Requirement for Income Tax Assessment

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I. Introduction

There is no federal income tax liability until the tax has been assessed. The statutory requirement for assessments is classified as Section 6203 of the Internal Revenue Code (26 U.S.C. § 6203), and the controlling regulation is classified as Part 301.6203-1 of Title 26 of the Code of Federal Regulations (26 CFR § 301.6203-1).

Whenever someone billed for federal income taxes makes a request, Internal Revenue Service personnel are required by statute and regulation to provide a true and correct copy of the underlying assessment certificate or certificates. There is no statutory or regulatory authority for substitution of other documents and records. Principal, penalties and interest must be assessed separately for each tax period. However, in recent years disclosure officers, revenue officers and other IRS personnel have categorically refused to provide lawful, procedurally proper assessment certificates. Responses consistently equivocate and evade the issue with claims that instruments such as the Individual Master File, Form 4340, and other documents and computer-generated records provide "presumptive evidence" that assessments have been made. The practice is somewhat on the order of Satan quoting scripture to Jesus. The presumptive evidence rationale is taken out of context and for all practical purposes is a cloak for criminal conspiracy.

This reasonably short paper addresses the fallacy of IRS personnel's failure to comply with requests for assessment certificates. In addition to the memorandum in Section II, 26 U.S.C. § 6203, 26 CFR § 301.6203-1 and relevant portions of cited cases are reproduced in Sections III through VII.

II. Requirements for Assessment Certificates & Disclosure

In *Brafman v. United States of America*, 348 F.2d 863 (5th Circuit, 1967), the court ruled in favor of the plaintiff because an assessment officer did not sign a certificate of assessment:

We **[**5]** do not reach the complex and tantalizing issue of a trust-fund theory of transferee liability for the transfer of a contingent insurance interest. The threshold issue of the validity of the assessment is crucial. We reverse on the ground that a valid assessment against the transferor's estate was not made, because of an assessment officer's failure **[*865]** to sign the certificate of assessment. The Government's claim against the transferee is proscribed by the statute of limitations governing this action.

The assessment certificate was introduced into evidence in the Brafman case. Because the assessment officer didn't sign it, the plaintiff won the suit.

Per 26 CFR § 301.6203-1, the assessment certificate must comply with and include the following:

The summary record of assessment, through support documents, shall,

1. Provide identification of the taxpayer;

2. Identify the character of the tax liability (class or kind);

3. The tax period, if applicable;

4. The amount of the assessment;

5. The amount of the assessment shall be that shown on a return if a return has been filed, or the amount reflected on the supporting list or record if no return is filed; and

6. The date of the assessment is the date the assessment is signed by the assessment officer.

The regulation stipulates that, "If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed."

The statute requires that, "Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment."

Where the statue requires the Secretary to provide a copy of the actual record of assessment (assessment certificate), the regulation must conform. There is no provision

for substituting something other than the actual assessment certificate: therefore, the regulation must be construed to comply with the statutory mandate. Possibly some elements included on the physical assessment certificate that are not required to execute a lawful, procedurally proper summary record of assessment can be redacted, but a copy requested by a taxpayer must include "the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed." Since the date of assessment is the date it is signed, the assessment officer signature is a mandatory element of the assessment certificate that must be provided on request.

A 1987 case decided in the United States District Court for the Middle District of Alabama clouded the assessment certificate issue and the acceptability of secondary evidence such as the Form 4340. However, the case did not change requirements of the statute or the regulation. The *Dixon* case, *infra*, is the one IRS personnel rely on to avoid the mandate for providing assessment certificates when someone requests them.

The case involved a unique situation where litigation to resolve disputed liabilities stretched out over a long enough period that the Internal Revenue Service had supposedly destroyed assessment certificates that established the disputed liabilities. At the time, IRS was only required to keep assessment certificates on file for six years and nine months after they were executed. The assessment certificate in question had allegedly been destroyed prior to the defendants commencing the discovery process. As a consequence, the court accepted secondary evidence that the assessment had been made because the defendants could not produce credible evidence to default the claim.

The case is *United States of America v. Dixon*, 672 F.Supp. 503 (USDC, Middle Dist. Ala., 1987). The judge explained the decision as follows:

The defendant correctly contends that the basis of tax liability is the assessment. For a tax liability to be duly collected, it must be first properly assessed. In order for a tax deficiency to be assessed against a taxpayer, an assessment officer must sign and date a Form 23-C. The defendant rests his argument entirely on the fact that the Government has not been able to produce a copy of or the original of Form 23-C, and has, supposedly, stipulated to its non-existence.

The Government argues that its failure to produce Form 23-C is not fatal to its case. First, the Government states that it stipulated only to the fact that it did not have the original or a copy of Form 23-C in its possession. The Government originally stated that the IRS keeps Form 23-C in its files for only three years, after which it is routinely sent to the Federal Records Center to be stored for thirty years. The Government's attorney has since learned that this is the present procedure, but that in 1979 when the assessment was entered, the IRS kept these forms for six years, nine months, after which they were routinely destroyed. Accordingly, the defendant is correct that the Government does not have in its possession the Form 23-C.

The Government argues, however, that it does not need to produce a copy of Form 23-C in order to satisfy its burden of proof. The Government has attached a copy of a "Certificate of Assessments and Payments" which is signed by an IRS officer certifying that it is a true transcript of all the assessments, penalties, interest, and payments on record for the defendant. This document reflects that on April 15, 1976 the defendant filed a tax return claiming and paying $118,728.45 in taxes. This document also reflects that the defendant was audited and *assessed* a deficiency of $ 159,871.02 in unpaid taxes, $ 7,993.55 in negligence penalty, and $ 34,247.44 in interest on July 23, 1979. n1

Accordingly, this Court accepts the document "Certificate of Assessments and Payments" submitted by the Government as presumptive proof of a valid assessment. Given that the defendant has produced *no* evidence to counter this presumption, the Court is satisfied that the Government has established that the claimed tax liability was properly assessed against the defendant.

In the absence of any direct evidence contradicting the Government's position, the presumption of official regularity controls. "The presumption of regularity supports the official acts of public officers and, in the absence of *clear evidence to the contrary*, courts presume that they have properly discharged their official duties." (Emphasis added) *United States v. Chemical Foundation, Inc., 272 U.S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926)* and *United States v. Ahrens, 530 F.2d 781, 783 (8th Cir. 1976).*

The Dixon downfall was failing to request a copy of the assessment certificate prior to the destruction date. Had they timely requested a copy under authority of 26 U.S.C. § 6203 and 26 CFR § 301.6203-1, failure of IRS personnel to furnish an assessment certificate would have been evidence sufficient to overcome the presumption. In *Hughes v. United States of America*, 953 F.2d 531 (9th Cir.,1991), the court shed light on consequences for failure to request assessment certificates:

In an attempt to establish the first prong of the *Elias* exception, the Hugheses first argue that the IRS failed to make a valid assessment against them so that all current IRS actions to collect from them are unlawful. Thus, the Hugheses argue, the IRS could never succeed on the merits of its claim. We reject this argument.

