An aerial photograph of Disney Springs at dusk. The scene is dominated by a large, modern glass skyscraper on the left and a curved glass building on the right. In the center, a large lake reflects the sky and surrounding lights. The sky is a mix of orange, purple, and blue, indicating sunset. The foreground shows various other buildings, some with lit-up windows, and a street with palm trees.

4th Annual Tax Rep Summit: Day 4

Drury Hotel, Disney Springs

December 13, 2024

Sponsored by



Thank you

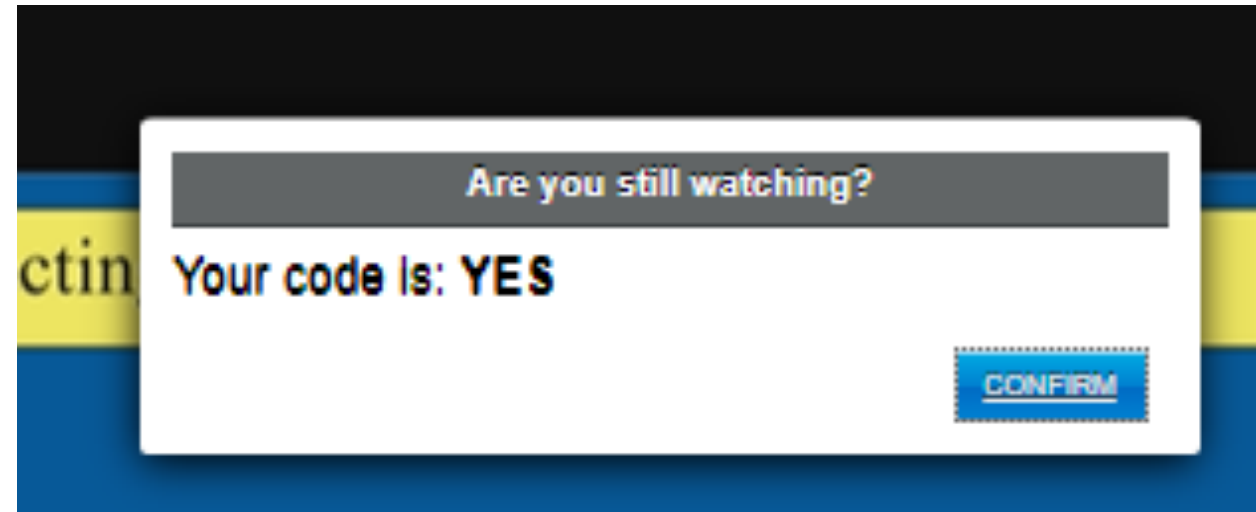


Housekeeping Items

- ▶ CPE Certificates – will be handed out at the end of the program. Online Audience will receive a link if they do the online attendance checks
- ▶ Questions during the program? Please walk up to the Mic stands so the on-line audience can hear you. Online, please use the chat box
- ▶ Facilities immediately outside, online stick to schedule

Housekeeping Items - Webcast

- ▶ On-Screen attendance checks
- ▶ Please keep to our schedule
- ▶ Use the chat room for questions
- ▶ Link for certificate will be emailed to you after the on-screen attendance checks are tallied on Monday or Tuesday



Webcast – Having Issues?

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877-406-8636

Today's Agenda

- ▶ We have given you in your handouts
- ▶ Webcast Audience: please try and take your break when we do so you do not miss the onscreen attendance checks

Schedule – Friday December 13th

Time	Item
9:00 -10:30	Nominees, Alter-Egos, Fraudulent Conveyances and Quiet Title Actions
10:30 - 10:45	Break
10:45 - 12:00	Strategies When The Client's Expenses Exceed the Allowable Standards

Nominees, Alter-Egos, Fraudulent Conveyances and Quiet Title Actions.

David Ramirez, EA,

Catharine O'Connor, Esq., Tax Mentor

Jeffrey Sklarz, Esq., Green & Sklarz LLC

Jamie Flores, Esq., Law Offices of Nick Nemeth

Clients will try all sorts of maneuvers to avoid having their assets grabbed to pay back tax debts.

This panel will review the options the IRS has to pursue transferees and the assets, and what options the taxpayer has to challenge the IRS's claim.

Nominee

Nominee – IRM 5.17.2.5.7.2

- ▶ Nominee
- ▶ (1) A “nominee” is someone designated to act for another. [Liability] extends to property “actually” owned by the taxpayer even though a third party holds & “legal” title to the property as nominee. Generally speaking, the third party in a nominee situation will be either another individual or a trust.

