representative's trust and closing the estate if, on final settlement of the estate, none of the estate remains in the representative's possession.[236] However, for purposes of Section 3713, courts have held personal representatives personally liable for unpaid tax claims of the U.S. even though the personal representative received a judicial discharge.[237]

1. Executor Held Personally Liable Where Entered Into Agreement With Beneficiaries And Made Distributions Two Years Before Received Notice Of Deficiency. In *Coppola*,[238] a father owned and operated several New York and Florida construction related businesses. In June 1975, the father died. In July 1975, the father's will was admitted to probate. His son served as executor, and did not establish a trust provided under the terms of the will. In September 1976, the executor filed a Form 706. The Service thereafter claimed a deficiency in the estate tax paid, resulting in part from an undervaluation of the father's interest in the New York corporations.

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[227] *Id*.
[228] *Id*.
[229] *See, e.g.,* U.S. v. Johnson, 112 A.F.T.R. 2d 2013-5474, 2013-5485-86 (D. Utah 2013).
[230] U.S. v. First Midwest Bank/Illinois, N.A., No. 97-C-7365, 1997 WL 675192 (N.D. Ill. 1997).
[231] *Id*.
[232] *Id*.
[233] Tex. Est. Code Ann. § 405.003(a).
[234] Tex. Est. Code Ann. § 405.003(d).
[235] *Id*.
[236] Tex. Est. Code Ann. § 362.012.
[237] *See, e.g.,* U.S. v. Bartlett, 186 F. Supp. 2d 875 (C.D. Ill. 2002).
[238] U.S. v. Coppola, 85 F.3d 1015 (2d Cir. 1996).

In May 1977, the executor, the mother, and another son entered into an agreement and plan of reorganization to divide the various family businesses among themselves in derogation of the terms of the father's will. Each party was required to pay any estate taxes due in proportion to the value of the assets each received. Shortly after the agreement was signed, the family members began to dispute their compliance with their respective obligations.

In August 1979, the Service issued a statutory notice of deficiency to the estate. In August 1982, the Tax Court filed a decision, stipulated to by the parties, finding that the estate had a tax deficiency of $166,633. In 1988, the U.S. brought an action in a federal district court to reduce to judgment the unpaid federal tax liabilities of the estate. The district court held that the son, as executor of the estate, was personally liable for taxes owed to the U.S. by the estate because he stripped the estate of all of its assets by distributing the assets to himself, his mother, and his brother and rendering it insolvent without first satisfying the tax debt, in violation of Section 3713(b). As of September 1994, the estate's total tax liability to the U.S. stood at $910,405.99, including interest.

The Second Circuit Court of Appeals agreed with the district court. By Section 3713's express terms, liability is imposed on a representative of a debtor, including an executor of an estate, who pays a debt of the estate to another in derogation of the priority of debts owed to the U.S., thereby rendering the estate insolvent.[239] In order for liability to attach, the executor must have knowledge of the debt owed by the estate to the U.S. or notice of facts that would lead a reasonably prudent person to inquire as to the existence of the debt owed before making the challenged distribution or payment.[240] In recognition of Section 3713's broad purpose of securing adequate revenue for the Treasury, courts have interpreted it liberally.[241] The executor depleted the assets of his father's estate by distributing them to himself and his family, thereby preventing payment of the tax debt.[242] Such conduct certainly falls within the broad prohibitions of Section 3713.[243]

The executor argued that he did not have notice of the Government's claim when the transfer was made because the Service issued the notice of deficiency in August 1979, which was over two years after the agreement was signed by him, the mother, and the brother.[244] The court, however, acknowledged that there is substantial evidence on the record to support the court's finding that the executor had the requisite notice at the time he signed the agreement in May 1977.[245] The law permits a finding of notice where the executor lacks actual notice of the liability but possesses notice of such facts as would lead a reasonable person to inquire as to the existence of unpaid claims.[246] The Second Circuit Court of Appeals affirmed the district court's finding that discussions and negotiations between the executor and the Service about an alleged tax deficiency prior to the signing of the agreement, and the agreement's explicit reference to "estate tax obligations" of the estate were sufficient put the executor on notice of the tax liability for purposes of Section 3713.[247] At the very least, he was obligated to inquire further before the assets were distributed under the agreement.[248]

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[239] *Id*. at 1020.
[240] *Id*.
[241] *Id*.
[242] *Id*.
[243] *Id*.
[244] *Id*. at 1020.
[245] *Id*.
[246] *Id*. at 1020-21.
[247] *Id*. at 1021.
[248] *Id*.

2. Personal Representative Held Personally Liable Where Entered Into Agreement With Beneficiaries, Made Distributions Of Stock, And Such Stock Subsequently Became Worthless Due To Bankruptcy. In *Johnson*,[249] the decedent died in September 1991. Her estate plan consisted of a will and a trust. Two of her four children were named as personal representatives and trustees. In June 1992, the personal representatives filed a Form 706 with the Service. The decedent's gross estate was valued at $15,958,765, with a federal estate tax liability of $6,631,448. The bulk of the estate consisted of shares of stock in a hotel corporation valued at $11,508,400. When the return was filed, the personal representatives elected to defer payment of a portion of the federal estate tax liability, to be paid in ten annual installments beginning in June 1997 and ending in June 2006. In July 1992, the Service properly assessed the estate for unpaid estate taxes.

In December 1992, the trustees and the heirs executed an agreement distributing all of the remaining trust assets to the heirs. With regard to the outstanding federal estate tax liability, the agreement stated as follows:

> "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 additionally taxes, interest or penalties will be borne equally by the BENEFICIARIES."[250]

In May 1995, the Service issued a notice of deficiency against the estate, determining that the hotel shares were worth $15,000,000 at the date of 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.[251] Thus, the total federal estate tax was $6,871,829.

In January 2002, the hotel corporation filed for chapter 11 bankruptcy, and shortly thereafter, a court approved the sale of all the hotel's assets to a third party free and clear of all liens, claims, and encumbrances. Thus, the heirs received no value for their hotel shares.

In 2003, which is approximately twelve years after the decedent's date of death, the estate defaulted on its federal estate tax liability after having paid $5,000,000 of the total amount due. In 2005, the Service 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 failed to fully pay the assessments made against the estate. The Service made efforts to collect the taxes due through levies, but failed to yield any collections. The court proceeding in the district court was a further attempt by the Service to collect the outstanding tax liability against the estate. The Government claimed that the personal representatives of the estate are liable for the estate tax at issue under Section 3713(b).

The personal representatives admitted that they distributed assets from the estate prior to satisfying the Government's tax claim. They contended, however, that they are not personally liable because the estate

[249] U.S. v. Johnson, 112 A.F.T.R. 2d 2013-5474 (D. Utah 2013); *later proceeding*, U.S. v. Johnson, 224 F. Supp. 3d 1220 (D. Utah 2016) (regarding discharge under section 2204 of the Code); *later proceeding*, U.S. v. Johnson, 121 A.F.T.R. 2d 2018-341 (D. Utah 2018) (regarding attorney fees).
[250] *Id*. at 2013-5476.
[251] *Id*.

had sufficient assets to pay the tax at the time the distributions were made. The personal representatives pointed to the agreement to support their contention because the heirs agreed, under the document, to pay the estate tax as it became due. Since the estate had this "right of contribution" from the heirs, the personal representatives claimed this constitutes a sufficient asset for them to avoid liability.

Before reaching its conclusion, the federal district court noted certain facts.[252] First, the agreement states that most of the assets of the estate had already been transferred before the agreement was ever entered.[253] Rather than applying the remaining assets to the tax liability, the personal representatives distributed the assets to themselves and two relatives with the acknowledgement that the distribution would accomplish a complete distribution of the assets.[254] Further, the agreement is ambiguous as to whether the estate was a party and had recourse against the beneficiaries as third parties.[255] The agreement was signed by the children serving as personal representatives only as trustees and beneficiaries, but not as personal representatives of the estate.[256] Thus, it is not clear whether the estate has the right to enforce the agreement.[257] Citing to *Coppola* and *First Midwest*, the court held that the individuals who distributed the estate's assets accepted the risk that the heirs may fail to pay the tax.[258] When the risk is realized, the Government may proceed on its claim against the personal representatives.[259]

However, in a later proceeding, the federal district court held that the personal representatives made a valid written application for discharge of personal liability under section 2204 of the Code pursuant to letters with the Service and furnished a valid special lien under section 6324A of the Code and, thus, their 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 Section 3713 is moot.[260]

3. Executor Held Personally Liable Where Received Judicial Discharge. In *Weisburn*,[261] the decedent died in June 1936. By his will, the decedent named his wife as executor of his estate. She was duly and properly qualified as executor of the estate. Prior to death, the Service assessed additional income tax, provided notice of such, and issued a warrant of distraint. After death, in August 1936, the Service filed a proof of claim with the wife, totaling $1,638.95, plus interest.[262] No payments were ever made or collected by the Service.

In March 1937, the wife filed in the orphan's court an inventory and appraisement of the personal estate showing total receipts of $4,053.30, of which amount $3,738.30 was cash. Thereafter, the wife filed in the orphan's court a Final Account showing, among other things, the following: (i) gross estate of $4,053.30; (ii) receipts of $4,053.30; (iii) disbursements of $3,385.23; and (iv) balance cash on hand of $668.07. Approximately five years after filing the inventory, in January 1942, the estate was called for audit by the orphan's court after several postponements as a result of requests by the U.S. The U.S. had sought such postponements in order that a final determination of the suit in the federal district court could be made before the orphan's court issued its order of distributions. At the hearing, however, the U.S. withdrew its objections to the distribution as the orphan's court intimated that it would make no further extensions. In

[252] *Id*. at 2013-5484.
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] *Id*.
[257] *Id*.
[258] *Id*. at 2013-5485.
[259] *Id*.
[260] U.S. v. Johnson, 224 F. Supp. 3d 1220 (D. Utah 2016).
[261] U.S. v. Weisburn, 48 F. Supp. 393 (E.D. Pa. 1943).
[262] *Id*. at 394.

February 1942, a decree was rendered by the orphan's court that confirmed the wife's account and ordered a distribution of the assets remaining in the hands of the wife.

In the federal district court proceeding, the issue was whether the wife is personally liable for sums disbursed in payment of the debts of the decedent without having first satisfied and paid debts due to the U.S.[263] The court concluded that the wife is personally liable.[264] Here, the decedent's assets which came into the possession of wife, as executor, were not sufficient to pay all of his debts.[265] Under those circumstances, the federal priority statute became applicable since the word "debts" includes taxes due the U.S.[266] Thus, the duty was on the wife to first satisfy the federal taxes owing by the insolvent estate.[267] This she failed to do.[268]

The wife argued strenuously that her liability to the U.S., personally and as executor, ceased with the entry of the final decree in the orphan's court, and that her discharge as executor relieved her of any liability.[269] In answer to this contention, the court stated that neither a discharge of an executor of an insolvent estate, an approval of his account, nor the distribution of assets relieve him from liability for debts due to the U.S.[270]

D. Broad Language Under Section 3713 Requiring Absolute Priority Of U.S. Results In Conflict Of Laws. The broad language under Section 3713 potentially applies to circumstances where other federal or state laws may also apply. The personal representative faces issues regarding the application of the conflicting laws when determining the proper priority of claims against a decedent and the decedent's estate. The personal representative is at risk of violating a law if he or she pays a claimant with priority under a law, but without priority under the other law. This conflict of laws has been addressed by courts, and continues to develop.