The IRS submitted Certificates of Assessments and Payments (Form 4340) as proof that assessments had been made. Official certificates, such as Form 4340, can constitute proof of the **[**8]** fact that the assessments actually were made. *See United States v. Zolla, 724 F.2d 808, 810* (9th Cir.) (postal form 3877 certifying mailing of deficiency notices and an IRS form certifying that taxes and failure-to-pay penalties had been assessed are "official certificates" that "are highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notices and assessments were properly made"), *cert. denied, 469 U.S. 830, 83 L. Ed. 2d 59, 105 S. Ct. 116 (1984); United States v. Chila, 871 F.2d 1015, 1017-18* (11th Cir.) (Certificate of Assessments and Payments is presumptive proof of a valid assessment), *cert. denied, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 498 (1989).* n2 Because Form 4340 is an official document which establishes that

assessments were made, and because the Hugheses have presented no contrary evidence indicating that assessments were not made, the Hugheses' argument fails.

Finally, the Hugheses' allegation that the IRS never furnished them with a copy of the record of assessment after being requested to do so also is insufficient to support a claim under § 2410. *26 U.S.C. § 6203* requires that the Secretary provide a taxpayer with a copy of the record of assessment if requested to do so. The Hugheses, however, have presented no evidence that, at the time the various assessments were being made, they ever requested a copy of the record of assessment. **[**20]** Because the Hugheses presented no evidence that they made such a request, they cannot now argue that the IRS failed to follow statutory procedures by neglecting to provide the Hugheses with the required copy. n4 The Hugheses' § 2410 claim fails, therefore, because of the absence of any evidence that the IRS's tax liens were procedurally defective. n5

The controlling statute and regulation impose a duty on the Secretary and his delegate to perform a specific task. On request, IRS personnel responsible for disclosure are required to provide copies of assessment certificates in compliance with the regulatory mandate or verify that they do not exist, i.e., that lawful, procedurally proper assessment certificates were never executed. In order to trigger the duty, the request must be made. IRS must give 10-day notice and demand for payment within a certain time after assessments have been made (26 CFR § 301.6303-1), but assessment certificates are simply filed when and if they are made. If someone does not request copies, assessment certificates are for all practical purposes internal documents. Under current law, they must be maintained on file for ten years and nine months.

The requirement for IRS to provide assessment certificates was cleared up by the court in *Huff v. United States of America*, 10 F.3d 1440 (9th Cir.,1993):

The district court ruled erroneously that count II did not present a procedural challenge to a tax lien. However, count II alleges that the IRS failed properly to assess taxes against the Huffs and that the IRS failed to respond to the Huffs' request for a copy of an assessment under § 6203. *See 26 C.F.R. § 301.6203-1* (1992) (indicating that § 6203 requires the IRS to send the taxpayer "a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed" if the taxpayer makes a request for a copy of the assessment pursuant to § 6203).

Generally, courts have held that IRS Form 4340 provides at least presumptive evidence that a tax has been validly assessed under § 6203. *See Farr, 990 F.2d at 454; Geiselman v. United States, 961 F.2d 1, 5-6* (1st Cir.), *cert. denied, 121 L. Ed. 2d 191, 113 S. Ct. 261 (1992); Rocovich v. United States, 933 F.2d 991, 994 (Fed. Cir. 1991)* ("Certificates of Assessments and Payments [are] routinely used to prove that a tax assessment has in fact been made."); *United States v. Chila, 871 F.2d 1015, 1017-18* (11th Cir.), *cert. denied, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 498 (1989); United States v. Miller, 318 F.2d 637, 638-39 (7th Cir. 1963).* Here, however, the IRS seeks to rely solely on these forms to prove not only that an assessment had been validly made, but that the taxpayer had

been provided with a copy of the assessment as per *Treasury Regulation § 301.6203-1*. We are unaware of any authority indicating that these forms standing alone constitute evidence for the latter proposition. Indeed, no entry on the form contains any information in this regard.

Moreover, in *Farr* this court ruled that Forms 4340 are merely presumptive, not conclusive, evidence that the IRS has complied with § 6203. *Farr, 990 F.2d at 454.* The court ruled that the fact that the taxpayer claimed not to have received certain notices precluded the court from granting judgment against the taxpayer in that case. *Id.* Here, the Huffs similarly claim that they never received any Form 4340 in response to their request for a copy of their assessments. While the government may have proved that Forms 4340 existed for the Huffs for the 1982 tax year, the record is devoid of any indication that the Huffs were provided with copies of these forms in response to their request for a copy of their assessments.

In addition, some of the Forms 4340 provided by the government to support the grant of summary judgment in this case appear defective. Courts have indicated that a Form 4340 is adequate to prove a valid assessment if it lists the "23C date," indicating the date on which the actual assessment was made. n5 *See Geiselman, 961 F.2d at 5-6* (indicating that the government could prove a valid assessment by providing a Form 4340 instead of a Form 23C, the actual assessment forms, because the Form 4340 listed the 23C dates); *Brewer v. United States, 764 F. Supp. 309, 315-16 (S.D.N.Y. 1991)* (holding that an issue of fact exists regarding the method of assessment when the IRS relies on Forms 4340 that do not list 23C dates). Here, the 4340 Form for Maurice Huff's 1982 tax year did not list any 23C dates. Accordingly, we conclude that the IRS could not rely solely on those forms to prove that Mr. Huff's tax was validly assessed.

Given the defect in the Forms 4340 and the fact that the record contains no evidence indicating that the Huffs received copies of their assessments pursuant to their request under § 6203, we conclude there are genuine issues of material fact as to whether the IRS has complied with the requirements of § 6203. *See Farr, 990 F.2d at 454; Geiselman, 961 F.2d at 5-6; Brewer, 764 F. Supp. at 315-16.* Accordingly, we reverse the district court's grant of summary judgment as to count II.

The *Huff* decision must be understood in the context of the 26 U.S.C. § 6203 performance mandate: “Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.” Regardless of flaws in the Form 4340, RACS 006, etc., IRS personnel have a duty to provide copies of assessment certificates, possibly with non-essential information redacted, when requested. Once the Huffs verified that they requested assessment certificates and that IRS personnel failed to comply with the request, IRS defaulted subject matter jurisdiction due to depriving them of procedural due process rights.

