

Contents

Protecting the Executor Who Becomes Aware of Undisclosed Foreign Accounts..	1
How to Prepare a Business Collection Information Statement (Form 433-B).....	10
Tax Court Calendar.....	32, 35
TAC Tip.....	32
Upcoming Events	34

Upcoming Free Events

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PROTECTING THE EXECUTOR WHO BECOMES AWARE OF UNDISCLOSED FOREIGN ACCOUNTS

By Frank Agostino, Esq.
Nicholas Karp, EA.¹

An executor administering an estate with undisclosed foreign accounts is exposed to substantial risks that may not be apparent. The following discussion is intended for executors and administrators who wish to understand and avoid those risks.²

A typical scenario

A taxpayer dies. An executor is appointed and learns of foreign accounts:

- Those foreign accounts hold investments.
- The decedent did not file FinCEN Form 114, *Reports of Foreign Bank and Financial Account* ("FBARs") or report the foreign income.
- The beneficiaries are reluctant to see the estate diminished by amending the decedent's returns and paying the taxes and penalties: they didn't do anything wrong, why should their inheritance go to the IRS?
- The executor hires an accounting firm to assist with tax issues. The goal is

(Continued on page 2)

to reconcile duties to the beneficiaries with duties to taxing authorities, government agencies, and courts. Implicitly the executor wishes to satisfy these aims without incurring personal liability.

- Assume that the total estate, including foreign accounts, is less than \$5,000,000.³

Superficially attractive, but risky advice sometimes given by accounting firms

The accounting firm advises the executor to:

- Report current year foreign income and file the current year FBAR, reasoning that the executor has signature authority over the foreign account for the current year, but no responsibility for prior years.
- Not file any prior year amended returns or FBARs, reasoning that the executor should not speculate as to the willfulness of the decedent.⁴
- Distribute the proceeds of the foreign accounts to the beneficiaries without taking any position as to whether they are required to file IRS Forms 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*. An executor has no obligation to give tax advice to beneficiaries: it is the beneficiaries' responsibility to determine their obligation to file IRS Forms 3520.

Lastly, the accounting firm advises against hiring a lawyer. The taxpayer is dead: who can the Government prosecute?

Stepping into the minefield

An executor following the advice outlined above may please beneficiaries in the short-term. However, he will be exposing both himself and the beneficiaries to significant and enduring hazards.

The most dangerous (and perhaps surprising) hazard is the potential for the executor to unwittingly commit a federal crime. 18 U.S.C. § 4 makes it a crime ("misprision") if a person, "having knowledge of the actual commission of a felony ... conceals and does not as soon as possible make known the same..." Tax evasion is a felony (26 U.S.C. § 7201). Courts have consistently held that misprision requires, "an affirmative act of concealment."⁵ Failing to disclose tax evasion can be considered concealing the theft of money from the United States. Concealing stolen money has been held to be an affirmative act upon which a charge of misprision may be based.⁶ The executor will, under the facts, have all the information needed to conclude that the decedent's returns understated tax liability and money is due the United States. If it is eventually determined that the decedent's non-filing was willful, a prosecutor could well reason that the executor's choice not to amend the returns was tantamount to concealing money stolen from the United States. Moreover, should any returns associated with the estate subsequently be examined, any lapse in providing information about the foreign accounts could implicate the executor in concealment. In either of these situations, if the Government can show the executor had reason to know the decedent's delinquencies were willful, the Government

August 2017

will have the elements needed to charge the executor with misprision.⁷

Criminal prosecution for this scenario is admittedly remote for an appointed executor with no prior relationship to the decedent. Consider, however, the not-uncommon situation where the executor is also a relative and beneficiary: with motive and plausible access to information the reasoning becomes less strained and the danger less tenuous.

The executor, particularly the executor-beneficiary, has an affirmative obligation to forestall this risk by documenting facts exculpating the decedent of willfulness: the decedent's illness or lack of sophistication, incomplete or erroneous advice he may have received, the absence of meaningful interaction with the account, etc. Such documentation must fit the facts: the executor cannot be willfully blind. Contemporaneous and plausible evidence that the executor investigated and found no reason to believe the decedent to be willful (and thus felonious) provides a meaningful bulwark against criminal indictment.

Civil liability

Civil liability is more mundane and significantly more likely than criminal prosecution. The executor risks personal liability by distributing assets to beneficiaries or creditors of the estate without addressing delinquent filings and faulty returns. 31 U.S.C. § 3713, *Priority of Government Claims*, is straightforward: "A claim of the United States Government shall be paid first..." Courts have not been reluctant to hold executors liable for dissipating assets due the Government.⁸ If the executor distributes assets or pays unse-

cured creditors and the estate later proves unable to pay amounts owed to the Government, the executor is personally liable.⁹

The absence of assessments or scrutiny prior to the decedent's departure offers no security or protection to the executor. IRC § 6901(b) provides that an executor's liability, "...may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax." The Internal Revenue Service ("IRS") has a long-stated position that:

*Even though the decedent's liability has not been assessed at the time of death, the liability was established and constituted a debt due the United States.*¹⁰

It is only small relief that courts have interpreted 31 U.S.C. § 3713 to impose strict fiduciary liability only if the fiduciary had notice of the claim before making the distribution.¹¹ Rev. Rul. 79-310¹² provides that:

*The executor of an estate is personally liable under section 1367 of the Revised Statutes¹³ if the executor has personal knowledge, or such knowledge as would put a reasonably prudent person on inquiry, of the debt owed the Government.*¹⁴

Unfortunately, our hypothetical executor, who signed the decedent's final IRS Form 1040 and the estate's IRS Form 1041, each reporting foreign accounts, will have a hard time arguing that he had not been "put on inquiry"

August 2017

of amounts due the Government for prior periods.¹⁵

Types of liability and their duration

Debts to the Government for which the executor might be held liable arise from several distinct sources:

- Penalties for delinquent FBAR filings.
- Penalties for delinquent reporting of foreign assets under IRC § 6038D.
- Tax, penalties, and interest due and accruing as a result of under-reported income.

31 U.S.C. § 5314 provides the authority for FBAR filings, with associated noncompliance penalties governed by 31 U.S.C. § 5321(a) (5). That statute has a six year period of limitations.

The other two categories of potential liabilities arise under Title 26. IRC § 6501(a) generally limits assessment of tax under Title 26 to three years. However, this general protection is breached by many exceptions including, importantly, IRC § 6501(c)(8)(A):

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

the date on which the Secretary is furnished the information required to be reported under such section. [Emphasis added.

IRC § 6038D is the section governing foreign reporting. If foreign reports aren't filed the clock never starts.

Moreover, a recent Technical Memorandum issued by the IRS Office of Chief Counsel takes an encompassing interpretation of the returns affected by the suspension of the running of the period of limitations under IRC § 6501(c):

In the event of a failure to furnish information required under section 6038D, section 6501(c)(8) operates to suspend the period of limitations on assessment of any tax with respect to any return, event, or period, to which the undisclosed information relates. This would suspend the period of limitations for assessment for any tax reportable on an individual's final Form 1040 or an estate's Forms 1041 or 706 anytime there is a failure to furnish information, required under section 6038D, which relates to that return.¹⁶

An estate's liability for Title 26 taxes and penalties resulting from non-disclosure of foreign assets continues indefinitely. Title 26 includes income, estate, and gift taxes. The

estate's six year liability for FBAR penalties suddenly seems generously lax by contrast.

Summarizing the points so far:

Taxes and penalties resulting from a decedent's failure to report foreign accounts and income become just debts of the decedent's estate.

The executor is personally liable for such debts left unsatisfied by the estate.

The United States can attempt to collect those debts from the estate for six years (for FBARs), or forever (for Title 26 taxes and penalties).

