

# CIVIL TAX PROCEDURE

**SECOND EDITION**

**DAVID M. RICHARDSON**

*Professor of Law  
Frederic G. Levin College of Law  
University of Florida*

**JEROME BORISON**

*Associate Professor of Law  
Sturm College of Law  
University of Denver*

**STEVE JOHNSON**

*E.L. Wiegand Professor of Law  
William S. Boyd School of Law  
University of Nevada, Las Vegas*

**GRADUATE TAX SERIES**



LexisNexis™

**Library of Congress Cataloging-in-Publication Data**

Richardson, David M. (David Maurice), 1939-

Civil tax procedure / David M. Richardson, Jerome Borison, Steve Johnson.

p. cm.

Includes index.

ISBN 978-1-4224-1756-0 (hardbound)

1. Tax administration and procedure — United States. 2. Taxation — Law and legislation — United States. 3. Income tax — Law and legislation — United States. I. Borison, Jerome, 1946- II. Johnson, Steve, 1949- III. Title.

KF6300.R53 2007

343.7304--dc22

2007038857

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2008 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Offices

744 Broad Street, Newark, NJ 07102 (973) 820-2000

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

701 East Water Street, Charlottesville, VA 22902-7587 (434) 972-7600

[www.lexis.com](http://www.lexis.com)

(Pub.03639)

LexisNexis  
GRADUATE TAX SERIES

**Series Editor**

Paul L. Caron

*Charles Hartstock Professor of Law  
Director, Faculty Projects  
University of Cincinnati College of Law*

**Board of Editors**

Ellen P. Aprill

*Associate Dean for Academic Programs  
John E. Anderson Chair in Tax Law  
Past Director, Graduate Tax Program  
Loyola Law School*

Elliott Manning

*Professor of Law  
Faculty Chair, Graduate Program in Taxation  
University of Miami School of Law*

Philip F. Postlewaite

*Professor of Law  
Director, Tax Program  
Northwestern University School of Law*

David M. Richardson

*Professor of Law  
Past Director, Graduate Tax Program  
University of Florida College of Law*





## PREFACE

The Lexis Graduate Tax Series grew out of the recognition that the goals of a graduate tax program are different than those of J.D. tax courses. J.D. tax courses are introductory in nature. Although many J.D. tax courses provide a good overview of their targeted areas of law, time rarely permits either in-depth analysis of complicated Code or Regulation provisions, or the application of those provisions to real life problems. In essence, J.D. tax courses provide students a foundation in the core statutory and judicial concepts.

LL.M. programs build on, and significantly expand, students' knowledge of the Code, Regulations, and judicial doctrines, and enhance their Code and Regulations reading skills. LL.M. programs require students to concentrate on the primary sources of the law, the Code and Regulations. Students are expected to improve their ability to read, comprehend, and apply the Code and Regulations, and they do so by working on complex fact patterns that raise difficult legal issues.

The different goals of graduate tax programs and J.D. tax courses suggest that the course materials used in those programs should also be different. Students in LL.M. programs need to move away from the standard, J.D., "author tells all," casebooks, which contain extensive quotations from cases and other secondary sources, and toward emphasis on the primary sources of the law. By applying the Code and Regulations to real-life fact patterns, students gain the confidence necessary to rely on the Code and Regulations as their main source of information.

An important, but different, driving force behind the development of specially designed course materials for LL.M. programs is the dramatic expansion of the quantity and complexity of tax law over the past forty or fifty years. The current commercially available versions of the Code and Regulations are roughly four times as large as their 1970 predecessors. Over that period, class time dedicated to tax has grown very little. Covering much more material in the same period of time has led authors to write longer J.D. textbooks, many of which exceed one thousand pages. Such comprehensive coverage leads to extended textbook assignments. This both forces and permits the students to bypass the assigned Code and Regulations provisions and spend their available time answering problems by reference solely to the author's explanation of the law in the textbook. Tax casebooks written primarily for the larger J.D. market that purport to be suitable for both J.D. and LL.M. tax courses, also lean towards comprehensive explanations of the Code and

Regulations, which tend to deflect students away from the primary sources.

