Volume 1

NATIONAL TAXPAYER ADVOCATE

Annual Report to Congress

2017

www.TaxpayerAdvocate.irs.gov/2017AnnualReport

This report is dedicated to several people
who have made it their life's work
to protect taxpayer rights,
improve the IRS, and
ensure a fair and just tax system:

Rena Girinakis,

retired Deputy National Taxpayer Advocate,
and former Local Taxpayer Advocate for Indiana,
whose leadership, passion, and courage
have ensured the independence of TAS;

Bill Wilde,

retiring Deputy Executive Director of Case Advocacy,
and former Local Taxpayer Advocate for Arkansas,
a fierce defender of taxpayers
who held the IRS accountable
and urged his employees to always go the extra mile;

&

Chris Bergin,

IN MEMORIAM
my dear friend, trusted counselor,
his passing is a great loss for us all.

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NATIONAL TAXPAYER ADVOCATE PURPLE BOOK
Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration

PREFACE: Introductory Remarks by the National Taxpayer Advocate

HONORABLE MEMBERS OF CONGRESS:

I respectfully submit for your consideration the National Taxpayer Advocate's 2017 Annual Report to Congress. Section 7803(c)(2)(B)(ii) of the Internal Revenue Code (IRC) requires the National Taxpayer Advocate to submit this report each year and in it, among other things, to identify at least 20 of the most serious problems encountered by taxpayers and to make administrative and legislative recommendations to mitigate those problems.

As we enter the New Year, with the IRS facing the daunting challenge of interpreting and implementing major new tax legislation, this year's report is both a Baedeker of the current problems facing the IRS and taxpayers, and a roadmap to a better way of doing business. We have identified 21 Most Serious Problems affecting taxpayers, made 11 Legislative Recommendations, discussed the ten Most Litigated Issues and significant stand-alone decisions, and published a Volume Two containing seven Research Studies.

We are also introducing a new publication with this Report — the National Taxpayer Advocate "Purple Book."[1] Over the last two years, the House Ways and Means Committee has expressed interest in passing "IRS reform" legislation. The Purple Book is designed to assist the committee in its efforts, and we have aimed to make it as user friendly as possible. In it, we present a concise summary of 50 legislative recommendations that we believe will strengthen taxpayer rights and improve tax administration. Most of these recommendations have been made in detail in our prior reports, but others are presented here for the first time. Each proposal is presented in a format similar to the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections. We offer these up as an aid to Congress, as it considers taxpayer rights and IRS reform legislation in the coming year.[2]

The IRS Funding Landscape and its "Present State"

In recent weeks, there has been considerable discussion about how the IRS has been beaten down by continuing funding cuts and about concerns the agency is stretched so thin it will not be able to properly implement tax reform.[3] I cede to no one in my advocacy for increased IRS funding. As the National Taxpayer Advocate, I see daily the consequences of reduced funding of the IRS and the choices made by the agency in the face of these funding constraints. These impacts are real and affect everything the IRS does. Funding cuts have rendered the IRS unable to provide acceptable levels of taxpayer service, unable to upgrade its technology to improve its efficiency and effectiveness, and unable to maintain compliance programs that both promote compliance and protect taxpayer rights. "Shortcuts" have become the norm, and "shortcuts" are incompatible with high-quality tax administration. There is no doubt that the IRS needs more funding.

At the same time, limited resources cannot be used as an all-purpose excuse for mediocrity. There is not a day that goes by inside the agency when someone proposes a good idea only to be told, "We don't have the resources." In the private and nonprofit sectors, saying "we don't have the resources" is the

1 National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*, *infra*.

2 *See* Kat Lucero, *Tax Administration: House Panel Aims to Unveil IRS Restructuring Bill in April*, BNA Daily Tax Report (Sept. 14, 2017); *see also IRS Reform: Lessons Learned from the National Taxpayer Advocate: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 115th Cong. (2017).

3 *See, e.g.*, Editorial, *Don't Cheer as the I.R.S. Grows Weaker*, N.Y. Times, Dec. 30, 2017, at A22.

beginning of the discussion, not the *end.* Yet with the IRS, lack of resources often has become a reflexive excuse for not doing something, or worse, for doing things "to save resources" that harm taxpayers, foster noncompliance, and undermine taxpayer and employee morale.

In this report, even as we catalog the consequences of reduced IRS funding on taxpayers and the tax system, we propose reasonable and actionable steps that can reverse this decline. If the IRS were to take these steps, many of which *require no extra infusion of cash,* taxpayers would receive better service, compliance efforts would be better focused, and concrete evidence would be placed before Congress that additional investments in the IRS would yield positive and meaningful results.

In my opinion, the discussion about IRS funding has largely proceeded based on false choices — either "you can't trust the IRS to administer the tax system so don't fund it" or "because the IRS doesn't have enough funding, it can't do the things it needs to do to administer the tax system." The truth lies somewhere in between. *The IRS absolutely needs more funding*. It cannot answer the phone calls it currently receives, much less the phone calls it can expect to receive in light of tax reform, without adequate funding. But within the budget it currently has, there are plenty of opportunities for the IRS to demonstrate that it can do a better job of using creativity and innovation to provide taxpayer service, encourage compliance, and address noncompliance.

In one of the Public Forums I held in 2016 on Taxpayer Needs and Preferences, a practitioner commented that before the IRS focuses so much effort on its "Future State," there is plenty the IRS can do to improve its "Present State."[4] This comment really struck me, because I had been feeling that the IRS, in response to budget cuts, was trying to shoe horn the taxpayers of the United States into the IRS's picture of the Future State without paying sufficient attention to what taxpayers were needing today.[5] In the private sector, one must do both at the same time, or one loses market share. As someone who worked much of my life with and in the nonprofit sector, I am accustomed to never having enough funding to accomplish the often life-altering tasks nonprofits undertake. But we never said, "We don't have the resources to do this." We found a way.

With that in mind and as the IRS moves into the 2018 Filing Season and begins to implement tax reform, this report focuses on things the IRS can do to improve customer service and taxpayer compliance with the resources it now has. The first step in this endeavor is to level-set the Present State.

- The IRS has received more than 95 million calls each year since Fiscal Year (FY) 2008. Even before the enactment of Public Law 115-97, the IRS estimated that during the 2018 filing season it would only answer about six out of ten calls from taxpayers seeking to speak to a live assistor (*i.e.,* a 60 percent "level of service" or LOS). For the full 2018 fiscal year, the IRS estimated the LOS for calls seeking a live assistor would be *below 40 percent — that is, only 4 out of 10 calls would get through to a live assistor.*[6]
- Since 2014, the IRS has only answered "basic" tax-law questions during the filing season, and it has not answered *any* tax-law questions beyond the April 15th filing deadline either on the toll-free telephone lines or in its Taxpayer Assistance Centers, even though more than 15 million taxpayers file returns later in the year. Thus, taxpayers who want to learn about how the tax law affects them

4 *See* Oral Statement of Tamara Borland, National Taxpayer Advocate Public Forum 16 (May 5, 2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/PublicForums/Transcripts/RedOakIA_Transcript_050516.pdf.

5 For additional discussion, see National Taxpayer Advocate 2016 Annual Report to Congress 1-41 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*).

6 IRS, Wage & Investment (W&I), *Business Performance Review* 4 (Nov. 9, 2017).

are left searching about 140,000 web pages on irs.gov or turning to paid professionals. This does not bode well for taxpayers seeking information about the major tax-law changes and their impact on 2018 federal income tax returns.

- A 2016-2017 TAS survey of U.S. taxpayers who had filed at least one tax return during the preceding year showed that 41 million taxpayers had no broadband access in their homes, and 14 million have no internet access at home.[7] Yet the IRS continues to direct taxpayers to create online accounts, even though taxpayers seeking to do so *have a "pass rate" of only about 30 percent — meaning that only about 3 out of 10 taxpayers attempting to create an online account are able to do so*.[8] Results from IRS pilots of taxpayer digital communication (TDC) show that while some taxpayers find submitting documents electronically during an audit to be very useful, the TDC audits tend to have longer cycle times. Moreover, many taxpayers simply do not want to go through the process of setting up an online account. In fact, TAS's TDC pilot included unrepresented taxpayers with Earned Income Tax Credit (EITC) or levy cases. Fewer than ten taxpayers opened accounts out of the more than 700 taxpayers who were offered the opportunity to participate in the pilot. Preliminary results from the Small Business/Self-Employed Division's TDC audit pilot show almost 24 percent of the taxpayers who were sent an invitation to participate in the pilot attempted to create an account (2,194 out of 9,149). Of those attempts, less than half (971 out of 2,194) succeeded in opening an account.[9] Thus, however meritorious, online accounts should not be counted on to provide significant resource savings any time soon.
- IRS staffing in key taxpayer-facing professions has declined precipitously since FY 2011. Of note is the 35 percent decline in the Stakeholder Liaison Outreach employees and Stakeholder Partnerships, Education, and Communication employees of the IRS workforce.[10] With only about 400 employees available for direct outreach and education to taxpayers, it is questionable whether the IRS can effectively assist taxpayers in understanding their obligations under the new tax law.[11]

7 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

8 IRS response to TAS information request (Nov. 22, 2017).

9 For an in-depth discussion of the IRS online account and the Taxpayer Digital Communications (TDC) pilot, see Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*, *infra*.

10 The Stakeholder Liaison Outreach employees transferred to C&L on April 2, 2017.

11 Some IRS employees — although not specifically employees of an outreach and communication function — make local appearances or speeches.