In the event responsible IRS personnel fail to comply with requests for assessment certificates, performance can be compelled by writ of mandamus. The court made note of

this remedy being employed by the plaintiff in *Essex v. Vinal, et al*, 499 F.2d 226 (8th Cir., 1974):

A claim for refund of the above amounts was made to the Commissioner September 14, 1970. On December 13, 1970, this claim was disallowed. As to the $55,000 and the $5,158.73 payments, the reason for denial was that the statute of limitations in Int. Rev. Code of 1954, § 6511 n3 had expired. The refund claim for the $13,372.40 deficiency was also denied by the Commissioner and a suit for refund of this payment, for which a timely refund claim had been made, is presently pending in federal district court. The plaintiff also, **[**4]** prior to the instant action, filed a suit in the district court for a writ of mandamus to compel the Internal Revenue Service to release its assessment records. Upon voluntary compliance this suit was dismissed by the District Court. The dismissal was affirmed on appeal under Local Rule 14. *Essex v. Walters, 475 F.2d 1407* (8th Cir.), cert. denied, *412 U.S. 919, 37 L. Ed. 2d 144, 93 S. Ct. 2732 (1973).*

Congress strengthened the mandate for compliance via § 1203 of the Internal Revenue Service reform and restructuring act of 1998. The section requires Internal Revenue Service personnel to comply with duties imposed by the Internal Revenue Code, Treasury regulations and published policy, including the Internal Revenue Manual. This is an important provision as it expands the compliance requirement to published policy as well as duties imposed by statutes and regulations.

At § 3.17.46.2.4(1), the Internal Revenue Manual provides the following definition: "Assessment Certificate: To impose a tax as authorized by the Internal Revenue Code, Assessments are supported by a summary record of assessment signed by an appointed assessment officer." At § 3.17.46.2.4(1), the IRM further specifies, "All assessments must be certified by signature of an authorized official on the Summary Record of Assessment (Form 23C, Assessment Certificate-Summary Record of Assessments). A signed Summary Record of Assessment authorizes issuance of notice and other collection actions (refer to IRC Regulations 301.6203-1)." In Sections 3.17.63.14.7 through 3.17.63.14.21, the IRM specifies that there must be an assessment for each instance of tax principal, interest and penalty. Elsewhere, the Internal Revenue Manual stipulates that when copies of assessment certificates are requested, IRS personnel responsible for disclosure must provide them.

The *Brafman* court, *supra*, stated another obvious truism:

The Treasury Regulations are binding on the Government as well as on the taxpayer: "Tax officials and taxpayers alike are under the law, not above it." *Pacific National Bank of Seattle v. Commissioner, 9 Cir. 1937, 91 F.2d 103, 105.* n7 Even the instructions on the reverse side of the assessment certificate, Form 23C, specify that the original form "is to be transmitted to the District Director for signature, after which it will be returned to the Accounting **[**10]** Branch for permanent filing. * * *"

Case after case has quoted Treasury Regulation § 301.6203-1 and cited it approvingly, and the treatises on taxation take its literal application for granted.

Criminal penalties for demanding payment of sums other and greater than legitimate tax obligations, and for failing to carry out duties prescribed by law, predate the 1998 restructuring act. Two subsections in 26 U.S.C. § 7214 speak to the matter:

§ 7214. Offenses by officers and employees of the United States.

(a) Unlawful acts of revenue officers and agents.

Any officer or employee of the United States acting in connection with any revenue law of the United States –

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; . . .

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. . . . The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

There is no liability for federal income tax unless or until there is a lawful, procedurally proper assessment certificate executed in compliance with requirements of 26 CFR § 301.6203-1. In the event that someone who is billed for an alleged federal income tax debt requests a copy of the assessment certificate to validate the debt, IRS disclosure personnel are obligated to provide a verified copy or certify that there is no valid assessment certificate. Once put on notice, revenue agents and other Internal Revenue Service personnel responsible for collecting tax debts are required to make inquiry reasonable under the circumstance to verify that lawful, procedurally proper assessment certificates have been executed. Individual Master Files, the Form 4340 and other such documents and records provide presumptive evidence, but only the lawful, procedurally proper assessment certificate itself constitutes conclusive evidence. When and if Internal Revenue Service personnel act individually or in concert to evade, avoid or defeat the duty prescribed by 26 U.S.C. § 6203, they are subject to penalties prescribed by 26 U.S.C. § 7214(a).

III. Internal Revenue Code Assessment Section

26 USCS § 6203 (2001)

§ 6203. Method of assessment.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1976, P.L. 94-455, Sec. 1906(b)(13)(A), substituted "Secretary" for "Secretary or his delegate" each place it appeared in Code Sec. 6203, effective 2/1/77.

NOTES:

CODE OF FEDERAL REGULATIONS

Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury--Procedure and administration, 27 CFR Part 70.

CROSS REFERENCES

USCS Administrative Rules, IRS, 26 CFR § § 601.103, 601.104, 601.106.

Authorization of Secretary of Treasury to prescribe rules and regulations, *26 USCS § 7805.*

IV. Code of Federal Regulations Assessment Requirement

26 CFR 301.6203-1

§ 301.6203-1 Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment

which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

V. Lexis Annotations for 26 U.S.C. § 6203

Summary record of assessment bearing signature of IRS assessment officer accompanied by signed certificate of assessments and payments that identifies taxpayer by name, address, and social security number, establishes nature of tax liabilities, period of liabilities, date of assessment, and amount to be assessed is sufficient to establish nexus between taxpayer and underlying assessments. *Gentry v United States (1992, CA6 Tenn) 92-1 USTC P 50225, 69 AFTR 2d 92-1158.*

Partner must be individually assessed before becoming liable for partnership's unpaid employment taxes, and where partners are not individually assessed within 3 year period, collection actions against partners are time barred. *United States v Briguglio (In re Briguglio) (2001, CD Cal) 2001-1 USTC P 50360, 87 AFTR 2d 1639.*

Date of assessment is date when summary record is signed by assessment officer in district director's office or in service center. *Welch Ins. Agency v Brast (1932, CA4 W Va) 55 F2d 60, 10 AFTR 1041,* cert den *285 US 555, 76 L Ed 944, 52 S Ct 457; Davidovitz v United States (1932) 75 Ct Cl 211, 58 F2d 1063, 11 AFTR 347.*

Assessment is complete as soon as record is signed by assessment officer. *Filippini v United States (1961, ND Cal) 200 F Supp 286, 62-1 USTC P 9144, 9 AFTR 2d 313,* affd (CA9 Cal) *318 F2d 841, 63-2 USTC P 9548, 11 AFTR 2d 1720,* cert den *375 US 922, 11 L Ed 2d 165, 84 S Ct 267.*

Assessment of estate tax deficiency was not timely filed and was invalid where it had not been signed by the proper official, and the authenticity of the document and admissibility at trial had no effect on the validity where the requisite signature was missing. *Brafman v United States (1967, CA5 Fla) 384 F2d 863, 67-2 USTC P 12494, 20 AFTR 2d 6008.*

VI. Additional Court Cites Concerning Assessments

Radinsky v. United States of America, 622 F.Supp. 412 (USDC, Colorado, 1985)

This is an action brought by Albert and Henrietta Radinsky to recover $ 8,012.17 wrongfully collected by the Internal Revenue Service (IRS) under threat of levy. The facts in the action are undisputed and set forth in the Memorandum Opinion and Order of May 2, 1985, denying the United States' motion to dismiss, and are incorporated herein by reference. The matter is now before the court on the parties' cross motions **[**2]** for summary judgment.