Books in the Graduate Tax Series are designed to be read with, and complement, the study of the Code and Regulations. Although some chapters of books in the Series provide detailed explanation of the topic, more frequently the chapters provide a general, normally brief, overview of the topic together with more complete explanations of the applicable portions of the Code and Regulations that are particularly difficult to understand. Also, many of the problems are based on situations encountered in practice or found in decided cases. Although some of the questions either state or disclose the issues and even the applicable statutes, many of them require analysis of a given set of facts to first determine and then resolve the critical issues.

Students need to recognize that shifting the emphasis to primary sources and practice-based problems, which is made possible by reducing the time spent reading and analyzing cases and other secondary sources, increases the responsibility of the student for his or her education. It is harder to master a complex statute or regulation by studying it than it is to have someone explain it. It is also harder to identify the issues and applicable law from a group of facts than it is to answer short problems that identify the issue and the applicable law.

Students in an LL.M. program should be able to handle the higher level of personal responsibility. Furthermore, if one accepts the premise that learning a core set of rules and developing Code and Regulations reading skills are equally important goals, it is clear that students must dedicate a significant portion of their study time to the primary sources of the law.

Like all other areas of law, tax law has both substantive and procedural components. This book addresses the procedures by which taxpayers' liabilities are determined and collected. These procedures include the filing of returns, the administrative and judicial mechanisms for resolving disputes about how much tax is owed, the administrative and judicial mechanisms by which unpaid taxes are collected after the extent of the liability has been determined, and penalties for noncompliance with tax rules. The focus of this book is on civil tax procedure. Although criminal tax rules are occasionally mentioned, this book does not examine them in detail.

A great many of the rules of civil tax procedure were created or significantly revised by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. Throughout the

book, this legislation is referred to as the 1998 Reform Act. Unless otherwise indicated, references to sections in this book are to the Internal Revenue Code of 1986 as amended through December 31, 2004.

In this course, students should focus on the assigned reading materials, principally sections of the Internal Revenue Code and the Regulations promulgated under it. For additional information and as aids in practice, there are numerous books and articles exploring in greater depth the topics addressed in this book. Some of the best are the current editions of: Jerome Borison (ed.), *Effectively Representing Clients Before the “New” IRS* (3 volumes); Michael Saltzman, *IRS Practice and Procedure*; and William D. Elliott, *Federal Tax Collections, Liens, and Levies*.

David Richardson would like to express his appreciation for the Summer Research Grants provided by the Frederic G. Levin College of Law at the University of Florida that helped make this book possible. He thanks Walter E. Afield, Ashley D. Money, Jacqueline K. Queener, and Ryan M. Schwartz, graduates of the University of Florida tax program, and Daniel A. Wolf, a J.D. student at the University of Michigan Law School, all of whom worked on the book. Most of all, he thanks his wife Regina for putting up with the many distractions associated with the evolution of the Lexis Graduate Tax Series and writing of this book.

Jerome Borison wishes to thank his super family—Meg, Spencer and Georgia—for giving him only a modestly tough time about the hours and hours spent in the basement office working at the computer on this book. Fortunately, he did not have to miss any soccer, baseball, softball, tennis, skiing, basketball, piano or choir activities or performances to do it.

Steve Johnson is grateful for the financial support of the E.L. Wiegand Foundation and the William S. Boyd School of Law, University of Nevada, Las Vegas. He also is grateful to Evelyn Johnson, Susan Stabile, Monica Miller, Cynthia Sawyers, Dick Morgan, Lauren Robel, Bill Popkin, John Sexton, and Lisa Goldberg for their contributions to his growth as a scholar and a person.





## **ACKNOWLEDGMENTS**

Portions of this book are derived from Jerome Borison, *Effectively Representing Your Client Before the “New” IRS* (3d Ed.). The authors wish to thank the American Bar Association Section of Taxation, which has kindly granted permission for its use.



