TRANSFEREE LIABILITY CHECK LIST

1. ____ Obtain Counsel's file for review and approval of the proposed notice of liability (SNL) asserting transferee liability. *See* IRM 4.3.19.1.7.1.

2. ____ Review Form 3031, Report of Investigation of Transferee Liability.

3. ___ Obtain a sample answer containing affirmative allegations of transferee liability that discusses alternative grounds for transferee liability under the Federal Debt Collection Procedure Act (FDCPA) and state law. *See* CCDM Exhibit 35.4.23-1

4. ____ Consider what you need to plead regarding the Transferor's tax liability.
   - _____ Is the Transferor's tax liability no longer subject to collateral attack by the Transferee, due to *res judicata* from another case or a closing agreement?
   - _____ Is the Transferor's tax liability properly assessed or was it futile to pursue collection against the Transferor (e.g, Transferor is a long dissolved corporation)?
   - _____ Is there a pending Tax Court case involving the Transferor's tax liability (or for related Transferees for the same tax)? If so, should cases be consolidated?
   - _____ Do you need to obtain Transferor's file to preserve it from routine destruction?
   - _____ Are affirmative pleadings required in your answer regarding the Transferor's tax liability (e.g., was Fraud Penalty assessed/determined against Transferor)?

5. ___ Consider what you need to plead regarding the form and timing of the transfer(s) to the Transferee.
   - ____ Is the form of the transfer directly from the Transferor to the Transferee?
   - ____ Is it necessary to recast the form of the transaction (i.e., substance over form) to treat the transfer as one from the Transferor (owing the tax) to the Transferee?
   - ____ Is the transfer indirect (i.e., to a third party for the Transferee's benefit)?
   - ____ Is there one transfer or a series of separate transfers over time?
   - ____ Is the transfer or series of transfers part of an overall plan to distribute most or all of the Transferor's assets?
   - ____ Is there evidence establishing the date(s) of the transfer(s), such as filings with the county or secretary of state's office?

6. ___ Consider what you need to plead regarding the value and any return consideration for the transfer.
   - ____ Is the transfer(s) in cash or a cash equivalent?
   - ____ If not, is there a readily agreed value/valuation (e.g., a dollar value reflected in acquisition/transfer documents, document stamps on a deed, insured value) for all of the transferred property?
   - ____ Is it agreed that there was no consideration provided for the transfer(s)?
   - ____ Is it necessary to recast the form of the transaction (substance over form) to treat the

transfer as being for no consideration (e.g., treat third party's stock purchase as the corporation paying a liquidating distribution/dividend to a stockholder)?

____ If some consideration is alleged for the transfer(s), is there evidence to show the value of the consideration (e.g., in the transfer documents) in comparison to the value of the transfers?

____ If the case is not settled, will you need to hire an expert to value the property and/or the value of the consideration (if any) given for the transfer?

____ If there may have been reasonably equivalent value actually given for the transfer, was the Transferee an insider for purposes of 28 U.S.C. § 3304(a)(2)? *See* IRM 5.17.14.2.3.1(7)

7. ___ Determine if actual fraud -- intent to hinder, delay, or defraud a creditor -- under state law and/or the FDCPA can be established. *See* 28 U.S.C. § 3304(b)(2).

____ Was the transfer to an insider?

____ Did the Transferor retain possession or control of the property after the transfer?

____ Was the transfer's occurrence concealed from third parties?

____ Before the transfer, had the Transferor been sued or threatened with suit?

____ Did the transfer, series of transfers, or the transfer plan involve substantially all of the Transferor's assets?

____ Did the Transferor flee or hide personally, or did the Transferor remove or conceal assets?

____ Was reasonably equivalent value given for the transfer?

____ Was the Transferor insolvent or become insolvent shortly after the transfer(s)?

____ Did the transfer(s) occur shortly before or shortly after the Transferor incurred a substantial debt?

____ If the applicable state law requires it, did the Transferee have knowledge or show reckless disregard of the Transferor's actual fraudulent intent?

8. ___ Determine if constructive fraud -- transfers not for equivalent value while insolvent or in anticipation of insolvency -- can be established. See IRM 5.17.14.

____ In form or substance, did the Transferor transfer property to the Transferee?

____ In form or substance, was the property transferred for inadequate or no consideration?

____ Was the transfer made <u>during or after</u> the period when the tax liability of the Transferor accrued?

____ If the Transferor's tax liability arises from an excessive NOL carryback refund and the refund was issued after the transfer occurred, did the Transferee benefit directly or indirectly from the refund being issued?

____ Was the Transferor insolvent prior to the transfer or made insolvent by the transfer?

____ When the transfer was made, was the Transferor engaged or about to engage in a business or transaction for which the remaining assets of the Transferor were unreasonably small in relation to the business or transaction?

____ When the transfer was made, did the Transferor incur or should the Transferor reasonably have believed that the Transferor would incur debts beyond the ability of the Transferor to pay as they became due?

____ Are there financial statements or court documents (e.g., bankruptcy schedules, creditor proofs of claim, judgments) that establish the Transferor's assets and/or liabilities (apart from the tax debts) when the transfer(s) occurred or around the related time the significant transactions or debts were expected to occur or to be incurred?

____ Has the Service made all reasonable efforts to collect the liability from the Transferor and/or would further collection efforts against the Transferor be futile?

____ Has the Service determined the value of the transferred property and the state in which the transfers occurred?

9. ___ Determine whether the value of the property transferred exceeded the amount of the Transferor's tax liabilities or whether the Transferee was obligated by contract or state law to assume all of the Transferor's debts.

____ If so, have you pleaded the Transferor's interest liability in your answer? *See* CCDM 35.4.23.2.

____ Have you pleaded the applicable "Transferee interest" in your Answer?

10. ___ Has the Petitioner/Transferee alleged that the Service's limitation period for pursuing the Transferee has expired under either the IRC or the applicable fraudulent conveyance law?

____ If the Transferor's tax liability has not yet been assessed, could it still have been assessed when the SNL was issued to the Transferee due to extensions, a pending Tax Court case, no return being filed, a 25% understatement, or fraud?

____ If the Transferor's tax liability was assessed more than one year before the SNL was issued to the Transferee, was the assessment limitation period against the Transferor open for a period of time after the assessment was made (e.g, for the normal three years on a filed return, by an extension, or for fraud)?

____ Did the Transferee extend the transferee liability limitation period by a waiver(s)?

____ Is the Transferee a transferee of a transferee? *See* I.R.C. § 6901(c)(2)

____ If Petitioner alleges that a state law limitation period necessary for reliance on the state's fraudulent conveyance law has expired, have you considered Bresson v. Commissioner, 213 F.3d 1173 (9th Cir. 2000) and cases cited therein?

____ If Petitioner alleges that an FDCPA limitation period necessary for reliance on the FDCPA's federal fraudulent conveyance law has expired, can you argue that the FDCPA does not limit Service's remedies? *See* 28 U.S.C. § 3003(b)(1).

Sources of information on transferee liability law and procedure:

- **!** Legal Reference Guide (LRG), IRM 5.17.14
- **!** Chapter 18 of GL Basic School Text (go to Counsel PA website, under Ref. Tools)
- **!** State laws guides on fraudulent conveyances (Counsel SBSE website, Legal Issues)
- **!** 14 Mertens Law of Federal Income Taxation § 53.01 et. seq.

- BNA Portfolio No. 158, “Transferee Liability”
- CCDM 35.4.23 (for Answers) and 35.10.5 (for Decision documents)
- Transferee Liability Desk Reference Guide for Revenue Officers, Doc. 10025