¶ 9.07[7] The Use by Service of Claim for Tortious Conversion

The Service possesses another less familiar weapon in its tax collection arsenal. The Service can sue third parties, claiming that the third parties tortuously converted taxpayer's assets, either burdened by a tax lien or subject to tax levy. The Tenth Circuit has characterized the conversion cause of action as a "well-established right to bring common law causes of action, including tortious conversion" for the purpose of collecting federal taxes. [91.14] The "statutory and common law remedies ... easily compliment each other," particularly where a third party has "converted and dissipated the funds the government would otherwise have demanded he surrender under § 6332(a)." [91.15] The "common law remedy casts a wider net to provide relief for any tortious act which impairs the lienor's interest in the converted property." [91.16] Numerous courts have recognized the government's right to utilize common law actions for conversion. [91.17]

The list of decided cases on Westlaw reveals that the IRS uses the conversion argument only once every few years. The conversion argument is usually seen in employment tax cases [91.18] and in construction-type cases when there is a violation of an escrow arrangement. [91.19] Various IRS administrative releases discuss the possibility of the Service bringing a tortious conversion claim, such as Chief Counsel Advisory 200614006. [91.20] In Litigation Bulletin 417, the Service expressed the view that the tortious conversion argument is a last-resort type argument.

There are litigating hazards, however, in taking this position and it should only be asserted where there are no other remedies. [91.21]

An action in conversion is available to a secured party "against a third party in order to vindicate his rights in collateral." [91.22] Moreover,

[A] party that benefits from proceeds subject to a statutory lien may be liable for conversion of such proceeds ... if it has notice of the lien, then accepts and benefits from the proceeds. [91.23]

As stated in *Permian Petroleum*, "Conversion damages are the value of the converted property on the date of conversion plus prejudgment interest." [91.24]

An oft-cited case for the tortious conversion argument is *Nomellini Construction*, [91.25] a case involving a general contractor taking over a subcontractor's debt. The subcontractor had contracted for concrete, could not pay for the concrete, and received threats from the concrete supplier to file a mechanic's lien on the construction project. The

agreement by the general contractor to assume the subcontractor's debt alleviated the filing of the mechanic's lien. The subcontractor also owed delinquent federal taxes. The Service sought to recover, by levy, from the general contractor the value of the subcontractor's assets. The levy was disregarded by the general contractor. The government urged the conversion argument, not because the general contractor failed to honor the levy, but because of actions by the contractor after the levy was served, such as transferring title to the property to itself, selling or disposing of the levied property, and intermingling some of the property with its own property. The court agreed that the general contractor engaged in tortious conversion by exercising domain over the levied property. In the court's words:

The statutory and common law remedies redress different evils. The manifest purpose of Section 6332 is to force the physical surrender of levied property to permit administrative sale, while the common law remedy casts a wider net to provide relief for any tortious act which impairs the lienor's interest in the converted property. [91.26]

The court was clear that it was not holding that Section 6332 was the exclusive remedy available to the government, but it allowed the conversion argument because of the actions of the general contractor after the levy was served, not because it failed to honor the levy.

In *Fritschler, Pellino, Schrank & Rosen*, [91.27] the court rejected a tortious conversion argument by the Service against a law firm that had received cash for legal services from a delinquent taxpayer. The court said that Section 6332 is the government's exclusive remedy:

The government argues that tortious conversion is an alternative theory under which the government can recover the $75,000. Section 6332 of Title 26 of the United States Code provides the government's sole remedy for recovery. The government may seek to recover property in the hands of a third party if the government can establish that the property has a valid lien against it, but the government may not seek a common-law remedy for conversion. Conversion is outside the scope of section 6332, and would require the court to create or imply a remedy that Congress could have created had it been of a mind to do so. [91.28]

This court is in a distinct minority with this view. [91.29]

There is no federal law of conversion, and so the Service needed to rely on state law (Texas law in this case) to establish a conversion. The elements of conversion under Texas law are typical:

1. The Service legally possessed the property or was entitled to the property.

2. The dealership (or bank) wrongfully exercised dominion and control over the property.

3. The Service demanded return of the property.

4. The dealership (and bank) refused to return the property.

When cash is involved, a conversion of money claim under state (Texas) law requires additional proof, namely that the money is (1) delivered for safekeeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper.