1. Section 6323 Of The Code. Section 6323 of the Code provides priority for certain persons. Section 6323(a) of the Code provides that the tax lien imposed by section 6321 of the Code in favor of the U.S. shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets certain requirements has been filed by the Service. In the case of real property, the notice shall be filed in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such state, in which the property subject to the lien is situated (its physical location).[271] In the case of personal property, whether tangible or intangible, the notice shall be filed in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such state, in which the property subject to the lien is situated (at the residence of the taxpayer at the time the notice of lien is filed), except state law merely conforming to or reenacting federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such state.[272] Section 6323(b) of the Code also provides priority for other certain interests.

Similarly, with respect to special liens for estate and gift taxes, section 6324(c)(1) of the Code provides that the lien imposed by section 6324 of the Code for unpaid estate and gift taxes shall not be valid

[263] *Id*. at 395.
[264] *Id*. at 397.
[265] *Id*. at 396.
[266] *Id*.
[267] *Id*.
[268] *Id*.
[269] *Id*. at 397.
[270] *Id*.
[271] I.R.C. §§ 6323(f)(1)(A)(i), (f)(2)(A).
[272] I.R.C. §§ 6323(f)(1)(A)(ii), (f)(2)(B).

as against a mechanic's lienor and shall not be valid with respect to any lien or interest described in section 6323(b) of the Code.

a. U.S. Supreme Court Harmonized Section 3713 And Section 6323 Of The Code So That Secret Lien Does Not Have Priority. The priority provided under section 6323 of the Code was addressed by the Supreme Court in *Romani*.[273] The question presented was whether Section 3713 requires that a federal tax claim be given preference over a judgment creditor's perfected lien on real property even though such a preference is not authorized by section 6323 of the Code?

The decedent died in 1992. His entire estate consisted of real property worth only $53,001. Prior to death, a Pennsylvania court entered a judgment in 1985 for $400,000 in favor of a corporation against the decedent. The judgment was recorded in the clerk's office and, therefore, as a matter of Pennsylvania law, it became a lien on all of the decedent's real property in that county. Thereafter, the Service filed a series of notices of tax liens on the decedent's property for unpaid taxes, interest, and penalties in the approximate amount of $490,000.

Because the estate property was encumbered by both a judgment lien and federal tax liens, the estate's administrator sought permission from a Pennsylvania court to transfer the property to the judgment creditor (the corporation). Thus, the administrator argued that section 6323 of the Code should be read as giving the U.S. a preference over other unsecured creditors, but not over secured creditors. The Government acknowledged that its tax liens were not valid as against the earlier judgment lien; but, "giving new meaning to Franklin's aphorism that 'in this world nothing can be said to be certain, except death and taxes,'" it opposed the transfer on the ground that Section 3713 gave it the right "to be 'paid first.'"[274] The Pennsylvania court overruled the Government's objection and authorized the conveyance. The Superior Court of Pennsylvania affirmed. The Supreme Court of Pennsylvania also affirmed, recognizing that there was a "plain inconsistency" between Section 3713, which appears to give the U.S. "absolute priority" over all competing claims, and section 6323 of the Code, which provides that the federal tax lien "shall not be valid" against judgment lien creditors until a prescribed notice has been given.[275]

The U.S. Supreme Court stated that three statutes control the disposition of the case: (i) Pennsylvania lien statute; (ii) federal tax lien statute (section 6323 of the Code); and (iii) federal priority statute (Section 3713).[276] There was no dispute about the meaning of two of the three statutes.[277]

Under the Pennsylvania lien statute,[278] a judgment shall create a lien against real property when it is recorded in the county where the property is located.[279] After the judgment has been recorded, the judgment creditor has the same right to notice of a tax sale as a mortgagee.[280] The recording in one county does not, of course, create a lien on property located elsewhere.[281] In this case, however, it was undisputed that the judgment creditor acquired a valid lien on the real property in the Pennsylvania court before the decedent's death and before the Government served notice of its tax liens.[282]

[273] U.S. v. Estate of Romani, 523 U.S. 517 (1998).
[274] *Id*. at 520.
[275] *Id*.
[276] *Id*. at 522.
[277] *Id*. at 522.
[278] 42 Pa. Cons. Stat. 4303(a).
[279] *Romani* at 522.
[280] *Id*.
[281] *Id*.
[282] *Id*. at 522-23.

Under the federal tax lien statute,[283] the Government's right to a lien on a delinquent taxpayer's property has been a part of our law at least since 1865.[284] Originally, the lien applied, without exception, to all property of the taxpayer immediately upon the neglect or failure to pay the tax upon demand.[285] An unrecorded tax lien against a delinquent taxpayer's property was valid even against a bona fide purchaser who had no notice of the lien.[286] In 1913, Congress amended the statute to provide that the federal tax lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice has been filed with the clerk of the federal district court or with the appropriate local authorities in the district court or county in which the property subject to the lien is located.[287] In 1939, Congress broadened the protection against unfiled tax liens to include pledges and the holders of certain securities.[288] The Federal Tax Lien Act of 1966 again broadened that protection to encompass a variety of additional secured transactions, and also included detailed provisions protecting certain secured interests even when a notice of the federal lien previously has been filed.[289] In sum, each time Congress revisited the federal tax lien, it ameliorated its original harsh impact on other secured creditors of the delinquent taxpayer.[290] In this case, it was agreed by the terms of section 6323(a) of the Code that the Government's liens are not valid as against the lien created by the earlier recording of the corporation's judgment.[291]

The Government placed its entire reliance on Section 3713.[292] The Supreme Court stated that it does not seem appropriate to view the issue in this case as whether the Tax Lien Act of 1966 has implicitly amended or repealed the priority statute.[293] Instead, the proper inquiry is how best to harmonize the impact of the two statutes on the Government's power to collect delinquent taxes.[294] There are sound reasons for treating the Tax Lien Act of 1966 as the governing statute when the Government is claiming a preference in the insolvent estate of a delinquent taxpayer.[295] That act is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens.[296] The act represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to the many different sorts of interests (including, for instance, judgment liens, mechanic's liens, and attorneys' liens), in many different types of property (including, for example, real property, securities, and motor vehicles).[297] Indeed, given the Court's unambiguous determination that the federal interest in the collection of taxes is paramount to its interest in enforcing other claims, it would be anomalous to conclude that Congress intended Section 3713 to impose greater burdens on the citizen than those specifically crafted for tax collection purposes.[298]

The Government emphasized that when Congress amended the Tax Lien Act in 1966, it declined to enact the American Bar Association's proposal to modify Section 3713, and Congress again failed to enact a similar proposal in 1970.[299] Both proposals would have expressly provided that the Government's priority in insolvency does not displace valid liens and security interests, and therefore would have harmonized

[283] I.R.C. § 6323.
[284] *Romani* at 523.
[285] *Id*.
[286] *Id*.
[287] *Id*. at 523-24.
[288] *Id*. at 524.
[289] *Id*.
[290] *Id*.
[291] *Id*.
[292] *Id*.
[293] *Id*. at 530.
[294] *Id*.
[295] *Id*. at 532.
[296] *Id*.
[297] *Id*.
[298] *Id*.
[299] *Id*. at 533.

Section 3713 with the Tax Lien Act.[300] But both proposals also would have significantly changed Section 3713 in many other respects to follow the priority scheme created by the bankruptcy laws.[301]

The Supreme Court responded that the failure of the 1970 proposal in the Senate Judiciary Committee – explained by no reports or hearings – might merely reflect disagreement with the broad changes to the priority statute, or an assumption that the proposal was not needed because Section 3713 does not apply to prior perfected security interests, or any number of other views.[302] Thus, the Committee's failure to report the proposals to the entire Congress does not necessarily indicate that any legislator though that Section 3713 should supersede the Tax Lien Act in the adjudication of federal tax claims.[303] They provide no support for the hypothesis that both Houses of Congress silently endorsed that position.[304] The actual measures taken by Congress provide a superior insight regarding its intent.[305] As the Court has noted, the 1966 amendments to the Tax Lien Act bespeak a strong condemnation of secret liens, which unfairly defeat the expectations of innocent creditors and frustrate the needs of citizens for certainty and convenience in the legal rules governing their commercial dealings.[306] These policy concerns shed light on how Congress would want the conflicting statutory provisions to be harmonized.[307]

The Supreme Court affirmed the Pennsylvania Supreme Court holding, in sum, nothing in the text or the long history of interpreting Section 3713 justifies the conclusion that it authorizes the equivalent of a secret lien as a substitute for the expressly authorized tax lien that Congress has said shall not be valid in a case of this kind.[308]

b. Claim Of Ex-Wife And Children Under Divorce Agreement Secondary To Claim Of The Government. In *Schick*,[309] a husband and wife divorced in June 2013. In April 2014, a notice of federal tax lien was filed with respect to the husband. In July 2014, the husband died, survived by his ex-wife and their children. Since the husband did not maintain life insurance for the ex-wife and children as required by the divorce agreement, the divorce agreement provided the ex-wife a lien in stock held by the husband.

The husband's estate was valued at $42,186. Liabilities, including significant income tax liabilities, exceeded that value. The husband owed $176,472.17 in assessed federal income taxes for 2010, and an estimated $24,104 for 2013, and $168,000 for 2014.

In January 2015, the ex-wife was appointed as executor of the husband's estate. In April 2015, the ex-wife filed a complaint in a New Jersey superior court seeking, among other things, judgment that the estate is insolvent and for the court to direct the payment of husband's assets based on priority of allowable claims as set forth in N.J.S.A. 3B:22-2; and a judgment authorizing the sale of the husband's interest in property, with the net proceeds to be applied to pay the first mortgage held by Chase Bank, and the balance to pay the creditors of the estate in order of priority as provided by N.J.S.A. 3B:22-2.

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300 *Id*.
301 *Id*.
302 *Id*. at 533-34.
303 *Id*. at 534.
304 *Id*.
305 *Id*.
306 *Id*.
307 *Id*.
308 *Id*.
309 Estate of Schick v. U.S., 116 A.F.T.R. 2d 2015-5866 (D. N.J. 2015).

In May 2015, the Government removed the action to federal district court asserting that the suit constituted an action against the Service, and that it impermissibly aimed to limit the Government's property interest through a quite title action. The Government further urged that the ex-wife's claims to the estate's property are subordinate to the Government's tax lien.

The federal district court held that the Government's tax interests against the estate are superior to the ex-wife's claims.[310] The parties agreed that the estate is liable for the taxes the husband owes and, thus, the government has a tax lien under section 6321 of the Code upon the value of the estate.[311] Significantly, moreover, in circumstances involving an estate with more debts than assets, the Government's claims shall be paid first.[312] The ex-wife readily acknowledged that the estate is insolvent.[313] Pursuant to Section 3713, then, the estate's debts to the Government must be paid before any other creditor is paid.[314]

The court acknowledged that there are some exceptions to this principle, including those whose rights are recognized as superior to the Government's pursuant to the Federal Tax Lien Act under section 6323 of the Code.[315] Here, neither the ex-wife nor the children are a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor.[316] The claims of the ex-wife and children amount to a general lien created by the parties' divorce agreement contract.[317] Such claims do not fall under any category recognized by section 6323(a) of the Code.[318] Accordingly, the debts owed to the ex-wife and the children may only be satisfied after the estate first satisfies its federal tax obligations.[319]

2. State Priority Statute. Chapter 355 of the Texas Estates Code provides for the presentment, payment, and priority of claims in estate administration. A claim may be presented to a personal representative of an estate at any time before the estate is closed if suit on the claim has not been barred by the general statutes of limitation.[320] A claim may also be presented by depositing the claim with the clerk with vouchers and the necessary exhibits and affidavit attached to the claim.[321] A claim or any part of a claim for money against an estate may not be paid until the claim or part of the claim has been approved by the court or established by the judgment of a court of competent jurisdiction.[322] Section 355.102 of the Texas Estates Code provides for the payment of claims as follows:[323]

> "**355.102 Claims Classifications; Priority of Payment**
>
> (a) Claims against an estate shall be classified and have priority of payment as provided by this section.
>
> (b) Class 1 claims are composed of funeral expenses and expenses of the decedent's last illness for a reasonable amount approved by the court,

[310] *Id*. at 2015-5869.
[311] *Id*.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*. at 2015-5869; *citing to*, *Romani*.
[316] *Schick* at 2015-5869.
[317] *Id*.
[318] *Id*.
[319] *Id*.
[320] Tex. Est. Code Ann. § 355.001.
[321] Tex. Est. Code Ann. § 355.002(a).
[322] Tex. Est. Code Ann. § 355.101.
[323] Similar to section 3-805 of the Uniform Probate Code (1969, last amended or revised in 2010), entitled Classification of Claims.

not to exceed a total of $15,000. Any excess shall be classified and paid as other unsecured claims.