FIGURE 0.0.1, Locations With Specified Employees in the Last Pay Period of the Fiscal Year[12]

Number of Locations, Employees, or Visitors	2011	2012	2013	2014	2015	2016	2017	Percent Change Since FY 2011
Appeals Officers (AOs)	1,129	1,058	958	881	795	739	744	-34%
Revenue Officers (ROs)	4,402	4,035	3,703	3,441	3,191	3,072	2,898	-34%
Revenue Agents (RAs)	11,849	11,160	10,413	9,688	9,009	8,789	8,138	-31%
Stakeholder Liaison Outreach Employees	137	123	119	110	105	98	105	-23%
Stakeholder Partnerships, Education and Communication Outreach Employees (SPEC)	522	475	444	405	386	365	311	-40%
Taxpayer Assistance Centers (TACs)	401	401	398	382	378	376	371	-7%
TAC Service Reps	1,639	1,515	1,484	1,520	1,423	1,267	1,140	-30%
Taxpayer Advocate Service, Case Advocates	996	945	919	862	784	726	683	-31%

- The IRS has reduced its employee training budget by nearly 75 percent since FY 2009.[13] Not only has the budget for training drastically declined, the way in which employees receive that training has shifted from face-to-face training to virtual training. In FY 2017, the IRS spent $489 per employee on training (over 0.3 percent of its budget), compared with nearly $1,450 per employee in FY 2009.[14] The Wage and Investment (W&I) Division, which has the largest number of employees of any operating division, spends only $87 per employee per year for training.[15] The

12 For fiscal years (FYs) 2011 through 2016, employee counts for Appeals Officers, Revenue Officers, Stakeholder Liaison Outreach, and SPEC Outreach are from the IRS response to the TAS fact check (Dec. 16, 2016). TAC Office figures for FYs 2011-2014 from the IRS response to the TAS fact check (Dec. 23, 2014), for FY 2015 from W&I analyst (Dec. 13, 2016), for FY 2016 from the IRS response to the TAS fact check (Dec. 20, 2016), and for FY 2017 from the IRS response to the TAS fact check (Nov. 3, 2017). The remaining data is obtained from a TAS query of non-supervisory positions and IRS Offices from the IRS Human Resources Reporting Center, *Position Report by Employee Listing for the ending pay period FY 2011 to FY 2017*. TAC Service representatives are non-supervisory employees in the 501 job series. Different from the data provided by the IRS that we published last year, Revenue Agent (RA) counts now only include field RAs (non-supervisory) in the TE/GE, SB/SE, and LB&I operating divisions. The RA data published last year from the IRS response to TAS fact check (Dec. 16, 2016) included duplicate counts of RAs in the Appeals function; and also included non-field RAs in the Whistleblower Office and in TAS. The counts of TAS caseworkers are from the Integrated Financial System. For 2017, the IRS responded that C&L had 105 employees assigned to outreach activities. However, the IRS response to the TAS fact check stated that these numbers only account for Small Business/Self-Employed (SB/SE) Stakeholder Liaison (SL) employees transferred to C&L on April 2, 2017. Therefore, we do not have details regarding any additional outreach employees. IRS response to TAS fact check (Nov. 20, 2017).

13 IRS response to TAS information requests (Nov. 22, 2013 and Nov. 7, 2017); IRS response to TAS fact check (Dec. 15, 2017). While the budget for training has increased by approximately $17 million since a low point of approximately $22.6 million in fiscal year (FY) 2013, the reduction from previous years of nearly $115 million spent on training is drastic.

14 IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017). IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 15, 2017). The IRS had 105,783 employees as of the last week of FY 2009 and spent $153,155,686 on training. Per employee, the IRS spent $1,448 in FY 2009 and only $489 in FY 2017. IRS response to TAS information requests (Nov. 22, 2013 and Dec. 7, 2017). IRS response to TAS fact check (Dec. 15, 2017).

15 IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017). IRS response to TAS information request (Nov. 7, 2017).

> IRS provides only 19 hours of training per employee in at least one key job series, which includes nearly five hours of mandatory briefings, leaving only 14 hours of substantive training.[16]

The IRS estimates that it will need about $495 million in FYs 2018 and 2019 to implement Public Law 115-97, including programming and systems updates, answering taxpayer phone calls, drafting and publishing new forms and publications, revising regulations and issuing other guidance, training employees on the new law and guidance, and developing the systems capacity to verify compliance with new eligibility and documentation requirements. The IRS has identified 131 filing season systems that will be impacted by the new legislative provisions which, among other things, include incorporating new individual and business tax rates, gradual inflation indexing changes for deductions and credits, threshold changes repeal, removing existing credits from systems, and updating fraud detection filters.

Following enactment of the last major tax reform legislation, the Tax Reform Act of 1986,[17] the IRS made changes to 162 existing forms, developed 48 new forms, and created 13 new publications. Call volume increased by 14 percent, and the IRS hired an additional 1,300 staff, increased phone capacity by 30 percent, and expanded hours and phone service to Saturdays. There was a two percent increase in tax returns that had to be corrected in processing. The IRS's recent experience implementing the Patient Protection and Affordable Care Act[18] suggests the additional work required by the Tax Reform Act of 1986 may be a reasonable predictor. After the passage of the ACA, calls and correspondence from taxpayers increased by eight percent from FY 2010 to 2011, and then increased by another 18 percent the following year.[19] However, the magnitude of taxpayer confusion and the number of inquiries a new law will generate are difficult to predict and can vary depending on the provisions in the law. After Congress authorized Economic Stimulus Payments in 2008, for example, the IRS was deluged with taxpayer telephone calls. Incoming calls on the Accounts Management telephone lines rose from about 66 million in FY 2007 to about 151 million in FY 2008 — an increase of over 125 percent.

Rebuilding the IRS Customer Service Environment

As the discussion above clearly demonstrates, the IRS needs more employees simply to answer the volume of phone calls and correspondence it annually receives. But because the IRS has focused its technology efforts on creating an online account — an important development and long overdue — it has not kept up with telephone technology or the approaches the private sector has adopted to deliver better customer service.[20] Instead, it has cherry-picked the practices that suit its own goals — to limit person-to-person contact in favor of automated and digital applications. It is doing this from a pure short-term cost analysis. But what private sector practices show — as outlined in our Most Serious Problem and Literature Review on telephone assistance[21] — is that customers have multiple needs and choose the

16 IRS response to TAS information request (Nov. 7, 2017). Employees in the Tax Exempt Government Entities (TE/GE) 0592 job series received 18.75 hours of training per employee, not even three full work days of training in an entire year. IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017). All IRS employees in FY 2017 were required to take a series of briefing accounting for at least 4.83 hours of training. Those courses were: Information Systems Security Refresher, Unauthorized Access (UNAX) Awareness, Facilities Management and Security Services Physical Security Briefing, Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) Briefing Refresher, Records Management Awareness, Privacy, and Information Protection & Disclosure Refresher.

17 Pub. L. No. 99-514, 100 Stat. 2085 (1986).

18 Pub. L. No. 111-148, 124 Stat. 119 (2010).

19 IRS, *TCJA Preliminary Implementation Cost Estimates* (Nov. 2017) (document on file with the National Taxpayer Advocate).

20 For example, the IRS does not have the capability to offer customer callback or scheduled call-back options.

21 Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment, infra; Literature Review: Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

service option that best serves those needs.[22] Customers (taxpayers) are smart in that way, but the IRS service strategy seeks to override taxpayers' own assessment of how they need to receive assistance and replace it with the IRS's belief that it knows better than the taxpayers themselves.

What would it take for the IRS to provide 21st century customer service? First, it must acknowledge what the private sector clearly knows: If you don't serve customers in the way they want and need to be served, they will look somewhere else. Of course, the IRS, as the *only* federal tax agency in the United States, has a monopoly on tax administration. On the surface, it appears "customers" (taxpayers) don't have a choice about seeking another tax agency to work with – there are no competitors to which they can move their "business." In fact, however, there is a competitor, and it is the lure of noncompliance. If the IRS isn't going to provide you the assistance you need in the manner you need it, then why bother complying with the tax laws? Yes, taxpayers know there may be consequences for blatant noncompliance, but if and when the opportunity presents itself for a taxpayer not to comply in subtle ways that are hard to detect (*e.g.,* reporting cash-economy income), the taxpayer may be more likely to take the opportunity, because there is no "brand loyalty" to the IRS and tax compliance. Simply put, the IRS hasn't earned taxpayer loyalty.

Alternatively, taxpayers seek tax assistance from a variety of tax sources — which may be licensed professionals (*e.g.*, attorneys, certified public accountants, or Enrolled Agents) or unregulated persons or just random internet sites. As we discuss in the Purple Book, the quality of the assistance varies wildly.[23] And it is not free. Thus, because the IRS doesn't provide top quality service to the average taxpayer, he or she must pay for it. This increases the individual burden of tax compliance.

So how can we arrest this sad state of affairs and turn the IRS and taxpayers' fortunes around? As a first step, the IRS should do a better job of following the priorities its appropriators have repeatedly set. For example, the Appropriations Committees have pushed back against the IRS's plans to transition taxpayers to online services, directing the agency to embrace an omnichannel customer service strategy and provide

22 An omnichannel service environment "ensures the service level, responsiveness, and quality of service received on individual channels and across channels would be equally high." Aspect, *What is an Omnichannel Experience?*, https://www.aspect.com/glossary/what-is-omni-channel-customer-service-experience.