## TABLE OF CONTENTS

<b>Chapter 1: STRUCTURE OF TAX ADMINISTRATION AND SOURCES OF TAX LAW</b> .....	1
I. INTRODUCTION .....	1
II. ROLES OF THE THREE BRANCHES .....	1
A. Congress .....	2
B. Executive Branch .....	5
1. Treasury Department .....	5
2. IRS .....	6
3. Department of Justice .....	11
C. Judicial Branch .....	12
1. Types of Tax Cases .....	13
2. Courts .....	14
3. Appeals .....	17
III. ADMINISTRATIVE SOURCES AND AUTHORITIES IN TAX .....	17
A. Regulations .....	17
B. Revenue Rulings .....	19
C. Revenue Procedures .....	20
D. Notices and Announcements .....	21
E. Other Published IRS Positions .....	21
F. Private Letter Rulings .....	21
G. Determination Letters .....	23
H. Technical Advice Memoranda .....	23
I. Government Manuals .....	24
J. Other Government Sources .....	25
IV. SOME ISSUES AS TO TAX AUTHORITIES .....	25
A. Deference to Regulations Generally .....	25
B. Deference to Particular Types of Regulations .....	27
C. Deference to Lower-Level Administrative Authorities ...	28
D. Regulations Changing Case Law .....	29
E. Use of Private Letter Rulings .....	30
F. Retroactivity and Prospectivity .....	31
G. Governmental Inconsistency .....	31
H. Weight of Tax Court Decisions .....	32
Problem .....	33

<b>Chapter 2: REPORTING OBLIGATIONS</b> .....	41
I. INTRODUCTION .....	41
II. THE ELECTRONIC FILING INITIATIVE .....	43
III. RECORD KEEPING .....	46
A. Income Tax Returns .....	47
1. Filing Thresholds .....	47
2. Joint Returns of Income Tax .....	48
B. Estate and Gift Tax Returns .....	49
1. Filing Thresholds—Estate Tax Returns .....	49
2. Filing Threshold—Gift Tax Returns .....	51
C. Information Returns .....	51
1. Information Concerning Persons Subject to Special Provisions—Sections 6031–6040 .....	51
2. Information Concerning Transactions with Other Persons—Sections 6041–6050V .....	52
V. SIGNING AND VERIFYING RETURNS .....	54
VI. TIME AND PLACE FOR FILING .....	56
VII. TIME AND PLACE FOR PAYING TAX .....	59
VIII. EXTENSION OF TIME TO FILE OR PAY .....	61
IX. DISCLOSURE OF REPORTABLE TRANSACTIONS .....	63
Problem .....	66
 <b>Chapter 3: SPOUSAL RELIEF</b> .....	 69
I. INTRODUCTION .....	69
A. Joint Income Tax Return Filed .....	70
B. Amount Due Involves Income Tax .....	71
C. Timely Election .....	71
D. Not Barred by Res Judicata or a Final Administrative Determination .....	72
III. ADDITIONAL REQUIREMENTS IMPOSED TO OBTAIN RELIEF UNDER SECTION 6015(b) .....	73
A. There Must Be an Understatement of Income Tax Attributable to the Other Spouse .....	73
B. The Spouse Seeking Relief Did Not Have Actual or Constructive Knowledge of the Understatement on the Return .....	74
1. Omitted Income Cases .....	75
2. Deduction Cases .....	75

C. It Would Be Inequitable to Hold the Innocent Spouse Liable for the Tax .....	76
IV. ADDITIONAL REQUIREMENTS IMPOSED TO OBTAIN RELIEF UNDER SECTION 6015(c) .....	77
A. IRS Has Burden to Prove the Electing Spouse's Actual Knowledge .....	77
B. Spouse No Longer Married, Separated, or Widowed at Time of Election .....	80
C. Amount of Deficiency Allocated to Other Spouse .....	80
D. Anti-Avoidance Rules .....	81
V. ADDITIONAL REQUIREMENTS IMPOSED TO OBTAIN RELIEF UNDER SECTION 6015(f) .....	82
VI. APPEALING AN ADVERSE DETERMINATION ADMINISTRATIVELY AND JUDICIALLY .....	84
A. Rights of the Nonrequesting Spouse .....	85
B. Can the IRS Attach a New Spouse's Income or Property to Pay the Purported Innocent Spouse's Prior Tax Debts? .....	86
C. Disclosure Issues .....	87
D. Effect of Divorce Decree Allocation of Responsibility for Understatements .....	87
E. Collection Activity and Statute of Limitations Are Suspended .....	88
VIII. CONCLUSION .....	88
Problem 1 .....	88
Problem 2 .....	90
<b>Chapter 4: EXAMINATION OF RETURNS</b> .....	93
I. INTRODUCTION .....	93
II. TAX GAP .....	94
III. SELECTION OF RETURNS FOR EXAMINATION .....	95
IV. TYPES OF EXAMINATIONS .....	98
A. Principal Audit Types .....	98
1. Correspondence Examinations .....	98
2. Office Audits .....	99
3. Field Examinations .....	99
B. Other Audit Types .....	99
C. Special Procedures in Aid of Examination .....	102