How long can the executor be held personally responsible?

It is important to distinguish the estate's liability from the executor's. As described above, the source of the executor's liability is indirect, mediated by IRC § 6901(b) and 31 U.S.C. § 3713. The Sixth Circuit, in *U.S. v. Moriarty*, 8 F.3d 329 (6th Cir. 1993) held that the applicable limitation period for a claim under 31 U.S.C. § 3713(b) is six years, commencing when the right of action, "accrues against the executor." The Fourth Circuit added guidance as to when the right of action accrues, holding that, "the commencement date for the statute of limitations under the statute is the date the distribution of assets to other creditors is completed."¹⁸ For Title 26 taxes and liabilities the executor's liability extends at least six years¹⁷ from the date of the last distribution from the estate.¹⁹

The interaction of these statutes and rulings is murkier for FBAR penalties. Does an executor distributing assets five years into the

six year statute for FBAR penalties have liability for six additional years, or only for the one year that those penalties could be asserted against the estate? Courts have not yet ruled, leaving the possibility open that the executor will have six years' exposure to FBAR penalties, counting from the date of the last distribution.

Traditional methods of limiting fiduciary liability fail

A prudent and well-advised executor will normally file IRS Form 4810, *Request for Prompt Assessment Under Internal Revenue Code Section 6501(d)*, to shorten the statute of limitations for returns related to an estate. However, IRC § 6501(d) explicitly limits its own scope where IRC § 6501(c) applies.²⁰ For reasons previously discussed, IRC § 6501(c)(8) suspends the running of the statute of limitations for an estate noncompliant in foreign reporting. Consequently, IRS Form 4810 cannot accelerate the running of limitations for returns related to such an estate.

An executor can generally obtain a defense against many liabilities by filing IRS Form 5495, *Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905*. The protection of these provisions is inadequate when foreign accounts are delinquent. The scope of IRC § 2204 is limited to taxes arising under chapter 11 (Estate Tax). IRC § 6905 applies to taxes imposed by subtitle A (Income Taxes) and chapter 12 (Gift Tax). The penalties for delinquent foreign reporting arise under subtitle F²¹ and 31 U.S.C. § 5321, leaving the executor exposed to a wide spectrum of potentially draconian penalties.

August 2017

Moreover, to submit IRS Form 5495 the executor must declare under penalties of perjury, that he has:

...examined this request, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. [Emphasis added.]

The “accompanying schedules and statements” are the decedent’s tax returns. In contrast to the required declaration, an executor aware of delinquent reporting will have every reason to believe such returns are false, incorrect, and incomplete, regardless of the willfulness of the decedent (or lack thereof). The executor who knows mandatory filings are absent cannot sign IRS Form 5495 without committing perjury.

What should the executor do?

Given the information presented so far, a law-abiding and prudent executor may well conclude that the decedent’s returns should be brought into compliance, and all debts to the United States settled before disposing of an estate’s assets. The hypothetical accounting firm introduced at the beginning of this article was correct that the executor should not speculate as to the decedent’s willfulness in failing to report the foreign accounts or income; however, speculation is not required to remedy the decedent’s delinquencies.

Depending on the facts, there are four ways to bring the decedent’s reporting and returns into compliance:

1. Offshore Voluntary Disclosure Program

(“OVDP”)²²

Entry into this program is an admission of past non-compliance. It will generally cost the estate 27.5% of the highest total value of unreported assets,²³ in addition to any tax and penalties due on previously unreported income. These amounts are determined for the most recent eight tax years for which the due date has already passed. Though onerous, OVDP is likely the best approach if, under the facts, it will be difficult to claim the decedent was not willful.

2. Streamlined Filing Compliance Procedures²⁴

These procedures are available where there is no evidence of willfulness, but tax is owed on previously unreported income. 5% of the highest total value of unreported assets is forfeited (in addition to the tax and penalties due on previously unreported income). The executor must be prepared to certify that, to the best of the executor’s knowledge: (1) There is no evidence of willfulness on the part of the decedent; (2) The failure to file and pay was the result of “negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.”²⁵ The program requires filing the most recent three years of U.S. tax returns for which the due date or a properly applied for extended due dates have passed, and the most recent six years of FBAR returns.

3. Delinquent International Information Return Submission Procedures²⁶

These procedures are available where there

is no evidence of willfulness, reasonable cause can be asserted for the failure to properly report, and no tax is owed for unreported income. The latter is a question of fact, which the executor can only answer after having amended returns prepared. If the delinquent information returns are accepted under this program no penalty is exacted.

4. Qualified Amended Return²⁷

Instead of following one of the above avenues to compliance, it is possible to file amended returns and hope that the IRS accepts those returns without challenge. There are substantial risks to this strategy, discussed in a prior issue of this journal.²⁸

In the past, some taxpayers have attempted to reduce the cost of compliance by quietly filing returns, paying tax owed, and only then making use of Delinquent International Information Return Submission Procedures. The IRS is increasingly cognizant of this strategy - and can assert substantial penalties (or criminal charges) if it is detected. Moreover, "quiet" disclosures of this form provide no protection against penalties under title 31.

Forward-looking advice to the beneficiaries

Though the accounting firm is correct that executors have no explicit responsibility to advise beneficiaries to file IRS Forms 3520, a conscientious executor is doing beneficiaries a disservice by not to at least making them aware of their duties. The IRS will have all the information needed to detect non-compliance going forward. It is not doing the beneficiaries any favors to leave them ignorant of their obligations.

Requirements applicable to Circular 230 practitioners

A final question arises as to whether Circular 230 prohibits the estate's accounting firm from advising the executor that he has no obligation to amend past returns. One relevant provision of Circular 230 is §10.21, which states:

Knowledge of client's omission. *A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.*

In this case, the historical non-compliance is the decedent's, not the executor's. However, an executor "stands in the shoes" of the decedent. While an executor has no direct or explicit mandate to file delinquent FBARs or to amend a decedent's previously filed returns, his primary mandate is to pay the es-

August 2017

tate's debts and expenses and to distribute assets. As described above, he cannot (safely) fulfill this mandate without cleaning up delinquent or erroneous filings. A Circular 230 practitioner who neglects to properly advise an executor of the consequences of the decedent's non-compliance may have a tough time persuading the IRS Office of Professional Responsibility that his own omission complied with either the spirit or letter of §10.21.

An attorney is a good idea

Despite the accounting firm's advice, the executor should engage an attorney to assist with this process:

- If decedent's failure is judged to be willful it may cost the beneficiaries a lot of money - possibly their entire inheritance. An attorney with experience in the area can help present the facts in such a way as to minimize the chance of a willfulness determination.
- Beyond the executor's responsibility to protect the beneficiaries' interests, an attorney can shield the executor against potential action by the beneficiaries themselves. The beneficiaries have a lot to lose if the executor mishandles remediation - and even if he handles it perfectly they might blame him when an expected inheritance evaporates in back taxes, interest, and penalties.
- The beneficiaries may have had involvement with the foreign account in prior years. If so, they are themselves at risk of criminal prosecution. In this

circumstance, the executor's and beneficiaries' interests may diverge, presenting a conflict of interest to shared representation.

Conclusion

Undisclosed foreign assets significantly magnify an executor's risks. Executors would be well-advised to reject the temptation to avoid the trouble and costs of compliance. An executor who cuts corners assumes extended personal risk. An attorney with experience in the area is the best way for the executor to protect himself - and the beneficiaries - from liabilities that can only grow and will endure well past the estate's closing.

