

## 2018 GL-1 - Lesson 2

### GENERAL TAX LIENS & SPECIAL TAX LIENS

(June 2018)

#### CONTENTS

I.	INTRODUCTION .....	2
II.	OBJECTIVE .....	2
III.	LIENS IN GENERAL .....	2
A.	Definition of lien.....	2
B.	Three Categories of Liens.....	2
C.	General v. Specific Liens.....	3
IV.	GENERAL FEDERAL TAX LIEN.....	3
A.	Creation -- I.R.C. § 6321 .....	3
B.	If any person .....	3
C.	Liable to pay any tax.....	3
D.	Neglects or refuses to pay the same.....	3
E.	After demand .....	4
1.	I.R.C. § 6303(a) .....	4
2.	Treas. Reg. § 301.6303-1(a) .....	4
3.	No notice.....	6
4.	No particular form required .....	6
F.	The amount (including any interest, additional amount, addition to tax or assessable penalty, together with any costs that may accrue in addition thereto).....	6
G.	Shall be a lien...upon all property and rights to property, whether real or personal, belonging to such person. ....	7
H.	Duration I.R.C. § 6322.....	7
1.	Lien arises at the time of assessment .....	7
2.	Lien Remains Until Liability Satisfied or Unenforceable .....	8
3.	Reducing liability to judgment.....	8
I.	Effect of Federal Tax Lien.....	9
J.	Value of Federal Tax Lien .....	9
K.	Release of Federal Tax Lien .....	10
L.	Statute of Limitations on Collection .....	10
1.	Service generally has 10 years.....	10
2.	Foreclosure suit.....	10
3.	Suspensions.....	10
4.	Extensions .....	11
V.	SPECIAL TAX LIENS.....	11
A.	Introduction.....	11
VI.	ESTATE TAX LIEN -- I.R.C. § 6324(a).....	12
A.	Creation of Estate Tax Liens.....	12
B.	Property Subject to Lien .....	12
1.	Section 2033 property .....	12
2.	Nonprobate property .....	12

Revised (February, 2018)

C.	Duration of Lien –10 years .....	12
D.	Discharge of Lien.....	13
E.	Administrative Expenses .....	14
F.	Priority of Estate Tax Lien.....	14
G.	Liability of Transferees - Nonprobate Assets .....	14
H.	Probate Assets .....	15
I.	Deferred Estate Taxes – I.R.C. § 6324A .....	16
J.	"Special Use" Value -- I.R.C. § 6324B.....	18
K.	Tax Court – case closings .....	19
VII.	GIFT TAX LIEN - I.R.C. § 6324(b).....	19
A.	Nature of the Gift Tax.....	19
B.	Creation of the Gift Tax Lien.....	19
C.	Property Subject to the Lien .....	20
D.	Personal Liability of the Donee – Recipient of the Gift .....	20
E.	Duration .....	21
F.	Priority of Gift Tax Lien .....	21

## I. INTRODUCTION

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

## II. OBJECTIVE

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

## III. LIENS IN GENERAL

### A. *Definition of lien*

A lien is a charge or encumbrance that one person has on the property of another as security for a debt or obligation. See Black's Law Dictionary (9th ed. 2009), lien.

### B. *Three Categories of Liens*

1. Consensual liens--arise by agreement of the parties. Examples: mortgage, pledge (security interest).
2. Common law liens--arise by operation of law and depend upon possession. Examples: innkeeper, warehouseman, and artisan's liens.
3. Statutory liens--created by statutes that are often enactments of common law liens. Examples: judgment liens, mechanic's liens and state and federal tax liens.

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

1. General lien--the right to charge any property of the debtor as security for a debt.
2. Specific lien--a charge upon particular property for the discharge of a debt. Most consensual and common law liens are specific liens.

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

### **A. *Creation -- I.R.C. § 6321***

1. The FTL is characterized as a general tax lien because of its applicability to all property of the taxpayer.
2. "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person" (emphasis added).