V.	AUDIT STRATEGIES AND CHOICES .....	102
	A. Generally .....	102
	B. Extending the Statute of Limitations .....	105
VI.	IRS INFORMATION GATHERING .....	107
	A. Information From the Taxpayer .....	107
	B. Information From Directly Knowledgeable Third Parties .....	111
	C. General Information .....	113
	D. International Information Gathering .....	114
	E. Taxpayer Protections and Defenses .....	115
VII.	INFORMATION GATHERING BY THE TAXPAYER .....	118
	A. Transaction Planning .....	118
	B. Audit and Administrative Appeal .....	119
	C. Means for Compelling Disclosure .....	119
	1. FOIA .....	119
	2. Other Devices .....	121
VIII.	APPEALS OFFICE CONSIDERATION .....	121
	A. Paths to the Appeals Office .....	122
	1. Traditional Path .....	122
	2. Early Involvement .....	123
	3. Docketed Cases .....	123
	4. Unavailability of Appeals Consideration .....	124
	B. Appeals Procedures .....	125
	C. Whether to Seek Appeals Consideration .....	128
	1. Possible Benefits .....	128
	2. Possible Drawbacks .....	129
IX.	CONCLUSION OF EXAMINATION OR ADMINISTRATIVE APPEAL .....	130
	A. No-Change Cases .....	130
	B. Agreed or Partly Agreed Cases .....	131
	C. Unagreed Cases .....	133
	Problem .....	133
<b>Chapter 5: ASSESSMENT PROCEDURES AND</b>		
<b>MATTERS RELATING TO THE STATUTES</b>		
<b>OF LIMITATIONS ON ASSESSMENT .....</b>		
	<b>I. INTRODUCTION .....</b>	<b>135</b>
	<b>II. HOW AN ASSESSMENT IS MADE .....</b>	<b>136</b>

III. TYPES OF EXCEPTIONS TO THE GENERAL STATUTE OF LIMITATIONS RULE . . . . .	137
A. Summary or Automatic Assessments . . . . .	137
B. Deficiency Assessments . . . . .	138
C. Jeopardy or Termination Assessments . . . . .	139
IV. WHAT IS AN “ADEQUATE RETURN” TO START THE STATUTE OF LIMITATIONS? . . . . .	140
A. Signed Under Penalties of Perjury . . . . .	140
B. Proper Form . . . . .	141
C. Proper Filing . . . . .	141
D. Sufficient Information to Calculate the Tax . . . . .	142
V. STATUTE OF LIMITATIONS ON ASSESSMENT—GENERAL RULE . . . . .	142
A. Late Filed Returns . . . . .	143
B. Early Returns . . . . .	143
C. Due Date on Weekend or Holiday . . . . .	143
D. The Mailbox Rule of Section 7502 . . . . .	144
E. Returns Filed Pursuant to an Extension to File . . . . .	145
F. Amended Returns . . . . .	145
G. Penalties and Interest . . . . .	145
VI. EXCEPTIONS TO THE GENERAL STATUTE OF LIMITATIONS RULE . . . . .	146
A. The Taxpayer Agreement/Waiver Exception . . . . .	146
B. The 25% Nonfraudulent Omission of Income Exception . . . . .	146
1. Avoiding the Extended Statute of Limitations By Adequate Disclosure . . . . .	147
2. Avoiding the Extended Statute of Limitations By Referencing the Definition of Gross Income . . . . .	148
C. The Fraud Exception . . . . .	149
D. Suspended Statute of Limitations Due to the Issuance of a Notice of Deficiency . . . . .	150
1. The Taxpayer Assistance Order (TAO) . . . . .	151
2. Bankruptcy . . . . .	151
3. Third-party Summons . . . . .	152
4. Transferee Liability . . . . .	152
5. Partnership Items . . . . .	152
6. Listed Transactions . . . . .	153
7. Others . . . . .	154