Footnotes:

1. Frank Agostino is the Principal of, and Nicholas Karp is an Enrolled Agent for Agostino & Associates.
2. Many articles in the *Agostino & Associates Monthly Journal of Tax Controversy* have discussed reporting requirements for foreign accounts in general, and alternative strategies available to delinquent individual taxpayers to return to compliance. See: <https://sites.google.com/site/seminarmaterials/Home/newsletter-archive> (April 2009; April 2013; February 2014; August 2015; November 2016).
3. If the estate were taxable, the executor would have to file (and sign) IRS Form 706, introducing further complications (e.g. fraudulent underreporting of liabilities) relevant to relatively few taxpayers. Also, basis consistency rules do not apply.
4. Willfulness bears importantly on the handling of delinquent filings, with significant impact on the amount of penalties. See 31 U.S.C. § 5321(a).
5. *United States v. Brantley*, No. 13–12776, 2015 WL 5915894, (11th Cir. Oct. 9, 2015).
6. *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934).
7. Lest “misprision” be considered an obscure and archaic relic, many recent news stories have identified it as a possible charge against former FBI Director Comey.
8. *Estate of Walker v. Commissioner*, 90 T.C. 253 (1988).
9. IRC § 6901(a)(1)(B).
10. Rev. Rul. 79-310, 1979-2 C.B. 404 (I.R.S. July 1, 1979).
11. See, e.g., *Leigh v. Commissioner*, 72 T.C. 1105 (1979).
12. 1979-2 C.B. 404.
13. The predecessor to 31 U.S.C. § 3713.
14. *Want v. Commissioner*, 280 F.2d 777 (1960); *Northwestern Jobbers Credit Bureau v. Commissioner*, 1 T.C. 863 (1943); Rev. Rul. 66-43 (1966-1 C.B. 291).
15. The United States Supreme Court decided in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 US 478 (1988) that the Personal Representative in every estate is personally responsible to provide actual notice to all known or “readily ascertainable” creditors of the decedent.
16. PMTA-2014-18.
17. Applying 28 U.S.C. § 2415.
18. *United States v. Dawkins*, 629 F.2d 972 (4th Cir.1980), as summarized in *United States v. Renda*, 821 F. Supp. 2d 853, 858 (E.D. Tex. 2011), *aff’d*, 709 F.3d 472 (5th Cir. 2013).
19. To any debtor or beneficiary other than the United States Government.
20. Also IRC §§ 6501(e) and (f).
21. IRC § 6038D(d).
22. <https://www.irs.gov/uac/2012-offshore-voluntary-disclosure-program>.
23. 50% for assets held at institutions publicly identified as being under investigation. The list of such institutions is growing.
24. <https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures>.
25. For a good discussion of issues associated with substituting the executor’s certification for the decedent’s see <https://www.angloinfo.com/blogs/global/us-tax/how-can-an-estate-use-the-irs-streamlined-procedures-for-unreported-foreign-accounts/>.
26. <https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures>.
27. https://www.irs.gov/irb/2015-7_IRB/ar06.html.
28. <https://docs.google.com/file/d/0B719qAMBEjGQeUVHUTRnMUFPWTA/edit>.

August 2017

HOW TO PREPARE A BUSINESS COLLECTION INFORMATION STATEMENT (FORM 433-B)

By Frank Agostino, Esq.
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The July edition of the Agostino & Associates' Tax Controversy Journal discussed the collection alternatives available to taxpayers with delinquent liabilities. Many delinquent taxpayers are small businesses. With respect to businesses, IRM § 5.15.1.14 (10-02-2012) *Business Financial Statements* explains "[t]he analysis of a business taxpayer's financial condition provides the basis for the majority of case resolutions." See also IRM § 5.15.1.16 (11-17-2014) *Making the Collection Decision*.

Accordingly, this month we explain how businesses prepare the collection information statement required by the IRS to obtain a collection alternative. IRS Form 433-B *Collection Information Statement for Businesses* is used by business taxpayers to apply for an installment agreement. The Form 433-B is used by the IRS to balance the taxpayer's proposed collection alternative against the potential results of enforcement action. Taxpayers use Form 433-B (OIC) to submit an Offers In Compromise (OIC). IRM § 5.1.21.7.2 (01-12-2015) *Offers In Compromise*.

Below we review each section and/or line of the Form 433-B and the relevant instructions set forth in IRS Publication 5059 *How to Prepare a Collection Information Statement (Form 433-B)* and the IRM §. The goal is to create a reference for taxpayers and tax professionals that can be referred to when com-

pleting Form 433-B.

Section 1

Business Information

The following business entities need to complete Form 433-B:

- Partnerships
- Corporations
- Exempt Organizations
- S Corporations
- Limited Liability Companies (LLC) classified as a corporation
- Other LLCs

Section 1 of Form 433-B asks for basic contact information for the business, as well as essential information about the business. Publication 5059 instructs:

Complete items 1 through 6. For items 4 and 5, include information for mobile commerce and mobile accounts such as PayPal Mobile or Paymate. Answer all questions in this section or write N/A if a question is not applicable. Include attachments if additional space is needed to respond completely to any question.

IRM § 5.8.5 (April 10, 2017) *Financial Analysis* explains what information the Revenue Officer is expected to review in connection

August 2017

with the evaluation of a Form 433-B. Best practices suggest that a tax professional should engage in similar due diligence. Consequently, we recommend that the tax professional review the taxpayer's source documents, including but not limited to:

a tax professional should engage in similar due diligence. Consequently, we recommend that the tax professional review the taxpayer's source documents, including but not limited to:

- previously filed income tax returns,
- profit and loss statements,
- bank and investment statements,
- loan statements,
- financing statements,
- bills or statements for recurring expenses, etc.

We also recommend that the taxpayer and his professionals consult the following search engines and databases before submitting the Form 433-B:

- Accurint/TLO
- Credit Reports
- Westlaw or Lexis/Nexis
- Department of Motor Vehicles (DMV) Databases
- Real Property Title Reports
- Uniform Commercial Code (UCC) Filings

- Corporate Information — Secretary of State.
- IRS Account Transcripts
- Tax Return Transcripts
- ECF

Below we review the Questions in Section 1 and provide guidance for completion of each

#	Item #/Question	Suggestion for Completion/Practice Tips
1a	Business Name	The Business name should include the DBA (doing business as) or TA (trading as), if applicable.
1b	Business Street Names	<p>This entry should reflect a physical address, not a P.O. Box or mail drop.</p> <p>The answer to this question should reflect the current business address.</p> <p>The IRS does "drive by" observations and may request to tour the business premise. IRS § 5.15.1.3 (11-17-2014) Verifying Financial Information instructs:</p> <p>Observe and document the physical layout of the business, the number of employees, the type and location of equipment, machinery, vehicles and inventory. A brief tour of the business premises may help to gauge the business</p>

August 2017

#ne.	Item #/Questions	Suggestions for Completion/Practice Tips
		<p>operation and the conditions of assets. Business premises may help to gauge the business operation and the condition of assets.</p> <p>IRM § 5.15.1.19 (11-17-2014) <i>Assets</i>:</p> <p>A field call should be made to locate and personally observe the condition of assets based on the merits and circumstances of the investigation</p> <p>If the business operated out of a residence address, you must use the residence address.</p>
1d	Business Telephone	<p>IRC § 6304 (a) provides:</p> <p><i>Communication with the taxpayer.</i> Without the prior consent of the taxpayer given directly to the Secretary or the express permission of a court of competent jurisdiction, the Secretary may communicate with a taxpayer in connection with the collection of any unpaid tax—...</p> <p>(2) if the Secretary knows the taxpayer is represented by any person authorized to practice before the Internal Revenue</p>