23 National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration: Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers, infra*.

it with the specifics about what it would take to deliver this approach.[24] To date, the IRS has not done so. If the IRS availed itself of this opportunity and set forth a plan — *with specifics* — that reflected an acceptance and understanding that taxpayers need ongoing access to *all* customer service methods — online, phone, in-person — instead of promoting the fiction of a Future State where almost everything is done online, the IRS would probably gain more credibility with the Appropriations Committees and would be more likely to receive additional funding. At the risk of vast understatement, a first step toward getting additional funding is complying with what your appropriators ask you to do.

Restoring the Taxpayer Compliance Environment

In addition to concerns about the present state of customer service, there are also concerns about declining audit rates. As noted above, the number of field revenue agents has declined from 8,652 in year FY 2011 to 8,502 in FY 2017. But as we discuss in our Most Serious Problem on audit rates, this is only part of the story.[25] In fact, the IRS underreports much of its compliance activity, because it has shifted its resources into automated, centralized, or correspondence initiatives. When you count those initiatives, the individual "compliance contact" rate for FY 2016 rises from 7/10ths of 1 percent to 6.2 percent![26]

But this is not just about numbers — it is about the way the IRS intends to do its compliance work in the future. Certainly, using correspondence to correct simple math or clerical errors makes sense — although no one would say IRS math error notices are a model of clarity.[27] But many tax return errors are attributable to the complexity of either the tax laws or taxpayers' lives. For example, while one might think it is easy to determine whether you are eligible to claim your child for purposes of the dependency exemption, the child tax credit, or the Earned Income Tax Credit, these provisions are highly complex, and people's family structures are increasingly diverse. Further, no matter how a business entity is organized, determining the deductibility of "ordinary and necessary" trade or business expenses is no easy

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24 *See. e.g.*, Senate Committee on Appropriations, *Explanatory Statement for Financial Services and General Government Appropriations Bill*, 2018, https://www.appropriations.senate.gov/imo/media/doc/FY2018-FSGG-CHAIRMEN-MARK-EXPLANATORY-STM.PDF (last visited Dec. 31, 2017).

> *Future State Vision.* – IRS's future state vision of the tax administration system is to promote and improve voluntary compliance by delivering better service to more people at a lower cost through less IRS-taxpayer personal interaction and greater online and third-party interactions. Security concerns aside, the IRS has not demonstrated that it has analyzed the consequences of its vision and the impact it will have on taxpayers. Additionally, it is unclear what research IRS conducted to understand taxpayer needs. *Id.* at 22
>
> The Committee remains concerned about IRS's Future State vision where taxpayers will rely on online services for their IRS interactions. The Committee expects the IRS to continue to improve telephone and face-to-face services and directs the IRS to submit a report on progress made in these areas to the Committees on Appropriations of the Senate and House of Representatives within 120 days of enactment. … The Committee is concerned with a growing number [of] TAC closures and decline in the number of taxpayers served. The Committee agrees with the National Taxpayer Advocate that the elimination of a regular walk-in option for taxpayers raises significant concerns about access to IRS services. The Committee directs the IRS to report to the Committee within 120 days of enactment of this Act the steps being taken to prevent any closures of TAC locations, and the status of any proposed alternatives to fully staffed TACs (such as virtual customer service sites). The Committee directs the IRS to conduct a study on the impact of closing a Taxpayer Assistance Center and the adverse effects it has on taxpayers' ability to interact with the IRS. Should the IRS choose to close a TAC location, the Committee directs the IRS to hold a public forum in the impacted community at least 6 months prior to the planned closure and notify the Committees on Appropriations of the Senate and House of Representatives. *Id.* at 25.

25 Most Serious Problem: *Audit Rates: The IRS is Conducting Significant Types and Amounts of Compliance Activities that It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections*, *infra*.

26 In addition to audits, the IRS makes tax adjustments through its Automated Underreporter (AUR) system, through its use of math error authority, through its automated substitute for return (ASFR) program and its Taxpayer Protection Program and Income Wage Verification program.

27 For a legislative recommendation about the IRS's "math error" authority, see National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration: Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute, infra*.

matter — as Supreme Court Justice Cardozo noted, "life in all its fullness must supply the answer to the riddle."[28]

In these instances, correspondence and automated audits just don't work. There needs to be person-to-person communication, and one auditor needs to be assigned to the taxpayer's case. This is essential if one looks at audits as an educational tool foremost and a revenue protection tool secondarily. The goal of any audit should be for the tax agency to understand the specific facts and circumstances of the taxpayer's situation and apply the law in light of those facts and circumstances and for the taxpayer to understand what he did incorrectly and how to proceed going forward in compliance with the law. The IRS can't do that without personal interaction in the context of family status or small business or sole proprietorship audits. And *why* you would want to avoid personal interaction with taxpayers is beyond me; this represents a missed educational opportunity and a waste of those precious audit resources.

In fact, a recent study of attitudes of sole proprietors and other taxpayers toward the tax system, included in this Report, found that only 38.8 percent of sole proprietors subject to a correspondence audit recalled they had had such an audit (compared to 67 percent for field audits and 73.7 percent for office audits).[29] This finding indicates there is not much of a "learning opportunity" with correspondence audits. Moreover, sole proprietors who had correspondence audits reported relatively low perceived levels of procedural, informational, interpersonal, and distributive justice, and feel less protected by the IRS. If taxpayer attitudes towards the tax system affect their willingness to comply with the tax laws, as I believe they do, then these findings undermine the IRS's position that correspondence audits are efficient and effective.

Problems of the IRS's Own Making

In this report, many of our Most Serious Problems are a roadmap to the way in which the IRS's implementation of congressional mandates as well as its own "Future State" vision are either actively harming taxpayers or are creating re-work for itself, thereby wasting resources. A few of them merit mention here.

Private Debt Collection:[30] Whatever one might think about Congress's mandate that the IRS use private debt collectors to make a dent in the nearly $400 billion owed, everyone can agree that if the program is going forward, we want it administered in a way that is "no more intrusive than necessary."[31] In this Report, however, we show the IRS's implementation of this program unnecessarily harms taxpayers and constitutes an end-run around the significant taxpayer rights protections that Congress has enacted in the collection arena.

To ensure the IRS does not collect a tax debt if doing so would leave a taxpayer without enough money to meet his or her basic living expenses, Congress required the IRS to "develop and publish schedules of national and local allowances" that ensure taxpayers "have an adequate means to provide for basic

28 *Welch v. Helvering*, 290 U.S. 111 (1933).

29 Research Study: *Audits, Identity Theft Investigations, and Taxpayer Attitudes: Evidence From a National Survey*, vol. 2, *infra*.

30 For an in-depth discussion of Private Debt Collection, *see* Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship*, *infra*.

31 The Taxpayer Bill of Rights includes *the right to privacy*, which the IRS describes as follows: "Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections, and will provide, where applicable, a collection due process hearing." IRS Pub. 1, *Your Rights as a Taxpayer* (Sept. 2017).

living expenses."[32] These Allowable Expense Standards, or ALEs, are a key component of the IRS's determination of a taxpayer's ability to pay a tax debt. If the IRS determines a taxpayer's income is below the appropriate ALE amount, it will classify that taxpayer as "Currently Not Collectible — Hardship" and generally not levy or take enforced collection action.

While there is no Internal Revenue Code definition of "low income," 250 percent of federal poverty level has been widely used as a proxy for "low income" by Congress in setting eligibility for *pro bono* representation by Low Income Taxpayer Clinics[33] and by the IRS in setting a carve-out level for Social Security recipients under the automated Federal Payment Levy Program. Yet, although the IRS has the legal authority and the capability to do so, the IRS has refused to screen out taxpayers whose incomes are so low that they would be eligible for "Currently Not Collectible-Hardship" status and, *by law,*[34] not subject to a levy on salary or wages.

IRS data bear out the impact of these decisions. Approximately 2,100 taxpayers entered into installment agreements while their debts were assigned to private collection agencies (PCAs), made payments on which the PCAs were paid commissions, and have filed recent returns.[35] *According to these taxpayers' returns, more than 45 percent had income that was less than their ALEs*.[36] Thus, these taxpayers could not afford to pay their basic living expenses under the installment agreements organized by the PCAs.

Moreover, of the 4,905 taxpayers who made payments after their debts were assigned to a private collection agency, 4,141 had filed recent returns as of September 28, 2017.[37] The returns filed by the 4,141 taxpayers show:

- 19 percent had incomes below the federal poverty level; median income for these taxpayers was $6,386; [38] and
- 25 percent had incomes above the federal poverty level but below 250 percent of the federal poverty level; median income for these taxpayers was $23,096.[39]

It is extremely likely that these taxpayers do not have the ability to meet their basic living expenses and would be placed in CNC-hardship status if their accounts were handled by the IRS. By not screening out these taxpayers from going to PCAs — who do not conduct financial analysis — the IRS is allowing collection against taxpayers that Congress explicitly and specifically sought to protect.

No one is making the IRS make these bad decisions. The harm to these taxpayers is something IRS leadership consciously decided to do despite my personal efforts, and those of my organization, to stop it.

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32 IRC § 7122(d)(2)(A).

33 *See* IRC § 7526(b)(1)(B)(i).

34 IRC § 6343 requires the IRS to release a levy in certain circumstances, including when the taxpayer and the IRS agree that the tax is not collectible. *See* IRC § 6343(e).

35 Individual Returns Transaction File (IRTF), Information Returns Master File (IRMF), Compliance Data Warehouse (CDW), data current through Sept. 28, 2017.

36 *Id*.

37 *Id*. TAS Research identified 4,018 taxpayers who made payments to the IRS more than ten days after their accounts were assigned to a PCA (and the payments were thus commissionable) and who filed a return for tax year 2014 or later.