28 U.S.C. § 1346(a)(1) confers jurisdiction upon this court and waives the sovereign immunity of the United States regarding claims for sums wrongfully collected under the internal revenue laws. In a suit under this section, a plaintiff "may challenge the constitutionality, legality or fairness of any tax statute or amount assessed or collected." *White v. C.I.R., 537 F.Supp 679 (D.Colo. 1982).* In the two briefs filed in this action, the IRS has not explained where it finds statutory authority to employ its tax collection procedures to collect from the plaintiffs a sum of money that has never been assessed as a tax. Since the IRS had no authority to adjust the plaintiffs' account or employ deficiency procedures in these circumstances, it is self-evident that the collection of the sum in this manner was wrongful.

Goetz v. United States of America, 286 F.Supp. 128 (USDC, Western M0, 1968)

Plaintiffs instituted this suit against the defendant for the return of the sum of $8,367.80 paid by the plaintiffs to the Internal Revenue Service following statutory notice of deficiency of income tax alleged to be due against the estate of M. Karl Goetz and Nancy R. Goetz, his widow.

In their complaint the plaintiffs base their right to recovery upon the ground first, that the money upon which the Government seeks to recover the **[**3]** tax was a gift under Section 102(a) I.R.C. 1954 n1 to plaintiff Nancy R. Goetz and not subject to tax, and second, that the assessment of the tax was not made until after the statute of limitations, Section 6501(a) Title 26 U.S.C. n2 had expired.

This action was instituted by the plaintiffs to recover the amount of the assessment together with the interest, on July 5, 1967.

It is the contention of the plaintiffs in their Motion for Summary Judgment that regardless of the fact that the money in question was transferred to the Service prior to the running of the statute of limitations, that said money was not due or owing until it had been properly assessed as a tax liability and that such an assessment was not made until a time after the statute of limitations had expired. (Although we have before us two different dates on which it is claimed that the assessment was made, both of those dates are admittedly beyond the period of limitations, and therefore have no bearing on the legal question which is before us.)

The defendant, on the other hand, contends that Title 26 § 6401(a) n6 which entitles **[*131]** the taxpayer to recover any amount "assessed or collected after the expiration of the period of limitation" does not embrace amounts had and received before the running of that period, or in other **[**9]** words, that there has been an actual payment of taxes duly collected. With this interpretation we cannot agree.

It does not follow from the fact that the Service had the taxpayers' money in hand prior to the running of the statute of limitations, that the money was duly collected. In order for the tax liability to have been duly collected, it must have been properly assessed

and such was not the case here in that the assessment was made at a time subsequent to the running of the statute of limitations.

It is this reasoning which apparently impelled the defendant to admit that the plaintiffs are entitled to recover the $1,736.20 interest payment in that said payment was not in the hands of the Service **[**10]** prior to the running of the statute (nor was it in their hands prior to its assessment).

We cannot accept the distinction that the defendant would have us draw, that the mailing of plaintiffs' check in response to the statutory notice of deficiency amounted to a payment and that, therefore, the tax in question was duly collected. On the contrary, we believe that plaintiffs' check served as a deposit to be utilized by the Government in the event a tax obligation were subsequently defined and imposed.

We are persuaded in so holding by the reasoning of the court in *Rosenman v. U.S., 323 U.S. 658, 65 S. Ct. 536, 89 L. Ed. 535 (1945)* which recognized that payments prior to assessment are deposits and not payments of taxes duly collected.

In the *Rosenman* case, supra, it was the Government that was attempting to invoke a similar statute of limitation to bar suit by the plaintiff for refund, whereas, in the instant case, we have the reverse of that situation, in that here we have the taxpayer seeking to utilize the statute as an affirmative basis for relief.

Though the two cases differ in that respect, the reasoning of the court as to the effect of the transfer of funds prior to any **[**11]** assessment of a tax obligation in regard thereto is sound and is applicable to both situations. We believe that the holding of the court, that money paid to the Internal Revenue Service prior to the imposition of a valid assessment is a deposit rather than a payment, should have the same meaning regardless of whether it is the Government who seeks to preclude suit by the taxpayer or whether it is the taxpayer who seeks to recover a refund.

In *U.S. v. Dubuque Packing Company, 233 F.2d 453 (8th Cir. 1956)* the court followed the *Rosenman* case, supra, and held that transfers of money in anticipation of further assessments did not have the status of payments until tax deficiencies were formally assessed by the commissioner. This case like *Rosenman* but unlike the instant case, involved a situation where the Government was contending that the two year statute of limitations as to plaintiff's suit for refund of overpayment of a deficiency began to run when the plaintiff transferred funds to the commissioner prior to the making of any assessment.

IT IS THEREFORE, our conclusion that the statute of limitations had expired at the time the assessment was made, and that the plaintiffs **[**12]** are entitled to recover the amounts paid to the Internal Revenue Service prior thereto, and that the Motion for Summary Judgment should be and is sustained.

United States of America v. Miller, 318 F.2d 637 (7th Circuit, 1963)

Appellant argues that the proposed waiver submitted by the administrator and the written acceptance thereof by the Government constituted a binding contract and an assessment which commenced the running of the statute of limitations, n1 or at least that a genuine issue of material fact as to the meaning of the waiver and acceptance was presented which could be properly adjudicated only by a trial on the merits.

We do not agree.

We think it clear that the term 'assessment' referred to in this section of the Internal Revenue Code of 1954 has **[*639]** a technical meaning spelled out in the Code and that meaning is binding on this court. n2

The district court properly considered the copy of the official Certificate of Assessments and Payments submitted by the Government in ruling on the motion for summary judgment. *28 U.S.C. § 1733*(b); and Rule 44(a), Fed.R.Civ.P. That document shows that assessment entries were made on March 8, and April 13, 1956, in the manner prescribed by the statute and the applicable regulation. Since the **[**5]** present suit was filed by the Government on March 2, 1962, it was not barred by the applicable statute of limitations.