In *United States vs. Boardwalk Motor Sports, Ltd.*, [91.30] the Service argued that a car dealership and a lending bank tortiously converted taxpayer's assets after a tax lien was filed and, then after, a levy was served. The key facts in the case are: Taxpayer owed $7.6 million in delinquent taxes, which were assessed in 2002 and 2003. Lien notices were filed by the Service against Taxpayer's assets in 2003 and 2004. In 2005, Taxpayer pledged his Ferrari to the bank for a $200,000 loan. The bank took a lien on the Ferrari, though it acknowledged it was junior to the previously filed federal tax liens. The bank noted its lien on the car title, which is held.

The Service verbally agreed to allow the taxpayer to consign the Ferrari to a Ferrari car dealer to enable it to be sold, though a misunderstanding developed over disposition of the sale proceeds. The Service insisted on receiving the proceeds. The dealership thought it would send the proceeds to the bank so that it could obtain clear title to give to the purchaser of the Ferrari. The Service served a levy on the dealership on July 2. On July 3, the next day, the taxpayer delivered the Ferrari to the dealership as part of the consignment transaction. The Ferrari was sold on July 25. On August 7, the dealership sent the proceeds, net of sales of commission, to bank, which released its lien on the Ferrari. On August 16, the bank applied the proceeds (i.e. set-off) to the taxpayer's loan at the bank. On August 21, the Service demanded from the bank the sales proceeds. On August 28, the Service served the bank with a levy. The Service imposed a 50 percent penalty under Section 6332(d)(2) on both the bank and the dealership, and ultimately sued them both for conversion.

The Fifth Circuit rejected the Service's argument that the dealership or bank was liable for tortious conversion, but upheld the claim that bank was liable for failure to honor an IRS tax levy. The court concluded that the Service failed to establish that on either of the dates of its levies, July 2 (against the dealership) or August 28 (against the bank), the Service had a right to any funds. For a conversion argument to succeed, the Service had to prove that it had the immediate right of possession since Texas law of conversion requires the elements of ownership, possession, or the right to immediate possession.

The Fifth Circuit held that the July 2 levy was a day too early. Thus, the Service did not have a right to possess the Ferrari on that day. The Service did not have a right to possession as against the bank because the Service only had filed a tax lien, which is not a self-executing collection device, as is a tax levy. To quote the court,

[T]he IRS's interest in the Ferrari—and the proceeds from its sale—were limited to a tax lien. As explained above, a tax lien is not self-executing, and it does not provide the IRS with an immediate right of possession until a levy is issued. Although the IRS needs to utilize only its own administrative procedures to gain a possessory interest in property subject to a tax lien . . . the result is the same: No immediate right to possession existed at the time of the alleged conversion. Therefore, the IRS's conversion claim cannot succeed. [91.31]

The levy on the bank on August 28 was two weeks after the bank set-off and thus was too late for the conversion argument. On the date of set-off, the Service did not have a levy in place and therefore did not have an immediate right of possession.

57

Aquilino v. United States, 363 US 509, 513, L. Ed. 2d 1365, 80 S. Ct. 1277, 60-2 USTC ¶ 9538, 5 AFTR2d 1698 (1960) , quoting Morgan v. Comm'r, 309 US 78, 82, 84 L. Ed. 585, 60 S. Ct. 424, 40-1 USTC ¶ 9210, 23 AFTR 1046 (1940) . See United States v. Sterling Nat'l Bank & Trust Co., 494 F2d 919, 921, 74-1 USTC ¶ 9336, 33 AFTR2d 74-1018 (2d Cir. 1974) , and United States v. National Bank of Commerce, 472 US 713, 722 (1985) , quoting United States v. Bess, 357 US 51, 55, 57, 78 S. Ct. 1054, 2 L. Ed. 2d 1135, 58-2 USTC ¶ 9595, 1 AFTR2d 1904 (1958) ; United States v. Rodgers, 461 US 677, 683 (1983) . See also United States v. Mitchell, 403 US 190, 204–205, 29 L. Ed. 2d 406, 91 S. Ct. 1763, 71-1 USTC ¶ 9451, 27 AFTR2d 71-1457 (1971) ; Burnet v. Harmel, 287 US 103, 110, 77 L. Ed. 199, 53 S. Ct. 74, 3 USTC ¶ 990, 11 AFTR 1085 (1932) ; Helvering v. Stuart, 317 US 154, 162, 87 L. Ed. 154, 63 S. Ct. 140, 42-2 USTC ¶ 9750, 29 AFTR 1209 (1942) .

58

Morgan v. Comm'r, 309 US 78, 80, 84 L. Ed. 585, 60 S. Ct. 424, 40-1 USTC ¶ 9210, 23 AFTR 1046 (1940) . See CC-2012-002 (Dec. 2, 2011) (IRS Chief Counsel asserts position that a federal common law analysis to prove alter ego status is legally correct and consistent with the important principle of uniformity of federal tax enforcement).