#	Item #/Questions	Suggestions for Completion/Practice Tips
		<p>Inserting the representative's telephone number confirms the taxpayer's decision to exercise his or her right to representation. See also IRC § 7803(a)(3)(l)(the right to retain representation)</p>
1f	Business Website	<p>The tax professional should review any business web sites.</p> <p>The attachment to Form 433-B should explain any inconsistencies between the website and the collection information statement.</p> <p>See also Section 2, <i>infra</i>.</p>

August 2017

#	Item #/Question	Suggestions for Completion/Practice Tips
2a	Employer Identification No.	The EIN listed here must match: (a) the business tax return that generated the tax liability; (b) The IRS account transcript, and (c) The representative's IRS Form 2848.
2b	Type of Entity	The owner's personal liability for the delinquent tax may depend on the type of entity. See IRM § 5.15.1.12 (10-02-2012) <i>Business Entity and Collection</i>
2c	Date Incorporated/Established	This date should match the date of the Corporate Information Search received from the Secretary of State.
3a	Number of Employees	This answer should be consistent with the Forms W-2 issued.
3b	Monthly Gross Payroll	This answer should be consistent with the account transcripts for the prior two quarters.
3c	Frequency of Deposits	This answer should be consistent with the account transcripts for the prior two quarters.
3d	Is the business enrolled in Electronic Federal Tax Payment System (EFTPS)	Check the appropriate box.

#	Item #/Question	Suggestions for Completion/Practice Tips
4	Does the business engage in e-commerce (internet sales) If yes, complete 5(a) and 5(b)	See IRM Exhibit 4.10.4-7 <i>Interview Questions Addressing E-Commerce Activities</i> .
	Payment Processor Payment	
	Credit Cards Accepted by the Business	IRM § 5.15.1.18 (10-02-2012) <i>Determining Business Income</i> explains:
		Payments from merchant cards and third party networks will be reflected on IRPTRO as Form 1099-K, Payment Card and Third Party Network Transactions, Address situations where reported income from sales is significantly lower than the amount reported for Form 1099-K transactions.

Section 2
Business Personnel and Contacts

The answers in this section are used in connection with the IRS investigation of the Trust Fund Recovery Penalty (TFRP). The TFRP is a penalty that essentially allows the IRS to pursue collection of unpaid trust fund taxes from those responsible persons that willfully failed to collect, account for, and pay over the trust fund taxes. IRM § 5.17.7 (July 18, 2012) *Liability of Third Parties for Unpaid Employment Taxes*.

August 2017

IRM § 5.15.1.16 (11-17-2014) Making the Collection Decision explains:

If the delinquency includes trust fund employment taxes, a TFRP investigation must be completed. The finances of any responsible person would be considered in analyzing the potential payment of the account. See IRM § 5.7, *Trust Fund Compliance*.

The taxpayer and his professionals should anticipate that the information provided in this section will be used by the IRS to evaluate whether the individuals listed (a) are responsible persons (IRM § 5.7.3.3.1, *Establishing Responsibility*) and (b) willfully failed to pay trust fund taxes (IRM § 5.7.3.3.2, *Establishing Willfulness*). Accordingly, the answers in Section 2 should be cross-referenced with those given on IRS Form 4180 (*Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes*). See IRM § 5.7.4.2.4 (06-29-2017) *Form 4180*.

For Section 2, Publication 5059 instructs:

Enter information about all persons responsible for collecting, paying and depositing withheld income and employment taxes, or for paying collected excise taxes. These persons could be officers, employees, partners, major shareholders, etc. Include attachments if additional space is needed to respond completely to the question.

IRM § 5.17.7.1.4 (08-01-2010) *Examination of Records* provides:

1. The revenue officer has the initial duty to determine the identity of officers, partners, members, or employ-

ees who had the duty to collect or pay over the taxes.

2. Records to be examined may include the following:

- Articles of incorporation or articles of organization
- By-laws of the corporation or operating agreements
- Minute books
- Payroll records
- Canceled checks and bank records and
- Tax returns

3. The articles of incorporation should contain the names and duties of all officers and directors of the corporation.

4. Corporate by-laws and minute books may disclose the names of persons responsible for the filing of returns and payment of taxes. They may show who has the authority to sign checks, deposit money, and make loans on behalf of the corporation.

5. Bank records and canceled checks should be examined for payment of other financial obligations after the taxes became due.

1. Signature cards should identify the persons authorized to sign corporate checks.

August 2017

2. Bank records may disclose possible diversion of corporate funds.

3. Financial statements provided to the bank in connection with a bank loan may provide additional information regarding responsibility and financial solvency of the corporation.

* * *

6. Tax returns, if filed, may provide the name of the person responsible for filing.

The tax professional answering these questions should review/evaluate the documents described in IRM § 5.17.7.1.4 (08-01-2010) *Examination of Records* before answering this set of questions.

This is also the time to evaluate whether the potential responsible officers should engage independent conflict free representation with respect to the potential TFRP.

Section 3
Other Financial Information

Like Section 2, Section 3 provides the IRS with information regarding additional collection sources.

IRM § 5.1.24.4 (08-15-2012) *Types of Third-Party Payer Arrangements* explains that:

1. A common law employer or a section 3401(d)(1) employer may use a third party to perform some or all of the employer's federal employment tax withholding, report-

ing, and payment obligations. Additionally, the common law employer's use of a section 3401(d)(1) employer is itself a type of third-party payer arrangement.

2. There are a variety of third-party payer arrangements. The most common are:

- IRC 3401(d)(1) Employer (IRM § 5.1.24.3.2)
- Temporary Staffing Service
- Payroll Service Provider
- Reporting Agent
- IRC 3504 Agent
- IRC 3505 Lender, Surety, or Other Person

3. See IRM Exhibit 5.1.24-1 for a chart illustrating the differences between a payroll service provider, reporting agent, and IRC 3504 agent.

Publication 5059 instructs:

Complete items 8 through 15 and attach copies of all applicable documentation. Answer all questions in this section or write N/A if a question is not applicable. Include attachments if additional space if needed to respond completely to any question.

August 2017

#	Question	Guidance
8	Does the business use a Payroll Service Provider or Reporting Agent?	The information in line 8 allows the IRS to determine whether to pursue collections of the unpaid trust fund taxes from those third parties the willfully failed to collect, account for, and pay over the unpaid trust fund taxes. IRM § 5.17.7 (July 18,2012) <i>Liability of Third Parties for Unpaid Employment Taxes</i> .
9	Is the business a party to a lawsuit?	Lawsuits frequently involve property and rights to property and may be useful to uncover assets. Consequently, Line 9 of Form 433-B asks if the business is a party to a lawsuit.

#	Question	Guidance
10	Has the business ever filed bankruptcy?	Line 10 asks if the business ever filed bankruptcy. IRM § 5.7.4.8 (06-29-2017) <i>Determining Whether to Pursue the TFRP in Installment Agreement or Bankruptcy Situation</i> explains that: <ol style="list-style-type: none"> 1. The TFRP will normally be pursued when efforts to collect the unpaid tax, penalty, and interest from the employer have been unsuccessful. 2. In certain situations, the Service may decide to withhold assertion of the TFRP while the employer is attempting to resolve the liability through another method. These situations could involve an in-business installment agreement (IRM § 5.7.4.8.1 <i>Considerations for In-Business Installment Agreements</i>) or bankruptcy (IRM § 5.7.4.8.2. <i>Trust Fund Taxpayer in Bankruptcy</i>), and IRM § 5.7.4.8.3, <i>Responsible Party in Bankruptcy</i>).