Nominee – IRM 5.17.2.5.7.2

- ▶ (2) No one factor determines whether a nominee situation is present, but a number of factors taken together may. The following list is neither exhaustive nor exclusive, but nominee situations typically involve one or more of the following:
 - ❑ The taxpayer previously owned the property.
 - ❑ The nominee paid little or no consideration for the property.
 - ❑ The taxpayer retains possession or control of the property.
 - ❑ The taxpayer continues to use and enjoy the property conveyed just as the taxpayer had before such conveyance.
 - ❑ The taxpayer pays all or most of the expenses of the property.
 - ❑ The conveyance was for tax avoidance purposes.

Nominee NFTL – IRM 5.12.7.6.1

- ▶ A nominee situation normally involves a fraudulent conveyance or transfer of a taxpayer's property to avoid legal obligations. To establish attachment of the statutory lien in a nominee situation, it must be shown that while a third party may have legal title to the property, it is the taxpayer that enjoys the full use and benefit.
- ▶ A nominee NFTL may be filed **WITHOUT** written approval of area counsel.

Alter Ego

Alter Ego IRM 5.17.2.5.7.1

- (1) Alter ego essentially means a “second self” It is a doctrine that allows the law to disregard an entity’s separate legal identity in order to extend liability and prevent abuse...
- (2) An alter ego generally involves a sham corporation used to avoid legal obligations. To establish an alter ego ... it must be shown that the shareholders disregarded the corporate entity and made it an instrumentality for the transactions of their own affairs.

Alter Ego Factors IRM 5.17.2.5.7.1(4)

- ▶ No One Factor is Determinative!
 - ❑ Commingling of corporate and personal finances and use of corporate funds to pay personal expenses.
 - ❑ Unsecured interest-free loans between the corporation and the shareholder.
 - ❑ The taxpayer is a shareholder, director, or officer of the corporation, or otherwise exerts substantial control over the corporation.

Alter Ego Factors IRM 5.17.2.5.7.1(4)

- ▶ No One Factor is Determinative!
 - ❑ The corporation is undercapitalized relative to its reasonable anticipated risks of business.
 - ❑ A failure to observe corporate formalities, e.g. issuance of stock, payment of dividends, director and shareholder meetings, or the maintenance of corporate records.
 - ❑ A failure to disregard the corporate fiction presents an element of injustice or “fundamental unfairness”

Common Alter Ego Investigations

- ▶ Individual = Business Entity
- ▶ Business Entity = Individual
- ▶ New Business = Old Business

Alter Ego NFTL – IRM 5.12.7.6.2

- ▶ There are two elements to the alter ego doctrine:
 - ❑ Unity of ownership and interest, and
 - ❑ Fraud or inequity would result from the failure to disregard the corporate entity.
- ▶ Filing an NFTL against an alter ego requires review, advice, and written direction from area counsel.

Transferee

Transferee Liability

IRM 4.11.52.2 Types of Transferee Liability

(1) IRC 6901, Transferred Assets, provides the IRS an administrative mechanism to assert that a transferee is liable for a transferor's primary liability. The transferee's substantive liability, however, is a matter of state law (state fraudulent transfer statutes) or federal law (28 USC 3301, Definitions through 28 USC 3308, Supplementary Provision). There are two types of transferee liability, both of which can be asserted under IRC 6901. The two types of transferee liability are "transferee at law" and "transferee in equity". For a more complete discussion of the two sources of transferee liability, see IRM 5.17.14.3.3, Establishing Transferee Liability.

Transferee at Law

IRM 4.11.52.1.1 Transferee at Law

(1) Transferee at law arises when a person/entity is responsible for the transferor's tax liability because of a contractual agreement with the transferor. In this situation, a valid contract must exist and the government must prove that the tax liability was within the terms of the contract (for example, an assumption or guarantee agreement). Statutory mergers where the surviving corporation is primarily liable for the debts of the merged corporation do NOT result in a transferee situation. Consult the contracts and agreement affecting the merger and applicable state law.

Transferee in Equity

IRM 4.11.52.2.2 Transferee In Equity

(1) Transferee in equity is the most common form of transferee liability. This situation arises when a person/entity receives the transferor's assets for less than full, fair and adequate consideration, leaving the transferor insolvent and unable to pay the tax liability.