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

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

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

1. There must be an assessed tax and not some other federal claim.
2. Assessed Tax. When a person files a return acknowledging a liability in excess of remittances, assessment will occur almost immediately after the return is received. In its simplest form, assessment involves nothing more than the recordation of the acknowledged tax liability on a list at the service center. See I.R.C. § 6203. However, assessment other than by recording a liability from a self-assessed tax return is a technical process driven by the rules found in Chapter 63 of the Internal Revenue Code. The assessment date of a tax can be determined by the taxpayer since he is entitled, upon request, to a copy of the record of assessment. See I.R.C. § 6203.

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

1. The failure to pay the entire amount of tax due after demand constitutes a neglect or refusal. See United States v. Wintner, 200 F. Supp. 157, 160 (N.D.

Ohio 1961), aff'd, 312 F.2d 749 (6th Cir. 1963), rev'd on other grounds, 375 U.S. 393 (1964). See also United States v. Bess, 357 U.S. 51, 55 (1958).

2. Payment by check which is dishonored is a neglect or refusal to pay.

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

### **1. I.R.C. § 6303(a)**

"Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address."

This notice, like the notice of deficiency under section 6212(b), must be sent to the last known address. See United States v. Chila, 871 F.2d 1015, 1019 (11th Cir. 1989), cert. denied, 493 U.S. 975 (1989); Pursifull v. United States, 849 F. Supp. 597, 601 (S.D. Ohio 1993), aff'd, 19 F.3d 19 (6th Cir. 1994). Before the issuance of Rev. Proc. 90-18, 1990-13 I.R.B. 19, (superseded by Rev. Proc. 2001-18, 2001-08 I.R.B. 708) the definition of "last known address" was an evolving standard. See, e.g., McPartlin v. Commissioner, 653 F.2d 1185, 1189 (7th Cir. 1981) (discussing factors to determine a last known address). Rev. Proc. 2001-18 has been superseded by Rev. Proc. 2010-16, effective June 1, 2010.

These revenue procedures explain how the Service is to be informed of a change in a taxpayer's address. Treasury Regulation section 301.6212-2(a) defines last known address as the address on the taxpayer's most recently filed and properly processed return, unless the Service has been given clear and concise notification of a different address. See Gyorgy v. Commissioner, 779 F.3d 466 (7th Cir. 2015). Pursuant to Treasury Regulation section 301.6212-2(b)(2), the Service will automatically update a taxpayer's address of record based on a new address that the taxpayer provides the United States Postal Service (USPS) that is retained in the USPS's National Change of Address database.

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

". . . notice shall be given as soon as possible and within 60 days. However, the failure to give notice within 60 days does not invalidate the notice." (emphasis added)

A substantial body of case law touches generally on the impact of "untimely" notice and demand. In most cases, the legal issue directly presented is whether a defect (often timeliness) of the notice and demand precludes the Service from collecting by instituting a judicial action. In these cases, the courts have uniformly held that improper notice and demand does not preclude the Service

from instituting judicial collection action. The rationale is that the purpose of notice and demand is to apprise the taxpayer that he owes a tax and to provide him with a warning that the Service may be about to take action to collect the tax; when no timely notice is given, the “warning” is deemed to have been given by the filing of pleadings in the civil action. See Anuforo v. Commissioner, 614 F.3d 799, 805 (8th Cir. 2010); Stevens v. United States, 49 F.3d 331, 337 (7th Cir. 1995); Purcell v. United States, 1 F.3d 932, 941 (9th Cir. 1993); United States v. McCallum, 970 F.2d 66, 69-70 (5th Cir. 1992); United States v. Chila, 871 F.2d 1015, 1019 (11th Cir. 1989), cert. denied, 493 U.S. 975 (1989); United States v. Berman, 825 F.2d 1053, 1060 (6th Cir. 1987); United States v. Jersey Shore State Bank, 781 F.2d 974, 981 (3d Cir. 1986), aff’d, 479 U.S. 442 (1987); United States v. Miller, 2010 WL 2202776, at \*4 (S.D. Ala. May 28, 2010); Crowd Mgmt. Servs., Inc. v. United States, 792 F. Supp. 87, 91 (D. Or. 1992); Blackston v. United States, 778 F. Supp. 244, 247-48 (D. Md. 1991); In re Bertelt, 206 B.R. 587, 593 (Bankr. M.D. Fla. 1996); In re Dewberry, 158 B.R. 979, 982 (Bankr. W.D. Mich. 1993). One case expressly relied on the regulation in holding that timely notice and demand is not a prerequisite to a civil suit. United States v. Friedman, 739 F.2d 252, 256 (7th Cir. 1984) (in light of the regulation, section 6303(a) should be given “a practical and not technical construction”).