August 2017

#	Question	Guidance
11	Do any related parties (e.g., officers, partners, employees) have outstanding amounts owed to business?	<p>Line 11 asks whether related parties have outstanding amounts owed to the business. The amount the business could collect from third parties is relevant to any proposed collection alternative.</p> <p>Loans to officers are considered an account receivable and valued according to their collectability. IRM § 5.5.8 (09-30-2013) <i>Securities and Stocks of Closely Held Entities</i>.</p>
12	Have any assets been transferred, in the last 10 years, from this business for less than full value?	<p>Line 12 asks whether, in the past ten years, the business has transferred any assets for less than full value. IRM § 5.15.1.23 (10-02-2012) <i>Assets Held By Others as Transferees, Nominees or Alter Egos</i> explains:</p> <p>A critical part of the financial analysis is to determine what degree of control the taxpayer has over assets and income in the possession of others.</p> <p>By contrast, IRM § 5.8.5.18 (09-30-2013) <i>Dissipation of Assets</i> explains the impact of transferring assets for less than fair market value on the taxpayer's proposed collection alternative:</p>

#	Question	Guidance
		<p>Inclusion of dissipated assets in the calculation of the reasonable collections potential (RCP) is no longer applicable, except in situations where it can be shown the taxpayer has sold, transferred, encumbered or otherwise disposed of assets in an attempt to avoid the payment of the tax liability or used the assets or proceeds (other than wages, salary, or other income) for other than the payment of items necessary for the production of income or the health and welfare of the taxpayer or their family, after the tax has been assessed or within six months prior to the tax assessments.</p>
13	Does this business have other business affiliations (e.g., subsidiary or parent companies)?	<p>Review the business tax returns and the returns of the individuals identified in Section 2 to complete Line 13 "<i>does the business have other affiliations?</i>"</p>

August 2017

#	Question	Guidance
14	Any increase/decrease in income anticipated?	<p>Line14 asks if any increase/decrease in income is anticipated.</p> <p>IRM § 5.8.5.20 (09-30-2013) Future Income explains the impact on anticipated changes in income on proposed collection alternatives.</p> <p>Consider whether the collection alternative should include Form 1127, <i>Application for Extension of Time for Payment of Tax Due to Undue Hardship</i>.</p>
15	Is the business a Federal Government Contractor?	<p>Line15 asks whether the taxpayer is a Federal Government Contractor. IRM § 5.7.9.3 (01-20-2017) <i>Handling of Federal Contractor Cases</i> explains the procedures for these cases. Tax Professionals should pay special attention to IRM § 5.7.9.4 (01-20-2017) <i>Federal Contractors and the Federal Payment Levy Program (FPLP)</i>. IRC § 6331(h) permits the Service to serve a continuous levy on 100 percent of the payment owed to federal contractors. The Small Business Jobs Act of 2010 amended IRC § 6330 (f) and (h), to permit the IRS to issue any levy on a taxpayer prior to providing them with their Collection Due Process (CDP) notice and hearing if the taxpayer is a federal contractor,</p>

Section 4
Business Asset and Liability Information

IRM § 5.15.1.14 (10-02-2012) *Business Financial Statements* instructs Revenue Officers:

A business' balance sheet is a snapshot of its financial picture on a given day. A balance sheet shows the financial position of a company by indicating the resources that it owns, the debts that it owes and the amount of the owner's equity in the business. One side of the balance sheet totals up assets, moving from most liquid (cash) to least liquid (plant and equipment or goodwill). The other side of the balance sheet lists liabilities in order of immediacy. Remember that assets must equal liabilities plus shareholder's/owner's equity. The balance sheet, along with the income statement, is an important tool for analyzing the financial health of a company. Using the balance sheet, compare current assets and current liabilities to assess equity; and consider hidden value in assets.

IRM § 5.15.1.19 (11-17-2014) *Assets* explains: "proper valuation of the assets is necessary to determine the total collection potential of the taxpayer."

IRM § 5.15.1.22 (10-02-2012) *Income-Producing Assets*

When determining the reasonable collection potential, an analysis is necessary to determine if certain assets are essential for the production of income. When it is determined that an asset or a portion of an asset is necessary for the production of in-

August 2017

come, it may be appropriate to adjust the income or expense calculation for that taxpayer to account for the loss of income stream if the asset were either liquidated or used as collateral to secure a loan.

Below we review the guidance available to complete Items 16 through 24.

**Item 16
Cash on Hand**

#	IRS Instruction	Other Guidance
16(a)	CASH ON HAND	Include cash that is not in the bank
	<p>Publication 5059 instructs:</p> <p>Enter the amount of cash on hand which includes cash in a safe, cash register and petty cash.</p> <p>If the business has a safe, list the contents.</p>	
16(b)	Is there a safe on the business premises	If the business has a safe, list the contents.

**Item 17
Business Bank Accounts**

#	IRS Instruction	Suggestions for Completion/Practice Tips
17	BUSINESS BANK ACCOUNTS	If the business does not have a bank account, attach an analysis showing how the business bills are paid.
(a)	Publication 5059 instructs:	
-	Enter all accounts, even if there is currently no balance.	The attachment to the Form 433-B should explain that the balance in the account is the balance after all outstanding checks are cleared ; otherwise, the Form 433-B will not be consistent with the bank statements as of the date of the Form 433-B.
(c)	Include online bank accounts, savings accounts, checking accounts, mobile payment accounts and stored value cards such a payroll cards and government benefit cards. Also, list all safety deposit boxes including location, box number and value. Attach a list of contents. Do not enter bank loans.	

August 2017

#	IRS Instruction	Suggestions for Completion/Practice Tips
17	BUSINESS BANK ACCOUNTS	If the business does not have a bank account, attach an analysis showing how the business bills are paid.
(a)	Publication 5059 instructs: Enter all accounts, even if there is currently no balance.	
(c)	Include online bank accounts, savings accounts, checking accounts, mobile payment accounts and stored value cards such a payroll cards and government benefit cards. Also, list all safety deposit boxes including location, box number and value. Attach a list of contents. Do not enter bank loans.	The attachment to the Form 433-B should explain that the balance in the account is the balance after all outstanding checks are cleared ; otherwise, the Form 433-B will not be consistent with the bank statements as of the date of the Form 433-B.

**Item 18
Accounts/Notes Receivable**

IRM § 5.15.1.32 (11-17-2014) *Accounts and Notes Receivable* instructs Revenue Officers:

1. Trade notes and receivables are income or “account receivable” amounts owed to the taxpayer by others. Consider the value of accounts

for purposes of potential enforcement.

2. To determine the value of accounts receivable:

1. When the receivables have been sold at a discount (factored) or pledged as collateral on a loan, apply the provisions of IRC 6323(c) to determine the lien priority of commercial transactions financing agreements. See Legal Reference Guide, IRM § 5.17.2.6.6.1, *Commercial Transaction Financing Agreements*.

2. Determine if the receivable has previously been secured by a lender. Refer to IRC 6323(d), *45-day Period for Making Disbursements*.

3. Examine the age of the receivable. While businesses generally intend to receive payment on these accounts within 30 days, the longer it takes for payment the less likely the business will receive full payment.

4. Examine accounts of significant value from which the taxpayer is not pursuing collection.

5. Examine accounts that are receivables from officers, stockholders or relatives.

3. Careful consideration should be given prior to serving a Notice of Levy on an account receivable when it is

August 2017

determined that liquidation of the receivable would be detrimental to the continued operation of an otherwise profitable business.

4. Secure a complete listing of accounts receivable:

1. Name, address and telephone number
2. Amount due
3. Age and date due

5. Consider federal contracts for potential enforcement. Identify the federal payment source and determine if there is a specific payment schedule. Secure a copy of the contract/agreement if needed.

#	IRS Instruction	Suggestions/Other
18	ACCOUNTS/NOTES RECEIVABLE	The Taxpayer Bill of Rights incorporated by IRC § 7803 (a)(G) includes "The Right to Privacy."