Brafman v. United States of America, 384 F.2d 863 (5th Cir., 1967)

We **[**5]** do not reach the complex and tantalizing issue of a trust-fund theory of transferee liability for the transfer of a contingent insurance interest. The threshold issue of the validity of the assessment is crucial. We reverse on the ground that a valid assessment against the transferor's estate was not made, because of an assessment officer's failure **[*865]** to sign the certificate of assessment. The Government's claim against the transferee is proscribed by the statute of limitations governing this action.

For a tax to be collected upon any deficiency, an assessment must be made against the taxpayer within three years after his return is filed. Int. Rev. Code of 1939, § 874 (§ 6501 of the 1954 Code). The mailing of a ninety-day letter of deficiency or the filing of any court action will suspend the running of the statute of limitations, and the time will not begin to run again until sixty days from the entry of final judgment of that court or until ninety days following the mailing of the letter of deficiency if no proceedings are begun. See Int. Rev. Code of 1954, § 6213. In the case of a transferee, a separate section provides that the assessment must be filed **[**6]** against the transferee within one year after the expiration of the period of limitation for assessment against the original transferor. Int. Rev. Code of 1939, § 900(b)(1) (§ 6901(c)(1) of the 1954 Code)

If the estate is not assessed within the statutory period there can be no transferee liability. *United States v. Updike, 1930, 281 U.S. 489, 50 S. Ct. 367, 74 L. Ed. 984.* For the Government to collect any tax from the transferee, Mrs. Brafman, a valid assessment must have been made against the estate of the transferor, Abraham Lazarowitz, by September 28, 1957.

There is no disagreement that if the assessment against the estate was made on July 23, 1956, as the Government argues and the documents apparently indicate, the assessment of the transferor was timely. Mrs. Brafman contends, however, that no valid assessment was made on July 23, 1956, because the assessment certificate was not signed.

Section 6203 of the Internal Revenue Code of 1954 specifies that an assessment n4 shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate.

The Treasury **[**7]** Regulations set forth the procedures governing the assessment process as follows:

The District Director shall appoint one or more assessment officers, and *the assessment shall be made by an assessment officer signing the summary record of assessment*. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period if applicable, and the amount of the assessment. The amount of the assessment shall in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. *The date of the assessment is the date the summary record is signed by an assessment officer*. * * * Treas. Reg. § 301.6203-1 (1955)(emphasis added.)

The assessment certificate involved in this case, a photostated copy of which is in the record, is not signed by an assessment officer or by any other official. The certificate refers to July 23, 1956, but shows that it was "prepared" August 1, 1956. Apparently this is the **[*866]** date on which the assessment was to be formally certified, as it appears twice in the certification portion of the form. Since the certificate lacks the requisite signature, it cannot constitute a valid assessment.

We are not moved by the Government's argument that the assessment was valid and effective on July 23rd because it is certified for authenticity under the seal of the United States Treasury. There is no question as to the authenticity of the document or its admissibility into evidence. n5 But authenticity of the certificate cannot be equated with validity of the assessment on the alleged date: a seal establishes the former, a signature of the assessment officer -- as required by the Treasury Regulations -- establishes the latter.

We find section 301.6203-1 of the Treasury Regulations reasonably adapted to carry out the intent of Congress as reflected in § 6203 of the Code. n6 We therefore adhere to our pronouncement in *United States v. Fisher, 5 Cir. 1965, 353 F.2d 396, 398-399,* that:

In the absence of any better test, we give effect to the generally recognized rule that Regulations issued by the Secretary of the Treasury, pursuant to statutory authority, and when necessary to make a statute effective, although not a statute, may have the force of law. *Fawcus Machine Co. v. United States, 282 U.S. 375, 51 S. Ct. 144, 75 L. Ed. 397;*

Commissioner of Internal Revenue v. South Texas Lumber Co., 333 U.S. 496, 501, 68 S. Ct. 695, 92 L. Ed. 831.

The Treasury Regulations are binding on the Government as well as on the taxpayer: "Tax officials and taxpayers alike are under the law, not above it." *Pacific National Bank of Seattle v. Commissioner, 9 Cir. 1937, 91 F.2d 103, 105.* n7 Even the instructions on the reverse side of the assessment certificate, Form 23C, specify that the original form "is to be transmitted to the District Director for signature, after which it will be returned to the Accounting **[**10]** Branch for permanent filing. * * *"

Case after case has quoted Treasury Regulation § 301.6203-1 and cited it approvingly, and the treatises on taxation take its literal application for granted. n8 In *United States v. Miller, 7 Cir. 1963, 318 F.2d 637,* the administrator of an estate executed an estate tax Waiver of Restrictions on Assessment, which was accepted by the Commissioner on February 16, 1956. The Commissioner made assessments by certificate on March 8 and April 13, 1956. Suit for collection was not brought until March 2, 1962. An intervenor argued on appeal that acceptance of the waiver amounted to assessment which commenced the running of the statute of limitations. The Court rejected this **[**11]** argument, saying that "assessment", as referred to in § 6502 of the Code, "has a technical meaning spelled out in the Code and that **[*867]** meaning is binding on this court." n9 The Court continued:

The district court properly considered the copy of the official Certificate of Assessments and Payments submitted by the Government in ruling on the motion for summary judgment. * * That document shows that assessment entries were made on March 8, and April 13, 1956, *in the manner prescribed by the statute and the applicable regulation*. Since the present suit was filed by the Government on March 2, 1962, it was not barred by the applicable statute of limitations. *318 F.2d at 639,* (emphasis added).

When § 6203 of the Internal Revenue Code of 1954 was before Congress, the detailed discussions of the proposed section in both the House and Senate was substantially the same:

This section is a substantial clarification of existing law. It provides that the assessments shall be made by recording the liability of the taxpayer in accordance with rules or regulations of the Secretary. This will permit recording of liability, and hence assessment, through machine operations **[**13]** or through any other modern procedure. The Secretary is directed to furnish to the taxpayer, upon request, a copy of the record of the assessment of that taxpayer's liability. n10

It appears to us that the requirement of the applicable Treasury Regulation -- that an assessment officer sign the assessment certificate -- is consistent with the literally mechanical procedures for recording of liability. The recordation is to be accomplished through "machine operations", but the actual and final assessment step, that step which establishes a prima facie case of taxpayer liability, n11 can be taken only with the approval of a responsible officer of the Internal Revenue Service. The Government may

want to postpone assessment in certain cases because of the limitations on collection and lien perfection that begin to run at the time of assessment. **[**14]** This might be accomplished, after the computers have run their course, only by the assessment officer refusing to sign the already prepared certificate. n12 What is important in any case is that assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulations, is the signing of the certificate.