With respect to the effect of notice and demand given more than 60 days after assessment on the Service’s ability to collect administratively, the regulation correctly states that untimely notice and demand does not invalidate the notice: Neither section 6321 (nor section 6331) requires that notice and demand must be provided within 60 days for the tax lien (and levy authority) to arise. Also, a reasonable construction of the statutory language in section 6303(a) itself does not impose any consequence for failing to provide notice within 60 days.

However, some appellate court decisions have stated, in dictum and without addressing the regulation, that under the statute, notice and demand must be provided within 60 days of assessment to permit the Service to collect administratively. See, e.g., United States v. Chila, 871 F.2d 1015, 1018 (11th Cir. 1989), cert. denied, 493 U.S. 975 (1989)(notice and demand not a prerequisite to a civil action, and must be provided only when the Service seeks to collect administratively); United States v. Berman, 825 F.2d 1053 (6th Cir. 1987)(same); United States v. Jersey Shore State Bank, 781 F.2d 974 (3d Cir. 1986), aff’d, 479 U.S. 442 (1987)(same); United States v. Associates Commercial Corp., 721 F.2d 1094 (7th Cir. 1983)(notice and demand must be provided as a prerequisite to any type of tax collection). See also, Blackston v. United States, 778 F. Supp. 244 (D. Md. 1991)(untimely notice and demand precludes exercise of lien and levy authority); In re Bertelt, 206 B.R. 587 (Bankr. M.D. Fla. 1996)(notice and demand essential for administrative collection); In re Dewberry, 158 B.R. 979 (Bankr. W.D. Mich. 1993)(improper notice and demand precludes only administrative collection). But see, Ramos v. United States, 1999 WL 973530, N.D. Cal.1999 (citing regulation in dictum and without analysis).

In other decisions, courts have noted the apparent conflict between the statutory and regulatory language without resolving the conflict, since the issue purportedly did not need to be resolved to decide the case, . see, e.g., Matter of Resyn Corp., 945 F.2d 1279, 1283 (3d Cir. 1991); Michael v. Commissioner, 133 T.C. 237, 244-45 (2009); McIntosh v. Commissioner, T.C. Memo. 2003-279, or have cited the regulation without analysis.

### **3. No notice**

Failure to give notice at all precludes the creation of a lien. See; Bauer v. Foley, 404 F.2d 1215, 1221-22 (2d Cir. 1968), modified on rehearing by 408 F.2d 1331 (2d Cir. 1969); United States v. Coson, 286 F.2d 453, 463 (9th Cir. 1961). It does not affect the existence of the liability, and liens are not the only method of collecting liabilities. See Jenkins v. Smith, 99 F.2d 827, 827 (2d Cir. 1938) (per curiam).

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

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

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

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

## **F. *The amount (including any interest, additional amount, addition to tax or assessable penalty, together with any costs***

***that may accrue in addition thereto)***

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

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

The determination of what is a taxpayer's "interest in property" is a state law question. See discussion in Lesson 4, infra.