38 U.S. Dept. of Health and Human Services, *Poverty Guidelines* (Jan. 31, 2017), https://aspe.hhs.gov/poverty-guidelines, showing that the poverty level for a single person in 2017 (for the 48 contiguous states and the District of Columbia) was $12,060. Thus, 250 percent of the 2017 federal poverty level for a single person was $30,150.

39 *Id*. As discussed below, for purposes of administering the IRS's automatic levy program, the Federal Payment Levy Program (FPLP), the IRS adopted 250 percent of the federal poverty level as a measure that serves as a proxy for economic hardship.

Form 1023-EZ:[40] In 2014, in response to 18-month cycle times for applicants for tax-exempt status under IRC § 501(c)(3) to receive determination letters from the IRS, the IRS introduced a radically shortened Form 1023-EZ, *Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*. The IRS has touted this initiative as a poster child of its "Future State" vision — claiming that it has reduced taxpayer burden, resource demands, and cycle time for tens of thousands of new tax-exempt organizations. In reality, what this initiative has done is allowed thousands of organizations *that do not meet the statutory requirements for exemption* to operate unchecked and uninformed. Specifically, the new procedures do not require these applicants to submit their articles of incorporation or bylaws to ensure they are properly organized and have adopted the appropriate charitable purpose clause as well as protections against misuse of funds.

As a result, TAS research studies have shown that *for the last three years, between 26 and 42 percent of approved entities filing Form 1023-EZ did not meet the organizational test for qualification as an IRC § 501(c)(3) organization.* This finding is even more stunning when you consider that Form 1023-EZ applicants now outnumber applications on the full Form 1023. Improper grants of tax-exempt status come at a huge cost to *all* U.S. taxpayers, since these entities are receiving funds tax-free and donors are getting tax deductions for charitable contributions. Yet the IRS steadfastly refuses to either check the online registers of articles of incorporation or to require organizations to submit their organizing documents with their application. Instead of addressing compliance concerns upfront when the organization is applying for recognition of its exempt status, the IRS says it will audit itself out of a problem entirely of its own making. And it is not doing that either, as the IRS audits fewer than one percent of tax-exempt entities every year. If this program is the apotheosis of the Future State vision, well, no wonder Congress and other stakeholders have concerns about the agency's direction.

Passport Denial/Revocation:[41] In early 2018, the IRS will begin implementing the congressionally mandated program that will lead to denial of passports to U.S. citizens who owe more than $51,000 in aggregate federal tax debt and meet certain other criteria.[42] The IRS Office of Chief Counsel has opined that the IRS has significant flexibility in administering this program, with even more discretion to create exclusions under this program than under the PDC program. Yet as we discuss in this Report, the way the IRS is administering the program arguably violates constitutional due process protections by failing to give adequate notice to the affected taxpayers of the denial and provide them sufficient time after that notice to come in and correct the situation before the harm (passport denial) occurs.

The IRS procedures most certainly violate the *right to a fair and just tax system*, which the IRS itself says includes "the right to expect the tax system to consider facts and circumstances that might affect [taxpayers'] underlying liabilities, ability to pay, or ability to provide information timely" and "the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if

40 For an in-depth discussion of Form 1023-EZ, *see* Most Serious Problem: *Exempt Organizations: Form 1023-EZ, Adopted to Reduce Form 1023 Processing Times, Increasingly Results in Tax Exempt Status for Unqualified Organizations, While Form 1023 Processing Times Increase*, *infra*.

41 For a detailed discussion of the IRS Passport Denial and Revocation program, *see* Most Serious Problem: *Passport Denial and Revocation: The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights*, *infra*.

42 *See* IRC § 7345. Under the statute, the federal tax debt must be an unpaid, legally enforceable federal tax liability of an individual, which has been assessed, is greater than $50,000 (currently indexed for inflation to $51,000), and meets either of the following criteria: (1) a notice of lien has been filed under IRC § 6323 and the Collection Due Process hearing rights under IRC § 6320 have been exhausted or lapsed; or (2) a levy has been made under IRC § 6331. Furthermore, there are statutory and discretionary exclusions from certification.

the IRS has not resolved their tax issues properly and timely through its normal channels."[43] Instead, the IRS has categorically refused to exclude those taxpayers who *currently* have cases in the Taxpayer Advocate Service. As of October 1, 2017, there were about 800 taxpayers who owe balances above $50,000 in the aggregate, do not meet a statutory or discretionary exclusion criteria, and were actively working with TAS to resolve their tax issues. Of the TAS cases with balances due over $50,000 that closed in FY 2017, more than 75 percent involve either exam or collection issues, and TAS closed 70 percent of these cases with full or partial relief. The IRS has the capability and authority to exclude these cases from the Passport program, yet it has refused to do so, for the "reason" that it would be treating these taxpayers differently from others. This is bizarre reasoning, since by statute, a taxpayer whose case is accepted in TAS has a "significant hardship" and TAS cases are treated differently as a matter of law, presumably because Congress believed taxpayers who approach TAS to try to resolve their problems deserve to be protected from most adverse actions while their cases are pending. This IRS decision also makes little sense from the standpoint of resource savings, because by certifying these cases to the Department of State, the IRS is creating additional work for TAS and for itself. Specifically, once TAS achieves a resolution of this case (which it usually does), we will also have to get the taxpayer "decertified." To avoid this needless waste of resources, I will be issuing Taxpayer Assistance Orders[44] (TAOs) before the program commences with respect to every taxpayer with an assessed, unpaid federal tax debt over $51,000 who has an open case in TAS and who does not otherwise meet an exception or exclusion from certification; the TAOs will order the IRS to not make the referral to the Department of State.

Conclusion

I realize that after this high-speed road trip through the IRS Present and Future State, readers may come away somewhat dispirited. However, I hope that readers will see, notwithstanding all the challenges the IRS faces, that there are solutions to these problems. Some of those solutions require more funding — for example, the IRS simply needs more staff to answer telephone calls and conduct field outreach and education, audit, appeals, and collection activities. But for each of the problems we've identified and discussed in the pages of this Report, there are recommendations that do not require substantial monetary investment to achieve. What these recommendations require is a willingness on the part of IRS leadership to look at tax administration through the eyes of the taxpayer, to be open to new approaches, and to cultivate creativity. Challenges notwithstanding, with strong leadership of the IRS and support from Congress, this can happen. It won't be easy, but the taxpayers of the United States deserve a better functioning IRS that understands and meets their needs, even as it ensures that all taxpayers comply with the tax laws.

Respectfully submitted,

Nina E. Olson
National Taxpayer Advocate
31 December 2017

43 IRS Pub. 1, *Your Rights as a Taxpayer* (Sept. 2017).
44 *See* IRC § 7811.

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TAXPAYER RIGHTS ASSESSMENT: IRS Performance Measures and Data Relating to Taxpayer Rights

In the 2013 Annual Report to Congress, the National Taxpayer Advocate proposed a "report card" of measures that "… provide a good indication whether the IRS is treating U.S. taxpayers well and furthering voluntary compliance."[1]

In 2014, the IRS officially adopted the Taxpayer Bill of Rights (TBOR), a list of ten rights that the National Taxpayer Advocate recommended to help taxpayers and IRS employees alike gain a better understanding of the dozens of discrete taxpayer rights scattered throughout the multi-million word Internal Revenue Code (IRC).[2] In late 2015, Congress followed suit by adding the list of fundamental rights to the IRC.[3] While listing these rights in IRC § 7803(a)(3) is a significant achievement for increasing taxpayers' awareness of their rights, the process of integrating taxpayer rights into all aspects of tax administration continues. The *Taxpayer Rights Assessment* contains selected performance measures and data organized by the ten taxpayer rights and is one step toward integrating taxpayer rights into tax administration.

This *Taxpayer Rights Assessment* is a work in progress. The following data provide insights into IRS performance; however, they are by no means comprehensive. In some instances, data is not readily available. In other instances we may not yet have sufficient measures in place to address specific taxpayer rights. And, despite what the numbers may show, we must be concerned for those taxpayers who still lack access to services and quality service even when performance metrics are increasing. This *Taxpayer Rights Assessment* will grow and evolve over time as data becomes available and new concerns emerge.

1. THE RIGHT TO BE INFORMED – Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

Measure/Indicator	Fiscal Year (FY) 2015	FY 2016	FY 2017
Individual Correspondence Volume (adjustments) [a]	4,358,447	4,817,708	4,598,654
Average cycle time to work Individual Master File (IMF) Correspondence [b]	80 days	84 days	69 days
Inventory Overage [c]	68.3%	49.1%	39.5%
Business Correspondence Volume (adjustments) [d]	2,952,329	2,940,925	2,736,451
Average cycle time to work Business Master File (BMF) Correspondence [e]	46 days	47 days	45 days
Inventory Overage [f]	18.8%	8.6%	11.7%
Total Correspondence (all types)	TBD	TBD	TBD
Quality of IRS Forms & Publications	TBD	TBD	TBD
IRS.gov Web Page Ease of Use	TBD	TBD	TBD
IRS Outreach	TBD	TBD	TBD

a IRS, Joint Operations Center (JOC), *Adjustments Inventory Reports: July-September Fiscal Year Comparison* (FY 2016 and FY 2017). This correspondence data is also repeated under Right 4 – *The Right to Challenge the IRS's Position and Be Heard*.
b IRS, Research Analysis and Data (RAD), *Accounts Management Reports: CIS Closed Case Cycle Time* (FY 2016 and FY 2017).
c IRS, *Weekly Enterprise Adjustments Inventory Report, FY 2016 and FY 2017* (weeks ending Oct. 1, 2016 and Sept. 30, 2017).
d IRS, JOC, *Adjustments Inventory Reports: July-September Fiscal Year Comparison* (FY 2016 and FY 2017).
e IRS, RAD, *Accounts Management Reports: CIS Closed Case Cycle Time* (FY 2016 and FY 2017).
f IRS, *Weekly Enterprise Adjustments Inventory Report, FY 2016 and FY 2017* (weeks ending Oct. 1, 2016 and Sept. 30, 2017).