(c) Class 2 claims are composed of expenses of administration, expenses incurred in preserving, safekeeping, and managing the estate, including fees and expenses awarded under Section 352.052, and unpaid expenses of administration awarded in a guardianship of the decedent.

(d) Class 3 claims are composed of each secured claim for money under Section 355.151(a)(1), including a tax lien, to the extent the claim can be paid out of the proceeds of the property subject to the mortgage or other lien. If more than one mortgage, lien, or security interest exists on the same property, the claims shall be paid in order of priority of the mortgage, lien, or security interest securing the debt.

(e) Class 4 claims are composed of claims:

(1) for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been:

(A) confirmed as a judgment or a determination of arrearages by a court under Title 5, Family Code; or

(B) administratively determined by the Title IV-D agency, as defined by Section 101.033, Family Code, in a Title IV-D case, as defined by Section 101.034, Family Code; and

(2) for unpaid child support obligations under Section 154.015, Family Code.

(f) Class 5 claims are composed of claims for taxes, penalties, and interest due under Title 2, Tax Code, Chapter 2153, Occupations Code, former Section 81.111, Natural Resources Code, the Municipal Sales and Use Tax Act (Chapter 321, Tax Code), Section 451.404, Transportation Code, or Subchapter I, Chapter 452, Transportation Code.

(g) Class 6 claims are composed of claims for the cost of confinement established by the Texas Department of Criminal Justice under Section 501.017, Government Code.

(h) Class 7 claims are composed of claims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent.

(i) Class 8 claims are composed of any other claims not described by Subsections (b) – (h)."

Although section 355.102 of the Texas Estates Code does not appear to expressly refer to a claim of the U.S., it does refer to a "tax lien" as a Class 3 claim, and certain "taxes" as a Class 5 claim.

Section 355.103 of the Texas Estates Code provides that when a personal representative has estate funds in the representative's possession, the representative shall pay in the following order: (1) funeral expenses and expenses of the decedent's last illness, in an amount not to exceed $15,000; (2) allowances made to the decedent's surviving spouse and children, or to either the surviving spouse or children; (3) expenses of administration and expenses incurred in preserving, safekeeping, and managing the estate; and (4) other claims against the estate in the order of the claims' classifications.

Section 355.104(a) of the Texas Estates Code provides that if a personal representative has the proceeds from a sale made to satisfy a mortgage, lien, or security interest, and the proceeds or any part of the proceeds are not required for the payment of any debts against the estate that have a preference over the mortgage, lien, or security interest, the representative shall pay the proceeds to any holder of a mortgage, lien, or security interest. If there is more than one mortgage, lien, or security interest against the property, the representative shall pay the proceeds to the holders of the mortgages, liens, or security interests in the order of priority of the holders' mortgages, liens, or security interests.[324]

If there are insufficient assets to pay all claims of the same class, other than secured claims for money, the claims in that class shall be paid pro rata, as directed by the court, and in the order directed.[325]

The Service has taken the position that federal law controls in situations in which a federal tax lien competes with any interest under state law or by contract.[326] However, the Service ***may in its discretion*** not assert priority of its federal tax lien over reasonable administrative expenses of the estate, to the extent that such expenses are not covered by an insurance policy, trust or other similar benefit that covers the costs of administrative expenses of the estate.[327] Reasonable administrative expenses are limited to expenses for preserving and marshalling estate assets.[328] Consideration should be given to how does allowance of this expense benefit the Government giving up its lien position.[329]

[324] Tex. Est. Code Ann. § 355.104(a).

[325] Tex. Est. Code Ann. § 355.108(a).

[326] I.R.M. 5.5.2.4(3); I.R.M. 5.5.2.4(4) (A state statute may not subordinate a federal tax lien to interests that Congress has not specifically permitted to prime the lien. State law is nullified to the extent that it conflicts with federal law.); I.R.M. 5.5.2.6(5) (In accordance with state law, claims and expenses are categorized for priority in which they will be paid. For federal tax claims, federal law controls the priority of payments of federal tax liens. To the extent there is a conflict between state and federal law, federal law controls.); I.R.M. 5.17.13.9(4) (Insofar as state priority laws conflict with the federal priority, the federal priority controls.).

[327] I.R.M. 5.5.2.4(3); I.R.M. 5.5.2.6(2) (The Service ***in its discretion*** may permit reasonable, necessary expenses to be paid before a federal tax lien. Such expenses must be examined to determine if an expense is reasonable and necessary to the administration of the estate. Reasonable and necessary expenses should not be permitted ahead of a tax lien if such expenses are already covered by an insurance policy, trust or other similar benefit that covers such costs. State statutes may limit the amount permitted to be paid for administrative expenses in probate. Inform the administrator that such planned expense payments may not be made prior to tax payments.); I.R.M. 5.17.13.4(2) (The Service may, *in limited circumstances,* cede priority for purposes of funding claims for family allowances, funeral expenses, or administrative expenses, even though debts to the Government technically have priority of these claims.).

[328] I.R.M. 5.5.2.6.1(2); I.R.M. 5.5.2.6.1.1(c) (Check local probate code to determine if thresholds have been established. The attorney's billing statements will provide information on what actions the attorney has taken on behalf of the estate to generate the fees. These commissions or fees should be limited to expenses for preserving or marshaling estate assets. Fees that have not been incurred or are estimated are not allowable.).

[329] I.R.M. 5.5.2.6.1(2); U.S. v. McLendon, 84 A.F.T.R. 2d 99-5714 (N.D. Tex. 1999) (With respect to the classification of claims in the Texas Probate Code, the U.S. argued at trial that its section 6321 lien should prevail over claims to reimbursement of administration expenses because the amounts so expended did not benefit the Government. This argument, which lacks support in the relevant statutes, regulations, and case law, is conspicuously absent (because of its insupportability, one might suppose) from the Government's closing argument. Following the Government's example, the court will say no more about this argument, except to note that it is untenable, unconvincing, and unworthy of the Government.).

However, the Service has recognized that certain exceptions to the Government's priority under Section 3713 have been allowed by the courts.[330] Administrative expenses such as court costs, reasonable compensation for the fiduciaries and attorneys, and expenses incurred in operating a business or liquidating assets made in the ordinary course of these operations.[331]

a. Fifth Circuit Recognized That Conflict Of Laws Remains Open. In *Johnson*,[332] the decedent died in 1985. Prior to death, in February 1983, the Service issued a jeopardy assessment against the decedent in the amount of $7.5 million. The Service subsequently placed a lien on all of the decedent's assets and seized cash and personal property pursuant to the lien. In April 1983, the Service issued notices of deficiency for the decedent's taxable years 1975 through 1979.

In July 1985, the decedent committed suicide. In August 1985, the executor was appointed. A few days after appointment, the executor notified the Service of the decedent's death, requested an abatement of the jeopardy assessment, and requested release of the seized assets so they may be sold and the proceeds applied in accordance with the priorities established by law. The Service wrote the executor that it could neither abate the assessment nor release the assets. In September 1985, the executor filed an Application for Recovery of Property or, in the Alternative, to Show Cause in Probate Court No. 2 of Harris County, Texas. The executor alleged that the Service's refusal to turn over the property was hindering his efforts to administer the estate. Specifically, the executor complained that he was unable to pay claims against the estate, particularly the administrative and funeral expenses incurred in accordance with his obligations under state and federal law. In October 1985, the Service petitioned for removal of the case from the probate court to the federal district court for the southern district of Texas. The petition was granted, and the district court dismissed.

On appeal to the Fifth Circuit, the question was whether the federal district court had jurisdiction to hear a claim by the executor of a taxpayer's estate seeking to quiet title to property subject to federal tax liens.[333] As an initial matter, the court stated that they are confronted by the question of whether the executor's suit may properly be classified as an action to quiet title.[334] The court answered this question in the affirmative.[335] The executor did not dispute the fact that the Government's assessment was valid and that a federal tax lien attached to the property.[336] Rather, the executor asserted that as the representative of the estate, he has an interest in the property which, at least to the extent of costs of administration and funeral expenses, is superior to the interest claimed by the Government.[337] Therefore, given that the executor is seeking to clarify or determine the relative rights of the parties in the property, presumably as a matter of the interaction of state and federal priority laws, his suit would seem the proper method for removing the clouds on title cast by federal tax liens.[338] If, in fact, the administrative and funeral expenses prime the federal tax

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[330] I.R.M. 5.5.9.23.2(3); I.R.M. 5.17.13.5(1) (Although Section 3713 does not provide for any exceptions to the Government's priority, courts have held that certain classes of claim can be paid before the tax debt. These excepted classes include administrative expenses, funeral expenses, and homestead or family allowances.).

[331] I.R.M. 5.5.9.23.2(3); I.R.M. 5.17.13.5(2) (Administrative expenses are expenses incurred for the general welfare of creditors. Administrative expenses include: court costs, reasonable compensation for the fiduciary and the fiduciary's attorney, and expenses incurred to collect and preserve assets.); I.R.M. 5.17.13.5(6) (Fees paid to the fiduciary or the fiduciary's attorney may be deemed unreasonable if: the fees are excessive in amount, or they are incurred in support of unreasonable activity, e.g., positions that are frivolous or without substantial merit, or they have been estimated or not incurred. Reasonable attorney fees are those incurred for preserving or marshalling estate assets.).

[332] Estate of Johnson, 836 F.2d 940 (5th Cir. 1988).

[333] *Id*. at 943.

[334] *Id*. at 945.

[335] *Id*.

[336] *Id*.

[337] *Id*. at 945-46.