***H. Duration I.R.C. § 6322***

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time." See United States v. Mattox, 2014 WL 67325 (E.D. Wisc. 2014).

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

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

- a) Problems for third parties can arise because of retroactive effect.
- b) Transactions may occur between assessment and notice and demand.
  - (1) Transfer of property, e.g., gift.
  - (2) Third party would take property subject to lien not known to exist when transfer was made.
- c) The assessment must be valid to give rise to the lien. See, e.g., Peterson v. Commissioner, T.C. Memo. 2016-17; Garrett v. Commissioner, T.C. Memo. 2015-228.

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

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

### **a) Payment ends the lien**

(1) Release of lien can be issued upon acceptance of bond. See I.R.C. § 6325(a)(2).

### **b) Unenforceable due to lapse of time**

(1) I.R.C. § 6502, the 10-year collection statute, with limited statutory suspensions, is discussed infra.

(2) Filing a proof of claim in a bankruptcy or a receivership proceeding is treated as the commencement of a proceeding in court under section 6502. Rev. Rul. 70-555, 1970-2 C.B. 296; In re Young, 2010 WL 1427584, at\*4 (S.D. Miss. Apr. 8, 2010). If the Service files a timely claim, it can receive a distribution from the estate after the 10-year period has expired.

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

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

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

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



c) The FTL is the basis of virtually all tax collection since it attaches to all the property of a taxpayer, both real and personal, as well as after-acquired property.

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

A taxpayer is not deprived of the use of his/her property when a general tax lien has come into being. The filing of a NFTL, however, publicizes his/her financial problems to creditors, which may affect the taxpayer's ability to obtain credit. NFTLs and their effect are discussed in Lesson 5 (Lien Priority) and Lesson 6 (Superpriorities).

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

When the FTL arises, it attaches to all the property of a taxpayer. If that property is later transferred, by sale or otherwise, the lien remains on the property. (Two possible exceptions are a non-liable tenant receiving an interest in a joint tenancy with a right of survivorship and a non-liable spouse receiving an interest in a tenancy by the entirety, where the interest is received by operation of law.) If the property appreciates years later and the Service decides to foreclose the lien, the Service's position is that the lien appreciates with the property, and its value is not limited to the property's value at the time of attachment. See United States v. Avila, 88 F.3d 229, 233 (3d Cir. 1996) (citing Han v. United States, 944 F.2d 526 (9th Cir. 1991), in which the Ninth Circuit considered the same issue and found that "[b]ecause the lien is unaffected by sale, we see no basis for fixing the amount of the lien at the time of the sale"). See also United States v. Blakeman, 997 F.2d 1084, 1092-93 (5th Cir. 1992) (rejecting defendant's argument that tax lien's value was limited to value at lien's attachment date).

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

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

According to United States v. Bess, 357 U.S. 51, 57 (1958), the tax lien stays on the property after the property is transferred. The Supreme Court has long held that "[t]he transfer of property subsequent to the attachment of the lien does not affect the lien, for 'it is of the very nature and essence of a lien, that no matter into whose hands the

property goes, it passes *cum onere*....” Id. (quoting Burton v. Smith, 38 U.S. (13 Pet.) 464, 483 (1839)). “Fixing the value of the lien at the time the taxpayer transfers the property certainly ‘affect[s] the lien,’ and therefore Bess prohibits it.” Avila, 88 F.3d at 233.

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

The Secretary must issue a certificate of release of any lien no later than 30 days after: (1) the liability is satisfied or deemed legally unenforceable, or (2) a bond securing payment is accepted by the Secretary. See I.R.C. § 6325(a). The certificate of release is conclusive evidence that the lien is extinguished provided that the release is filed in the same office as any notice of lien. See I.R.C. § 6325(f)(1)(a). The release of a lien can be revoked under appropriate circumstances. See I.R.C. § 6325(f)(2). Lien releases are discussed in Lesson 8 (Release and Discharge).