1 *See* National Taxpayer Advocate 2013 Annual Report to Congress xvii-xviii (Preface: *Taxpayer Service Is Not an Isolated Function but Must Be Incorporated throughout All IRS Activities, Including Enforcement*).
2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights.
3 *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2. THE RIGHT TO QUALITY SERVICE – Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Number of Returns Filed (projected, all types) [a]	245,821,318	246,945,921	251,046,000
Total Individual Income Tax Returns [b]	148,840,642	150,711,378	152,413,600
E-file Receipts, calendar year (Received by 12/04/15, 12/02/16, 12/01/17) [c]	128,784,000	131,851,000	132,319,000
E-file Receipts: Tax Professional (calendar year) [d]	61%	60%	60%
E-file Receipts: Self Prepared (calendar year) [e]	39%	40%	40%
Returns Prepared by:			
VITA / TCE / AARP (tax year) [f]	3,564,102	3,542,336	3,402,019
Free File Consortium (tax year) [g]	2,588,934	2,356,167	2,352,555
Fillable Forms (tax year) [h]	355,080	346,098	325,482
Number of Taxpayer Assistance (“Walk-In”) Centers (TAC) [i]	378	376	371
Number of TAC Contacts [j]	5.6 million	4.5 million	3.3 million
Total Calls to IRS [k]	116,679,405	117,479,981	95,618,714
Number of Attempted Calls to IRS Customer Service Lines [l]	101,507,150	104,275,387	74,471,676
Toll Free: Percentage of calls answered [Level of Service (LOS)] [m]	38.1%	53.4%	77.1%
Toll Free: Average Speed of Answer [n]	30.5 minutes	17.8 minutes	8.4 minutes
NTA Toll Free: Percentage of calls answered (LOS) [o]	43.7%	58.1%	76.7%
NTA Toll Free: Average Speed of Answer [p]	16.2 minutes	8.9 minutes	2.9 minutes
Practitioner Priority: Percentage of calls answered (LOS) [q]	47.6%	71.0%	81.9%
Practitioner Priority: Average Speed of Answer [r]	46.6 minutes	10.5 minutes	8.9 minutes
Tax Exempt/Government Entities Percentage of calls answered (LOS) [s]	60.2%	56.8%	69.5%
Tax Exempt/Government Entities: Average Speed of Answer [t]	23.4 minutes	15.9 minutes	9.2 minutes
Toll Free Customer Satisfaction [u]	87.0%	88.0%	90.0%
Awareness of Service (or utilization)	TBD	TBD	TBD
IRS Issue Resolution – Percentage of taxpayers who had their issue resolved as a result of the service they received	TBD	TBD	TBD
Taxpayer Issue Resolution – Percentage of taxpayers who reported their issue was resolved after receiving service	TBD	TBD	TBD

a IRS Pub. 6292, *Fiscal Year Return Projections for the United States 2016-2023* 4 (Aug. 2016); IRS Pub. 6292, *Fiscal Year Return Projections for the United States: 2017-2024* 3 (Sept. 2017). The FY 2016 figure has been updated from what we reported in the 2016 Annual Report to Congress to report actual return counts. The FY 2017 figures are projected numbers. The number of returns and related metrics are proxies for IRS workload and provide context for the environment in which taxpayers seek Quality Service and other rights.

b IRS Pub. 6292, *Fiscal Year Return Projections for the United States 2016-2023* 4 (Aug. 2016); IRS Pub. 6292, *Fiscal Year Return Projections for the United States: 2017-2024* 3 (Sept. 2017). The FY 2016 figure has been updated from what we reported in the 2016 Annual Report to Congress to report actual return counts.

c IRS, *E-File Reports*, http://efile.enterprise.irs.gov/Progress.asp (last visited Dec. 11, 2017).

d *Id.*

e *Id.*

f Free, in-person return preparation is offered to low income and older taxpayers by non-IRS organizations through the Volunteer Income Tax Assistance (VITA), Tax Counseling for the Elderly, and AARP Tax-Aide programs. IRS, Compliance Data Warehouse (CDW), Individual Returns Transaction File. The FY 2015 and FY 2016 figures have been updated from what we reported in the 2016 Annual Report to Congress. The FY 2015 figure represents tax year 2014 returns. The FY 2016 figure represent tax year 2015 returns. The FY 2017 figure represent tax year 2016 tax returns.

g IRS, CDW, Electronic Tax Administration Marketing Database.

h *Id.*

i FY 2015 figure from Wage & Investment (W&I) analyst (Dec. 13, 2016). FY 2016 figure from W&I response to TAS fact check (Dec. 20, 2016). FY 2017 figure from IRS response to TAS information request (Nov. 3, 2017).

j W&I, Business Performance Review (BPR), 4th Quarter, FY 2017 7 (Nov. 9, 2017).

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k IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (weeks ending Sept. 30, 2016 and Sept. 30, 2017; reports generated Nov. 19, 2017).
l *Id.*
m *Id.* Accounts Management calls answered include reaching live assistor or selecting options to hear automated information messages.
n *Id.*
o *Id.*
p *Id.*
q *Id.*
r *Id.*
s *Id.*
t *Id.*
u W&I, BPR, 4th Quarter, FY 2017 11 (Nov. 9, 2017).

3. THE RIGHT TO PAY NO MORE THAN THE CORRECT AMOUNT OF TAX – Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Toll-Free Tax Law Accuracy [a]	95.0%	96.4%	96.7%
Toll-Free Accounts Accuracy [b]	95.5%	96.1%	96.0%
Scope of Tax Law Questions Answered	TBD	TBD	TBD
Correspondence Examinations			
No change rate [c]	17.3%	16.2%	14.7%
Agreed rate [d]	16.3%	20.6%	22.4%
Non-response rate [e]	48.3%	42.1%	40.6%
Percentage of cases appealed	TBD	TBD	TBD
Field Examinations			
No change rate [f]	15.3%	14.6%	14.3%
Agreed rate [g]	45.7%	45.4%	46.1%
Non-response rate [h]	0.3%	0.3%	0.3%
Percentage of cases appealed	TBD	TBD	TBD
Office Examinations			
No change rate [i]	13.5%	12.2%	14.4%
Agreed rate [j]	44.7%	43.4%	42.8%
Non-response rate [k]	19.8%	20.6%	19.0%
Percentage of cases appealed	TBD	TBD	TBD
Math Error Adjustments	TBD	TBD	TBD
Math Error Abatements	TBD	TBD	TBD
Number of Statutory Notices of Deficiency Issued	TBD	TBD	TBD
Number of Statutory Notices of Deficiency Appealed	TBD	TBD	TBD
Number of Collection Appeals Program Conferences	TBD	TBD	TBD
Number of Collection Appeals Program Conferences Reversing IRS position	TBD	TBD	TBD
Number of Collection Due Process Conferences	TBD	TBD	TBD
Number of Collection Due Process Conferences Reversing IRS position	TBD	TBD	TBD

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a W&I, BPR, 4th Quarter, FY 2017 4 (Nov. 9, 2017).
b *Id*.
c IRS, CDW, Audit Information Management System (AIMS), Closed Case Database.
d *Id*.
e *Id*.
f *Id*.
g *Id*.
h *Id*.
i *Id*.
j *Id*.
k *Id*.

4. THE RIGHT TO CHALLENGE THE IRS'S POSITION AND BE HEARD – Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Individual Correspondence Volume (adjustments) [a]	4,358,447	4,817,708	4,598,654
Average cycle time to work IMF Correspondence [b]	80 days	84 days	69 days
Inventory Overage [c]	68.3%	49.1%	39.5%
Business Correspondence Volume [d]	2,952,329	2,940,925	2,736,451
Average cycle time to work BMF Correspondence [e]	46 days	47 days	45 days
Inventory Overage [f]	18.8 %	8.6%	11.7%
Percentage of Math Error Adjustments Abated	TBD	TBD	TBD
Percentage of Statutory Notices of Deficiency Appealed to Tax Court	TBD	TBD	TBD
Number of Collection Appeal Program Conferences Requested by Taxpayers [g]	TBD	TBD	TBD
Percentage of CAP Conferences that Reversed the IRS Position	TBD	TBD	TBD
Number of Collection Due Process Hearings Requested by Taxpayers [h]	TBD	TBD	TBD
Percentage of Collection Due Process Hearings that Reversed the IRS Position	TBD	TBD	TBD

a IRS, JOC, *Adjustments Inventory Reports: July-September Fiscal Year Comparison* (FY 2016 and FY 2017).
b IRS, RAD, *Accounts Management Reports: CIS Closed Case Cycle Time* (FY 2016 and FY 2017).
c IRS, CDW, Audit Information Management System (AIMS), Closed Case Database.
d IRS, JOC, *Adjustments Inventory Reports: July-September Fiscal Year Comparison* (FY 2016 and FY 2017).
e IRS, RAD, *Accounts Management Reports: CIS Closed Case Cycle Time* (FY 2016 and FY 2017).
f IRS, *Weekly Enterprise Adjustments Inventory Report*, FY 2016 and FY 2017 (weeks ending Oct. 1, 2016 and Sept. 30, 2017).
g Taxpayers may request a Collection Appeals Process review as the result of IRS actions such filing a notice of federal tax lien, an IRS levy or seizure of property, and termination, rejection, or modification of an installment agreement. *See* IRS Pub. 1660, *Collection Appeal Rights*.
h Taxpayers may request a Collection Due Process review when the IRS plans to take actions such as filing a federal tax lien or levy. *See* IRS Pub. 1660, Collection Appeal Rights.

