

## Outside Counsel

## Expert Analysis

# Passport Revocation Begins For ‘Seriously Delinquent Tax Debt’

In January 2018, the Internal Revenue Service is rolling out a new collection tool: certifying a taxpayer’s “seriously delinquent tax debt” for passport revocation. Taxpayers who owe more than \$51,000 in tax, penalties and interest; and (1) are not in a payment plan or do not have one pending, and (2) have exhausted or let lapse their administrative rights, can expect to receive IRS Notice CP508C, notifying them of their seriously delinquent debt. At the time the Notice is systematically issued to the taxpayer, the State Department is notified of the taxpayer’s seriously delinquent debt and may revoke the taxpayer’s passport, or refuse to issue or renew the passport, until the debt has been decertified.

This procedure was created by statute (26 U.S.C. §7345) in 2015, as part of the Fixing America’s Surface Transportation (FAST) Act and is now being implemented by the IRS.

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The statute defines “seriously delinquent tax debt” as debt that has been assessed by the IRS; is greater than \$50,000 (indexed for inflation); “to which—(i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed; or (ii) a levy is made pursuant to section 6331.” The statutory exceptions to a “seriously tax delinquent debt” include debts that are being timely paid pursuant to an installment agreement or an offer in compromise or if a collection due process hearing has been requested or is pending or innocent spouse relief has been elected or is requested. See §7345(b)(2). Certain debt—Affordable Care Act assessments, employer shared responsibility payments,

criminal restitution assessments, child support obligations and FBAR assessments—are not subject to certification under §7345. See I.R.M. 5.19.1.5.19.2 (12-26-2017).

The certification may be reversed if (1) the certification is found to be erroneous (such as when an exception is met); (2) the debt has been fully paid; (3) an installment

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agreement is entered into; (4) an offer is accepted by the IRS; or (5) innocent spouse relief is elected or requested. See §7345(c). The State Department will hold a taxpayer’s certification open for 90 days to allow a taxpayer to demonstrate to the IRS that either the certification is erroneous or after receipt of Notice CP508C, the taxpayer enters into an acceptable payment alternative

with the IRS. See I.R.M. 5.19.1.5.19.8 (12-26-2017).

### **Discretionary Certification Exclusions by the IRS**

Late last year, the IRS issued guidance as to certain categories of tax debt it will exclude from certification even if the debt would otherwise be considered “seriously delinquent tax debt.” The exclusions include: debt that is determined to be currently not collectible due to hardship; debt resulting from identity theft; taxpayers that are in a disaster zone; tax debt that is the subject of a bankruptcy proceeding; debt of a deceased taxpayer; debt that is included in a pending offer in compromise; and debt that is included in a pending installment agreement. See I.R.M. 5.19.1.5.19.4 (12-26-2017). Pending OICs and installment agreements will only be excluded if they are legitimate and are not made to delay collection. Additionally, the IRS will postpone certification of a seriously delinquent tax debt for taxpayers who are serving in a combat zone. 26 U.S.C. §7508(a)(3).

### **Reversal of Certification by the IRS and Expedited Decertification**

The IRS will “systematically” notify the State Department within 30 days if a taxpayer’s previously certified debt is fully satisfied, becomes legally unenforceable, or ceases to be a seriously delinquent tax debt

because the taxpayer has entered into an approved installment agreement; is paying the debt in a timely matter as a part of an accepted offer in compromise or settlement with the Department of Justice; or collection has been suspended due to a timely requested or pending collection due process hearing pursuant to 26 U.S.C. §6330. See I.R.M. 5.19.1.5.19.9 (12-26-2017). Upon receipt, the State Department shall remove the certification from the taxpayer’s record. See 22 U.S.C. §2714a(g); Chief Counsel Notice 2018-1 (01/12/2018). A pending equivalent hearing—a hearing that is requested after the 30-day statutory time limit but before a year has lapsed—will not protect a taxpayer from having his/her tax debt certified as seriously delinquent and subject to passport revocation. See I.R.M. 5.19.1.5.19.2 (12-26-2017). Nor will a certification be reversed because a taxpayer pays a portion of the debt down below the \$51,000 threshold. See I.R.M. 5.19.1.5.19.9 (12-26-2017).