VII. PLEADING THE STATUTE OF LIMITATIONS AND BURDEN OF PROOF	154
A. Spotting a Potential Statute of Limitations Issue	154
B. Pleading the Statute of Limitations	154
C. Burden of Proof	155
D. Res Judicata and Collateral Estoppel	156
E. Joint Return Filers	157
Problems	158
<b>Chapter 6: EXAMINATION OF PARTNERSHIPS</b>	161
I. INTRODUCTION	161
A. Overview—TEFRA	161
1. The Unified Proceeding	163
2. The Duty of Consistency	164
3. The Tax Matters Partner	164
4. Excluded Partnerships	166
II. ADMINISTRATIVE PROCEEDINGS	167
A. The Notice of Beginning	167
B. Period for Mailing the Notice of Beginning	168
1. Participation	169
2. Summary Reports	169
3. Settlement—Partnership Items	170
4. Settlement—Affected Items	170
5. Requests for Consistent Treatment	171
III. JUDICIAL REVIEW OF AN FPAA	172
IV. STATUTE OF LIMITATIONS ON MAKING ASSESSMENTS	174
Problems	178
<b>Chapter 7: TERMINATION AND JEOPARDY ASSESSMENTS</b>	183
I. INTRODUCTION	183
II. TERMINATION AND JEOPARDY ASSESSMENT AND LEVY	184
A. Conditions Justifying Expedited Assessment	185
1. Termination Assessment	187
2. Jeopardy Assessment	189
A. In General	190
B. Administrative Phase	192



C. Trial Phase . . . . .	192
D. Post-Trial Phase . . . . .	195
IV. OTHER TAXPAYER PROTECTIONS AND OPTIONS . . . . .	195
A. Abatement . . . . .	195
B. Bond . . . . .	196
C. Stay of Sale . . . . .	196
V. RELATED ASSESSMENT MECHANISMS . . . . .	198
A. Departing Aliens . . . . .	198
B. Tax-Exempt Organizations . . . . .	199
C. Corporate NOL Carrybacks . . . . .	200
D. Passive Foreign Investment Companies . . . . .	200
E. Receiverships and Bankruptcies . . . . .	200
F. Possessors of Large Amounts of Cash . . . . .	201
VI. PRACTICAL DIFFICULTY . . . . .	202
Problem . . . . .	203
<b>Chapter 8: TAX COURT LITIGATION OF DEFICIENCY</b>	
<b>DETERMINATIONS . . . . .</b>	
I. INTRODUCTION . . . . .	207
II. THE “NOTICE OF DEFICIENCY” AND TAX COURT	
JURISDICTION . . . . .	208
A. Meaning of Deficiency . . . . .	209
B. Types of Tax Subject to Deficiency Determinations . . . . .	210
C. Content and Form of the Notice of Deficiency . . . . .	210
D. Mailing the Notice of Deficiency to the Taxpayer’s	
Last Known Address . . . . .	211
E. Timely Filing the Tax Court Petition . . . . .	214
F. Issuance of Additional Deficiency Notices . . . . .	215
G. Tax Court’s Exclusive Jurisdiction . . . . .	215
III. OVERVIEW OF A TAX COURT CASE . . . . .	216
A. Pleadings . . . . .	216
B. Discovery . . . . .	216
C. Settlement . . . . .	217
D. Stipulations . . . . .	217
E. Notice of Calendared Case and Pretrial Orders . . . . .	218
F. Calendar Call, Trial, and Briefs . . . . .	218
G. Decision . . . . .	219
H. Finality of Tax Court Decision . . . . .	221
I. Appeal . . . . .	221
J. Assessment of Deficiency After Decision . . . . .	221