5. THE RIGHT TO APPEAL AN IRS DECISION IN AN INDEPENDENT FORUM – Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals' decision. Taxpayers generally have the right to take their cases to court.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Number of Cases Appealed [a]	113,870	114,362	103,574
Appeals Staffing (On-rolls) [b]	1,569	1,449	1,345
Number of States without an Appeals or Settlement Officer [c]	11	11	11
Customer Satisfaction of Service in Appeals [d]	65%	67%	N/A
Average Days in Appeals to Resolution	TBD	TBD	TBD
Percentage of Statutory Notices of Deficiency Appealed to Tax Court	TBD	TBD	TBD

a Office of Appeals, BPR, 4th Quarter, FY 2017 10 (Oct. 27, 2017).
b *Id*.
c IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/posrpt.htm. Employee Position (OF8) Listing for weeks ending Oct.3, 2015, Oct. 1, 2016, and Sept. 30, 2017. The FY 2016 figure has been updated from what we reported in the 2016 Annual Report to Congress. The IRS also has Appeals and Settlement Officers in the District of Columbia which are not included in these figures.
d Office of Appeals, BPR, 4th Quarter, FY 2017 10 (Oct. 27, 2017). The FY2017 figure not yet available.

6. THE RIGHT TO FINALITY – Taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Average Days to Complete Correspondence Examination (non-EITC) [a]	231 days	196 days	204 days
Average Days to Complete Correspondence Examination (EITC) [b]	221 days	217 days	221 days
Average Days to Reach Determination on Applications for Exempt Status [c]	83 days	54 days	54 days
Average Days for Exempt Organization Function to Respond to Correspondence [d]	175 days	45 days	27 days

a W&I, BPR, 4th Quarter, FY 2017 8 (Nov. 9, 2017).
b *Id*.
c Tax Exempt and Government Entities (TE/GE), BPR, 4th Quarter, FY 2017 8 (Nov. 30, 2017).
d TE/GE, BPR, 4th Quarter, FY 2017 9 (Nov. 30, 2017).

7. THE RIGHT TO PRIVACY – The right to privacy goes to the right to be free from unreasonable searches and seizures and that IRS actions would be no more intrusive than necessary. Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Number (or percentage) of Collection Due Process cases where IRS cited for Abuse of Discretion	TBD	TBD	TBD
Number of Offers in Compromise Submitted using 'Effective Tax Administration' as Basis	TBD	TBD	TBD
Percentage of Offers in Compromise Accepted that used 'Effective Tax Administration' as Basis	TBD	TBD	TBD
Number of cases where taxpayer received repayment of attorney fees as result of final judgment	TBD	TBD	TBD

8. **THE RIGHT TO CONFIDENTIALITY** – Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Number of Closed Unauthorized Access of Taxpayer Account (UNAX) Investigations [a]	173	147	151
UNAX Investigations Resulting in Prosecution, Removal, Resignation or Suspension of Employee [b]	70	38	64
UNAX Investigations Resulting in other Administrative Dispositions [c]	83	81	74
UNAX Investigations Where Employee Cleared of Wrongdoing [d]	20	28	13

a IRS, Automated Labor and Employee Relations Tracking System (ALERTS). The number of IRS employees averaged 89,251 in FY 2015, 85,002 in FY 2016, and 83,775 in FY 2017. IRS, Human Resources Reporting Center, *Fiscal Year Population Report*.
b IRS, ALERTS.
c *Id*. Administrative dispositions includes alternative discipline in lieu of suspension; case cancelled or merged with another case; caution letter; last chance agreement; oral counseling; reprimand; written counseling; etc.
d *Id*.

9. **THE RIGHT TO RETAIN REPRESENTATION** – Taxpayers have the right to retain an authorized representative of their choice to represent them in their dealings with the IRS. Taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Percentage of Power of Attorney Requests Overage (as of 9/26/15, 10/1/16, 9/30/17) [a]	0%	0%	18.2%
Number of Low Income Taxpayer Clinics Funded (calendar year) [b]	132	138	138
Funds Appropriated for Low Income Taxpayer Clinics [c]	$10.0 million	$12.0 million	$12.0 million
Number of States with a Low Income Taxpayer Clinic (calendar year) [d]	49	49	49
Number of Low Income Taxpayer Clinic Volunteer Hours (calendar year) [e]	54,164	60,669	47,480

a IRS, JOC, *Customer Account Services, Accounts Management Paper Inventory Reports* (weeks ending 9/26/2015, 10/1/2016 and 9/30/2017).
b IRS Pub. 5066, *Low Income Tax Clinics Program Report* (Dec. 2015, Jan. 2017, and Dec. 2017).
c Consolidated and Further Continuations Appropriations Act, 2015, Pub. L. No. 113-235, enacted Dec. 16, 2014. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, enacted Dec. 18, 2015. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, enacted May 5, 2017. The amounts actually awarded to Low Income Taxpayer Clinics (LITCs) differed from the appropriated amounts. The IRS contributed an additional $0.25 million in FY 2015 bringing the total to $10.25 million. The amount awarded to clinics in FY 2016 was over $11.4 million based on the number of available grantees who met the requirements. The amount awarded to clinics in FY 2017 was approximately $11.8 million based on the number of available grantees who met the requirements. The FY 2016 figure has been updated from what we reported in the 2016 Annual Report to Congress.
d IRS Pub. 5066, *Low Income Tax Clinics Program Report* (Dec. 2015, Jan. 2017, and Dec. 2017). Forty-nine states and the District of Columbia have at least one LITC. Currently there is no LITC in North Dakota.
e *Id*. The FY 2016 number (60,669) was confirmed by the LITC Program Director (Oct. 28, 2016). The FY 2016 Pub. 5066 reported a rounded number (60,000). The FY 2015 figure reflects volunteer hours from calendar year (CY) 2014. The FY 2016 figure reflects volunteer hours from CY 2015. The FY 2017 figure reflects volunteer hours from CY 2016.

10. THE RIGHT TO A FAIR AND JUST TAX SYSTEM – Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

Measure/Indicator	FY 2015	FY 2016	FY 2017
Offer in Compromise (OIC): Number of Offers Submitted [a]	66,600	64,479	62,243
OIC: Percentage of Offers Accepted [b]	42.5%	42.5%	38.1%
Installment Agreements (IA): Number of Individual & Business IAs [c]	2,986,121	3,115,404	2,924,780
Streamlined Installment Agreements Number of Individual & Business IAs [d]	2,567,623	2,630,811	2,236,434
Installment Agreements Collection Field Function (CFf): Number of Individual & Business IAs [e]	52,053	42,978	35,449
Streamlined Installment Agreements (CFf): Number of Individual & Business IAs [f]	10,679	8,477	6,936
Number of OICs Accepted per Revenue Officer [g]	7.4	7.7	7.6
Number of IAs Accepted per Revenue Officer [h]	14.0	12.0	10.6
Percentage of Cases in the Queue (Taxpayers) [i]	15.7%	15.5%	13.9%
Percentage of Cases in the Queue (Modules) [j]	24.7%	23.9%	21.8%
Percentage of Taxpayer Delinquent Accounts (TDAs) reported Currently Not Collectible – Tolerance [k]	16.3%	16.9%	32.3%
Age of Delinquencies in the Queue [l]	4.5 years	4.5 years	4.5 years
Percentage of Modules in Queue prior to three tax years ago [m]	79.2%	78.7%	78.2%
Percentage of cases where the taxpayer is fully compliant after five years [n]	44%	48%	48%

a IRS, Collection Activity Report No. 5000-108, FY 2015 (Oct. 4, 2015), FY 2016 (Oct. 7, 2016), and FY 2017 (Oct. 2, 2017).
b *Id*.
c IRS, Collection Activity Report No. 5000-6, FY 2015 (Dec. 9, 2015), FY 2016 (Oct. 3, 2016), and FY 2017 (Oct. 1, 2017).
d *Id*.
e *Id*.
f *Id*.
g *Id*. *See also* IRS Human Resources Reporting Center – number of revenue officers in Small Business/Self Employed as of the end of FY 2015, FY 2016, and FY 2017 (pay period 19).
h *Id*.
i IRS, Collection Activity Report No. 5000-2, FY 2015 (Dec. 5, 2015), FY 2016 (Oct. 3, 2016), and FY 2017 (Oct. 1, 2017).
j *Id*.
k *Id*. For FY 2017, the IRS shelves cases prior to potential transfer for the Private Collection Initiative.
l Accounts Receivable Dollar Inventory. Age of cases in the collection queue as of cycle 37 of 2015, 2016, and 2017.
m IRS, Collection Activity Report No. 5000-2, FY 2015 (Dec. 5, 2015), FY 2016 (Oct. 3, 2016), and FY 2017 (Oct. 1, 2017).
n Calculation by TAS Research. Percentage of taxpayers with tax delinquent accounts in 2010, 2011, and 2012, respectively, and who have no new delinquencies five years later. IRS, CDW, Individual Master File (IMF).