(2) Fraudulent transfers in equity are generally proven by showing either constructive fraud or actual fraud.

Transferee NFTL – IRM 5.12.7.6.3

- ▶ Transferee refers specifically to when a **statutory lien** attaches to property and the property has been transferred by the taxpayer through a gift, bequest, devise, or inheritance before an **NFTL** could be filed.
- ▶ There is no requirement that the taxpayer retain use of or a beneficial interest in the property like with a nominee lien.
- ▶ With the approval of Area Counsel, a special condition NFTL naming the transferee and the property transferred may be filed.

Collection from the Transferee is Secondary

IRM 5.17.14.3.2 Collection from the Transferee is Secondary

(1) Courts generally consider a transferee's liability to be secondary to the primary liability of the transferor. Secondary liability means:

- ❑ The transferee derives its liability from the transferor's liability, and
- ❑ Property is received under circumstances subjecting the transferee to the liabilities of the transferor.

(2) Before pursuing a transferee, the IRS must generally exhaust all legal remedies it may

have against the transferor for collection of the tax. The general rule is that the IRS must show that collection remedies against the transferor have been exhausted or would be futile. See, *Gumm v. Commissioner*, 93 T.C. 475, 480 (1989).

Remedies

Collection Due Process Hearing

- ▶ A Collection Due Process (CDP) Hearing will arise when a Notice of Federal Tax Lien (NFTL) is filed.
 - ❑ Timely Hearing within 30 days, starting after 5 business days from filing NFTL (IRM 5.1.9.3.1(2))
 - ❑ Non timely (aka Equivalent) within 1 year, starting after 5 business days from filing NFTL (IRM 5.9.3.1(2))
- ▶ A timely CDP hearing will generally give the taxpayer an option to proceed to tax court if unhappy with the outcome of the appeal. Need to be mindful of prior opportunity and whether there are strategic reasons to just head straight to court.

Quiet Title Action

5.17.5.18.2 Actions to Quiet Title

(3) A taxpayer may bring a quiet title action under 28 USC § 2410(a)(1) against the United States **to challenge the procedural validity of a federal tax lien and sale, but may not contest the merits of the underlying tax assessment in the proceeding.** See *James v. United States*, 970 F.2d 750 (10th Cir. 1992); *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992); *McCarty v. United States*, 929 F.2d 1085 (5th Cir. 1991); *Pollack v. United States*, 819 F.2d 144 (6th Cir. 1987); *Aqua Bar & Lounge, Inc. v. United States*, 539 F.2d 935 (3d Cir. 1976). In other words, section 2410 waives sovereign immunity with respect to procedural violations arising from assessment, levy, seizure, or sale, but not with respect to the amount of tax liability assessed.

Certificate of Non Attachment

- ▶ Under Internal Revenue Code section 6325(e), a Certificate of Non-Attachment of Federal Tax Lien may be issued when any person is, or may be, injured by the appearance that a Federal tax lien attaches their property
- ▶ A certificate of non-attachment is most commonly requested when a person with a similar name is confused for the taxpayer named on the Notice of Federal Tax Lien; however, a certificate of non-attachment can be requested for other situations to clarify the attachment of the lien to certain property.
- ▶ See Pub 1024

Keep a Close Eye On....

- ▶ Indications that there may be a Criminal Investigation
 - ❑ When a Revenue Officer has managed to make a case for a special condition Notice of Federal Tax Lien (NFTL) chances are they may also be preparing a referral to CI.
 - ❑ Doesn't mean anything will happen but for non attorneys need to beware of the limits of practitioner privilege and make sure your client is fully informed.
- ▶ Conflicts of Interest
 - ❑ Issues surrounding Nominee, Alter Ego, & Transferee liability frequently involve multiple parties who likely have adverse interests (aka a Conflict).

Litigating Nominee, Transferee & Quiet Title Actions

- ▶ Defendants to nominee assessments or liens cannot typically use administrative remedies to resolve the case.
- ▶ Affirmative litigation (usually in US District Court) is required.
- ▶ The IRS cannot administratively seize property from an alleged transferee, they must file a lawsuit, typically in US District Court.