IV. SMALL TAX CASES (“S” CASES) . . . . .	222
V. BURDEN OF PROOF IN TAX COURT . . . . .	223
VI. CHOICE OF FORUM . . . . .	224
A. Breadth of Jurisdiction . . . . .	225
B. Payment Considerations . . . . .	226
C. Precedent . . . . .	226
D. Judge vs. Jury and Legal Argument vs. Equitable Considerations . . . . .	227
E. Concerns About New Issues . . . . .	228
F. Accruing of Interest . . . . .	229
G. Costs of Litigation . . . . .	230
1. Publicity . . . . .	230
2. State Law . . . . .	231
3. Speed of Disposition . . . . .	231
4. Nationwide Jurisdiction . . . . .	231
5. Tax Court’s Exclusive Jurisdiction . . . . .	231
VII. ATTORNEY’S FEES AND COSTS . . . . .	231
Problem . . . . .	233
<b>Chapter 9: OVERPAYMENTS—CLAIMS FOR REFUND . . . . .</b>	<b>237</b>
I. INTRODUCTION . . . . .	237
II. IS THERE AN OVERPAYMENT? . . . . .	239
A. What Constitutes Payment? . . . . .	240
B. The Tax Properly Due . . . . .	241
III. CAN THE TAXPAYER ESTABLISH THE RIGHT TO A REFUND? . . . . .	242
A. The Requirement of a “Claim” . . . . .	242
B. Who Qualifies as a “Taxpayer”? . . . . .	244
C. The Timely Filing Requirement . . . . .	244
1. The Statute of Limitations . . . . .	244
2. Extension of the Statute of Limitations on Filing a Claim for Refund . . . . .	245
3. Special Rules Relating to Income Taxes . . . . .	247
D. The Section 6511(b)(2) Limitation . . . . .	248
IV. CAN A VALID REFUND BE DIVERTED TO ANOTHER USE? . . . . .	249
V. THE REFUND JURISDICTION OF THE TAX COURT . . . . .	251

VI. THE REFUND JURISDICTION OF THE FEDERAL DISTRICT COURTS AND THE COURT OF FEDERAL CLAIMS .....	251
VII. ADMINISTRATIVE ADJUSTMENT REQUESTS .....	252
VIII. TENTATIVE CARRYBACK AND REFUND ADJUSTMENTS .....	254
Problem .....	255
<b>Chapter 10: JUDICIAL AND STATUTORY RULES THAT OVERRIDE THE STATUTES OF LIMITATION .....</b>	<b>259</b>
I. INTRODUCTION .....	259
II. JUDICIAL DOCTRINES .....	261
III. MITIGATION .....	264
A. Error Year Barred by Law or Rule of Law .....	266
B. Determinations .....	267
C. Circumstances of Adjustment .....	269
1. The Equitable Basis for Mitigation .....	269
2. The Original Circumstances of Adjustment .....	270
3. The Choice of Year Circumstances of Adjustment ....	271
D. Conditions Necessary for Adjustment .....	272
1. Section 1311(b)(1): The Original Circumstances of Adjustment .....	272
2. Section 1311(b)(2): The “Choice of Year” Circumstances of Adjustment .....	274
E. Related Parties .....	275
F. Amount and Method of Adjustment .....	276
Problem 1 .....	277
Problem 2 .....	277
Problem 3 .....	278
Problem 4 .....	279
Problem 5 .....	279
Problem 6 .....	280
Problem 7 .....	282
Problem 8 .....	283
Problem 9 .....	284

<b>Chapter 11: PENALTIES</b> .....	287
<b>PART A:</b>	
<b>PENALTIES FOR FAILURE TO FILE OR PAY TIMELY</b>	
I. GENERAL .....	287
II. PREPAYING TAX LIABILITY .....	288
A. Calculating the Penalty .....	290
B. Defenses to the Estimated Tax Penalty .....	290
III. FAILURE TO FILE RETURNS TIMELY .....	292
A. Due Dates, Extensions, and Substitutes for Return .....	292
B. Failure to File Penalty .....	292
C. Fraudulent Failure to File .....	294
IV. FAILURE TO PAY TAX TIMELY .....	295
A. Failure to Pay the Tax Shown as Due on the Return .....	296
B. Failure to Pay Tax Deficiency .....	297
C. Combined Late Filing and Late Payment Penalties .....	297
V. The Reasonable Cause Defense .....	298
A. Situations That Might, Depending on the Circumstances, Qualify as Reasonable Cause .....	299
1. Reliance on a Tax Advisor or Other Third Person .....	299
2. Death, Serious Illness, or Unavoidable Absence .....	299
3. Erroneous Advice From the IRS .....	300
4. Fire, Casualty, Natural Disaster, or Other Disturbance .....	300
5. Service in a Combat Zone .....	301
6. Automatic Reasonable Cause for Late Payment if Payment within 90% of Tax Liability .....	301
B. Situations That Generally Do Not Qualify as Reasonable Cause .....	301
1. Mistake or Forgetfulness .....	301
2. Time and Business Pressures .....	302
3. Invalid Extension .....	302
4. Records Unavailable .....	302
5. Ignorance of the Law .....	303
6. Constitutional Objections and Religious Beliefs .....	303
7. Lack of Funds .....	303
VI. HOW AND WHEN TO DISPUTE “LATE” PENALTIES .....	304
A. Some Filing and Payment Penalties May Be Automatically Assessed and Others Are Entitled to Deficiency Procedures .....	304