INTRODUCTION: The Most Serious Problems Encountered by Taxpayers

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(III) requires the National Taxpayer Advocate to prepare an Annual Report to Congress that contains a summary of at least 20 of the most serious problems encountered by taxpayers each year. For 2017, the National Taxpayer Advocate has identified, analyzed, and offered recommendations to assist the IRS and Congress in resolving 21 such problems.

As in earlier years, this report discusses at least 20 of the most serious problems encountered by taxpayers — but not necessarily *the top 20* most serious problems. That is by design. Since there is no objective way to select the 20 most serious problems, we consider a variety of factors when making this determination. Moreover, while we carefully rank each year's problems under the same methodology (described below), the list remains inherently subjective in many respects.

To simply report on the top 20 problems would limit our effectiveness in focusing congressional, IRS, and public attention on critical issues. It would require us to repeat much of the same data and propose many of the same solutions year to year. Thus, the statute gives the National Taxpayer Advocate flexibility in selecting both the subject matter and the number of topics discussed and to use the report to put forth actionable and specific solutions instead of mere criticism and complaints.

Methodology of the Most Serious Problem List

The National Taxpayer Advocate considers a number of factors in identifying, evaluating, and ranking the most serious problems encountered by taxpayers. In many years, the National Taxpayer Advocate identifies a theme or groupings of issues for the report that is reflected in the selection of issues. For example, this year the themes are:

- *Significant Challenges in Tax Administration;*
- *The Right to Quality Service;*
- *The Right to a Fair and Just Tax System: Special Taxpayer Populations;*
- *The Right to an Independent Administrative Appeal;* and
- *Challenges in Revenue Protection.*

The 21 issues in this year's report are ranked according to the following criteria:

- Impact on taxpayer rights;
- Number of taxpayers affected;
- Interest, sensitivity, and visibility to the National Taxpayer Advocate, Congress, and other external stakeholders;
- Barriers these problems present to tax law compliance, including cost, time, and burden;
- The revenue impact of noncompliance; and
- Taxpayer Advocate Management Information System (TAMIS) and Systemic Advocacy Management System (SAMS) data.

Finally, the National Taxpayer Advocate and the Office of Systemic Advocacy examine the results of the ranking on the remaining issues and adjust it where editorial or numerical considerations warrant a particular placement or grouping.

Taxpayer Advocate Management Information System (TAMIS) List

The identification of the Most Serious Problems reflects not only the mandates of Congress and the IRC, but TAS's integrated approach to advocacy — using individual cases as a means for detecting trends and identifying systemic problems in IRS policy and procedures or the Code. TAS tracks individual taxpayer cases on TAMIS. The top 25 case issues, listed in Appendix 1, reflect TAMIS receipts based on taxpayer contacts in fiscal year 2017, a period spanning October 1, 2016 through September 30, 2017.

Use of Examples

The examples presented in this report illustrate issues raised in cases handled by TAS. To comply with IRC § 6103, which generally requires the IRS to keep taxpayer returns and return information confidential, the details of the fact patterns have been changed. In some instances, the taxpayer has provided written consent for the National Taxpayer Advocate to use facts specific to that taxpayer's case. These exceptions are noted in footnotes to the examples.

MSP #1 PRIVATE DEBT COLLECTION: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship

RESPONSIBLE OFFICIAL

Mary Beth Murphy, Commissioner, Small Business/Self-Employed Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

In 2015, Congress enacted legislation requiring the IRS to enter into "qualified tax collection contracts" for the collection of "inactive tax receivables."[2] The National Taxpayer Advocate cautioned that the initiative as it was being implemented appeared inconsistent with the law and would disproportionately burden taxpayers experiencing economic hardship.[3]

The IRS assigned the first tax debts to private collection agencies (PCAs) in April 2017.[4] According to the IRS, for fiscal year (FY) 2017:

- The IRS received $6.7 million of payments from taxpayers whose debts were assigned to PCAs; and

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Fixing America's Surface Transportation Act, Pub. L. No. 114-94, Div. C, Title XXXII, § 32102, 129 Stat. 1312, 1733-36 (2015) (FAST Act), (adding subsections (c) and (h) to IRC § 6306).

3 *See* National Taxpayer Advocate 2016 Annual Report to Congress 172-191 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*).

4 IRS News Release IR-2017-74, *Private Collection of Some Overdue Federal Taxes Starts in April; Those Affected Will Hear First From IRS; IRS Will Still Handle Most Tax Debts* (Apr. 4, 2017), https://www.irs.gov/newsroom/private-collection-of-some-overdue-federal-taxes-starts-in-april-those-affected-will-hear-first-from-irs-irs-will-still-handle-most-tax-debts.

- The total cost of the PDC program was $20 million, three times the amount collected.[5]

Thus, the initiative is not raising net revenue. Moreover, the IRS letter advising taxpayers that their account is being assigned to a PCA is generating 40 percent as many dollars for the public fisc as collection activity by PCAs does.[6] At the same time, the IRS pays commissions to PCAs on payments from taxpayers that are attributable to IRS, rather than PCA, action.[7]

The recent returns of approximately 4,100 taxpayers who made payments to the IRS after their debts were assigned to PCAs show:

- Median income was about $41,000;
- Over 1,100 taxpayers, or 28 percent, had incomes below $20,000; and
- 44 percent had incomes below 250 percent of the federal poverty level.[8]

Among these 4,100 taxpayers were those who receive Social Security Disability Insurance (SSDI) benefits, even though the IRS agreed to exclude the debts of SSDI recipients from assignment to PCAs.[9]

Approximately 1,700 taxpayers entered into installment agreements while their debts were assigned to PCAs, made payments on which the PCAs were paid commissions, and have filed recent returns.[10] According to these taxpayers' returns, 45 percent had income that was less than their allowable living expenses (ALE).[11] Thus, these taxpayers could not afford the payments due under the installment agreements organized by the PCAs. The IRS refuses to allow TAS to participate in its procedures for monitoring calls between taxpayers and PCAs, which could provide insight into why so many of these vulnerable taxpayers are entering into installment agreements they cannot afford.

ANALYSIS OF PROBLEM

Background

In 2016, the IRS entered into contracts with four PCAs that allow the PCAs to contact taxpayers, solicit payment of past-due taxes, offer payment arrangements that may, with IRS approval, extend to

5 IRS, *Private Debt Collection (PDC) Program Scorecard for Fiscal Year (FY) 2017*, reporting operational data through Sept. 14, 2017 and IRS costs through Sept. 30, 2017.

6 As discussed below, the IRS paid commissions to private collection agencies (PCAs) at the rate of 20 percent of the amount of payments taxpayers made, and is authorized to keep for itself an additional 25 percent. Thus, up to 45 percent of the receipts attributable to PCA activity was paid in commissions or may be retained by the IRS, rather than being paid to the Treasury.

7 IRS response to TAS information request (Nov. 21, 2017), discussed below.

8 Individual Returns Transaction File (IRTF), Information Returns Master File (IRMF), Compliance Data Warehouse (CDW), data current through Sept. 28, 2017, showing there were 4,141 taxpayers who made payments while their debts were assigned to a PCA and who filed a return for tax year 2014 or later. Their income characteristics are discussed in more detail below.

9 IRTF, IRMF, CDW, data current through Sept. 28, 2017.

10 *Id.* There were 1,676 taxpayers who entered into an installment agreement after their debts were assigned to a PCA, made a payment, and filed a recent return. As discussed below, some of these taxpayers entered into an installment agreement by contacting the IRS directly, rather than working with the PCA.

11 *Id.*

seven years, and receive a commission of up to 25 percent of the amount collected.[12] The IRS is also authorized to retain for itself an additional amount up to 25 percent of the amount collected.[13] The IRS is required to assign to PCAs tax debts that the IRS includes in "potentially collectible inventory" (PCI), a term not defined in the statute or in Treasury regulations.[14]

The PDC Program Thus Far Is Not Producing Net Revenue

The IRS periodically summarizes PDC program performance in program "scorecards."[15] The FY 2017 Scorecard shows:

- The IRS had assigned about $920 million of inactive tax receivables to PCAs;[16]
- About $7 million, or less than one percent of the dollars assigned for collection, had been collected;[17] and
- The total program cost was about $20 million, consisting of about $1 million in commissions paid to PCAs and $19 million of other PDC program costs.[18]

Thus, it does not appear that PCAs are particularly effective in collecting the debts assigned to them. In any event, the cost of the PDC program thus far exceeds the revenue it generates. It appears that a little over half of the total program costs incurred in FYs 2016 and 2017 combined were one-time startup costs, as opposed to continuing costs of oversight and assignment.[19] The IRS is in the process of developing a model for projecting program revenues and costs.[20]

The IRS Pays Commissions to PCAs for Work Done by the IRS, Which May Be Inconsistent With IRC § 6306

The National Taxpayer Advocate has previously expressed concern that PCAs may receive commissions on payments taxpayers make in response to the IRS's letter advising them their debts were assigned to

12 IRC § 6306(c) requires the IRS to enter into "qualified collection contracts" with respect to "inactive tax receivables." However, a "qualified collection contract," as defined in IRC § 6303(b)(1), would allow PCAs to offer installment agreements for "a period not to exceed 5 years." Thus, the National Taxpayer Advocate is not persuaded that the IRS's contracts with PCAs meet the statutory definition of "qualified collection contracts." *See* National Taxpayer Advocate 2016 Annual Report to Congress 172, 179 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*). IRC § 6306(e) authorizes the IRS to pay commissions pursuant to a "qualified collection contract." The National Taxpayer Advocate does not find any statutory authority for paying commissions to PCAs with respect to installment agreements of more than five years' duration.