59

United States v. Bess, 357 US 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135, 58-2 USTC ¶ 9595, 1 AFTR 1904 (1958) .

60

357 US at 55.

61

"It would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy, and which are reducible to possession by another only upon the insured's death when his right to change the beneficiary comes to an end." 357 US at 55–56.

62

357 US at 56. See also CCA 200249001 (Chief Counsel's office advised that the federal tax lien attaches to a taxpayer's vested interest in a defined benefit pension plan, but that the tax lien does not reach guaranteed amounts payable to a beneficiary as a death benefit, citing *United States v. Bess* as authority).

63

Comm'r v. Stern, 357 US 39, 78 S. Ct. 1047, 2 L. Ed. 2d 1126, 58-2 USTC ¶ 9594, 1 AFTR 1899 (1958) .

64

Aquilino v. United States, 363 US 509, 4 L. Ed. 2d 1365, 80 S. Ct. 1277, 60-2 USTC ¶ 9538, 5 AFTR2d 1698 (1960) .

65

United States v. Durham Lumber Co., 363 US 522 4 L. Ed. 2d 1371, 80 S. Ct. 1282, 60-2 USTC ¶ 9539, 5 AFTR2d 1703 (1960) .

66

363 US at 514.

67

In Grimm v. Comm'r, 894 F2d 1165, 90-1 USTC ¶ 50,048, 65 AFTR2d 90-645 (10th Cir. 1990) , local law was interpreted to hold a surviving spouse liable for tax liability attributable to her share of community property income pending administration of her deceased spouse's estate. Mrs. Grimm, an American citizen, and her husband redeemed their corporate stock while they resided in the Philippines. Payment was to be received in five annual installments. Mr. Grimm died before the last three installments. Mrs. Grimm moved to Utah, where she probated her husband's will. The final three installments for the redemption were paid to Mrs. Grimm and her brother, as executors, during their administration of the estate. Mrs. Grimm failed to report any portion of the final three note payments as part of her personal income. She claimed that no tax was due until the money was distributed to her personally because, she argued, under Philippine law, community assets acquired during marriage did not immediately belong to her at her husband's death, and she had merely an expectancy until the administration of her husband's estate was concluded. After examining Philippine law to ascertain the ownership rights of both Mrs. Grimm and the estate on the deferred payments, the court concluded that Mrs. Grimm had a vested ownership interest in her community portion of the redemption payments and the community income resulting therefrom. She was found to be responsible for paying the income tax on her community half of the redemption payments.

See also Yardas v. United States, 899 F2d 550, 90-2 USTC ¶ 50,390, 65 AFTR2d 90-1070 (6th Cir. 1990), adhered to and reh'g denied, 1992 US App. LEXIS 16256 (6th Cir. 1992), reh'g (en banc) denied, 1992 US App. LEXIS 37143 (6th Cir. 1992) (a notice of garnishment by a judgment creditor served on the Clerk of the United States District Court established a superior interest in property seized at the direction of, and under the authority of, the district court; Ohio law permitted judgment creditors to establish a claim to property by serving notice of garnishment on the person or entity having possession or control of that property) .

68

In enacting Section 6321, Congress was satisfied that the determination of whether such rights exist would emerge from an analysis of contemporary transactions. See Randall, Sr. v. H. Nakashima & Co., 542 F2d 270, 277–278, 76-2 USTC ¶ 9770, 38 AFTR2d 76-6190 (5th Cir. 1976) . See generally Young, “Priority of the Federal Tax Lien,” 34 U. Chi. L. Rev. 723, 726 (1967). See Hardy v. United States, 918 F. Supp. 312, 96-1 USTC ¶ 50,214 (D. Nev. 1996) (determinations of the separate or community character of Indian marital property should be resolved by reference to Nevada's state law, not to tribal law; Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 USC § 1162, USC §§ 1321–1326, 28 USC § 1360, empowered states to adjudicate civil disputes to which an Indian is a party; in 1955, Nevada enacted a state statute assuming state judicial jurisdiction over civil actions to which an Indian is a party and which arise in Indian Country. Nev. Rev. Stat. § 41.430).

69

Bigheart Pipeline Corp. v. United States, 835 F2d 766, 88-1 USTC ¶ 9110, 61 AFTR2d 88-351 (10th Cir. 1987) .