[338] *Id*. at 946.

lien, there must be some way to give judicial effect to the validity conferred statutory priority.[339] Thus, the court concluded that, for the limited purposes of the case, the executor is a third party eligible to bring an action to quiet title to property burdened by federal tax liens under section 2410(a) of the Code and that the district court, therefore, has jurisdiction to entertain this case.[340]

In footnote 14 of the opinion, the Fifth Circuit acknowledged the conflict of laws between Section 3713 and Texas probate law.[341] In support of its contentions, the executor noted that a number of cases have held that administrative and funeral expenses take priority over a federal tax lien.[342] "We do not presume to decide whether the executor's position on the merits will ultimately prevail. We merely note that the executor's position is not devoid of support."[343] The Fifth Circuit did not reach a conclusion as to the priority of administration expenses. The court stated that it expresses no opinion whatsoever on the merits of the executor's position regarding the primacy of administrative and funeral expenses over a federal tax lien.[344] That question was not properly before the court and must be left to the considered judgment of the district court if further proceedings follow.[345]

b. Conflict of Laws Has Been Resolved Under Certain Circumstances By Treating Administration Expenses As Debts Of The Estate, Rather Than Debts Of The Decedent. The Service itself acknowledges that there are exceptions to the priority created by Section 3713(a) for prior interests, administrative expenses, and family allowance.[346] In Revenue Ruling 80-112,[347] an individual died in September 1978, leaving property insufficient to pay taxes owed the U.S. for which it had no lien and other debts including funeral and administrative expenses, doctor's bills from the decedent's lasts illness, and wages due a household employee. The state in which the decedent resided provides that a reasonable one-year family allowance be paid out of a decedent's estate. Under the laws of the state, claims against the estate of a deceased debtor are to be paid in the following order: administration expenses, funeral expenses, costs of last illness, family allowances, wages of household employees, and all other claims. The Service recognized that the funeral and administrative expenses and the one-year family allowance provided by state law are under state law not debts of the decedent, but are charges against the property of the decedent to be deducted before payment of debts; but costs of the decedent's last illness and the wages of household servants are debts from the decedent. The Service held that the claims against the decedent's estate for funeral and administrative expenses and the family allowance have priority over federal tax claims of the Government for which it has no lien. However, such federal tax claims are superior to claims against a decedent's estate for doctor's bills from the decedent's last illness and wages due a household employee.

Some courts have also held that the Government has priority over debts of the decedent, but not debts of the estate.[348] Texas law defines which claims are claims against the estate versus claims against the

[339] *Id*. at 947.
[340] *Id*.
[341] *Id*. at 946, n.14. Similar approach used by Supreme Court. *See*, Crane v. Comm'r, 331 U.S. 1 (1947); Comm'r v. Tufts, 461 U.S. 300 (1983). Footnote 14 of the opinion recently cited by other courts in Texas. *See*, *MacIntyre* at 2012-5154; In re Ramirez, 120 A.F.T.R. 2d 2017-6833, 6826 (Bktcy Ct. Tex. 2017).
[342] *Johnson* at 946, n.14.
[343] *Id*.
[344] *Id*. at 947-48.
[345] *Id*. at 948.
[346] I.R.M. 34.4.1.7(2); PLR 8341018 (Accordingly, the Government's assessment lien for 1978 taxes in the amount of $8,756, plus accrued interest and penalties, grants the Government priority for the amount over all payments by the Estate except those administrative expenses which are necessary for the collection and preservation of the Estate. Payments from the Estate assets of funeral and administrative expenses and the exempt property and family allowances, provided for under laws of State X, have priority over payment of Decedent's unassessed federal income tax liability for 1979.).
[347] Rev. Rul. 80-112, 1980-1 C.B. 306 (1980).
[348] *MacIntyre* at 2012-5154; *citing to, Johnson* (declining to reach the question but collecting cases); In re Estate of Funk, 849 N.E.2d 366, 373 (Ill. 2006) (holding that funeral expenses and expenses of administration of the estate are debts of the estate and

decedent in section 355.102 of the Texas Estate Code.[349] Under that section, class 1 and class 2 claims are debts of the estate.[350] They include class 1 – funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed a total of $15,000, with any excess to be classified and paid as other unsecured claim; and class 2 – expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, and unpaid expenses of administration awarded in a guardianship of the decedent.[351] Accounting and attorneys' fees may be classified as class 2 expenses and, thus, expenses of the estate, if they were incurred in the preservation, safekeeping, and management of the estate.[352] Class 3 claims begin the debts of the decedent with secured claims for money.[353] At this point, Section 3713 comes into play for estates without sufficient funds to satisfy the claims of the Government and takes priority over any debts of the decedent.[354] Therefore, those distributions that can fairly be characterized as debts of the estate would not trigger individual lability on the part of the executor.[355]

In *Martin*,[356] the Supreme Court of Utah recognized that administration expenses need priority to incentivize administration of an estate. In that case, a real estate contract was entered for the sale of land in August 1962, and the contract was recorded in May 1963. In December 1964, the contract was assigned and

not subject to Section 3713's priority requirement); *Weisburn* (according priority to federal tax claims "except as to payment which [executor] made for administrative expenses, for funeral expenses, and for the headstone."); Martin v. Dennett, 626 P.2d 473 (Utah 1981) (concluding that while Section 3713 accords priority to federal tax claims over the debts of the debtor, it does not accord a similar priority over debts of the estate, including administrative and funeral expenses); Estate of Igoe v. U.S., 717 S.W.2d 524 (Mo. 1986) (IRS tax lien did not have priority over family and homestead allowances under Missouri state law.).

[349] *MacIntyre* at 2012-5154 (referring to Section 322 of the Texas Probate Code, which is the predecessor statute to Section 355.102 of the Texas Estates Code.).

[350] *Id*.

[351] *Id*. at 2012-5155; Tex. Est. Code Ann. § 355.102(b) & (c).

[352] *MacIntyre* at 2012-5155; Hope v. Baumgartner, 111 S.W.3d 775, 778 (Tex. App. – Fort Worth 2003, no pet.).

[353] *MacIntyre* at 2012-5155; Tex. Est. Code Ann. § 355.102(d).

[354] *MacIntyre* at 2012-5155.

[355] *Id*.; *see also*, In re Estate of Funk, 849 N.E.2d 366, 373 (Ill. 2006) ("Under section 3713(a), the United States is entitled to priority with respect to payments of 'debts of the debtor,' not debts incurred by the estate. *** The government's view was that if the executor and attorney fees were scaled back, the money could be added to the funds obtained from the sale of the farm, thereby increasing the amount the government would receive in satisfaction of the promissory note secured by the mortgage. *** [T]he government advised that it believed $124,500 to be a fair settlement amount. *** The government's settlement offer exceeded the funds left in the estate by $32,484.29. It would therefore have necessitated return by Printy of some, if not all, of the executor's fees approved by the court, leaving her with no compensation for a decade's worth of work on behalf of the estate and for the benefit of the government. It would have also required Cherry to further discount his fee, notwithstanding that he had been paid nothing for his work since 1989, and made no provision for further payment, despite the fact that the estate could still not be closed and significant work for the estate still lay ahead. *** As in the case of the attorney fees, its [the Government's] argument was that it had a superior claim to the money used to pay them. *** [T]he statutory priority of the United States extends only to the net proceeds of the estate after the expenses of administration have been paid. Under the statute as it has been consistently interpreted and applied for more than 200 years, expenses of administration take precedence over claims by the federal government. In other words, such expenses are paramount and prior to any claim which the United States may have against the proceeds of the estate as creditor of the deceased. They must therefore be deducted from the funds under the control of the representative of the estate before the claims of the United States are paid. *** Under the Federal Insolvency Statute [Section 3713], Cherry was therefore entitled to all of the attorney fees he was paid for his work on behalf of the estate, including the $38,830.73 challenged by the government in this appeal."); *but see,* In re Estate of Simmons, 120 A.F.T.R. 2d 2017-5368, 5371-72 (D. Ind. 2017) ("Speikhout also asserts that, as Personal Representative, she and her counsel are entitled to just and reasonable compensation for their services pursuant to Indiana Code § 29-1-10-13. *** Accordingly, because Spiekhout's interest does not fall under any of the exceptions listed in § 6323 – purchaser, holder of security interest, mechanics lienor, or judgment lien creditor – the Government's tax liens have priority. Speikhout argues that under the Court's conclusion, no reasonable representative or counsel would provide services under such impositions. The Court, however, notes that Spiekhout's policy argument is addressed and remedied by the procedures set forth in the Internal Revenue Manual ('IRM'). Pursuant to IRM 5.5.2.4(3), the Government 'may in its discretion not assert priority over reasonable administrative expenses of the estate.' *** The Government made clear that, if documentation is provided evidencing payments made by Spiekhout to maintain the Property, the Government will allow Spiekhout's unreimbursed expenses to be paid ahead of the federal tax liens.").

[356] Martin v. Dennett, 626 P.2d 473 (Utah 1981); *see also*, In re Carl's Estate, 94 N.E.2d 239 (Ohio Prob. 1950).

the assignment was recorded. In 1965, the U.S. recorded a notice of three federal tax liens totaling $4,181.29. The notice of tax liens were refiled in 1970 and 1971. After the decedent's death, proceeds of $1,347.46 from the sale of the real property was deposited with the clerk of the court to be held pending adjudication of the relative rights and claims of the decedent's estate and the U.S. A federal district court held that the U.S., by virtue of its tax liens in the total amount of $3,143.04 had claims superior to the claims of the decedent's estate for funeral expenses and administrative expenses.

On appeal, the Supreme Court of Utah reversed. The court stated that Section 3713 accords priority only to those debts "due from the deceased."[357] It does not include debts incurred by the estate.[358] It is the latter category of expenses that is the basis of this case.[359] Clearly, funeral expenses are expenses of the estate, not the deceased.[360] Section 75-3-805(a), Utah Uniform Probate Code, governs priorities of the debts by an estate.[361] It provides that if the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order (i) reasonable funeral expenses; (ii) costs and expenses of administration; (iii) debts and taxes with preference under federal law; and ***.[362] The state statute, in granting priority to funeral and administration expenses of an estate over the debts of the deceased is controlling as to claims against the estate.[363] Even the most cursory consideration of the problem reveals the propriety of this result.[364] If administration expenses are not provided for as a first charge upon assets of an estate, there would be absolutely no assurance that estate could ever be administered.[365]

In *Igoe*,[366] the decedent had filed a delinquent 1980 federal income tax return in 1981. In 1982, the Service filed a notice of a federal tax lien with respect to the unpaid 1980 tax liability. In January 1983, the decedent paid $43,989.94 of his delinquent taxes to the Service. No other payments to the Service were made prior to the decedent's death. The decedent died in June 1983. The decedent's wife was appointed administrator of the estate. The Service filed a proof of claim against the estate in the amount of $81,607.40 for the unpaid tax balance, interest, and penalties. The administrator filed a petition seeking her homestead allowance of $7,500 under Missouri law. In addition, the guardian of the decedent's six minor children from a previous marriage claimed a right to family allowance under Missouri law. The U.S. objected to the claims of the surviving spouse and minor children, contending that, under section 6321 of the Code, the tax lien had priority because it was effective before the decedent's death.

The Missouri priority statute[367] provided that all claims and statutory allowances against the estate of a decedent shall be divided into the following classes: (i) costs; (ii) expenses of administration; (iii) exempt property, family and homestead allowances; (iv) funeral expenses; (v) debts and taxes due to the U.S.; (vi) expenses of the last sickness, wages of servants, claims for medicine and medical attendance during the last sickness, and the reasonable cost of a tombstone; ***. The probate court applied the Missouri statute and ruled that the family and homestead allowances claimed against the decedent's estate had priority over the Service's tax lien. The court awarded $7,500 to the surviving spouse, less $1,485 for business furniture she elected to keep, and $28,000 as a reasonable family allowance for the six surviving minor children. The estate was insufficient to satisfy both the tax lien and the homestead and family allowances.

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[357] *Martin* at 475.
[358] *Id*.
[359] *Id*.
[360] *Id*.
[361] *Id*.
[362] *Id*. at 475.
[363] *Id*.
[364] *Id*.
[365] *Id*.
[366] Estate of Igoe v. U.S., 717 S.W.2d 524 (Mo. 1986).
[367] Mo. Ann. Stat. § 473.397 (1978).