Collection by DOJ Tax Generally

- DOJ Tax publishes a collection manual: <https://www.justice.gov/tax/judgmentcollectionmanual-table-contents>
- While the IRS typically uses its administrative remedies to collect debts, the DOJ does not have that option.
- Most collections are governed either by the Tax Code or the Federal Debt Collection Procedures ACT (“FDCPA”), 28 U.S.C. 3001 *et seq.*
- The FDCPA applies to all governmental collection actions not just under Title 26.
- Collection actions will be handled by a trial lawyer at DOJ Tax, through the local US Attorney’s Office. Sometimes the Financial Litigation Unit (“FLU”) of the US Attorney’s Office will be more involved, such as when the case involves criminal restitution orders.
- Litigation will generally occur in the US District Court in which the taxpayer resides. Exceptions include:
 - *Ex patriot* taxpayers. The collection action could take place in another country.
 - *In rem* actions. The collection action takes place where the property is located.
 - Occasionally, collection can take place in a Court of Claims action.
 - Occasionally, the DOJ must use a state court.

Collection by DOJ Tax Generally (cont.)

DOJ collection procedures include:

- Prejudgment remedies to preserve assets for later collection, including injunctions and receiverships.
- Foreclosing tax liens.
- Reducing assessments to judgment.
- Third-party actions, such as pursuing transferee liability.

Prejudgment Remedies

- A prejudgment remedy (“PJR”) is permitted by Fed. R. Civ. P. 64 (state law) and 65 (preliminary injunctions) and the FDCPA 3101-3105
- The purpose of a PJR is to ensure an asset is available pending final judgment.
- To obtain a PJR the Government must show (FDCPA 3101):
 - (b) Grounds.** Subject to section 3102, 3103, 3104, or 3105 [28 USCS § 3102, 3103, 3104, or 3105], a prejudgment remedy may be granted by any court if the United States shows reasonable cause to believe that—**(1)** the debtor—
 - (A)** is about to leave the jurisdiction of the United States with the effect of hindering, delaying, or defrauding the United States in its effort to recover a debt;
 - (B)** has or is about to assign, dispose, remove, conceal, ill treat, waste, or destroy property with the effect of hindering, delaying, or defrauding the United States;
 - (C)** has or is about to convert the debtor's property into money, securities, or evidence of debt in a manner prejudicial to the United States with the effect of hindering, delaying, or defrauding the United States; or
 - (D)** has evaded service of process by concealing himself or has temporarily withdrawn from the jurisdiction of the United States with the effect of hindering, delaying, or defrauding the United States; or
 - (2)** a prejudgment remedy is required to obtain jurisdiction within the United States and the prejudgment remedy sought will result in obtaining such jurisdiction.
- The Government must support the above grounds with a declaration (1) identifying the amount of the debt, (2) an explanation of the grounds for getting the PJR, (3) compliance with applicable law, and (4) the form of PJR requested.

Prejudgment Remedies (cont.)

- FDCPA 3101(d) has very specific notice and hearing requirements.
- Depending on the assets available, the form of PJR will differ:
 - **Notice of *Lis Pendens*** – 28 U.S.C. 1964. A *lis pendens* is a notice filed on the land records that any transaction will be subject to the rights of the filer, subject to final adjudication. Filing a *lis pendens* will protect the Government's priority and rights. Lis pendens must conform to state law.
 - **Attachment** – FDCPA 3102. Allows the freezing of assets or sequestration (setting aside) to ensure those assets – typically cash or equivalents, or personally property – are available to satisfy a later judgment.
 - **Receivership** – FDCPA 3103. Appointment of a third-party to take control of assets – typically an operating business. A receiver has full control over the assets they manage, subject to court oversight.
 - **Garnishment** – FDCPA 3104. Garnishment can take two forms (1) redirection of the debtor's accounts receivable to an escrow account or (2) the account debtor holds the funds pending resolution of the case.
 - **Sequestration** – FDCPA 3105. Funds of the taxpayer are set aside in an escrow account pending resolution of the case.

Post Judgment Remedies

- A judgment is any final appealable order of a court. Fed. R. Civ. P. 54.
- The FDCPA and Title 26 provide the Government with several post judgment remedies.
- Once an assessment is final, the IRS will typically handle collection through administrative means
- However, if the assessment is close to the CSED (10 years from assessment) or a NFTL will soon expire, the IRS will refer the case to DOJ to pursue further non-administrative remedies
 - Tax lien foreclosure
 - Reducing the assessment to a money judgment

Post Judgment Remedies (cont.)