We recognize that in sustaining Mrs. Brafman's contention regarding lack of proper assessment within the limitations period we are disposing of this case on what could be termed a "technical defense". As the district court said in **[*868]** *United States v. Lehigh, W.D. Ark. 1961, 201 F. Supp. 224, 234,* this **[**15]** is both true and immaterial:

Any procedural defense is in a sense "technical." The procedures set forth in the Internal Revenue Code were prescribed for the protection of both Government and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting party must be prepared to face, whether such party be the taxpayer or the Government.

Certainly the courts have not hesitated to enforce strictly the Code requirement that a taxpayer's returns must be signed to be effective. Thus, unsigned returns, even with remittances, have been viewed as nullities from the standpoint of imposition of penalties n13 and of commencement of the running of the statute of limitations. n14 It has availed the taxpayer little that his failure to sign was inadvertent. n15

Finally, where state taxation is involved compliance with a statutory provision requiring an assessment list to be signed by the assessors is usually considered essential to the validity of further proceedings. 84 C.J.S. Taxation § 473 (1954).

Girard Trust Bank, et al v. United States, 643 F.2d 725 (Ct. of Claims, 1981)

Section 6401 does not define an "overpayment," but does provide that the term "includes" certain enumerated items which will be treated as or "considered" overpayments. An "overpayment" is not necessarily a form of "payment." It can be the "amount" by which an "amount allowable as credits" exceeds "the tax imposed." n6 Use of the term "the tax imposed" rather than "the *liability* for tax," disposes of any argument that an overpayment, for purposes of section 6611, necessarily occurs with respect to an interim liability. In fact, under the provisions of section 6401(c), an amount paid as tax may constitute an "overpayment" even though there was *no* tax "liability" in respect of which such amount was paid. On the other hand, one may not unilaterally establish an "overpayment" by the "deposit" of money with the district director in "payment" of an amount designated as a "tax." n7 "Liability" and amounts "due" normally depend upon "assessment," and the latter is entirely a Government, not a taxpayer, function. n8 Thus an actual "liability" can eventually constitute an "overpayment" for the reason that the "tax imposed" by law, which **[*370]** is to say the correct amount **[***9]** of the "entire tax liability" as finally determined, is less than the total of the amounts paid by or credited to the taxpayer, as tax. This is not to say that the "overpayment" does not *occur* until the

final determination of the tax; it merely means that there cannot be an ascertainment that there *has been* an overpayment of tax until the "tax imposed" has been ascertained.

Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1405 (9th Cir., 1982)

For a levy to be statutorily authorized in the circumstances here, two conditions must be fulfilled. First, a 10-day notice of intent to levy must have issued. *See 26 U.S.C. § 6331*(a). Terry ascertained that this had been done. Second, the taxpayer must be liable for the tax. *Id*. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.

For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *Flora v. United States* **[**25]** *, 362 U.S. 145, 176, 4 L. Ed. 2d 623, 80 S. Ct. 630 (1960),* the Service may assess the tax only in certain circumstances and in conformity with proper procedures.

Essex v. Vinal, et al, 499 F.2d 226 (8th Cir., 1974)

The asserted noncompliance with the regulation is the allegation that those officers who signed the assessment certificates were not in fact "assessment officers." Accepting *arguendo* that this is so, we find nothing in *Rosenman* or *Brafman* to support the plaintiff's legal contention that the assessments are thus **[**10]** void and the payments converted to deposits subject to recovery in the instant suit.

In *Rosenman*, the Commissioner's claim was that the date of a $120,000 advance payment should govern the running of the statute of limitations for filing a claim for refund. This contention was rejected because the payment had been held in a special suspense account and was not considered as "payment" until the amount of tax due was actually assessed by Internal Revenue. There is no doubt that had the deposit been assessed upon receipt as was done in the present case, it would have been considered "payment" at that time.

Brafman is closer to plaintiff's position. In *Brafman*, the Commissioner in 1962 attempted to impose transferee liability for estate taxes upon a beneficiary of the estate of a decedent who died in 1951. This liability was predicated upon an assessment certificate prepared August 1, 1956, after a Tax Court decision in favor of the Government. The *Brafman* court began with the proposition that there could be no transferee liability if there was no assessment within the statutory period, which in *Brafman* terminated September 28, 1957. The assessment certificate **[**11]** of August 1, 1956, was unsigned. Treas. Reg. § 301.6203-1, *supra*, was interpreted to require signature on the assessment certificate. An unsigned certificate was determined to be wholly void, thus there was no assessment upon which to base transferee liability.

So far as our research has disclosed, plaintiff presents an argument of first impression. Arguably, it would be permissible to interpret Treas. Reg. § 301.6203-1 to void a signed assessment if not signed by an authorized assessment officer. However, we think such an approach is totally unwarranted. The distinction, as we see it, between *Brafman* and the present case is that **[*231]** *Brafman* involved the facial invalidity of the assessment; any person familiar with the requirement that an assessment certificate be signed would at once recognize the invalidity of an unsigned assessment. In the present case the assessments are at least *de facto* valid; no irregularity appears on the face of the assessment certificates. Even accepting plaintiff's allegations as true, we think this would establish only that the assessment was erroneously or illegally made, not that no assessment was made. Provision for **[**12]** challenging an erroneous or illegal assessment is provided by *28 U.S.C. § 1346*(a) (1). This section reads:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or * * * any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *.

The above provision is the only one upon which plaintiff may establish a waiver of immunity on behalf of the United States, yet this avails her little due to her failure to make a timely administrative claim. Int. Rev. Code of 1954, § 7422(a) provides:

(a) *No suit prior to filing claim for refund*. -- No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or * * * of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, **[**13]** according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

In re Western Trading Company, 340 F.Supp. 1130 (1972)

We, nevertheless, conclude that the law applicable to ordinary bankruptcy is inapplicable to this Chapter XI proceeding. The salutary purposes of Section 397 are two-fold. It not only recognizes the need of taxing authorities for additional time to determine and assess taxes which may be asserted **[**8]** late as a priority claim under Section 64 of the Act, but it also fixes a time limit qualification upon the type of claims which will be accorded such preferred treatment. While the bankruptcy court may be required to reconsider its order of confirmation or to modify the plan of arrangement or dismiss the proceeding on account of the impact of such a late filed claim (see In re Gates, *supra*, 256 F. Supp. at page 4), it need do so only if the delayed claim is for a tax

"found to be owing" within one year of the filing of the petition. "Found to be owing," as used in this section, means "assessed." The Internal Revenue Code provides for a specific procedure for assessment *(26 U.S.C. § 6203).* An assessment is an administrative determination of tax liability. *Kurio v. United States, 281 F. Supp. 252 (S.D.Tex.1968); United States v. Miller, 318 F.2d 637 (7th Cir. 1963).* And until the assessment has been made, the tax has not been found to be owing.