#	IRS Instruction	Suggestions/Other
18	<p>Publication 5059 instructs:</p> <p>Enter the name, address and phone number of the receivable.</p> <p>Include e-payment accounts and factoring companies, as well as any bartering or online auction accounts.</p> <p>Include Federal Government Contracts. List all contracts separately, including contracts awarded, but not started.</p> <p>Include attachments if additional space is needed.</p>	<p>The Taxpayer Advocate defines the Right to Privacy follows:</p> <p>Taxpayers have the right to expect that any IRS inquire, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.</p> <p>IRC § 7602© Notice of contact of third parties provides that:</p> <p>An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.</p>

August 2017

#	IRS Instruction	Suggestions/Other
18		Receivables and values change daily. Many revenue officers will accept a receivable list that values the receivable as set forth in IRM § 5.15.1.32 (11-17-2014) without all of the detail required by that section.
18f	Total Outstanding Balance	Total from attachment

**Item 19
Investments**

#	IRS Instruction	Other
19	<p>INVESTMENTS</p> <p>Publication 5059 instructs:</p> <p>Include any investments including stocks, bonds, mutual funds, stock options, certificates of deposit, and commodities such as gold, silver copper, etc.</p>	<p>IRM § 5.15.1.25 (Oct. 02, 2012) provides that: "Financial securities are considered an asset and their value should be determined."</p>

**Item 20
Available Credit**

Publication 5059 instructs:

Include all lines of credit and credit cards issued by a bank, credit union, or savings and loan (MasterCard, Visa, overdraft protection, etc.).

#	Item #/Question	Suggestions for Completion/Practice Tips
20	<p>AVAILABLE CREDIT</p> <p>Include all lines of credit and credit cards.</p>	<p>The IRS may request that the taxpayer borrow to pay his or her tax debt.</p> <p>In evaluating borrowing, the Tax Professional must evaluate the Form 433-B and ask "when does borrowing become stealing?" Borrowing on credit lines to pay delinquent liabilities should be consistent with the taxpayer's ability to repay the creditor.</p>

**Items 21, 22 and 23
Real Property, Vehicles and Business
Equipment and Intangible Assets**

Publication 5059 instructs:

Current Fair Market Value – Indicate the amount you could sell the asset for today.

Date of Final Payment – Enter the date the loan or lease will be fully paid.

August 2017

**Item 21
Real Property**

Publication 5059 instructs:

List locations of all property that is leased, owned or is being purchased by the business. If the business is leasing or renting, list lessor or landlord. If the business is purchasing, list lender. Include attachments if additional space is needed.

IRM § 5.15.1.30 (Oct. 02, 2012) instructs that: [i]n certain situations, the equity in real estate should be pursued to full pay or reduce the tax liability. In these situations, the taxpayer should be asked to secure a loan, or sell the real estate.

#	Question	Suggestions for Completion/Practice Tips
21a	Property Description	
	Purchase/Lease/Date	
	Current Fair Market Value	IRS generally accepts the low end from www.Zillow.com and / or www.Trulia.com. These reports should be attached. Your schedule should remind the Revenue Officer that these values do not account for costs incurred in a sale (e.g., broker's commissions and other closing costs).

#	Question	Suggestions for Completion/Practice Tips
	Current Loan Balance	Attach documents verifying the monthly payment and payoff amount. IRM § 5.15.1.20 (10-20-2012) Determining Equity in Assets: Encumbrances can be verified using internal sources, online research and external sources. See IRM § 5.15.1.5, Internal Resources and Online Research, and IRM § 5.15.1.6, External Sources.
	Monthly Payment	
	Date of Final Payment	
	Equity	Most business with tax debt cannot borrow. As stated above, the IRM § requires the Revenue Officer to request that the taxpayer use the equity in real property to full pay or reduce the tax liability. A request for a collection alternative will be more credible if the taxpayer attaches a letter showing the taxpayer attempted to borrow against the equity and was denied.

August 2017

**Item 22
Vehicles, Leased and Purchased**

#	Question	IRS	Instructions for Completion/ Practice Tips
22	Vehicles, Leased and Purchased These line request the Year, Make/ Model, Mileage, License/Tag Number, Vehicle Identification No. (VIN), and Lendor/ Lessor.	IRM § 5.8.5.3.1.3 (09-30-2013) Verify monthly payment and payoff amount. IRM § 5.8.5.12, <i>Motor Vehicles, Airplanes and Boats.</i>	<i>Publication 5059:</i> List all vehicles owned and leased (cards, boats, Rvs, motorcycles, all-terrain and off-road vehicles, trailers, mobile homes, etc.) If the business is leasing, list the lessor. If the business is purchasing, list the lender. Include attachments if additional space is needed.
(a)			List only the vehicles titled in the business's name on Form 433-B. The vehicles titled in personal names should be listed on Form 433-A.

#	Question	IRS	Instructions for Completion/ Practice Tips
			Use www.KBB.com to determine the value of any vehicles.
22(e)	Total Equity		

August 2017

**Item 23
Business Equipment and Intangible Assets**

IRM § 5.15.1.34 (10-02-2012) *Machinery and Equipment:*

To determine the value of business assets:

1. For automobiles and trucks, consult trade association guides, such as Blue Books, Automobile Dealers, newspapers, etc.
2. For specialized machinery and equipment, consult a trade association guide, secure an appraisal from a knowledgeable and impartial dealer, or contact the manufacturer.
3. Contact the Property Appraisal and Liquidation Specialist (PALS) to assist with the valuation of property.
4. For especially difficult valuation problems where no other resource will meet the need, follow local procedure to request the services of an IRS valuation engineer.

#	Item #/ Question	Instructions for Completion/ Practice Tips	
23	<p>BUSINESS EQUIPMENT AND INTANGIBLE ASSETS</p> <p>Include all machinery, equipment, merchandise inventory, and other assets in 23a through 23d. List intangible assets in 23e through 23g (licenses, patents, logos, domain names, trademarks, copyrights, software, mining claims, goodwill and trade secrets.)</p>	<p>Publication 5059 instructs:</p> <p>List of all machinery, equipment merchandise inventory, and other assets in 23a through 23d.</p> <p>List intangible assets in 23e through 23g. Intangible assets include licenses, patents, logos, domain names, trademarks, copyrights, software, mining claims, goodwill and trade secrets.</p> <p>Include attachments if additional space is needed.</p>	<p>IRM § 5.15.1.37 (10-02-2012) <i>Intangible Assets</i> provides guidance on the impact of intangible assets.</p>

August 2017

**Item 24
Business Liabilities**

Do not complete lines 47, 48 and 49
(For IRS use only).

Publication 5059 instructs:

Include notes and judgments not listed previously on this form (e.g., if equipment is secured by a note and the note was listed in Item 23, it would not be included in Item 24).

IRM § 5.15.1.3 (11-17-2014) *Verifying Financial Information* instructs:

7. Information provided on the CIS, as it pertains to income, assets, and expenses, should match the information provided on other financial statements, tax returns and schedules, and other sources used to verify assets or encumbrances. Discrepancies must be addressed and documented in the case history.

**Section 5
Monthly Expense Statement for Business**

IRM § 5.15.1.14 (10-02-2012) *Business Financial Statements* explains:

4. The Income Statement or Profit and Loss Statement is a financial statement that shows revenue, expenses and profit during a given accounting period, usually either a quarter or a year. Along with the balance sheet, the income statement is a tool used to assess the health and prospects of a company. The income statement shows revenue and expenses, including operating expenses, depreciation, income taxes and extraordinary items. Using the income statement, a taxpayer or revenue officer can quickly figure cash flow, profit margins and other important indicators of how the business is doing.