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

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

Under I.R.C. § 6502(a), the Service generally has 10 years to collect, by levy or court proceeding, a properly assessed tax. The expiration of the statute of limitations is an affirmative defense. See United States v. Rozbruch, 28 F. Supp. 3d 256 (S.D.N.Y. 2014), aff’d., 621 Fed.Appx. 77 (2d Cir. 2015).

### **2. Foreclosure suit**

The Government may collect by filing suit to foreclose a tax lien on the taxpayer’s property. Such an action must be brought within the 10-year collection period. See I.R.C. § 6502(a)(1). The running of the ten-year period is suspended during the pendency of the foreclosure suit. See United States v. Worldwide Labor Support of Ill., Inc., 2011 WL 148196, at \* 1 (S.D. Miss., Jan. 18, 2011).

### **3. Suspensions**

The 10-year period may also be suspended by the following:

- a) Collection due process hearings and appeals therefrom under sections 6320(c) and 6330(e).
- b) Innocent spouse claims and appeals from innocent spouse determinations under section 6015(e)(2).
- c) The pendency of an offer in compromise or installment agreement under section 6331(k)(3)(B).
- d) The taxpayer’s bankruptcy under section 6503(h).

e) Section 7811(d) can also suspend the statute of limitations where a Taxpayer Assistance Order is sought by a taxpayer and/or issued.

f) Additional suspensions can be found in Code sections 6503, 7508, and 7508A.

#### **4. Extensions**

Under section 6502, the Service's ability to obtain extensions of the statute of limitations is limited to two situations. First, under section 6502(a)(2)(A), the statute of limitations for collection may be extended at the same time an installment agreement is entered into. Second, under section 6502(a)(2)(B), if there has been a levy on a taxpayer's property prior to the expiration of the collection period and if the extension is agreed upon in writing prior to the release of the levy under section 6343, the collection period may be extended.

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

## **V. SPECIAL TAX LIENS**

### ***A. Introduction***

Federal estate tax that is not paid when it is due (whether arising out of a filed return with an unpaid tax or a subsequently determined deficiency) triggers a tax lien, which arises as of the date of death. I.R.C. § 6324(a). The lien continues for a period of 10 years from the date of death, unless the tax is paid or becomes unenforceable by lapse of time. There is no requirement for assessment of or demand for payment of the tax liability for the lien to come into existence. There is no provision regarding filing notice of FTL with respect to this lien. This special estate tax lien is in addition to the general tax lien under section 6321 which arises upon assessment of the tax and a failure to pay after notice and demand.

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

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

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

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

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

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

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

Under I.R.C. § 2033, "[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

#### **2. Nonprobate property**

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

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

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

1. The majority of courts have held that the 10-year period provided in section 6324(a) is a period of absolute duration and is not a period of limitation that can be tolled merely by the filing of a suit to foreclose the lien. See United States v. Davis, 52 F.3d 781, 782 (8th Cir. 1995) (government's appeal dismissed because it was filed more than 10 years after death; estate tax lien had to be enforced during 10-year period); United States v. Potemken, 841 F.2d 97, 100 (4th Cir. 1988); United States v. Cleavenger, 517 F.2d 230, 234-35 (7th Cir. 1975). See also New England Acceptance Corp. v. United States, 35 F. Supp. 2d 53, 56 (D.N.H. 1997).

2. Some courts have held that the time period is limitational and the 10-year period can be extended. See United States v. Harrell, 1987 WL 49363, at \*2

(M.D. Fla. Dec. 11, 1987); United States v. Saleh, 514 F. Supp. 8, 12 (D.N.J. 1980).

3. The Service follows the majority view. The lien will lapse unless the judgment is obtained prior to the expiration of the 10-year period. See Cleavenger, 517 F.2d at 235.