70

The court pointed out the following facts concerning the apparent hardship on Core: (1) Core failed to record its assignment; (2) Core began to drill and develop the leases after the notice of tax lien was filed; and (3) Core knew or should have known of the IRS priority.

71

21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F2d 354, 358, 86-2 USTC ¶ 9516, 57 AFTR2d 86-1423 (3d Cir. 1986) ; Ryandall, Sr. v. H. Nakashima & Co., 542 F2d 270, 76-2 USTC ¶ 9770, 38 AFTR2d 76-6190 (5th Cir. 1976) .

72

IRC § 6323(a). See Chapter 11 for complete discussion of measuring the lien's priority relative to other liens.

73

Chicago Merchantile Exch. v. United States, 840 F2d 1352, 1357, 88-1 USTC ¶ 9203, 61 AFTR2d 88-781 (7th Cir. 1988) .

74

United States v. 110–118 Riverside Tenants Corp., 886 F2d 514, 90-2 USTC ¶ 50,493, 65 AFTR2d 90-503 (2d Cir. 1989), cert. denied, 495 US 956, 109 L. Ed. 2d 743, 110 S. Ct. 2560 (1990) .

74.1

Markham v. Fay, 74 F3d 1347, 1356, 96-1 USTC ¶ 50,118, 77 AFTR2d 732 (1st Cir. 1996) . *Markham* holds that an explicit power in a third party to cut off a beneficiary from a residual interest in the corpus would make that an interest not yet "vested" under Massachusetts law and, therefore, according to *Markham*, an interest too frail to support a lien. Markham, 74 F3d 1347, 1365 . However, *Markham*'s holding on this point depended on its assumption that the federal tax lien issue turned on whether "under Massachusetts law…a right in a trust has vested.…" Id.

What Drye v. United States, 528 US 49, 120 S. Ct. 474, 481, 145 L. Ed. 2d 466 (1999) now makes clear is that labels like "vesting" and "nonvesting" under Massachusetts law are not determinative, and that federal law determines whether an interest that exists under state law is sufficiently substantial that it should be treated as "property" or "rights to property" for purposes of the federal tax lien statute. Cf. United States v. Murray, 217 F3d 59, 86 AFTR2d 2000-5077, 2000-2 USTC ¶ 50,571 (1st Cir. 2000) .

74.2

Pansier v. United States, 225 BR 657, 84 AFTR2d 99-5468, 99-2 USTC ¶ 50,640 (ED Wis. 1998) .

74.3

Following: Fried v. New York Life Ins. Co., 241 F2d 504 (2d Cir. 1957), cert. denied, 354 US 922 (1957) , in which the Second Circuit found that a federal tax lien attached to monthly disability benefit payments. The taxpayer had purchased private disability insurance, then was assessed income tax deficiencies, and next became totally and permanently disabled. The Service levied upon the disability insurance company for taxpayer's payments. The insurance company, which admitted its contract liability to pay the taxpayer's $250 each month as long as he remained disabled, deposited the disability payments with the court, and the taxpayer and the government litigated who would receive them. The Second Circuit sided with the government: "Fried had a contractual right to these sums each month which the insurance company could not defeat. Therefore…the government by proper levy could require that these sums be applied upon Fried's delinquent taxes." 241 F2d at 505.

74.4

Internal Revenue Serv. v. Orr (In re Orr), 180 F3d 656, 99-2 USTC ¶ 50,668, 84 AFTR2d 99-5390 (5th Cir. 1999) .

74.5

See ¶ 9.09[2][l].

74.6

In re Orr, 180 F3d 656, 660 .

74.7

In re Orr, 180 F3d 656, 660 .

74.8

See ¶ 9.09[2][l].

74.9

Capitol Indem. Corp. v. United States, 452 F3d 428, (5th Cir. 2006) .

75

United States v. Bess, 357 US 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135, 58-2 USTC ¶ 9595, 1 AFTR2d 1904 (1958) . See In re Alexander's Graham Bell, Inc., 59 BR 95, 97, 86-1 USTC ¶ 9421 (Bankr. WD Pa. 1986) (lien attached to sale proceeds of sale of liquor license); Deitsch v. Board of Liquor License Comm'rs, 1 AFTR2d 1680, 58-1 USTC ¶ 9496 (D. Md. 1958) (rejecting a state classification of a liquor license as not being property).