Most importantly, IRM § 5.15.1.15 (10-02-2012) *Cash Flow Analysis* provides:

1. Taxpayers may substitute business financial statements for the income and expense section of the 433-B, Collection Information for Businesses.

To avoid the potential for inconsistencies, most business taxpayers elect to substitute business financial statements for this section of Form 433-B and explain any adjustments in an attachment. The charts below are intended to give guidance to those taxpayers that elect to complete Section 5 of the Form 433-B.

Publication 5059 instructs:

Identify a time period that reflects your typical business income and expenses (e.g., 3, 6, 9 or 12 months). Complete the average monthly income/expense statement for the stated time period. The business information should reconcile with your business profit and loss statement.

August 2017

#	Item	Instruction from Publication 5059	Other
25	Gross Receipts from Sales / Services	Enter the amount of money received by the business from all sources for the goods sold or services rendered. This figure is the total before any costs or expenses are subtracted.	Most taxpayers substitute their financial statements in lieu of completing lines 25 through 46.
26	Gross Rental Income	Enter the amount of gross rents which represent payments received for the use of business assets and may be in the form of monies, services, assets, bartering or any combination of these.	IRM § 5.15.1.18 (10-02-2012) <i>Determining Business Income</i> explains: Gross rents disclose the existence of an asset. Determine the asset and the payor, then levy on the receivable or seize the asset if

#	Item	Instruction from Publication 5059	Other
			If necessary.
27	Interest Income	Enter the amount of interest received by the business from loans, notes, mortgages, bonds, bank deposits, tax refunds, etc.	IRM § 5.15.1.18 (10-02-2012) <i>Determining Business Income</i> explains: The reported interest income discloses the source that generated the income. Examples include cash, savings accounts and bonds.
28	Dividends	Enter the amount of dividends received by the business from U.S. foreign sources.	IRM § 5.15.1.18 (10-02-2012) <i>Determining Business Income</i> explains: These funds may be investment or security accounts; or, they may be reinvested in the entity paying them.

August 2017

#	Item	Instruction from Publication 5059	Other
29	Cash Receipts	Include cash received from customers that is not included in come items 25 through 28.	IRM § 5.15.1.16 (11-17-2014) <i>Making the Collection Decision:</i> When analyzing and verifying the financial date, be alert to any indications of fraud. If indications of fraud are identified, refer to IRM § 25.1, Fraud Handbook or contact the Fraud Referral Specialist (FRS) before further contact with the taxpayer or representative.

**Total Monthly Business Expenses
Items 36 to 48**

Publication 5059 instructs:

Enter total monthly expenses for the business. Allowable business expenses are the cost of carrying on a business or trade. Generally, they must be necessary for the operation of the business. Do not include “non-cash” expenses, such as depreciation, bad debts or depletion. Interest cannot be deducted as a separate expense if it is already included in any other allowable installment payments.

IRM § 5.15.1.3 (11-17-2014) *Verifying Financial Information* instructs:

8. When analyzing expenses for a business taxpayer, ensure that business expenses are not included under personal expenses. Compare Form 433-A and Form 433-B to income tax returns to verify assets and income or analyze bank deposits.

10. Compare income to expenses. If expenses exceed income, ask the taxpayer probing questions to determine alternate sources of income that may be supplementing his/her income.

#	Item	Instruction from Publication 5059	Other
30	Other Income	Other income represents items that do not fit into one of the specific categories on Form 433-B or listed in other income on the business tax return.	

August 2017

#	Item #/ Question	IRS Instruc- tion	Other
36	Materials Purchased	Materials are items directly related to the productions of a product or service.	Most taxpayers substitute their financial statements in lieu of completing lines 25 through 46.
37	Inventory Purchased	Goods bought for resale.	
38	Gross Wages & Salaries		This amount should be consistent with Forms 941 filed by the business. If necessary.

#	Item #/ Question	IRS Instruc- tions	Other
39	Rent		
40	Supplies	Supplies are items used to conduct business and are consumed or used up within one year. This could be the cost of books, office supplies, professional equipment, etc.	
41	Utilities/ Telephone	Utilities include gas, electricity, water, oil, other fuels, trash collection, telephone, cell phone and business internet.	
42	Vehicle/ Gasoline Oil		If a vehicle is used part business/part personal, only the business portion should be listed.

August 2017

#	Item #/ Question	IRS Instruc- tions	Other
43	Repairs and Maintenance		
44	Insurance		
45	Current Taxes	Real estate, state, and local income tax, excise, franchise, occupational, personal property, sales and the employer's portion.	Include real estate, excise, franchise, occupational, property, sales and employer's portion of employment taxes.
46	Other Expenses		Other expenses may include payments for delinquent state and local (county or municipal) tax liabilities.
48	Total Expenses		Deductions may not necessarily be allowed as an expense in determining the ability to pay—only actual cash expenses are used.

#	Item #/ Question	IRS Instruc- tions	Other
			The non-cash expenses should be removed from the analysis.

Certification and Signature

Publication 5059 provides:

The partner, corporate officer, or LLC member must sign Form 433-B, Collection Information Statement for Businesses, under penalties of perjury. The signature certifies that the information is accurate and complete. Any changes made after signing the form should be initialed and dated.

IRM § 5.8.1.13.8 (05-05-2017) *Signatures* provides that since the CIS requires certification under penalty of perjury, the taxpayer(s), and not the representative, must personally sign the Form 433-B.

IRM § 25.1.8.4 (10-27-2016) *Fraudulent Offers In Compromise* explains:

1. IRM § 5.8.10.10, Indicators of Taxpayer Fraud, provides a comprehensive discussion of indications of potential fraud warning signs most identifiable during an interview relating to Offers in Compromise.
2. When indicators of potential fraud arise during an offer investigation, the offer specialist (OS) will follow guidelines outlined in IRM § 5.8.4.18, *Potential Fraud Referrals*."

Only an owner, officer, partner or LLC member should sign the form. The person signing the form, signs under penalties of perjury that the form is accurate and complete. The Courts have sustained criminal tax prosecutions based on the submission of false IRS Forms 433. See, e.g., *United States v. Holroyd*, 732 F.2d 1122, 1127-1128 (2d Cir. 1984).

The Attachment

Pursuant to IRC § 6330, the denial of a taxpayer’s proposed collection alternative is reviewable by the IRS Office of Appeals. Section 6330(c)(3)(C) requires Appeals to evaluate:

whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

In addition to the taxpayer’s financial condition, IRM § 5.15.1.16 (11-17-2014) *Making the Collection Decision* requires the Revenue Officer to consider:

Past compliance history — How long has the taxpayer been in business? Is there a history of non-compliance?

Reason for non-compliance — Was the current tax problem related to a specific, identifiable event, e.g. loss of a key supplier, failure of a primary customer, impact from a natural disaster, etc.? Is there reason to believe the taxpayer is recovering from this event?

Current compliance — Is the taxpayer

current and has the cause of past non-compliance been corrected?

* * *

Impact — What impact will the case resolution being considered have on third parties?

See also IRM § 8.22.9.6.4 (Nov. 13, 2013); *Budish v. Commissioner*, T.C. Memo 2014-239.

The attachment to the Form 433-B should tell the taxpayer’s story, explain the impact of enforced collection on the taxpayer and innocent third parties and ask the Revenue Officer to balance the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

CONCLUSION

The collection information statement is an important part of the resolution process. A well prepared and documented collection information statement (i.e., Forms 433-B and 433-B(OIC) is the key to whether the IRS (a) classifies an account currently not collectible, (b) enters into an installment agreement, (c) approves an offer in compromise, or (d) withdraws a notice of federal tax lien. An inaccurate Form 433-B can cause the premature assertion of trust fund recovery penalties and or criminal prosecution. Taxpayers and tax professionals preparing Form 433-B must perform financial due diligence before submitting the form to the IRS. They should also remember to tell the taxpayer’s story.