The IRS will decertify a tax debt when a discretionary exclusion is met, such as if the certified taxpayer files for bankruptcy; enters a combat zone; is determined to be currently not collectible; or there is an adjustment to the account that reduces the certification amount below the threshold, such as in the case of penalty abatement based on

reasonable cause. However, penalty abatement that occurs as a result of the First Time Abatement Rule will *not* result in decertification once the taxpayer has been certified even if the abatement brings the debt down below the threshold amount (now \$51,000). See I.R.M. 5.19.1.5.19.9 (12-26-2017). The IRS will also decertify the debt if requested to do so by the State Department. Additionally, 22 U.S.C. §2714(a)(e)(B) allows the State Department to issue a passport or not revoke a passport in “emergency circumstances or for humanitarian reasons.” The State Department may also issue a limited passport that provides for return travel only to the United States. *Id.* However, “this [action by the State Department] does not affect the taxpayer’s certification as a seriously delinquent taxpayer or reverse[s] their certification.” See I.R.M. 5.19.1.5.19.8 (12-26-2017).

In the case of an erroneous certification, such as when the taxpayer is in a combat zone and the IRS was unaware of it or there is an approved installment agreement, the IRS will notify the State Department “as soon as practicable.” See I.R.M. 5.19.1.5.19.9 (12-26-2017).

A taxpayer may request expedited decertification if they are eligible for decertification and (1) have foreign travel scheduled 45 days or less or live abroad; and (2) have a pending application for a

passport or renewal and can provide their passport application number and the location of the passport application. See I.R.M. 5.19.1.5.19.9.1 (12-26-2017). The IRS may then complete internal Form 14794, which will be forwarded directly to the State Department for action.

### No Administrative Appeal Rights

Unlike when the IRS files a lien or issues a final notice of intent to levy, the taxpayer has no administrative appeal rights after receiving Notice CP508C. The statute does provide for judicial review, requiring a taxpayer to bring an action against the United States in the U.S. District Court or Tax Court “to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification.” 26 U.S.C. §7435(e)(1). If found to be erroneous, both of these courts may order the IRS to “notify the State Department that the certification was in error.” §7435(e)(2). Since the Tax Court is a court of limited jurisdiction, if the taxpayer is seeking a court order directed to the State Department, the District Court may be the more appropriate venue.

### Concerns

This latest collection tool by the IRS is cause for concern. While it may certainly be successful for the

IRS collecting revenue, it is a new procedure involving coordination between two government agencies, short time periods and no administrative appeal rights. The IRS is a severely underfunded agency now charged with certifying and decertifying “seriously delinquent tax debt” which has significant

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consequences on the taxpayer in addition to liens and levies. Taxpayers who wish to resolve their seriously delinquent tax debt by entering into an installment agreement may have difficulty doing so, if they don’t qualify for the online application (which has limitations as to the amount of the debt owed and time limitations as to when the debt must be paid off) and are unable to get through to the IRS on the phone to set up an agreement as many calls are dropped after long holding periods due to call volume and inability of the IRS to process all the customer service calls it receives.

Passports are not only needed for a vacation abroad, but many taxpayers need a valid passport to work or travel within the United

States. For U.S. citizens living abroad, they will lose their ability to travel if their passports are revoked and unfortunately, certification notices from the IRS may not reach them as the IRS’ systems have difficulty with international addresses. While some practitioners have suggested that 26 U.S.C. §7345 may violate a citizen’s constitutional rights including the right to travel, passport revocation has been held to be constitutional for unpaid child support as long as the debtor has notice and an opportunity to contest the revocation/denial of his/her passport. See *Weinstein v. Albright*, 261 F.3d 127 (2d Cir. 2001). To avoid certification, it is advisable that taxpayers arrange for an acceptable collection resolution or timely avail themselves of their collection due process hearing rights.