76

Fidelity & Deposit Co. of Md. v. New York City Hous. Auth., 241 F2d 142, 144, 57-1 USTC ¶ 9410, 50 AFTR 1606 (2d Cir. 1957), on remand, 157 F. Supp. 87, 58-1 USTC ¶ 9350, 1 AFTR2d 1130 (SDNY 1957) ; see Cahn, “Local Law in Federal Taxation,” 52 Yale LJ 799, 816 (1943); Note, “Property Subject to the Federal Tax Lien,” 77 Harv. L. Rev. 1485, 1487 (1964) (“state labels should not control where the realities—the beneficial incidents of ownership—belie them”). See also United States v. National Bank of Commerce, 472 US 713, 720, 105 S. Ct. 2919, 85-2 USTC ¶

9482, 56 AFTR2d 85-5210 (1985) ; United States v. Bess, 357 US 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135, 58-2 USTC ¶ 9595, 1 AFTR2d 1904 (1958) .

77

Little v. United States, 704 F2d 1100, 1106, 83-1 USTC ¶ 9343, 51 AFTR2d 83-1196 (9th Cir. 1983) , later appeal, 794 F2d 484, 86-2 USTC ¶ 9558 (9th Cir. 1986) (concerning a right of redemption under state law, the Ninth Circuit said, “Simply because an interest is classified as a “privilege” under state law should not exempt such interest from attachment by a federal tax lien if such interest represents an economic asset in the sense that it has pecuniary worth and is transferable, so that a claim can be enforced against it. As previously discussed, the interest in the instant case meets this definition and should, therefore, be considered a property interest within the meaning of Section 6321 of the Internal Revenue Code.” 704 F2d 1100, 1106); In re Terwillinger's Catering Plus, Inc., 911 F2d 1168, 90-2 USTC ¶ 50,460, 66 AFTR2d 90-5453 (6th Cir. 1990), cert. denied, Ohio Dep't of Taxation v. IRS, 115 L. Ed. 2d 987, 111 S. Ct. 2815 (1991) (IRS tax lien had priority claim over State of Ohio to proceeds from sale of taxpayer's Ohio liquor license; state law providing that liquor license is a privilege and not a property interest was ignored). Accord United States v. Battley (In re Kiruma), 969 F2d 806, 811, 92-2 USTC ¶ 50,397, 70 AFTR2d 5414, (9th Cir. 1992) (“At bottom, our inquiry into state law to determine the nature of the interest created by Alaska does not require extensive analysis because a liquor license will constitute property, within the meaning of federal law, if the license has beneficial value for its holder, and it is sufficiently transferable.”); 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F2d 354, 357, 86-2 USTC ¶ 9516, 57 AFTR2d 86-1423 (3d Cir. 1986) (same) . Hargrave v. Town of Pemberton (In re Tabone, Inc.), 175 BR 855 (Bankr. DNJ 1994) (federal tax lien may be satisfied from the proceeds of the sale of debtor's liquor license, even though the attachment of a lien to a liquor license is generally prohibited under New Jersey law, and even though a liquor license is not considered to be property for state definitional purposes; state law cannot be used to prevent the attachment of a federal tax lien by the Service; tax lien attaches to all of debtor's property, including the proceeds from the sale of debtor's liquor license). See also Gardner v. United States, 34 F3d 985, 94-2 USTC ¶ 50,482, 74 AFTR2d 94-6307 (10th Cir. 1994) (as the result of a divorce decree, labeled a judgment, wife was awarded all interest in marital property on the assessment date and husband was awarded practically none of the property; the government unsuccessfully contended that the fact that the divorce decree was written in terms of a “judgment” against husband suggested that he maintained an ownership interest in the property up to the time the decree was entered, and therefore that a tax lien did attach to the property. “Although the divorce decree is framed in terms of a ‘judgment,’ we cannot ignore the fact that the Kansas court merely divided marital property pursuant to its duty to do so.…”).

78

Treas. Reg. § 301.6334-1(c); United States v. Mitchell, 403 US 190, 91 S. Ct. 1763, 29 L. Ed. 2d 406, 71-1 USTC ¶ 9451, 27 AFTR2d 71-1457 (1971) .

79

United States v. Kimbell Foods, Inc., 440 US 715, 734, 59 L. Ed. 2d 711, 99 S. Ct. 1448, (1979) ; In re Rosenberg's Will, 269 NY 247, 199 NE 206, AFTR 1417 (NY App. 1935), cert. denied, Rosenberg v. United States, 298 US 669 (1936) . Note that while some properties are immune from certain debts, they are not immune from the federal tax lien. For example, disability benefits under Social Security and seaman wages are subject to the federal tax lien even though they are exempt from execution generally. See Kane v. Burlington Sav. Bank, 320 F2d 545, 549, 63-2 USTC ¶ 9596, 12 AFTR2d 5252 (2d Cir. 1963), cert. denied, 375 US 912, 11 L. Ed. 2d 151, 84 S. Ct. 209 (1963) (disability benefits received under Social Security were not exempt from levy under IRC § 6334(a)(4)) .