If you have any questions about completing collection information statements and requesting collection alternatives feel free to

August 2017

contact Frank Agostino, Esq. or Caren Zahn, EA.

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Streamlined Installment Agreements and One-Year Rule

The One-Year Rule assists clients when it appears they do not qualify for a streamlined installment agreement because of the amount of liability and time given to full pay.

The period of time given to fully satisfy an assessed liability in a streamlined installment agreement is 72 months (Six-Year Rule), or full payment by the Collection Statute Expiration Date, whichever is earlier. The amount owed must be less than \$50,000. In some cases taxpayers cannot full pay their account within six years. In those cases taxpayers may be eligible for an installment agreement of up to one year with a monthly amount less than the IRS would generally require to allow the taxpayer time to modify or eliminate excessive necessary expenses. The monthly installment amount will increase after one year to the amount necessary to satisfy the streamlined installment agreement time and amount requirements (Six-Year Rule). The taxpayer does *not* have to qualify for the streamlined agreement (Six-Year Rule) in order to apply the One-Year Rule. The One-Year Rule is not applicable to corporations, partnerships, LLCs (where the LLC is identified as the liable taxpayer), or to any business expenses. The One-Year Rule is also not applicable for BMF liabilities owed by in-business sole proprietors or LLCs where the individual owner is identified as the liable taxpayer.¹ See IRM § 5.14.1.4.1 (01-01-2016) *Six-Year Rule and One-Year Rule*. Note: For non-streamlined installment agreements (balances greater than \$50,000) the one-year-rule *may* still apply.

We may soon see new criteria because the IRS is testing expansion of the streamlined installment agreement program that includes extending time to pay from 72 months to 84 months and increasing the maximum assessed liability from \$50,000 to \$100,000.00.² (See IRS, Streamlined Processing of Installment Agreements, <https://www.irs.gov/businesses/small-businesses-and-self-employed/streamlined-processing-of-installment-agreements> (Oct.19,

UPCOMING UNITED STATES TAX COURT CALENDAR CALLS

All Calendar Calls Are Held at:

Jacob K. Javits Federal Building
26 Federal Plaza
Rooms 206, 208
New York, NY 10278

September 25, 2017

October 23, 2017

November 13, 2017

November 27, 2017

December 04, 2017

August 2017

Footnotes:

1. See IRM § 5.14.1.4.1 (01-01-2016) *Six-Year Rule and One-Year Rule*.
2. See IRS, Streamlined Processing of Installment Agreements, <https://www.irs.gov/businesses/small-businesses-self-employed/streamlined-processing-of-installment-agreements> (Oct.19, 2016).

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NYCLA - U.S. Tax Court Calendar Call Pro Bono Program
Calendars for September, October, November and December 2017

Date	Presiding Judge	RSVP to Volunteer/Observe
September 25, 2017	The Honorable Juan F. Vasquez	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-9252017-judge-juan-f-vasquez-tickets-33546944815
October 23, 2017	Special Trial Judge Daniel A. Guy, Jr.	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-10232017-special-trial-judge-daniel-a-guy-jr-tickets-33547303889
November 13, 2017	The Honorable Joseph H. Gale	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-11132017-judge-joseph-h-gale-tickets-33547371090
November 27, 2017	The Honorable John O. Colvin	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-11272017-judge-john-o-colvin-tickets-33547543606
December 4, 2017	The Honorable Carolyn P. Chiechi	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-12042017-judge-carolyn-p-chiechi-tickets-33547585732

The U.S. Tax Court Calendar Call Pro Bono Program provides counseling to self-represented taxpayers seeking advice in the area of tax law at calendar call sessions of the U.S. Tax Court conducted in New York. Self-represented taxpayers are advised by volunteers while appearing pro se before the U.S. Tax Court.

Volunteers may be asked to consult with pro se petitioners regarding the merits of their cases and evaluate any settlement proposals from the Internal Revenue Service, act as a communicator or mediator between the parties to assist in resolving the case and provide procedural advice to pro se petitioners who decide to proceed to trial. Individuals thinking of volunteering for the program and volunteers who are new to the program who would like to observe the calendar call session and client counseling are encouraged to attend.

For those of you interested in volunteering or in the Tax Court, PLEASE feel free to attend the calendar, observe and give moral support to the volunteers and unrepresented taxpayers.

Volunteers should arrive at the court (Rooms 206/208, Jacob K. Javits Federal Building, 26 Federal Plaza) and check in with NYCLA no later than 9:30 AM. Please allow sufficient time to clear the building's security screening.




TAX CONTROVERSIES INVOLVING THE CASH BUSINESS

Three (3) Free NY & NJ CLE¹, CPE², and EA CE Credits

Tax Professionals that attend the seminar are encouraged to accept a pro bono tax controversy case assignment from a NJ Low-Income Tax Clinic, VITA, an ABA-sponsored Tax Court Pro Bono program or Taxpayers Assistance Corporation.

WHEN	WHERE
Tuesday, September 5, 2017 6:00 PM – 9:00 PM	Bergen Community College Ciarco Learning Center 355 Main Street Room 102/103 Hackensack, NJ 07601

Topics Include

The Books and Records Required to be Maintained by the Cash Business	Employment Tax & the "Off the Books" Employee
Indirect Methods of Proof Used by the Government and the Taxpayers' Defenses to Arbitrary Determinations	Sales Tax and Unreported Cash Sales
Best Practices of Income and Expense Reconstruction	Understanding Statistic Sampling
The Cash-T & IRS Form 4822, Statement of Annual Estimated Personal and Family Expenses	Best Practices for the Eggshell Examination
Defending Exams Resulting From Form IRS 1099-K	Criminal v Civil Tax Investigations of Cash Businesses
Information Reporting Re Cash Receipts and Expenses	The Preparer's Liability for the Client's Unreported Cash
RSVP @ http://conta.cc/2iWyogg	 APPROVED CONTINUING EDUCATION PROVIDER

¹ This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law. This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.

² Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD. #CFP CE Credit will be provided.



NYCLA'S NON-TRADITIONAL TAX ADVOCACY

featuring

Nina E. Olson, the National Taxpayer Advocate

THREE (3) FREE NY & NJ CLE*, CPE†, and EA CE CREDITS


Tax Professionals that attend the seminar are encouraged to accept a pro bono tax controversy case assignment from NYCLA, an ABA-sponsored Tax Court Pro Bono program or a NY or NJ Low-Income Tax Clinic

WHEN	WHERE
Tuesday, September 26, 2017 Registration & Sign-In @ 8:30AM Seminar 9:00 AM to 12:00 PM	JONES DAY 250 Vesey Street New York, NY 10281-1047

This seminar introduces the volunteers to nontraditional advocacy in tax controversy case, including

1. when & how to request assistance from the Taxpayer Advocate Service (TAS),
2. when & how to complain to the Taxpayer Inspector General for Tax Administration (TIGTA complaint);
3. when & how to use of the traditional media and social media in tax cases, and
4. when & how to complain to elected officials (i.e., how and when constituent services offices can help).

OTHER PANELISTS INCLUDE

Frank Agostino, Esq., AGOSTINO & ASSOCIATES Rita Chan, VICE MEDIA Kathy Keneally, Esq., JONES DAY Krystofor Proev, TIGTA	David Voreacos, BLOOMBERG Matthew Weir, TIGTA Kaja Whitehouse, NEW YORK POST
RSVP @ http://conta.cc/2whMDDT Feel free to contact Jeff Dirmann at Jdirmann@AgostinoLaw.com with questions.	 APPROVED CONTINUING EDUCATION PROVIDER

* This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law. This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.

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