4. The Government can enforce its estate tax lien beyond the 10-year period when it serves a valid notice of levy and demand in accordance with the requirements of section 6331 prior to the expiration of the 10-year period. See Chevron, U.S.A. v. United States, 705 F.2d 1487, 1489 (9th Cir. 1983). Keep in mind that even if the 10-year special estate tax lien has expired, the section 6321 general tax lien may still be effective. Generally, assessment and notice and demand are made at the time the estate tax return is filed, which is after the date of death. While the reach of the general tax lien may not be as broad as that of the special estate tax lien (the general tax lien reaches only the taxpayer's property while the estate tax lien reaches all property, probate and non-probate, included in the gross estate), it provides an additional means for collecting the outstanding tax and should be considered.

5. The United States may seek enforcement of the special estate tax lien to collect an estate tax from a transferee even though the statute of limitations on assessment bars assessment of an estate tax against an estate. The limitations period for making an assessment against a transferee is one year after the expiration of the normal assessment period. See I.R.C. § 6901(c).

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

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

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

because the foreclosure action was commenced before the NFTL was filed.

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

1. Property of the gross estate used to satisfy charges against the estate or administrative expenses can be divested of the estate tax lien. I.R.C. § 6324(a)(1). Note: This automatic divestiture provision only applies where the expenditures are allowed by a court of competent jurisdiction. See *Kleine v. United States*, 539 F.2d 427, 431 (5th Cir. 1976).
2. Reasonable expenses incurred in contesting an estate tax deficiency reduce the tax collectible under the special estate tax lien. See *Porter v. Commissioner*, 52 T.C. 515, 520 (1969).

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

There is no requirement that a lien notice with respect to the section 6324 estate tax lien be filed to obtain priority over purchasers, security interests, and judgment lien creditors. Accordingly, the estate lien generally takes priority over all subsequent lien claims. However, the estate tax lien is not valid against mechanic's liens and superpriorities described in section 6323(b). See I.R.C. § 6324(c)(1).

The special estate tax lien attaches at decedent's death, and becomes a lien at that time. It does not take priority over pre-existing liens such as mortgages or pledges which attached during the decedent's lifetime. See *In re Decker's Estate*, 49 A.2d 714, 719 (Pa. 1946). See also *Detroit Bank*, 317 U.S. at 337; *United States v. Vohland*, 675 F.2d 1071, 1074-75 (9th Cir. 1982).

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

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

If property is included in the calculation of the gross estate under sections 2034 through 2042 (nonprobate assets), the transferee spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, such property, becomes personally liable for the estate tax to the extent of the value of such property at the time of decedent's death, and a lien attaches to his or her interest in that property. See I.R.C. § 6324(a)(2).

1. The statute of limitations applicable to the personal liability established by section 6324(a)(2) is not the 10-year period from the date of death set forth in

section 6324(a)(1); rather, it is 10 years from the date the assessment is made against the estate upon the filing of the estate tax return in accordance with section 6502(a). The section 6324(a)(2) personal liability arises independently from the estate tax lien; accordingly, it may be collected within the ordinary collection period of 10 years from the date of assessment. A separate assessment against the transferees is not required. See United States v. Bevan, 2008 WL 5179099, at \*6 (E.D. Cal. Dec. 10, 2008); United States v. Degroft, 539 F. Supp. 42, 44 (D. Md. 1981); Estate of Mangiardi v. Commissioner, T.C. Memo. 2011-24, aff'd, 442 Fed.Appx. 526 (11th Cir. 2011), .

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

3. Non-probate assets included in the taxable estate that are transferred by a transferee to a purchaser or holder of a security interest are divested of the special estate tax lien, and a like lien attaches to all of the transferee's property, including all after-acquired property. I.R.C. § 6324(a)(2). This rule also applies to a transferee of a transferee. The special estate tax lien attaches to any consideration received from the purchaser or secured lender, even though the fiduciary may have obtained a discharge from personal liability under section 2204. See I.R.C. § 6324(a)(3); Treas. Reg. § 301.6324-1(a)(2)(iii).

a) Accordingly, if a beneficiary or donee of a decedent's nonprobate assets transfers such an asset that divests the estate tax lien, then all of that beneficiary's or donee's property, though never a part of the decedent's estate, is subject to the lien.

b) The beneficiary's or donee's personal liability is limited to the date-of-death value of the nonprobate assets received.