We note that the Advisory Committee on Bankruptcy Rules appointed by the **[*1134]** Chief Justice of the United States under the program of the Judicial Conference of the United States is in accord with this interpretation. In the **[**9]** Preliminary Draft of Proposed Bankruptcy Rules and Official Forms under Chapter XIII of the Bankruptcy Act, September, 1971, the Committee of bankruptcy experts has proposed Rule 13-405, as follows:

"Upon application accompanied by a proof of claim the court may allow the following claims to participate in distributions under the plan:

"(a) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, at the time of the filing of a petition under Rule 13-103 or 13-104 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of the petition.

"(b) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, after the filing of a petition under Rule 13-103 or 13-104 and which are assessed while the case is pending * * *."

In this instance, we consider Section 397 of the Bankruptcy Act to be "an overriding statement of federal policy" (Randall, *supra*, at p. 515, *91 S. Ct. at p. 993)* to the effect that a tax liability to participate in a plan of arrangement must have been assessed before confirmation of the plan or within one year after the filing of the petition, or must have become owing on account of the operations of the trustee, receiver or debtor in possession (In re Gates, *supra*).

The instant claim for estimated 1969 corporate income tax deficiencies does not qualify under any category. It has never been assessed, it has never "been found to be owing." It is, thus, barred from participating in the plan of arrangement as a priority claim. It is, nevertheless, not discharged (Section 78a (1) of the Act, *11 U.S.C. § 35).* Its collectibility as a non-priority claim may be left for future determination.

United States v. Coson, 286 F.2d 453

This brings us to the merits of the case. The court's opinion, which the Judge treated as his findings, found there had been no notice or demand respecting these taxes given to Coson, individually, prior to commencement of his action. He also found: 'Between March and August of 1955, plaintiff invested $ 31,000 in a newly organized Las Vegas, Nevada, hotel and gambling establishment known as the 'Moulin Rouge,' and

obtained a 1.70 per cent interest therein. He reasonably and in good faith thought he was investing as a limited partner in a limited partnership. The Moulin Rouge was note, however, **[**14]** a limited partnership. Upon first ascertaining this, plaintiff promptly mailed notices of renunciation.' n10 *(169 F.Supp. 672)*

All of this is significant in view of the fact that on December 27, 1956, when this suit was started, no notice or demand concerning these taxes had been given to or served upon Coson. This procedural prerequisite to the securing of a Government lien for such taxes is made plain by the statute. See *Detroit Bank v. United States, 317 U.S. 329, 335, 63 S.Ct. 297, 87 L.Ed. 304.* § 6321 of Title 26 U.S.C. recites that the amount of taxes shall be a lien upon the property of a person liable to pay the tax who 'neglects or refuses to pay the same after demand.' n15 The procedure for making such demand is set forth in § 6303(a) of the same title as follows: 'Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after **[**23]** the making of an assessment of a tax pursuant to § 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. * * *'

It will be noted that our decision here is based upon our holding that the Government's lien was irregular, insufficient and valueless from a procedural standpoint for failure to serve the statutory notice and demand in connection therewith and for failure to comply with required procedures.

In developing that conclusion many circumstances tend to show that not only were these required procedures not complied with but **[**25]** that Coson was not a taxpayer and not liable for the tax to begin with. Whether that non-liability could also constitute the basis for a suit of this kind, or for relief under § 2410(a) of Title 28, we need not here decide. The recent case of *Pipola v. Chicco, 2 Cir., 274 F.2d 909, 914,* appears to give a negative answer to that question. But that case agrees with what we hold here, that in an action of the kind here involved plaintiff may attack the Government lien for taxes as irregular or valueless 'from a procedural standpoint', and may raise the question whether the Government 'complied with required procedures * * * or whether by error the assessment was made against a taxpayer other than the one intended.' n16

VII. Cases Where Assessment Certificates Not In Evidence

Hughes, et al v. United States of America, 953 F.2d 531 (9th Cir., 1991)

In an attempt to establish the first prong of the *Elias* exception, the Hugheses first argue that the IRS failed to make a valid assessment against them so that all current IRS actions to collect from them are unlawful. Thus, the Hugheses argue, the IRS could never succeed on the merits of its claim. We reject this argument.

The IRS submitted Certificates of Assessments and Payments (Form 4340) as proof that assessments had been made. Official certificates, such as Form 4340, can constitute

proof of the **[**8]** fact that the assessments actually were made. *See United States v. Zolla, 724 F.2d 808, 810* (9th Cir.) (postal form 3877 certifying mailing of deficiency notices and an IRS form certifying that taxes and failure-to-pay penalties had been assessed are "official certificates" that "are highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notices and assessments were properly made"), *cert. denied, 469 U.S. 830, 83 L. Ed. 2d 59, 105 S. Ct. 116 (1984); United States v. Chila, 871 F.2d 1015, 1017-18* (11th Cir.) (Certificate of Assessments and Payments is presumptive proof of a valid assessment), *cert. denied, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 498 (1989).* n2 Because Form 4340 is an official document which establishes that assessments were made, and because the Hugheses have presented no contrary evidence indicating that assessments were not made, the Hugheses' argument fails.

Finally, the Hugheses' allegation that the IRS never furnished them with a copy of the record of assessment after being requested to do so also is insufficient to support a claim under § 2410. *26 U.S.C. § 6203* requires that the Secretary provide a taxpayer with a copy of the record of assessment if requested to do so. The Hugheses, however, have presented no evidence that, at the time the various assessments were being made, they ever requested a copy of the record of assessment. **[**20]** Because the Hugheses presented no evidence that they made such a request, they cannot now argue that the IRS failed to follow statutory procedures by neglecting to provide the Hugheses with the required copy. n4 The Hugheses' § 2410 claim fails, therefore, because of the absence of any evidence that the IRS's tax liens were procedurally defective. n5

United States of America v. Dixon, 672 F.Supp. 503 (USDC, Middle Dist. Ala., 1987)

The United States of America brought this action to recover unpaid federal income taxes for the year 1975 in the amount of $ 200,997.02, including interest and penalties. On May 22, 1987, the Government filed a motion for summary judgment supported by a document entitled "Certificate of Assessments and Payments." The defendant, Julian Dixon, has also filed a motion for summary judgment which raises two points: (1) that the Internal Revenue Service did not follow the assessment procedures established in *26 U.S.C. § 6203* and *26 C.F.R. 301.6203-1*; and (2) that a Notice of Deficiency was not sent to him by certified or registered mail as required by *26 U.S.C. § 6212.* Upon consideration of the motions filed herein and the documents and affidavits attached thereto, the Court has determined that the Government is entitled to summary judgment.