80

United States v. Mitchell, 403 US 190, 91 S. Ct. 1763, 29 L. Ed. 2d 406, 71-1 USTC ¶ 9451, 27 AFTR2d 71-1457 (1971) .

81

See Blair v. Comm'r, 300 US 5, 81 L. Ed. 465, 57 S. Ct. 330, 37-1 USTC ¶ 9083, AFTR 1132 (1937) ; West v. American Tel. & Tel., 311 US 223, 236, 61 S. Ct. 179, 85 L. Ed. 139 (1940) (stating that federal courts are bound to follow state law even though they believe that “the rule is unsound in principle or that another is preferable”; a decision of state intermediate appellate court on state law issue is “not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” 311 US at 237–238); Freuler v. Helvering, 291 US 35, 78 L. Ed. 634, 54 S. Ct. 308, 4 USTC ¶ 1213, AFTR 834 (1934) .

82

Erie RR Co. v. Tompkins, 304 US 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938) . The Erie doctrine is not limited to diversity cases. The approach to local law in these types of taxation cases continues to be the same approach as in diversity cases. See Estate of Spiegel v. Comm'r, 335 US 701, 93 L. Ed. 330, 69 S. Ct. 301, 49-1 USTC ¶ 10703, 37 AFTR 459 (1949) ; Comm'r v. Bosch, 387 US 456, 18 L. Ed. 2d 886, 87 S. Ct. 1776, 19 AFTR2d 1891 (1967) .

Ferguson, Freeland, & Stephens, Federal Income Taxation of Estates and Beneficiaries 37 n.60 (Little, Brown & Co. 1970). See Verbit, “State Court Decisions in Federal Transfer Tax Litigation: Bosch Revisited,” 23 Real Prop. Prob. & Tr. J. 407 (1988). See also Schmit v. United States, 688 F. Supp. 1466, 89-1 USTC ¶ 9303, 63 AFTR2d 89-1004 (D. Nev. 1988), aff'd without op., 892 F2d 1046 (9th Cir. 1989), reported in full, 896 F2d 352, 91-1 USTC ¶ 50,024, 65 AFTR2d 90-683 (9th Cir. 1989) (full faith and credit given state divorce court determination of separate property of wife; federal tax lien of former husband would not attach to wife's separate property); Grimm v. Comm'r, 894 F2d 1165, 90-1 USTC ¶ 50,048, 65 AFTR2d 90-645 (10th Cir. 1990), aff'g 89 TC 747 (1987) (Tax Court and Tenth Circuit interpreted Philippine community law as holding a surviving spouse liable for taxes on the community portion of note payments payable during the administration of her deceased husband's estate) .

83

King v. Order of United Commercial Travelers, 333 US 153, 92 L. Ed. 608, 68 S. Ct. 488 (1948) ; Comm'r v. Bosch, 387 US 456, 18 L. Ed. 2d 886, 87 S. Ct. 1776, 19 AFTR2d 1891 (1967) .

84

West v. American Tel. & Tel., 311 US 223, 85 L. Ed. 139, 61 S. Ct. 179 (1940) .

85

Comm'r v. Bosch, 387 US 456, 18 L. Ed. 2d 886, 87 S. Ct. 1776, 19 AFTR2d 1891 (1967) .

86

Helvering v. Stuart, 317 US 154, 164, 87 L. Ed. 154, 63 S. Ct. 140, 42-2 USTC ¶ 9750, 29 AFTR 1209 (1942) ; Huddleston v. Dwyer, 322 US 232, 237, 232, 88 L. Ed. 1246, 64 S. Ct. 1015 (1944) ; Propper v. Clark, 337 US 472, 486–487, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) , quoted with approval in United States v. Durham Lumber Co., 363 US 522, 526–527 (1960) ; see also Estate of Spiegel v. Comm'r, 355 US 701, 93 L. Ed. 330, 69 S. Ct. 301, 49-1 USTC ¶ 10703, 37 AFTR 459 (1949) .

87

United States v. Rodgers, 461 US 677, 76 L. Ed. 2d 236, 103 S. Ct. 2132, 83-1 USTC ¶ 9374, 52 AFTR2d 83-5042 (1983) .