## **H. Probate Assets**

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

1. As discussed, the section 6324 special estate tax lien operates independently

of the general lien arising from unpaid taxes which is imposed by section 6321. Therefore, even if a tax lien under section 6321 is inferior to a purchaser's acquired interest of section 2033 (probate) property, the special lien under section 6324 provides the United States a superior claim unless the purchaser falls under the specific protections in section 6324. See Rev. Rul. 69-23, 1969-1 C.B. 302.

2. The procedure and conditions for discharge of an executor under section 2204 are described in Treas. Reg. § 20.2204-1.

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

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

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

2. If the Service requires a bond pursuant to section 6165 to secure deferral of estate tax pursuant to section 6166, the estate may elect to provide a lien pursuant to section 6324A in lieu of the bond.

3. The lien is created by the executor's election, after an election has been made under section 6166 to defer the payment of estate tax up to 15 years. See I.R.C. § 6166(a). The lien election is then made by filing an agreement signed by all parties with interests in the property. See Treas. Reg. § 301.6324A-1(b)(1). See also In re Roth, 2004 WL 716743, \*4 (W.D. Pa. Apr. 1, 2004); Noble v. Soler, 1997 WL 873539, at \*4 (S.D. Ohio Dec. 17, 1997) (describing I.R.C. § 6324A(c) agreement referred to in § 6324A(a)); Evelpis Properties v. United States, 1997 WL 382122, at \*2-3 (S.D. Ohio Apr. 15, 1997).

4. The amount of the lien is the unpaid tax, plus additions, payment of which is deferred. See I.R.C. §§ 6324A(b)(2) and 6324A(e)(1)-(2).

5. Any property can be designated by the signed agreement if it is expected to survive the deferral period. See I.R.C. § 6324A(b)(1); Treas. Reg. §§ 20.6324A-1(b). The property offered in the 6324A agreement does not have to be property of the estate. As long as the property is expected to survive the deferral period, is of an adequate amount, and is designated in the agreement, the Service may not reject the agreement based on the type of property offered. See I.R.C. § 6324A(b).



6. The lien arises at the discharge of the executor, under section 2204, or earlier if notice is filed, and continues until the deferred amount is paid or becomes unenforceable through lapse of time. See I.R.C. § 6324A(d)(2). See section 6503(d) for the suspension of the period of limitations for collection in cases that have elected the extended payout provided by section 6166.

7. This lien replaces the section 6324 lien on covered property. See I.R.C. § 6324A(d)(4). See also Noble, 1997 WL 873539, \*4 (quoting § 6324A(d)(4): “if there is a lien under this section on any property with respect to any estate, there shall not be any lien under section 6324 on such property with respect to the same estate”). However, the section 6324A lien divests the section 6324(a) lien only with respect to property designated in the section 6324A lien agreement. IRS CCA 200645027, 2006 WL 3291711 (July 31, 2006).

8. Notice of the lien must be filed to compete with section 6323(a) interests but no refiling is necessary. See I.R.C. § 6324A(d)(1). Priority over this lien is accorded, however, even if notice is filed, to some liens and security interests in real property. See I.R.C. § 6324A(d)(3).

9. Lien protection can exist when no section 6324A lien was elected with the section 6166 extended estate tax payout, even though the 10-year section 6324(a) lien expires before the 15-year payout period is complete. The section 6324A lien provides additional security for the 5-year additional payout period under section 6166 that continues after the section 6324 lien would otherwise have expired. However, the Service may have other means of security for that 5-year period, even if the section 6324A lien is not elected. These other means include a general lien provided by section 6321 and the personal liability of the executor.