The Service appealed, alleging that as a matter of law the probate court erred by ruling that homestead and family allowances had priority over assessed federal tax liens. The Service argued that the federal tax lien arose prior to, and was not extinguished by, the decedent's death. Therefore, any party who takes possession of the decedent's property takes subject to the pre-existing tax lien. The Service also supported its argument by relying on sections 6321 and 6323 of the Code, which create the federal lien for taxes and establish its priority. Section 6323 of the Code specifically lists those claims having superiority over the federal tax lien. Because homestead and family allowances are not listed, the Service argued that they are not to be given priority.

The Missouri Supreme Court affirmed the probate court's judgment.[368] The court recognized that the authorities relating to the issue of the priority of federal tax liens are not consistent.[369] Some courts have ruled that claims to homestead rights are superior to federal tax liens, while others have held to the contrary.[370] Comparison of the cases in this area is made even more difficult because both state statutes and fact patterns differ from case to case.[371] This case was decided by using the rationale under *Martin* that homestead and family allowances are debts of the estate and not debts of the decedent.[372] Homestead and family allowances are similar to funeral expenses and costs of estate administration.[373]

The court recognized that the Government did not object to the payment from the decedent's estate of his funeral expenses nor the attorney's fees incurred in administering the estate.[374] These estate debts are not listed in section 6323 of the Code.[375] Yet they were allowed without the Government's protest suggesting that section 6323 of the Code is not as all inclusive a list as the U.S. would have the court believe.[376] The Government sought relief in a Missouri state court and is therefore bound by the same rules which bind and govern other litigants.[377]

c. First Circuit Declined To Apply Equitable Exception. In *McNicol*,[378] the decedent died in July 2002, survived by his wife and four minor children. At the time of death, the decedent owed over $340,000 in unpaid federal income tax liabilities. Since the liabilities exceeded the value of the estate, the estate was insolvent. The assets of the estate consisted almost entirely of stock in two corporations. Each corporation owned a fishing vessel as its sole asset, and the value of the stock in each corporation was coextensive with the value of that vessel. In July 2002, shortly after the decedent's death, the wife transferred a portion of the shares to herself. In January 2003, the wife was appointed executor of the decedent's estate. In April 2003, the wife transferred the rest of the shares to herself. When the wife transferred the shares, she was admittedly aware of the decedent's unpaid tax debts.

Later in 2003, the Service completed its assessment of taxes, penalties, and interest owed by the decedent's estate, totaling $342,538.93. In October 2003, the Service formally submitted a probate claim. The claim was not paid. In November 2006, the Service contacted the wife to resolve the matter, but negotiations stalled. In 2008, the wife told the Service that she would no longer cooperate. The Service countered by serving the wife with formal notice of potential liability under Section 3713. In due course the Government sued the decedent's estate and the wife, both individually and as executor, in federal district

368 *Igoe* at 527.
369 *Id*. at 526.
370 *Id*.
371 *Id*.
372 *Id*. at 527.
373 *Id*.
374 *Id*.
375 *Id*.
376 *Id*.
377 *Id*.
378 U.S. v. McNicol, 829 F.3d 77 (1st Cir. 2016).

court in Massachusetts. Its two count complaint sought both to reduce to judgment the estate's unpaid federal tax liability and to secure judgment against the wife personally for transferring assets of the estate to herself without first paying the estate's federal tax debts. The court concluded that the wife was liable up to the value of the transferred assets because all three requirements for Section 3713(b) liability were satisfied. The acknowledged facts unambiguously demonstrated that the wife effected asset transfers by distributing virtually all of the assets of the decedent's estate to herself; that the estate was insolvent at the time of the transfers because its unpaid federal income tax liabilities far exceeded the value of the estate's assets; and that the wife was aware of the unpaid tax liabilities when she effected the transfers. No more was needed for a finding of Section 3713(b) liability.

On appeal, the First Circuit Court of Appeals was required to construe and apply Section 3713.[379] The court concluded that the statute says what it means and means what it says.[380] Faced with inhospitable terrain, the wife served up a salmangundi[381] of reasons why she should not be subject to Section 3713(b) liability at all or, alternatively, why she should be subject to liability only in a lesser sum.[382] The wife's primary argument started with the premise that certain types of expenses associated with administering an estate may be entitled to precedence over the Government's tax claims. Building on the premise, she insisted that she used the transferred assets to pay administrative expenses and, therefore, she is entitled to an equitable exception. The court rejected her argument.[383] It stated that it does not gainsay that a personal representative of an estate that is indebted to the U.S. for unpaid taxes may nonetheless use estate assets to defray certain types of expenses without contravening the statutory priority.[384] Citing to section 34.4.1.7 of the Internal Revenue Manual, the court recognized that the Government itself acknowledges that there are exceptions to the priority created by Section 3713(a) for family allowance and administrative expenses (such as expenses incurred for the general welfare of creditors, expenses incurred to collect and preserve assets, court costs, and funeral expenses).[385] Despite this promising provenance, however, the wife's argument for an equitable exception fails.[386] Even if it were assumed that an equitable exception to Section 3713 may exist – a matter on which the court stated that it takes no view – the wife's prospects would not improve.[387] As a threshold matter, the record flatly contradicts the wife's assertion that she transferred the stock to herself for the purpose of paying administration expenses.[388] Instead, the record shows that the wife deliberately chose to not liquidate the estate and pay the tax debts owed to the U.S.[389] The wife chose not to sell the two fishing vessels because she wanted to maintain the lucrative income that the vessels had been generating and use that income to fund her family's lifestyle.[390] The wife hoped that the Service would not seek to collect the liabilities and that the statute of limitations period would expire.[391] Manifestly, then, the wife failed to present competent evidence sufficient to make out a genuine issue of material fact, and that failure is fatal to the argument that she seeks to advance.[392]

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[379] *Id*. at 79.
[380] *Id*.
[381] A dish of chopped meat.
[382] *McNicol* at 82.
[383] *Id*.
[384] *Id*.
[385] *Id*.
[386] *Id*.
[387] *Id*. at 82.
[388] *Id*.
[389] *Id*.
[390] *Id*.
[391] *Id*.
[392] *Id*. at 83.

E. Reliance on Attorney. The Fifth Circuit has recognized that Section 3713 does not provide an attorney-reliance exception.[393] Over the years, courts have read into Section 3713 the "knowledge" and "insolvency" requirements to protect innocent representatives.[394] The Fifth Circuit, however, declined to announce a further exception for reliance on an attorney.[395] A contrary interpretation would create an exception to Section 3713 that might swallow the rule.[396] As long as a debtor's representative was to receive advice from counsel that the debtor had some basis to contest the Government's claim, the representative could distribute the debtor's assets to non-federal creditors.[397] Such an interpretation would defeat the purpose of Section 3713(b) to ensure that debts of the U.S. are repaid first.[398]

1. 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. In *Leigh*,[399] the decedent died intestate in July 1969. In September 1969, a key employee of the decedent's corporation was appointed as administrator of the decedent's estate. The administrator had served the corporation as production manager, and in this capacity was involved in every aspect of the decedent's business, with the exception of sales and bookkeeping departments. Due to the administrator's familiarity with the business and the decedent's heirs' desire to continue the operation of the business, the decedent's brothers asked the administrator to serve as such. Subsequent to becoming administrator, he assumed the duties of president of the corporation. In this capacity, he made all major decisions for the corporation including those involving financial matters.

The administrator had no prior experience with the administration of any estate or the affairs of a deceased person and, therefore, shortly after his appointment retained an attorney to represent the estate. The administrator had previously used the attorney's firm in personal legal matters and was entirely satisfied with its work. Subsequent to the retention of the attorney, the administrator followed a course of blindly relying on the attorney's competence to administer the estate. When the administrator met with the attorney, it was usually for the purpose of signing checks or documents. It was the administrator's practice to attempt to read these documents before singing. If, however, the documents were long and legalistic, the administrator would sign them without reading them. The administrator never questioned the attorney as the nature or contents of the documents he was signing; it was his feeling that the attorney was doing whatever was necessary to protect him and the heirs.

In April 1971, a Form 706 was filed with the Service. The administrator was aware at this time that estates paid taxes, and had previously had discussions with the attorney about the general obligation of estates to pay, and about the tax liabilities of the estate. In October 1972, an amended Form 706 was presented to the administrator by the attorney for his signature. The amended return listed as estate assets certain trusts maintained by the decedent which had not been included in the original Form 706. Due to the inclusion of the trusts, the return reflected an additional tax of $27,061. Appearing clearly on the first page of this return was the caption "Amended Estate Tax Return," the amount of tax paid with the original return, and the amount of $27,061, signifying the net estate tax payable. The administrator looked at this page, but signed the return without questioning the attorney as to its significance. The attorney forwarded the amended Form 706 to the Service with a letter that contained the following paragraph:

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393 *Renda* at 485.
394 *Id*.
395 *Id*.
396 *Id*.
397 *Id*.
398 *Id*.
399 Leigh v. Comm'r, 72 T.C. 1105 (1979).

> "You will note that the reason for the Amended Return is the joint tenancy accounts that were discovered very recently. As indicated to you heretofore, each of these accounts has approximately $3,000.00 in it for the payment of taxes. Please levy on these sums as soon as possible in that the estate does not have any more funds available for the payment of taxes."[400]

Also in October 1972, the administrator accompanied the attorney to state court where his Petition for Order Settling Final Account of Administrator and For Distribution was heard. Further, the administrator filed a proposed Order Settling Final Account of Administrator and Decree of Distribution. The order recited that the assets in the possession of the estate on that date amounted to $177,043, of which $63,302 was in cash. The accounting did not reflect the additional estate tax either as having been paid or as a liability. The order was entered in October 1972, and distribution of all the assets to the beneficiaries was made at that time. In November 1972, the administrator was discharged as administrator of the estate. The administrator at no time had a beneficial interest in the estate, outside of the statutory fees he was awarded for serving as administrator. The order from October allowed the administrator a commission of based on allegations in the report that he had spent eighty-one hours rendering extraordinary services in administering the estate, including conferences with real estate brokers, bank executives, accountants, attorneys, and a revenue agent, concerning affairs of the estate.

The Service issued a statutory notice of deficiency that determined personal liability against the administrator for the unpaid estate tax of $27,061.

The Tax Court stated that the ultimate issue for resolution is whether the administrator is personally liable for the unpaid estate tax owing by the estate.[401] The court recognized that a literal reading of Section 3713 appears to impose strict liability on a fiduciary who makes a distribution that leaves the estate with insufficient funds with which to pay a debt owed the U.S.[402] However, courts have long departed from such a rigid interpretation.[403] It has long been held that a fiduciary is liable only if it had notice of the claim of the U.S. before making the distribution.[404] Whether the fiduciary had notice is determined by whether the executor knew or was chargeable with knowledge of the debt.[405] The knowledge requirement of Section 3713 may be satisfied by either actual knowledge of the liability or notice of such facts as would put a reasonably prudent person on inquiry as to the existence of the unpaid claim of the U.S.[406] It is this knowing disregard of the debts due to the U.S. that imposes liability on the fiduciary.[407]

There was no dispute that that the unpaid estate tax of $27,061 constitutes a debt, nor that at a time when the estate had sufficient assets with which to pay this debt, there was a payment of a debt to another within the meaning of Section 3713.[408] Therefore, the court determined that the only issue before them is whether the administrator possessed knowledge or notice of the estate tax liability at the time of distribution of the estate.[409]

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[400] *Id*. at 1107.
[401] *Id*. at 1108.
[402] *Id*. at 1109.
[403] *Id*.
[404] *Id*.
[405] *Id*.
[406] *Id*. at 1110.
[407] *Id*. at 1109-10.
[408] *Id*. at 1110.
[409] *Id*.