1. General . . . . .	304
2. What to Include in the Presentation . . . . .	306
3. Burden of Proof and Burden of Production in Court Proceedings . . . . .	306
VII. CONCLUSION . . . . .	307
Problems . . . . .	308

## PART B:

### ACCURACY-RELATED AND FRAUD PENALTIES

I. INTRODUCTION . . . . .	309
A. Procedures Regarding Assessment . . . . .	309
B. IRS' Burden of Production Relative to the Penalty . . . . .	310
II. CALCULATING THE PENALTY . . . . .	310
A. Stacking of Penalties . . . . .	311
B. What is an Underpayment? . . . . .	312
C. Impact of Filing a "Qualified Amended Return" . . . . .	312
III. THE NEGLIGENCE PENALTY . . . . .	313
A. Negligence . . . . .	314
B. Disregard of Rules and Regulations . . . . .	315
C. Impact of Disclosure on the Section 6662 Negligence or Disregard of the Rules and Regulations Penalty . . . . .	316
IV. THE SUBSTANTIAL UNDERSTATEMENT PENALTY . . . . .	316
V. SUBSTANTIAL VALUATION MISSTATEMENTS . . . . .	319
A. Substantial Income Tax Overvaluations . . . . .	319
B. Substantial Estate and Gift Tax Undervaluations . . . . .	320
VI. THE FRAUD PENALTY . . . . .	320
A. Statute of Limitations and Fraud . . . . .	322
B. Res Judicata and Collateral Estoppel . . . . .	323
VII. THE REASONABLE CAUSE EXCEPTION . . . . .	324
A. Reliance on Advice of Tax Professionals . . . . .	324
B. Special Rules Apply to Charitable Deductions . . . . .	325
VIII. CONCLUSION . . . . .	325
Problem . . . . .	326

## **Chapter 12: INTEREST . . . . . 329**

I. INTRODUCTION . . . . .	329
II. INTEREST ON UNDERPAYMENTS . . . . .	330
A. The Basic Rules . . . . .	330
1. Carrybacks . . . . .	333
2. Suspension of Interest on Underpayments . . . . .	334

a.	Suspension in case of delayed issuance of notice of tax due . . . . .	334
b.	Suspension in case of failure to contact the taxpayer in a timely manner . . . . .	334
c.	Suspension in the case of a presidentially declared disaster or terroristic or military action . . . . .	337
3.	Abatement of Interest Attributable to Unreasonable Errors and Delays by the IRS . . . . .	337
4.	Interest on Penalties, Additional Amounts, and Additions to Tax . . . . .	339
III.	INTEREST ON OVERPAYMENTS . . . . .	340
A.	The Basic Rules . . . . .	340
B.	Modifications to the Basic Rules . . . . .	341
1.	Rules Affecting the Period Over Which Interest Is Paid . . . . .	341
2.	Carrybacks . . . . .	342
IV.	TAX COURT JURISDICTION OVER INTEREST DETERMINATIONS . . . . .	342
Problem	. . . . .	344
 <b>Chapter 13: COLLECTION OF TAX</b> . . . . .		347
I.	INTRODUCTION . . . . .	347
II.	COLLECTION STRUCTURE . . . . .	348
III.	ASSESSMENT . . . . .	349
IV.	LIENS . . . . .	350
A.	Creation and Extent . . . . .	350
B.	Notice of Lien . . . . .	353
C.	Priorities . . . . .	355
V.	ENFORCED COLLECTION . . . . .	357
A.	Administrative Levy . . . . .	357
B.	Administrative Sale . . . . .	359
C.	Judicial Sale . . . . .	361
VI.	ANCILLARY PROCEDURES . . . . .	362
VII.	ADMINISTRATIVE AND HYBRID PROTECTIONS FOR TAXPAYERS AND THIRD PARTIES . . . . .	364
A.	Relief From Tax Liens . . . . .	364
B.	Relief From Levies . . . . .	366
C.	Taxpayer Assistance Orders . . . . .	366