26 U.S.C. § 6203 provides that "the assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment."

26 C.F.R. § 301.6203-1 provides, in part, that "... the assessment shall be made by an assessment officer signing the summary record of assessment. The summary record through supporting records, shall provide identification of the taxpayer, the character of

the liability assessed, the taxable period, if applicable, and the amount of the assessment ... The date of the assessment is the date the summary record is signed by an assessment officer ..." Both parties state in their briefs that this document is known as Form 23-C within the Internal Revenue Service.

The defendant correctly contends that the basis of tax liability is the assessment. For a tax liability to be duly collected, it must be first properly assessed. In order for a tax deficiency to be assessed against a taxpayer, an assessment officer must sign and date a Form 23-C. The defendant rests his argument entirely on the fact that the Government has not been able to produce a copy of or the original of Form 23-C, and has, supposedly, stipulated to its non-existence.

The Government argues that its failure to produce Form 23-C is not fatal to its case. First, the Government states that it stipulated only to the fact that it did not have the original or a copy of Form 23-C in its possession. The Government originally stated that the IRS keeps Form 23-C in its files for only three years, after which it is routinely sent to the Federal Records Center to be stored for thirty years. The Government's attorney has since learned that this is the present procedure, but that in 1979 when the assessment was entered, the IRS kept these forms for six years, nine months, after which they were routinely destroyed. Accordingly, the defendant is correct that the Government does not have in its possession the Form 23-C.

The Government argues, however, that it does not need to produce a copy of Form 23-C in order to satisfy its burden of proof. The Government has attached a copy of a "Certificate of Assessments and Payments" which is signed by an IRS officer certifying that it is a true transcript of all the assessments, penalties, interest, and payments on record for the defendant. This document reflects that on April 15, 1976 the defendant filed a tax return claiming and paying $ 118,728.45 in taxes. This document also reflects that the defendant was audited and *assessed* a deficiency of $ 159,871.02 in unpaid taxes, $ 7,993.55 in negligence penalty, and $ 34,247.44 in interest on July 23, 1979. n1

Accordingly, this Court accepts the document "Certificate of Assessments and Payments" submitted by the Government as presumptive proof of a valid assessment. Given that the defendant has produced *no* evidence to counter this presumption, the Court is satisfied that the Government has established that the claimed tax liability was properly assessed against the defendant.

In the absence of any direct evidence contradicting the Government's position, the presumption of official regularity controls. "The presumption of regularity supports the official acts of public officers and, in the absence of *clear evidence to the contrary*, courts presume that they have properly discharged their official duties." (Emphasis added) *United States v. Chemical Foundation, Inc., 272 U.S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926)* and *United States v. Ahrens, 530 F.2d 781, 783 (8th Cir. 1976).*

Huff v. United States of America, *10 F.3d 1440* (9th Cir., 1993)

The district court ruled erroneously that count II did not present a procedural challenge to a tax lien. However, count II alleges that the IRS failed properly to assess taxes against the Huffs and that the IRS failed to respond to the Huffs' request for a copy of an assessment under § 6203. *See 26 C.F.R. § 301.6203-1* (1992) (indicating that § 6203 requires the IRS to send the taxpayer "a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed" if the taxpayer makes a request for a copy of the assessment pursuant to § 6203).

Generally, courts have held that IRS Form 4340 provides at least presumptive evidence that a tax has been validly assessed under § 6203. *See Farr, 990 F.2d at 454; Geiselman v. United States, 961 F.2d 1, 5-6* (1st Cir.), *cert. denied, 121 L. Ed. 2d 191, 113 S. Ct. 261 (1992); Rocovich v. United States, 933 F.2d 991, 994 (Fed. Cir. 1991)* ("Certificates of Assessments and Payments [are] routinely used to prove that a tax assessment has in fact been made."); *United States v. Chila, 871 F.2d 1015, 1017-18* (11th Cir.), *cert. denied, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 498 (1989); United States v. Miller, 318 F.2d 637, 638-39 (7th Cir. 1963)*. Here, however, the IRS seeks to rely solely on these forms to prove not only that an assessment had been validly made, but that the taxpayer had been provided with a copy of the assessment as per *Treasury Regulation § 301.6203-1*. We are unaware of any authority indicating that these forms standing alone constitute evidence for the latter proposition. Indeed, no entry on the form contains any information in this regard.

Moreover, in *Farr* this court ruled that Forms 4340 are merely presumptive, not conclusive, evidence that the IRS has complied with § 6203. *Farr, 990 F.2d at 454.* The court ruled that the fact that the taxpayer claimed not to have received certain notices precluded the court from granting judgment against the taxpayer in that case. *Id.* Here, the Huffs similarly claim that they never received any Form 4340 in response to their request for a copy of their assessments. While the government may have proved that Forms 4340 existed for the Huffs for the 1982 tax year, the record is devoid of any indication that the Huffs were provided with copies of these forms in response to their request for a copy of their assessments.

In addition, some of the Forms 4340 provided by the government to support the grant of summary judgment in this case appear defective. Courts have indicated that a Form 4340 is adequate to prove a valid assessment if it lists the "23C date," indicating the date on which the actual assessment was made. n5 *See Geiselman, 961 F.2d at 5-6* (indicating that the government could prove a valid assessment by providing a Form 4340 instead of a Form 23C, the actual assessment forms, because the Form 4340 listed the 23C dates); *Brewer v. United States, 764 F. Supp. 309, 315-16 (S.D.N.Y. 1991)* (holding that an issue of fact exists regarding the method of assessment when the IRS relies on Forms 4340 that do not list 23C dates). Here, the 4340 Form for Maurice Huff's 1982 tax year did not list any 23C dates. Accordingly, we conclude that the IRS could not rely solely on those forms to prove that Mr. Huff's tax was validly assessed.

Given the defect in the Forms 4340 and the fact that the record contains no evidence indicating that the Huffs received copies of their assessments pursuant to their request under § 6203, we conclude there are genuine issues of material fact as to whether the IRS has complied with the requirements of § 6203. *See Farr, 990 F.2d at 454; Geiselman, 961 F.2d at 5-6; Brewer, 764 F. Supp. at 315-16.* Accordingly, we reverse the district court's grant of summary judgment as to count II.