The administrator contended that due to his unfamiliarity with the estate tax return, and the nature of the estate tax in general, that he had no actual knowledge of the liability. Furthermore, the administrator argued that as a layman inexperienced with estate matters, his retention of competent counsel relieved him of the duty to inquire as to the property disposition of the estate and, therefore, he is not chargeable with knowledge of the facts that a reasonable inquiry would have produced.

The court stated that, although it sympathizes with the administrator's plight, it cannot sustain either of his contentions.[410] In October 1972, the administrator signed the amended Form 706 which gave rise to the liability in question.[411] At that time he looked at the first page of the return where the caption "Amended Estate Tax Return" and the amount of the liability in question appeared clearly.[412] Since the administrator, previous to this time, was aware of the general obligation of estates to pay taxes and in fact had signed the original Form 706 and had paid the tax shown to be due thereon, the court believed that his signature on the amended return showing an outstanding tax liability is prima facie evidence that he had actual knowledge of the existence of the debt due to the U.S. within the meaning of Section 3713.[413]

The main thrust of the administrator's argument seemed to be, however, that even if he knew that there was additional tax due the Government, he assumed that the attorney would see that it was paid and he was therefore justified and reasonable in not inquiring further into whether the debt to the Government was paid.[414] The administrator cited to numerous cases which stand for the proposition that in some instances reliance on competence of counsel, without more, constitutes reasonable cause for the late filing of a return or for late payment of tax and will thus prevent the imposition of additions to tax under section 6651 of the Code.[415] The administrator stated that the reasoning of these cases should apply equally to the imposition of liability on the fiduciary under Section 3713.[416] The court did not find these cases controlling as there is no reasonable cause requirements under Section 3713.[417]

In this case, the court did not have the question of whether the administrator was put on notice of the debt to the Government before he distributed the assets of the estate.[418] About one week before the assets were distributed, the administrator signed, with the intent that it be filed, an amended Form 706 which clearly reflected on its face that additional tax was due to the Government.[419] There was no mystique about how the tax was computed – the administrator's own agents had computed it.[420] Certainly the administrator had an obligation, independent of any reliance on his attorney, to look at the face of the return to see whether any additional tax was due, and he does not deny that he looked at the return before signing it.[421] In fact, the court thought that the administrator was definitely aware of the fact that the return was filed for the purpose of showing, and in fact did show, that additional tax was owing.[422] It may be that the administrator assumed that the tax would be paid from some other source, but Section 3713 required more of him than an honest belief that the Government would be paid; it imposed on him a duty to see that this was done.[423]

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410 *Id*.
411 *Id*.
412 *Id*. at 1110-11.
413 *Id*. at 1111.
414 *Id*.
415 *Id*.
416 *Id*.
417 *Id*.
418 *Id*. at 1112.
419 *Id*.
420 *Id*.
421 *Id*.
422 *Id*.
423 *Id*. at 1112.

To hold that blind reliance on the competence of counsel relieves fiduciaries from the duty to inquire as to the actual payment of tax would subvert the purposes of Section 3713.[424] In view of this purpose, the court was convinced that Section 3713 requires more than a belief on the part of the administrator that the debt to the Government would be paid.[425] Once the fiduciary has actual knowledge that the debt to the Government exists, or notice sufficient to put a reasonably prudent person on inquiry, the statute imposes a duty on the fiduciary, to the extent estate asset are available, to see that it is paid.[426] The act of payment does not require legal expertise so that responsibility thereof can be delegated to an attorney.[427] If the fiduciary does so, he assumes the risk of his attorney's actions and is chargeable with the knowledge of the facts that an inquiry would have revealed.[428] Any other conclusion would be contrary to the purpose of Section 3713.[429] Here, a reasonable inquiry of the attorney should have revealed that the tax had not in fact been paid.[430] That the administrator apparently chose not to make this inquiry does not relive him from liability.[431]

In *Stiles*,[432] a similar result was reached by a federal district court in Pennsylvania. In that case, the decedent died in 2002. The estate's primary assets consisted of real estate in Wilmington, Delaware, and an investment account worth $2,303,547 at the date of death. Between 2002 and 2005, the executor distributed approximately $775,000 from the estate to himself, and $425,000 to each of his two sisters. In 2003, during a telephone call with his lawyer, the executor was informed that the estate's tax returns were late. In June 2008, tax returns for the estate were filed, and the Service assessed income tax, interest, and penalties against the estate in the amount of $2,093,091. The Government then filed an action in the federal district court to reduce to judgment the tax assessments for years 2007 through 2010. The Government also sought to foreclose the tax lien, relating to the income tax assessments, and sell real property. The Government argued that the executor is personally liable under Section 3713 for depleting the estate before paying the estate's tax liability. The executor argued that he had detrimentally relied on advice of his attorney when he made the distributions. The court agreed with the Government. Based on the record before the court, the executor knew about the estate's tax liability, at the latest, in June 2003.[433] However, the executor continued to distribute assets out of the estate through 2006.[434] The executor was aware that the estate's tax returns had not been filed and he failed to take action to remedy the situation or inquire into it as a prudent person of ordinary intelligence in his position would have so inquired.[435] Relying on the poor advice from an attorney is not a defense.[436] It is unfortunate that poor legal advice was received; however, poor advice does nothing to mitigate liability for the decisions of the executor in managing the estate.[437]

2. Executor Not Held Personally Liable Because Lacked Knowledge Of Tax Claim Where Consulted Attorney Who Advised That No Tax Was Due. In *Little*,[438] the decedent died in October 1989. The decedent had no close family members. A friend of the decedent agreed to act a personal representative and was appointed by a St. Louis probate court to serve as such. The personal representative

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[424] *Id*.
[425] *Id*.
[426] *Id*. at 1112-13.
[427] *Id*. at 1113.
[428] *Id*.
[429] *Id*.
[430] *Id*.
[431] *Id*.
[432] U.S. v. Stiles, 114 A.F.T.R. 2d 2014-6809 (W.D. Penn. 2014); *see also*, U.S. v. Shriner, 113 A.F.T.R. 2d 2014-1360 (D. Md. 2014).
[433] *Stiles* at 2014-6815.
[434] *Id*.
[435] *Id*. at 2014-6816.
[436] *Id*.
[437] *Id*.
[438] Little v. Comm'r, 113 T.C. 474 (1999).

was neither related to nor an heir of the decedent. The personal representative was not a college graduate and had no prior experience in the administration of an estate. The personal representative engaged a Missouri attorney to provide legal services regarding the administration of the estate. The total of all disbursements and distributions by the estate was $331,577.88. All disbursements and distributions from the estate were made on the advice of the attorney. The personal representative and the attorney had no actual knowledge of the estate's income tax liabilities at the time the disbursements and distributions were made.

The Service sent letters and notices of deficiency to the personal representative's address, and the personal representative received them and forwarded them to the attorney for advice. In May 1993, the attorney engaged the services of an accountant to review the administration of the estate. Upon review of the estate records, the accountant discovered that certain income tax returns had not been prepared and filed for the decedent and the estate. The accountant reconstructed the available financial information and prepared and filed income tax returns in September 1993 for the decedent for the year 1989, and for the estate for the years 1989, 1990, and 1991. Each of the returns reflected an unpaid balance due, but no payments accompanied the returns. The attorney and the personal representative became aware of the estate's unpaid income tax liabilities when the accountant informed them, sometime after May 1993 and before the returns were filed in September 1993.

In November 1993, the personal representative submitted a Form 656, Offer in Compromise, to the Service. The offer concerned both the decedent's and the estate's income tax liabilities and was accompanied by a check drawn on the estate's checking account in the amount of $17,586.07, which was the amount the personal representative proposed to compromise the liabilities for the decedent's 1989 income tax liability, and the estate's income tax liabilities for 1989, 1990, and 1991. The Form 656 contained the following statement: "This offer in compromise of $17,586.07 represents the remaining value of the estate. There are no future sources of funds available."

The Service did not accept the offer in compromise. Several months later, the Service returned the offer in compromise and the uncashed check without any explanation. After the personal representative informed the attorney and the accountant of the returned offer and the uncashed check, they had a series of meetings and conversations with the representatives of the Service, including a meeting with supervisory personnel of the Service. As a result of these conversations and meetings, the attorney and the accountant believed they had negotiated a final resolution with the Service. The attorney and the accountant informed the personal representative that the matter had been resolved with the Service, resulting in the case being closed. The personal representative was then advised by the attorney that there was no tax liability to be paid by the estate and that it was appropriate to pay out the remaining funds in the estate and to close the probate case. After receiving such advice, the personal representative used the remaining assets of the estate to pay claims against the estate, and the estate was closed.

In October 1995, a Statement of Account and Proposed Final Distribution, signed by the personal representative and the attorney, was filed in the probate court, which showed that all assets of the estate had been distributed and stated that all claims, expenses of administration and taxes have been paid in full.

In September 1997, the Government determined that the personal representative was personally liable under Section 3713 for income taxes and additions to tax due from the estate and mailed a notice of liability to the personal representative.

The Tax Court held that it is clear that the personal representative had no actual knowledge of the estate's income tax liabilities at the time that he made disbursements and distributions from the estate.[439]

[439] *Id*. at 480.

Although the personal representative received Forms W-2 and 1099 and other notices from the Service, which was sufficient to put the personal representative on inquiry, the personal representative acted in a prudent and reasonable manner consistent with his fiduciary duties.[440] The personal representative forwarded the forms to the attorney and sought his advice.[441] The attorney informed the personal representative that because of the estate's size, the estate had no income tax liabilities.[442] The attorney's advice was wrong.[443] The personal representative continued to receive the same advice from the attorney after giving him other notices from the Service that indicated there might be unpaid income taxes for which the estate might be liable.[444] It was not until the summer of 1993 when the accountant was brought in and prepared and filed delinquent returns that the tax liabilities in issue were discovered by the attorney.[445] But almost all the estate's assets had already been distributed by then.[446] Relying on the advice of the attorney and the accountant, the personal representative closed the estate.[447]

The key to the Tax Court's analysis was that the court distinguished the case from other cases where the executor relied on an attorney.[448] A fiduciary who knows of a debt to the U.S. cannot delegate his responsibility to pay such a debt.[449] The act of payment requires no legal expertise.[450] If a fiduciary delegates to an attorney responsibility to make payment, he assumes the responsibility for the attorney's actions.[451] Under such circumstances, failure to pay a debt due to the U.S. gives rise to personal liability under Section 3713.[452] The question presented in this case is different.[453] The question is whether the personal representative had the requisite knowledge at the time that he was disbursing funds to have knowingly disregarded debts due to the U.S.[454] It is this knowing disregard of the debts due to the U.S. that gives rise to liability under Section 3713.[455]

The court recognized that no cases involving Section 3713(b) have been brought to its attention where the fiduciary was put on notice of possible debts due to the U.S., made reasonable inquiry of legal counsel, and then relied in good faith on erroneous legal advice that there were no such debts.[456] In this case, the personal representative had no prior experience with the administration of estate when he was put on notice of potential income tax liabilities of the estate.[457] Had he determined on his own that there were no tax liabilities or simply ignored this notice and made no further inquiry, he would probably be chargeable with notice of the tax liabilities.[458] However, the personal representative did not ignore the information about potential tax liabilities.[459] The personal representative recognized that he did not have the knowledge or experience to determine whether the estate owed tax.[460] He therefore gave the information to the estate's

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440 *Id*.
441 *Id*.
442 *Id*.
443 *Id*.
444 *Id*. at 481.
445 *Id*.
446 *Id*.
447 *Id*.
448 *Id*. at 481-82.
449 *Id*. at 481.
450 *Id*.
451 *Id*.
452 *Id*.; *citing to, Leigh*.
453 *Little* at 481.
454 *Id*.
455 *Id*.
456 *Id*.
457 *Id*. at 482.
458 *Id*.
459 *Id*.
460 *Id*.