88

See, for example, Paddock v. Siemoneit, 147 Tex. 571, 218 SW2d 428, 436, 428, 49-1 USTC ¶ 9202, 38 AFTR 1173 (1949) .

89

United States v. Rodgers, 649 F2d 1117, 1127, 81-2 USTC ¶ 9536, 48 AFTR2d 81-5526 (5th Cir. 1981) .

89.1

Old West Annuity and Life Ins. Co. v. Apollo Group, 605 F3d 856 (11th Cir. 2010) .

89.2

Drye v. United States, 528 US 49, 120 S. Ct. 474, 145 L. Ed. 2d 466 (1999).

89.3

Old West Annunity and Life Ins. Co. v. Apollo Group, 605 F3d 859, 861 (11th Cir. 2010) . See CC-2012-002 (Dec. 2, 2011) (IRS Chief Counsel asserts position that a federal common law analysis to prove alter ego status is legally correct and consistent with the important principle of uniformity of federal tax enforcement).

89.4

United States v. Kimball Foods, Inc., 440 US 715, 99 S. Ct. 1448, 1458-59, 59 L. Ed. 2d 711 (1979) .

89.5

Old West Annuity and Life Ins. Co. v. Apollo Group, 605 F3d 859, 861 (11th Cir. 2010) .

89.6

Citing United States v. Scherping, 187 F3d 796, 801-02 (8th Cir. 1999) (“Generally, federal courts will look to state law to determine whether an entity is an alter ego of a taxpayer.”); Floyd v. Comm'r, 151 F3d 1295, 1298-99 (10th Cir. 1998) (applying state law); Towe Antique Ford Found. v. Comm'r, 999 F2d 1387, 1391 (9th Cir. 1993) (“We apply the law of the forum state in determining whether a corporation is an alter ego of the taxpayer.”); Zahra Spiritual Trust v. United States, 910 F2d 240, 242 (5th Cir. 1990) (“In determining whether the appellants are the alter egos of the taxpayers, and whether the taxpayer has an interest in property to which the government's tax lien attached, we look to state law.”). Old West Annuity & Life Inc. Co. v. Apollo Group, 605 F3d 856 at 861 (11th Cir. 2000) .

89.7

In re Laughlin, 602 F3d 417 (5th Cir. 2010) (King, J.) (of particular interest is the fact that Judge King, who wrote the opinion in *Laughlin*, was a note bankruptcy lawyer before becoming a judge on the Fifth Circuit).

89.8

Following Gaughan v. Dittlof Revocable Trust (In re Costas), 555 F3d 790 (9th Cir. 2009) and Simpson v. Penner (In re Simpson), 36 F3d 450, 452 (5th Cir. 1994) (per curiam).

90

United States v. Creamer Indus., Inc. 349 F2d 625, 65-2 USTC ¶ 9527, 16 AFTR2d 5071 (5th Cir.), cert. denied, 382 US 957, 15 L. Ed. 2d 361, 86 S. Ct. 434 (1965) .

91

Prewitt v. United States, 792 F2d 1353, 86-2 USTC ¶ 9513, 58 AFTR2d 86-5340 (5th Cir. 1986) .

91.1

Wagner v. United States, 545 F3d 298 (5th Cir. 2008) . See, William D. Elliott, Divorcing Delinquent Taxpayers: Unrecorded and Thus Unrequited, CCH Taxes Magazine (Mar. 2010), p. 17.

91.2

Citing Texas Commerce Bank-Fort Worth, N.A., CA-5, 896 F2d 152, 156, 90-1 USTC ¶ 50,155.

91.3

IRC § 6323(a).

91.4

United States v. V&E Eng'g. & Constr. Co., 819 F2d 331, 87-1 USTC ¶ 9355 (1st Cir. 1987) .

91.5

PR Laws Ann., Tit. 31, § 3822 (1968).

91.6

United States v. V&E Eng'g & Constr. Co., 819 F2d 331, 334, 87-1 USTC ¶ 9355 (1st Cir. 1987).

91.7

Gibbons v. United States, 71 F3d 1496, 96-1 USTC ¶ 50,008 (10th Cir. 1996) .

91.8

Gibbons v. United States, 71 F3d 1496, 1498, 96-1 USTC ¶ 50,008 (10th Cir. 1996) .

91.9

Colorado Revised Statutes § 38-35-109 provides: “All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property, certificates, and certified copies of orders, judgments, and decrees of courts of record may be recorded in the office of the county clerk and recorder of the county where such real property is situated. No such unrecorded instrument or document shall be valid as against any class of persons with any kind of rights who first records, except between the parties thereto and such as have notice thereof.”