Foreclosure of Tax Liens – FDCPA 3201 (f), 28 U.S.C. 2001

- A tax lien foreclosure is like any other judgment lien foreclosure.
- The IRS will initiate a civil action in US District Court where the property is located – foreclosures are *in rem* proceedings.
- The IRS will then seek to sell the property by hiring a realtor to market and sell the property. The sale is generally by negotiated sale, but sometime by auction.
- 28 U.S.C. 2002 allows for the US Marshal to seize and sell real estate. This is less typical but not unheard of.

Post Judgment Remedies (cont.)

Reduction of Assessment to State Law Judgment IRC 7401

- If the CSED is about to expire and the amount is great enough, the IRS will refer the case to DOJ. The lawsuit to reduce the assessment to a state law judgment will extend the time in which the Government has to collect to whatever time a judgment is good under applicable state law (Connecticut is 20 years for example.)
- After referral, DOJ will handle all aspects of the case, subject to “client:” approval.
- Judgments are enforced under FDCPA 3202-3205:
 - **Execution** – FDCPA 3203. Includes (1) ability to have receiver appointed, (2) auction of assets, and (3) levy rights (seizure of assets).
 - **Installment Payment Order** – FDCPA 3204.
 - **Garnishment** – FDCPA 3205. Redirection of payments due to taxpayer from third-parties (i.e. collection of accounts receivable)

Defenses to Collection

- Generally, there are no defenses to collection of tax debts once liability has been established and collateral attacks on liability (i.e. DATL OIC) have been exhausted or waived.
- Payment is always a defense.
- On appeal, posting a bond under Fed. R. Civ. P. 62(b) stays collection.
- There is a 30-day automatic stay of collection under Fed. R. Civ. P. 62(a), which is the time in which a party has to file a notice of appeal.
- Exemptions – FDCPA 3014.

Settlement

- DOJ will settle cases on a doubt as to collectability basis.
- DOJ Tax publishes its own Settlement Reference Manual: chrome-extension://efaidnbnmnibpcajpcgclclefindmkaj/https://www.justice.gov/d9/pages/attachments/2015/10/07/settlement_reference_manual_2009._04-02-09.pdf
- DOJ is not required to apply the “reasonable collection potential (“RCP”) analysis that the IRS uses.
- Exemptions are set by the FDCPA and generally mirror IRS exemptions.
- Whereas the IRS does not like to use future income collateral agreements (“FICAs”, the DOJ uses them frequently as “shmuck insurance”

Settlement - Practice Points

- DOJ is generally very rigid when settling a case based on collectability.
- They will usually seek more than the RCP.
- DOJ does not take all referrals from the IRS on reduce to judgment matters but has recently begun taking more.
- FDCPA exemptions (individuals only) are limited.

Third-Party Action

- **Transferee cases – FDCPA 3301-3308.** Fraudulent transfer cases.
 - 6-year SOL under the FDCPA 3307(d).
 - Good faith defense for subsequent transferees. Requires both (a) good faith and (b) taking for value. FDCPA 3307(a).
 - Other limits on avoidability:
 - (f) Limitation of voidability. A transfer is not voidable under section 3304(a)(2) [28 USCS § 3304(a)(2)]
 - (1) to the extent the insider gives new value to or for the benefit of the debtor after the transfer is made unless the new value is secured by a valid lien;
 - (2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or
 - (3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured both present value given for that purpose and an antecedent debt of the debtor.
- **Nominee cases.** A claim that assets in the possession of a third-party are actually the property of the taxpayer. This is a common law issue subject to state law. Not all states recognize nominee ownership.
- **Alter Ego Liability.** A claim that a business is really a sham and the Government may reach the assets of the business to satisfy the debt of its owner, or vice versa (called reverse veil piercing). These are state law claims and not all states recognize reverse veil piercing.

Quiet Title Actions

- If the DOJ does **not** foreclose on a tax lien, the taxpayer may file a civil action to “quiet title” – meaning to obtain a judicial determination that the tax lien is invalid.
- Quiet title actions can be used to challenge nominee or alter ego assessments/liens.
- Quiet title actions are permitted pursuant to 28 U.S.C. 2410(a)(1).
- State courts have concurrent jurisdiction with District Court over quiet title actions.
 - Thus, if there is a mortgage foreclosure pending in state court, the taxpayer can cross claim against the IRS for quiet title to address a nominee lien.

Quiet Title Actions (cont.)

- When litigating quiet title actions, the issue is **who really owns the property?** Is it the taxpayer or the title owner.
- The IRS takes the position that if a non-working spouse holds title to property, they are generally a nominee.
- Thus, quiet title actions often involve tracing sources and uses of funds used to purchase and maintain property.