licensed attorney, who had been retained to advise the personal representative in the administration of the estate, and asked for advice.[461] The personal representative's inquiry was neither haphazard nor careless; rather it was the prudent and reasonable thing to do.[462] Unfortunately, the attorney came up with the wrong advice when he repeatedly told the personal representative that there was no tax liability.[463] But what more should the personal representative have done?[464]

Regardless of the culpability of the attorney in failing to ascertain the estate's income tax liabilities, the facts supported a conclusion that the personal representative fulfilled his duty of inquiry and was reasonable and acted in good faith following the attorney's advice that no tax was due from the estate.[465] In the unique circumstances of the case, the court found that the personal representative lacked knowledge of the estate's income tax liabilities at the time he made payments from the estate's assets and did not knowledge disregard debts due to the U.S.[466] The court therefore held that the personal representative is not liable under Section 3713 for the unpaid tax liabilities.[467]

3. Executor Held Personally Liable Where Believed Tax Claim Was Not Valid After Consulting Attorney Who Advised That Tax Claim Could Potentially Be Asserted. In *MacIntyre*,[468] a donor died in 1995. Shortly before death, the donor made indirect gifts to certain members of his family. After death, the Service assessed gift taxes against the donor's estate. The donor's estate challenged the assessment in Tax Court. The Tax Court set the amount of the gift at $35,953,316. The donor's estate never paid the tax on the gift. By operation of law, the liability of the donor for unpaid gift tax shifted to the donee.[469]

The donee died in 2007. Shortly after the donee's death, the executor of the donee's estate was informed that the Service might assert donee liability against the donee's estate because the donor's estate had failed to pay gift taxes on the gift. In August 2008, the executor emailed his brother and mentioned this fact. However, the executor made distributions from the donee's estate. The donee never paid the tax on the gift.

The Government brought claims against the executor for personal liability under Section 3713 for distributions from the estate to lower priority creditors and for failure to preserve sufficient funds to pay the donee's liability for gift tax. The executor argued that he did not have knowledge of the claim because the executor believed that the stipulation from the donor's Tax Court case regarding the value and recipients of the gift was not binding on the donee because he received legal advice to that effect. The Government countered that the executor misapprehends the question when he argues that he did not have knowledge because he believed that the donee did not have any tax liability for the gift taxes on the gift.

The federal district court agreed with the Government.[470] It is sufficient to show that the fiduciary had notice of such facts as would put a reasonably prudent person on inquiry as to the existence of the unpaid claim.[471] The executor did not contend that he was never told that the Service might try to make a claim

[461] *Id*.
[462] *Id*.
[463] *Id*.
[464] *Id*.
[465] *Id*. at 483.
[466] *Id*.
[467] *Id*.
[468] U.S. v. MacIntyre, 110 A.F.T.R. 2d 2012-5151 (S.D. Tex. 2012).
[469] I.R.C. § 6324(b).
[470] *MacIntyre* at 2012-5154.
[471] *Id*.

against the donee's estate for the unpaid gift taxes on the gift.[472] In fact, the executor admits that he was told that the Service might try to assert a claim against the donee's estate for the donee liability on the gift.[473]

Instead, the executor argued that he did not believe the Government's claim against the donee was valid for various reasons.[474] But, as the Government pointed out, the executor's belief in the validity of the Government's claim is not the test.[475] The executor had sufficient notice of the claim to put a reasonably prudent person on notice.[476] It is regrettable the executor received incorrect advice on that point, but poor legal advice is not a defense.[477] Despite the executor's belief that the Government's claim was not valid, the executor was required by Section 3713 to preserve the funds to pay the Government's claim – should it be proved valid.[478] Accordingly, the executor met the test for individual liability under Section 3713 and was, therefore, held personally liable for distributions made from the estate.[479]

On appeal to the Fifth Circuit, the executor argued that the Government did not prove that the executor knew about the donee's potential liability for the unpaid gift tax and, therefore, cannot be found to have violated Section 3713.[480] The executor acknowledged that, under *Renda*, erroneous legal advice as to the validity of a claim is not an excuse under Section 3713.[481] But, he argued that such rule only applies when the claim has actually been made and, therefore, does not apply here where he allegedly had knowledge of the potential claim while the Government delayed in making the claim.[482] The executor also pointed to *Little* to argue that advice of legal counsel is a defense under Section 3713 with regard to potential claims.[483]

The Government flatly rejected any argument about the executor's lack of knowledge because the executor admitted during depositions that he knew of the potential donee gift tax liability to the Government in excess of $35 million.[484]

The Fifth Circuit agreed with the Government. Liability under Section 3713 requires that (1) a fiduciary (2) distributed the estate's assets before paying a claim of the Government and (3) knew or should have known of the Government's claim.[485] The only dispute is whether the executor met the knowledge requirement.[486] Actual knowledge is not required; the knowledge requirement may be satisfied by either actual knowledge of the liability or notice of such facts as would put a reasonably prudent person on inquiry as to the existence of the unpaid claim of the U.S.[487] The court held that the executor knew of the potential liability to the Government and, thus, Section 3713 applies.[488] In *Renda*, the court had held that a representative's actual knowledge of a federal claim is sufficient, notwithstanding that representative's reliance on the erroneous advice of counsel as to how to address the claim.[489] The court was unpersuaded by the executor's reliance on *Little* and to distinguish their case from *Renda* based only on the fact that the

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[472] *Id*.
[473] *Id*.
[474] *Id*.
[475] *Id*. at 2012-5154.
[476] *Id*.
[477] *Id*.
[478] *Id*.
[479] *Id*.
[480] U.S. v. Marshall, 798 F.3d 296, 311 (5th Cir. 2015).
[481] *Id*. at 311; *citing to*, *Renda*.
[482] *Marshall* at 311-12.
[483] *Id*. at 312.
[484] *Id*.
[485] *Id*.
[486] *Id*.
[487] *Id*.
[488] *Id*. at 312.
[489] *Id*.

Government had not made an actual claim against the donee's estate when they received the erroneous legal advice.[490] The court recognized that it has already declined to follow *Little* to the extent that its analysis of the effect of erroneous legal advice is inconsistent with the weight of authority on the issue.[491] The same considerations that, in *Renda*, led the court to refuse to read an exception due to erroneous legal advice into Section 3713 apply with equal force here: (i) the statute does not provide for an attorney-reliance exception, and (ii) a contrary interpretation would create an exception to Section 3713 that might swallow the rule.[492] Thus, because erroneous legal advice as to the validity of a claim is not an excuse for violating Section 3713 and the executor admitted in depositions that he had knowledge of the potential claims against the donee's estate, the court held that Section 3713 applies.[493]

III. Addressing Risk Of Personal Liability Under Section 3713. Congress has provided the personal representative several options under the Code for addressing tax liens and the risk of personal liability under Section 3713. The Service has prepared corresponding forms for most options.

A. Request Transcript Or Copy Of Prior Return. To request tax return information of a decedent, the personal representative may file a Form 4506-T, Request for Transcript of Tax Return. To request a copy of a decedent's tax return, the personal representative may file a Form 4506, Request for Copy of Tax Return. There is a $50 fee for each return requested. It may take up to 75 days for the Service to process the request. Section 6103(e)(3) of the Code provides that the return of a decedent shall, upon written request, be open to inspection by or disclosure to the administrator, executor, or trustee of his estate. Return information of any taxpayer may be open to inspection by or disclosure to any person authorized under section 6103(e) of the Code to inspect any return of such taxpayer if the Service determines that such disclosure would not seriously impair federal tax administration.[494]

B. Request Prompt Assessment. In general, the amount of any tax shall be assessed within three years after the return was filed.[495] To request prompt assessment of tax, the personal representative may file a Form 4810, Request for Prompt Assessment Under Internal Revenue Code Section 6501(d). Section 6501(d) of the Code generally provides that, in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which a return is required in the case of a decedent, or by his estate during the period of administration, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within eighteen 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) by the executor, administrator, or other fiduciary representing the estate of such decedent, but not after the expiration of three years after the return was filed.[496] The request, in order to be effective, must be transmitted separately from any other document, must set forth the classes of tax and the taxable periods for which the prompt assessment is requested, and must clearly indicate that it is a request for prompt assessment under the provisions of section 6501(d) of the Code.[497]

The effect of such a request is to limit the time in which an assessment of tax may be made, or a proceeding in court without assessment for collection of tax may be begun, to a period of eighteen months from the date the request is filed with the proper district director.[498] The request does not extend the time

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490 *Id*.
491 *Id*.
492 *Id*.
493 *Id*.
494 I.R.C. § 6103(e)(7).
495 I.R.C. § 6501(a).
496 Treas. Reg. § 301.6501(d)-1(a).
497 Treas. Reg. § 301.6501(d)-1(b).
498 *Id*.

within which an assessment may be made, or a proceeding in court without assessment may be begun, beyond three years from the date the return was filed.[499]

C. Request Release Of Lien For Error. The appeal established by section 6326 of the Code is the exclusive administrative remedy with respect to the erroneous filing of a notice of federal tax lien.[500] Under that section, any person shall be allowed to appeal to the Service after the filing of a notice of federal tax lien on the property or the rights to property of such person for a release of such lien alleging an error in the filing of the notice of federal tax lien.[501] Such appeal may be used only for the purpose of correcting the erroneous filing of a notice of lien, not to challenge the underlying deficiency that led to the imposition of a lien.[502] If the Service determines that the filing of the notice of any lien was erroneous, the Service shall expeditiously (and, to the extent practicable, within fourteen days after such determination) issue a certificate of release of such lien and shall include in such certificate a statement that such filing was erroneous.[503]

An appeal of the filing of notice of federal tax lien must be based on any one of the following allegations: (i) the tax liability that gave rise to the lien, plus any interest and additions to tax associated with said liability, was satisfied prior to the filing of notice of lien; (ii) the tax liability that gave rise to the lien was assessed in violation of the deficiency procedures set forth in section 6213 of the Code; (iii) the tax liability that gave rise to the lien was assessed in violation of title 11 of the U.S. Code (Bankruptcy Code); or (iv) the statute period for collection of the tax liability that gave rise to the lien expired prior to the filing of notice of federal tax lien.[504] An appeal must be made in writing to the district director of the district in which the notice of federal tax lien was filed within one year after the taxpayer becomes aware of the erroneously filed tax lien.[505]

D. Request Hearing With Appeals. To request a collection due process hearing (also known as a "CDP hearing") with the Service's Office of Appeals ("***Appeals***"), taxpayers are encouraged to use Form 12153, Request for a Collection Due Process or Equivalent Hearing, so that the request can be readily identified and forwarded to Appeals.[506]

A taxpayer is entitled to one collection due process hearing with Appeals with respect to the first filing of a notice of federal tax lien for a given tax period or periods with respect to the unpaid tax shown on the notice of federal tax lien if the taxpayer timely requests such a hearing.[507] The taxpayer must request such a hearing during the thirty 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.[508]

A taxpayer is also entitled to one collection due process hearing with respect to the unpaid tax and tax period covered by the pre-levy or post-levy collection due process notice provided to the taxpayer.[509] The taxpayer must request the hearing within the thirty day period commencing on the day after the date of the collection due process notice.[510] To the extent practicable, the hearing with respect to the notice of federal

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499 *Id*.
500 Treas. Reg. § 301.6326-1(f).
501 I.R.C. § 6326(a).
502 Treas. Reg. § 301.6326-1(a).
503 I.R.C. § 6326(b).
504 Treas. Reg. § 301.6326-1(b).
505 Treas. Reg. § 301.6326-1(d).
506 Treas. Reg. § 301.6320-1(c)(2), Q&A1(iv).
507 I.R.C. § 6320(b); Treas. Reg. § 301.6320-1(b)(1).
508 I.R.C. § 6320(b); Treas. Reg. § 301.6320-1(b)(1).
509 I.R.C. § 6330(b); Treas. Reg. 301.6330-1(b)(1).
510 I.R.C. § 6330(b); Treas. Reg. 301.6330-1(b)(1).

tax lien is held in conjunction with a hearing with respect to the notice of pre-levy or post-levy collection due process notice.[511]

E. Request Withdrawal Of Lien. To request the withdrawal of a federal tax lien, the personal representative may file a Form 12277, Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien. Section 6323(j) of the Code provides that the Service may withdraw a notice of a lien filed under section 6323 of the Code if the Service determines that – (i) the filing of such notice was premature or otherwise not in accordance with administrative procedures of the Service; (ii) the taxpayer has entered into an agreement under section 6159 of the Code to satisfy the tax liability for which the lien was imposed by means of installment payments, unless such agreement provides otherwise; (iii) the withdrawal of such notice will facilitate the collection of the tax liability; or (iv) with the consent of the taxpayer or the National Taxpayer Advocate, the withdrawal of such notice would be in the best interests of the taxpayer and the U.S.