D. Installment Agreements . . . . .	366
E. Offer-in-Compromise . . . . .	367
F. Collection Due Process . . . . .	370
G. Collection Appeals Program . . . . .	372
VIII. JUDICIAL PROTECTIONS FOR TAXPAYERS AND THIRD PARTIES . . . . .	373
A. Judicial Remedies in the Code . . . . .	373
B. Judicial Remedies Under Other Statutes . . . . .	374
C. The Anti-Injunction Act . . . . .	376
D. Non-Starters . . . . .	376
IX. STATUTE OF LIMITATIONS . . . . .	377
X. TAX COLLECTION BY PRIVATE COMPANIES . . . . .	379
Problem . . . . .	380
<b>Chapter 14: THE SECTION 6672 “TRUST FUND RECOVERY PENALTY” . . . . .</b>	<b>383</b>
I. INTRODUCTION . . . . .	383
II. THE EMPLOYER’S COMPLIANCE DUTIES: WITHHOLDING TAXES, MAKING PAYMENT, AND FILING RETURNS . . . . .	385
III. LIABILITY FOR TRUST FUND TAXES PURSUANT TO SECTION 6672 . . . . .	386
A. The “Responsible Person” Element . . . . .	387
1. Defense Strategies with Respect to the Responsible Person Element . . . . .	388
a. Establish that individual did not have status, auty, or authority . . . . .	388
b. The “I was just following orders” defense . . . . .	389
c. Not a responsible person at the time taxes withheld . . . . .	389
B. The “Willfulness” Element . . . . .	390
1. Defense Strategies With Respect to the Willfulness Element . . . . .	391
a. Establish that the responsible person did not act “willfully” . . . . .	391
b. Establish reasonable cause . . . . .	391
c. Establish there were no funds available at the time the person became a responsible person . . . . .	392

IV. PROCEDURES FOR DETERMINING LIABILITY FOR THE PENALTY .....	393
A. Protesting the Proposed Penalty to the Appeals Division .....	394
B. Judicially Appealing an Adverse Determination .....	396
V. PROCEDURES FOR COLLECTING THE PENALTY .....	397
VI. MONITORING THE STATUTE OF LIMITATIONS .....	399
VII. GENERAL STRATEGIES IN SECTION 6672 CASES .....	400
A. Try to Shift Blame to Others .....	400
B. Act to Gain More Time .....	400
C. Evaluate Bringing a Suit for Contribution Against Other Potentially Liable Persons .....	401
D. Designate Payments to Trust Fund Portion of Assessments .....	401
E. Try to Settle the Case Among the Targets .....	402
Problem .....	403
<b>Chapter 15: TRANSFEREE AND FIDUCIARY LIABILITY .....</b>	<b>407</b>
I. INTRODUCTION .....	407
II. CORE IDEA OF NEXUS .....	407
III. SECTION 6901 AND RELATED SECTIONS .....	409
IV. SUBSTANTIVE BASES OF LIABILITY .....	411
A. Fiduciary Liability .....	411
B. Transferee Liability at Law .....	412
1. Contract .....	412
2. Federal Non-fraudulent-conveyance Statute .....	413
3. State Non-fraudulent-conveyance Statute .....	413
C. Transferee Liability in Equity .....	414
1. Actual Fraud .....	415
2. Constructive Fraud .....	416
V. PROCEDURAL ASPECTS .....	417
A. Incorporated Procedures .....	417
B. Statute of Limitations .....	418
C. Burden of Proof .....	419
D. Discovery .....	420
E. Privity .....	421
F. Right to Contribution .....	421



---

VI. EXTENT OF LIABILITY .....	422
VII. ALTERNATIVES TO TRANSFEREE AND FIDUCIARY LIABILITY .....	423
Problem .....	424
<b>Table of Cases</b> .....	TC-1
<b>Table of Statutes</b> .....	TS-1
<b>Table of Secondary Authorities</b> .....	TSA-1
<b>Index</b> .....	I-1