Questions

Thank you!



15 Minute Break



Strategies when the Client's Expenses Exceed the Allowable Standards

Hardship (5.15.1.2 (11-22-2021))

(14) The standard amounts set forth in the national and local guidelines are designed to account for basic living expenses. In some cases, based on a taxpayer's individual facts and circumstances, it will be appropriate to deviate from the standard amount when failure to do so will cause the taxpayer economic hardship. See IRM 5.15.1.2(13).

(16) **Economic hardship occurs when a taxpayer is unable to pay reasonable basic living expenses.** The determination of a reasonable amount for basic living expenses will be made by the Commissioner and will vary according to the unique circumstances of the individual taxpayer. Unique circumstances, however, **do not include the maintenance of an affluent or luxurious standard of living.** See, (26 CFR 301.6343-1(b)(4)).

Necessary Expense Test

(1) Allowable expenses include those expenses that meet the necessary expense test. The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.

There are three types of allowable expenses:

- Allowable Living Expenses - based on National and Local Standards
- Other Necessary Expenses - expenses that meet the necessary expense test, and are normally allowed
- Other Conditional Expenses - expenses, which may not meet the necessary expense test, but may be allowable based on the circumstances of an individual case

IRM 5.15.1.8 (07-24-2019) Allowable Expense Overview

Food,
Clothing,
Misc.

Housing &
Utilities

Vehicle
Ownership

Vehicle
Operating

Health
Insurance

Out of
Pocket
Medical

Other
Expenses

Food, Clothing, & Miscellaneous

Food

Housekeeping Supplies

Apparel & Services

Personal Care Products & Services

Miscellaneous

Housing & Utilities

Mortgage or Rent

Utilities

Telephone/Cell/Cable/Internet

Real Estate Taxes & Insurance

Maintenance & Repairs

Vehicle Ownership

Vehicle #1 up to \$629 per month

- Entitled to ACTUAL monthly payment up to standard

Vehicle #2 up to \$629 per month

- Entitled to ACTUAL monthly payment up to standard

Vehicle Operating

Gas

Insurance

Licenses/Registrations

Maintenance

Health Insurance

Major Medical

Dental

Vision

Disability Insurance

Long Term Care Insurance

Accidental Death & Disability Insurance

HSA Contributions

Out of Pocket Medical

Medical Services

- Co-Pays, Co-Insurance, Paid Bills, Bills on Payment Plan, etc.

Prescription Drugs

Medical Supplies

- Glasses, Contacts, Oxygen, etc.

Other Expenses

Child/Dependent Care

Current Taxes

Life Insurance

Retirement Contributions

Other Expenses

Union Dues

Delinquent State & Local Taxes

Student Loans

Court Ordered Payments

Advocating for Allowance

Hardship

Necessary

Support
Collections

Six & One
Year Rule

Financial Analysis Handbook

IRM 5.15.1

Searching the Handbook can provide guidance, examples, and ideas on how to shape your argument.

Ctrl F to search keywords

reasonable and documented in the taxpayer's history.

5.15.1.10 (11-22-2021)

Local Standards

- (1) Local standards include the following expenses:
 - a. **Housing and Utilities** - The **housing** and utilities standards are derived from U.S. Census Bureau, American Community Survey and BLS data, and are provided by state down to the county level.
 - b. **Transportation** - The transportation standards for taxpayers with a vehicle consist of two parts: nationwide figures for monthly loan or lease payments referred to as ownership costs, and additional amounts for monthly operating costs broken down by Census Region and Metropolitan Statistical Area (MSA).

5.15.1.10.1 (11-22-2021)

Housing and Utilities

- (1) **Housing** expenses include: mortgage (including interest) or rent, property taxes, necessary maintenance and repair, homeowner's or renter's insurance, homeowner dues and condominium fees.
- (2) The utilities include gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, cable television, internet services, telephone and cell phone.
- (3) Usually, these expenses are considered necessary only for the primary place of residence. Any other **housing** expenses should be allowed only if, based on a taxpayer's individual facts and circumstances, disallowance will cause the taxpayer economic hardship.

Questions

Thank you!



Final Instructions

- ▶ Pick up your CPE Certificates on the way out
- ▶ For the online audience, look for a link to do your evaluation and get your certificate by Wednesday
- ▶ Get us the registration for next year and grab your seat while you can!

**See You Next Year – Happy
Holidays!**