A notice of federal tax lien is withdrawn by the filing by the Service of a notice of withdrawal in the office in which the notice of federal tax lien is filed.[512] A copy of such notice of withdrawal shall be provided to the taxpayer.[513]

A request for the withdrawal of a notice of federal tax lien must be made in writing in accordance with procedures prescribed by the Service.[514] The written request will include the following information and documents – (i) name, current address, and taxpayer identification number of the person requesting the withdrawal of notice of federal tax lien; (ii) a copy of the notice of federal tax lien affecting the taxpayer's property, if available; (iii) the grounds upon which the withdrawal of notice of federal tax lien is being requested; (iv) a list of the names and addresses of any credit reporting agency and any financial institution or creditor that the taxpayer wishes the Service to notify of the withdrawal of the notice of federal tax lien; and (v) a request to disclose the withdrawal of notice of federal tax lien to such persons.[515]

F. Request Release Of Lien Or Discharge Of Property. Section 6325(a) of the Code provides that the Service shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than thirty days after the day on which – (i) the Service finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or (ii) there is furnished to the Service and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by regulations. Satisfaction of the tax liability occurs when – (i) the appropriate official determines that the entire tax lability listed in a notice of federal tax lien has been fully satisfied; or (ii) the taxpayer provides the appropriate official with proof of full payment with respect to the entire tax liability listed in a notice of federal tax lien together with certain information and documents.[516] The term "proof of full payment" means – (i) an internal revenue cashier's receipt reflecting full payment of the tax lability in question; (ii) a canceled check in an amount sufficient to satisfy the tax liability for which the release is being sought; (iii) a record, made in accordance with procedures prescribed by the Service, of proper payment of the tax liability by credit or debit card or by electronic funds transfer; or (iv) any other manner of proof acceptable to the appropriate official.[517] A request for a certificate of release with respect to a notice of federal tax lien shall be submitted in writing to the

[511] I.R.C. § 6320(c).
[512] I.R.C. § 6323(j)(1); Treas. Reg. § 301.6323(j)-1(a).
[513] I.R.C. § 6323(j)(1); Treas. Reg. § 301.6323(j)-1(a).
[514] Treas. Reg. § 301.6323(j)-1(d)(1).
[515] Treas. Reg. § 301.6323(j)-1(d)(2).
[516] Treas. Reg. § 301.6325-1(a)(4).
[517] Treas. Reg. § 301.6325-1(a)(5).

appropriate official.[518] The request shall contain the information required in the appropriate publication of the Service.[519]

To request discharge of property from a federal tax lien, the personal representative may file a Form 14135, Application for Certificate of Discharge of Property from Federal Tax Lien. Section 6325(b)(1) of the Code provides that the Service may issue a certificate of discharge of any part of the property subject to any lien if the Service finds that the fair market value of the part of the property subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority over such lien.

To request a discharge of property from an estate tax lien, the personal representative may file a Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien. Section 6325(c) of the Code provides that the Service may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 of the Code if the Service finds that the liability secured by such lien has been fully satisfied or provided for. The primary purpose of such discharge is not to evidence payment or satisfaction of the tax, but to permit the transfer of property free from the lien in case it is necessary to clear title.[520]

An application for a certificate of discharge of property from the lien for estate or gift tax should be filed with the appropriate official responsible for the collection of the tax.[521] It should be made in writing under penalties of perjury and should explain the circumstances that require the discharge, and should fully describe the particular items for which the discharge is desired.[522] Where realty is involved, each parcel sought to be discharged from the lien should be described on a separate page and each such description submitted in duplicate.[523] In the case of an estate tax lien, the application should show the applicant's relationship to the estate, such as executor.[524]

If a certificate is issued and filed in the same office as the notice of lien to which it relates, such certificate shall have the following effect: (i) in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished; and (ii) in the case of certificate of discharge, such certificate shall be conclusive that the property covered by such certificate is discharged from the lien.[525]

G. Request Discharge Of Executor. To ultimately address the risk of personal liability under Section 3713, the personal representative may file a Form 5495, Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905.

To counter balance Section 3713, section 2204 of the Code provides a means by which executors, fiduciaries, and others, can be discharged from personal liability.[526] Section 2204(a) of the Code provides

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[518] Treas. Reg. § 301.6325-1(a)(7).
[519] *Id*.
[520] Treas. Reg. § 301.6325-1(c)(1).
[521] Treas. Reg. § 301.6325-1(c)(2).
[522] *Id*.
[523] *Id*.
[524] *Id*.
[525] I.R.C. § 6325(f)(1).
[526] Wilkes v. U.S., 50 F. Supp. 2d 1281 (D. Fla. 1999), *affirmed*, 210 F.3d 394 (11th Cir. 2000); *Espinor* at 2016-2146 (The co-executors distributed property of the estate prior to fully paying the federal estate tax liabilities. They were aware of the estate's tax liabilities, and did not seek and were not granted discharge from personal liability under section 2204 of the Code. Accordingly, the co-executors are jointly and severally liable for unpaid federal estate taxes pursuant to Section 3713.); I.R.M. 5.5.9.23.1(9) (Determine if the fiduciary was given a discharge from personal liability under section 2204 of the Code for any tax deficiency. A

that if the executor makes written application to the Service for determination of the amount of the tax and discharge from personal liability therefor, the Service (as soon as possible, and in any event within nine months after the making of such application, or, if the application is made before the return is filed, then within nine months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501 of the Code) shall notify the executor of the amount of the tax. Thus, the executor of a decedent's estate may make written application to the applicable internal revenue officer with whom the estate tax return is required to be filed for a determination of the federal estate tax and for a discharge therefrom.[527] The executor, on payment of the amount of which he is notified 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.[528] 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.[529] The discharge applies only to the executor in his personal capacity and to his personal assets.[530] The discharge is not applicable to his liability as executor to the extent of the assets of the estate in his possession or control.[531] The discharge is not to operate as a release of any part of the gross estate from the lien for estate tax for any deficiency that may thereafter be determined to be due.[532] Further, the provisions of section 2204 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 has been transferred to a purchaser or a holder of a security interest, in which case such part 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.[533]

In addition, an executor, may make written application to be discharged from personal liability for the amount of federal estate tax for which the time for payment has been extended under sections 6161, 6163, or 6166 of the Code.[534] In such a case, the executor will be notified of the amount of bond, if any, to be furnished within nine months after receipt of the application, or if the application is made before the return is filed, within nine months after the return is filed.[535] The amount of the bond shall not exceed the amount of tax the payment of which has been extended.[536] Upon furnishing the bond in the required form, or upon receipt of the notification that no bond is required, the executor will be discharged from personal liability for the tax the payment of which has been extended.[537] If no notification is received, then the executor is discharged at the end of such nine month period from personal liability for the tax the payment of which has been extended.[538]

Similarly, with respect to the decedent's income and gift taxes, section 6905(a) of the Code provides that, if the executor makes written application (filed after the return with respect to such taxes is made and filed in such manner and such form as may be prescribed by regulations of the Service) for release from personal liability for such taxes, the Service may notify the executor of the amount of such taxes. The

fiduciary would still be liable for the tax due on the return as originally filed. Look for documentation associated with the Form 706.).

527 Treas. Reg. § 301.6501(d)-1(a).

528 I.R.C. § 2204(a); Treas. Reg. § 20.2204-1(a).

529 Treas. Reg. § 20.2204-1(a).

530 *Id*.

531 *Id*.

532 *Id*.

533 I.R.C. § 6324(a)(3).

534 Treas. Reg. § 20.2204-1(b).

535 *Id*.

536 *Id*.

537 *Id*.

538 *Id*.

application should be made to the applicable internal revenue officer with whom the Form 706 is required to be filed.[539] If no Form 706 is required to be filed, then such application should be filed where the decedent's final income tax return is required to be filed.[540] The application must be filed after the return with respect to such income or gift taxes is filed.[541] The executor, upon payment of the amount of which he is notified, or nine months after receipt of the application if no notification is made by the Service before such date, 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 showing such discharge.[542] If no such notification is received, then the executor is discharged at the end of such nine month period from personal liability for any deficiency thereafter found to be due.[543] The discharge of the executor from personal liability applies only to him in his personal capacity and to his personal assets.[544] The discharge is not applicable to his liability as executor to the extent of the assets of the estate in his possession or control.[545]

A written application for discharge under sections 2204 and 6905 of the Code is different from a request for an estate tax closing letter. An estate tax closing letter is a written communication from the Service that specifies the amount of the net estate tax and any generation-skipping transfer tax for which the estate is liable.[546] Notably, the estate tax closing letter also confirms that that the estate tax return has either been accepted by the Service as filed, or has been accepted after an adjustment by the Service to which the estate has agreed.[547] Thus, the receipt of an estate tax closing letter generally indicates that, for purposes of determining the estate tax liability of the decedent's estate, the Service's examination of the estate tax return is closed.[548] The Service has recognized that it understands that executors, local probate courts, state tax departments, and others have come to rely on estate tax closing letters for confirmation that the Service's examination of a Form 706 has been completed and the Service's file has been closed.[549] The personal representative may use the estate tax closing letter, Form L-118, together with proof of payment, to establish that his personal liability for the estate tax has been satisfied.[550] Prior to June 1, 2015, the Service issued an estate tax closing letter for every Form 706 filed (except in the case of a Form 706 filed for the purpose of electing portability).[551] For Form 706s filed on or after June 1, 2015, the Service changed its policy and now will issue an estate tax closing letter only at the request of an estate, which request is to be made at least four months after the filing of the Form 706.[552]

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539 Treas. Reg. § 301.6905-1(a).
540 *Id*.
541 *Id*.
542 I.R.C. § 6905(a); Treas. Reg. § 301.6905-1(a).
543 Treas. Reg. § 301.6905-1(a).
544 *Id*.
545 *Id*.
546 Notice 2017-12, 2017-5 I.R.B. 742 (2017).
547 *Id*.
548 *Id*.
549 *Id*.
550 Rev. Proc. 70-10, 1970-1 C.B. 437 (1970).
551 Notice 2017-12, 2017-5 I.R.B. 742 (2017).
552 *Id*.