91.10

The court was using the classic metaphor derived from B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts, ¶ 111.5.4 (Thomson Reuters/WG&L 1981), and based upon United States v. National Bank of Commerce, 472 US 713, 727, 85-2 USTC ¶ 948 , that the Service stands in the shoes of the taxpayer. See Gardner v. United States, 34 F3d 985, 94-2 USTC ¶ 50,482 (10th Cir. 1994) (“the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out,” quoting Professor Bittker).

91.11

Thomson v. United States, 66 F3d 160, 163, 95-2 USTC ¶ 50,549 (8th Cir. 1995) .

91.12

Minn. Stat. § 507.34.

91.13

Citing Miller v. Hennen, 438 NW2d 366, 369 (Minn. 1989) .

91.14

United States v. Henshaw, 388 F3d 738, 743 (10th Cir. 2004) .

91.15

Ibid.

91.16

Nomellini Constr. Co. v. United States, 328 F. Supp. 1281, 1285, 71-2 USTC ¶ 9510 (ED Cal. 1971) .

91.17

See, e.g., United States v. Peabody Constr. Co., 392 F. Supp. 2d 36, 2005-1 USTC ¶ 50,210 (D. Mass. 2005) ; Walker v. United States, 636 F. Supp. 61 (ND Okla. 1986) ; United States v. North Side Deposit Bank, 569 F. Supp. 948 (WD Pa. 1983) ; United States v. Smyers, 1999 WL 250732 (CD Cal. 1999) (unreported); United States v. Paladin, 539 F. Supp. 100 (WDNY 1982) .

91.18

E.g., United States v. North Side Deposit Bank, 569 F. Supp. 948, 83-2 USTC ¶ 9503 (WD Pa. 1983) .

91.19

E.g., United States v. Allen, DC-Wash., 207 F. Supp. 545, 62-2 USTC ¶ 9704 (D. Wash. 1962) .

91.20

CCA 200614006 (Apr. 7, 2006). See also IRS LB 417 (June 1995).

91.21

IRS LB 417 (June 1995).

91.22

Permian Petroleum Co. v. Petroleos Mexicanos, 934 F2d 635, 651 (5th Cir. 1991) (citation omitted); see also Amarillo Nat'l Bank v. Komatsu Zenoah Am., Inc., 991 F2d 273 (5th Cir. 1993) .

91.23

In re TXNB Internal Case, 483 F3d 292, 308 (5th Cir. 2007) (citing Home Indemnity Co. v. Pate, 814 SW2d 497, 498-99 (Tex. App—Houston, 1991, writ denied)).

91.24

Permian Petroleum Co. v. Petroleos Mexicanos, 934 F2d 635 (5th Cir. 1991) .

91.25

Nomellini Constr. Co. v. United States, 328 F. Supp. 1281, 1285, 71-2 USTC ¶ 9510 (ED Cal. 1971) .

91.26

Nomellini Constr. Co. v. United States, 328 F. Supp. at 1285–1286 .

91.27

Fritschler, Pellino, Schrank & Rosen, S.C. v. United States, 716 F. Supp. 1157, 89-1 USTC ¶ 9111 (ED Wis. 1988) .

91.28

Fritschler, Pellino, Schrank & Rosen, S.C. v. United States, 716 F. Supp. 1160-1161 .

91.29

Cases commonly cited for support of a tortious conversion claim by the Service are: Nomellini Constr. Co. v. United

States, 328 F. Supp. 1281, 1285, 71-2 USTC ¶ 9510 (ED Cal. 1971) ; United States v. Allen, 207 F. Supp. 545, 62-2 USTC ¶ 9704 (D. Wash. 1962) ; Walker v. United States, 636 F. Supp. 61, 86-1 USTC ¶ 9240 (ND Okla. 1986) ; United States v. Matthews, 244 F2d 626 (9th Cir. 1957) (not a tax case); United States v. Bank of Celina, 721 F2d 163, 83-2 USTC ¶ 9688 (6th Cir. 1983) (bank set-off case); Webster-Robinson Mach. & Supply Co., 65-1 USTC ¶ 9255 (D. Wash. 1965) .

91.30

United States vs. Boardwalk Motor Sports, Ltd., 692 F3d 378, 2012-2 USTC ¶ 50,536 (5th Cir. 2012) .

91.31

United States vs. Boardwalk Motor Sports, Ltd., 692 F3d at 383 .