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

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

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

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

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

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

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

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

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

### **K. Tax Court – case closings**

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

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

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

1. The gift tax is a tax imposed on the donor and historically was intended to prevent avoidance of the estate tax. The Tax Reform Act of 1976 "unified" the rates and calculations of the federal estate and gift taxes. See I.R.C. §§ 2001, 2010, 2502. For gifts made during 2010, when there was no estate tax, the gift tax rate is established solely by section 2502.
2. The gift tax is imposed on the donor who makes a gift of money or other property to the extent that the value of the gift exceeds the amount of the exclusions authorized by section 2503 and the deductions authorized by sections 2522 and 2523. See I.R.C. § 2501(a); Treas. Reg. §§ 25.2501-1(a), 25.2511-1(a). It does not apply to transfers by corporations or persons other than individuals. See Treas. Reg. § 25.2501-1(b). But a corporate gift may be treated as a gift by the shareholders. See Treas. Reg. § 25.2511-1(h)(1). See also J. George Spitz Trust v. Commissioner, T.C. Memo. 1971-8.
3. The donor is taxed even though the recipient of the gift (donee) is a corporation or any other person. The donor is taxed when the gift is completed even if at that time the identity of the donee is not known or ascertainable. See Treas. Reg. § 25.2511-2(a).
4. The donee is liable if the donor does not pay the gift tax. Treas. Reg. § 301.6201-1(a); United States v. Marshall, 798 F.3d 296 (5th Cir. 2015).
5. The gift tax return is now due annually, except for the gift tax return due for the year of the decedent's death. See I.R.C. §§ 6019 & 6075(b).

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

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

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

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

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

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

1. The donee may be liable, not only for tax on the gift, but also for the entire gift tax liability of the donor, up to the value of the gift received. See I.R.C. § 6324(b). See also *United States v. Botefuhr*, 309 F.3d 1263, 1276 (10th Cir. 2002). Moreover, while section 6324(b) limits the maximum amount of the transferee/donee's tax liability, it does not limit or restrict interest which may be added on to that liability. A transferee/donee is liable for interest until the liability is paid, at the statutory rate found in section 6621, which includes interest from and after the issuance of the notice of transferee liability. See I.R.C. § 6601(a). Compare *Baptiste v. Commissioner*, 29 F.3d 1533, 1541 (11th Cir. 1994) (holding that a transferee's liability is distinct from that of the transferor and thus interest is not limited to the value of the transferred property) with *Poinier v. Commissioner*, 86 T.C. 478, 487-90 (1986), rev'd in part by *Poinier v. Commissioner (Poinier II)*, 858 F.2d 917 (3d Cir. 1988) (holding that a transferee's total liability, including liability for interest, is limited to the value of the gift received by that donee), cert. denied, 490 U.S. 1019 (1989), and *Baptiste v. Commissioner*, 29 F.3d 433, 437-38 (8th Cir. 1994) (same holding with respect to interest on underlying estate taxes).

2. The donee may be entitled to recovery from other liable donees but not from the donor.

3. The statute of limitations on collection applicable to the personal liability established by section 6324(b) is not the 10-year period from the date the gifts are made set forth in the section; rather, it is 10 years from the date the assessment is made against the donor. See *Botefuhr*, 309 F.3d at 1277-79. The section 6324(b) personal liability arises independently from the gift tax lien; accordingly, it may be collected within the ordinary collection period of 10 years from the date of assessment.

4. The liability of the donee is based on federal law, not state law, and the solvency of the transferor is irrelevant. See *Poinier II*, 858 F.2d at 919-20.

5. The Tax Court lacks jurisdiction to offset any gift tax deficiencies and

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

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

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

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

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

2018 GL-1 Instruction Assigned to David Lau

Previous Instruction: Brooke Laurie, Adam Flick, Eric P. Benson, Beth A. Nunnink, Shannon K. Castaneda, Laurence ("Larry") K. Williams, and Kathryn A. Meyer