13 IRC § 6306(e).

14 IRC § 6306(c) generally requires the IRS to assign to PCAs all "inactive tax receivables," defined as any "tax receivable" that meets any one of three criteria. A "tax receivable" for purposes of the statute is an account the IRS includes in "potentially collectible inventory" (PCI).

15 The PDC Program Scorecard for Fiscal Year 2017 reports operational data through Sept. 14, 2017 and IRS costs through Sept. 30, 2017.

16 *Id.*, showing $919,593,380 of tax receivables were assigned.

17 *Id.*, showing $6,698,661 were collected.

18 *Id.*, showing commissions were paid of $1,068,944. Under the IRS's contract with the PCAs, commissions are generally payable with respect to payments taxpayers make beginning after ten days from the assignment of the debt to the PCA. Other PDC program costs were $18,967,203.

19 IRS response to TAS information request (Dec. 19, 2017), providing combined costs for FYs 2016 and 2017, showing total costs of $35,321,078, of which $18,818,397 (53 percent) are one-time costs and $16,502,681 (47 percent) are recurring costs.

20 SB/SE response to TAS information request (Nov. 21, 2017).

The IRS is aware that it is paying commissions to Private Collection Agencies (PCAs) with respect to work done by the IRS, but has no plans to change its procedures to attempt to identify payments that were clearly not attributable to PCA action.

a PCA, rather than due to any action on the part of the PCA.[21] As the PDC program has unfolded, inappropriate commission payments have emerged in another context, as an example illustrates:

- On April 10, a taxpayer's debt was assigned to a PCA;
- On May 24, the taxpayer contacted the IRS and the IRS assisted the taxpayer in entering into an installment agreement. This caused the case to be recalled from the PCA, but the recall was not recorded in IRS databases until June 19; and
- In the meantime, on June 5, the taxpayer made a payment pursuant to the installment agreement the IRS had organized. The IRS paid the PCA a commission on that payment. [22]

The IRS is aware that it is paying commissions to PCAs with respect to work done by the IRS, but has no plans to change its procedures to attempt to identify payments that were clearly not attributable to PCA action.[23] The IRS's position is that its contract with the PCAs requires this outcome.[24] However, this practice appears inconsistent with IRC § 6306(e), which authorizes commissions on amounts collected "under any qualified tax collection contract." According to IRC § 6306(d), a tax debt that is subject to a pending or active installment agreement "shall not be eligible for collection pursuant to a qualified tax collection contract." Thus, from the moment an installment agreement is pending as a result of the taxpayer requesting an installment agreement directly from the IRS, the debt is not eligible for collection pursuant to a qualified tax collection contract, and commissions to PCAs are not authorized on ensuing payments.[25]

The IRS Ten-Day "Pre-PDC Assignment" Letter Generates 40 Percent As Much for the Treasury As PCA Activity Does

Taxpayers whose accounts were assigned to PCAs made payments totaling $6.7 million.[26] About $1.2 million of these payments were not commissionable because they were made within ten days after the IRS notified the taxpayers that their debts were being assigned to a PCA, but before the taxpayers had

21 *See* National Taxpayer Advocate 2016 Annual Report to Congress 172, 190-191 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*).

22 IRS response to TAS information request (Nov. 21, 2017).

23 *Id.*

24 IRS response to TAS information request (Dec. 19, 2017). Section 2.3 of the IRS's contract with the PCAs specifies, with exceptions not relevant here, that commissions are payable on any payment received 11 days or more after the date the account is transferred to a PCA and up to ten calendar days after the account is returned to the IRS.

25 IRS employees are required to record a pending installment agreement within 24 hours after contact with a taxpayer. IRM 5.14.1.3, *Identifying Pending, Approved and Rejected Installment Agreement Proposals on IDRS* (Jan. 1, 2016).

26 IRS, *PDC Program Scorecard for Fiscal Year 2017*, showing total payments of $6,698,661.

any contact with a PCA.[27] Thus, about 18 percent of the payments were generated in response to the IRS letter and without any action on the private collector's part.

The IRS received about $5.4 million of payments that were subject to commissions.[28] The IRS actually paid commissions of $1.1 million, a rate of 20 percent.[29] The IRS is also authorized to retain for itself 25 percent of the amount collected by PCAs.[30] Thus, up to 45 percent of the $5.4 million of commissionable payments, or about $2.4 million, will be diverted from the public fisc.[31] The remaining $3 million is the minimum amount that would be paid to the Treasury. As noted above, the IRS's letter brought in $1.2 million, which is 40 percent as much as the amount PCA activity contributes to the public fisc.[32] The National Taxpayer Advocate is not surprised that a simple letter from the IRS can induce compliance.[33] The IRS might obtain even better results (in terms of adding to public coffers and increasing compliance) by sending periodic letters to taxpayers monthly throughout the year reminding them of their tax debt rather than only sending the annual reminder required by statute.[34]

The PDC Program Burdens Taxpayers Who Are Likely Experiencing Economic Hardship

Of the 4,905 taxpayers who made payments after their debts were assigned to PCAs, 4,141 had filed recent returns as of September 28, 2017.[35]

The returns filed by the 4,141 taxpayers show:

- Overall median income of $40,955;
- 28 percent, or 1,170, had annual income of less than $20,000;

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27 IRS, *PDC Program Scorecard for Fiscal Year 2017,* showing the IRS received $1,187,238 in payments that are not subject to commissions to PCAs. PCAs conduct operations in compliance with the most current version of the Private Collection Agency Policy and Procedures Guide (PPG). References to the PPG are to the Sept. 29, 2017 version. PPG section 5.3, *Initial Contact Letters*, provides that PCAs are permitted to send their first contact letter to taxpayers ten days after the IRS sends its initial contact letter. PPG section 6.3, *Telephone Contact with Taxpayers*, provides that PCAs may telephone taxpayers five days after sending their first contact letter.

28 *Id.*, showing the IRS received $5,363,918 in payments subject to commissions (and showing the IRS received $147,505 in payments that are not categorized as either commissionable or non-commissionable).

29 *Id.*, showing the IRS actually paid commissions of $1,068,944. Under IRC § 6306(e)(1), the IRS is authorized to pay commissions to PCAs of up to 25 percent.

30 IRC § 6306(e)(2).

31 Of the $5,363,918 collected, 45 percent is $2,413,763. The remaining 55 percent is $2,950,155.

32 The amount of non-commissionable payments, $1,187,238, is equal to 40 percent of $2,950,155, the minimum amount payable to the Treasury.

33 *See* National Taxpayer Advocate 2016 Annual Report to Congress, vol. 2, 31, 42 (Research Study: *Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter from the National Taxpayer Advocate*). *See also* Research Study: *Second Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter from the National Taxpayer Advocate*, vol. 2, *supra*, describing situations in which a targeted, educational letter may deter noncompliance.

34 IRC § 7524 provides "[n]ot less often than annually, the Secretary shall send a written notice to each taxpayer who has a tax delinquent account of the amount of the tax delinquency as of the date of the notice." The IRS meets this requirement by sending taxpayers with delinquent accounts Notice CP-71, *Reminder Notice*, once a year.

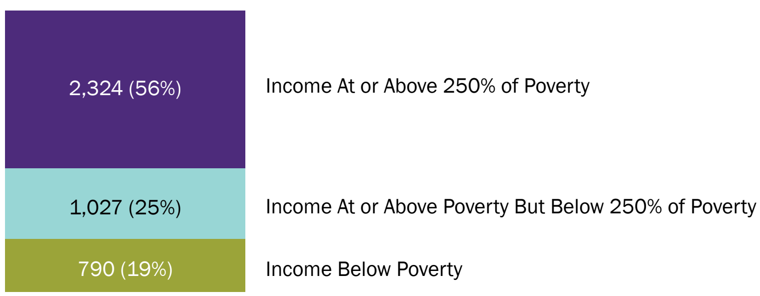
35 Accounts Receivable Dollar Inventory (ARDI), IRTF, IRMF, CDW, data current through Sept. 28, 2017. TAS Research identified 4,905 taxpayers who made commissionable payments to the IRS (generally, payments taxpayers make more than ten days after their accounts are assigned to a PCA) 4,141 of whom filed a return for tax year 2014 or later. As discussed below, the income characteristics of taxpayers who did not file returns may differ from those who filed returns.

- 19 percent, or 790, had incomes below the federal poverty level; median income for these taxpayers was $6,386;[36]
- 25 percent, or 1,027, had incomes at or above the federal poverty level but below 250 percent of the federal poverty level; median income for these taxpayers was $23,096; and
- Five percent, or 205, received Social Security retirement or disability income; median income for these taxpayers was $14,365.[37]

Figure 1.1.1 below shows the proportion of the 4,141 taxpayers whose incomes were below the federal poverty level, the proportion whose incomes were at or above the federal poverty level but less than 250 percent of the federal poverty level, and the proportion whose incomes were 250 percent or more of the federal poverty level.

FIGURE 1.1.1[38]

Taxpayers Who Made Payments After Their Debts Were Assigned to a Private Collection Agency, by Income Level



Recent returns of taxpayers who made payments after their debts were assigned to Private Collection Agencies show: Overall median income of $40,955; 28 percent had annual income of less than $20,000; 19 percent had incomes below the federal poverty level; and 25 percent had incomes at or above the federal poverty level but below 250 percent of the federal poverty level.

36 U.S. Dept. of Health and Human Resources, *Poverty Guidelines* (Jan. 31, 2017), https://aspe.hhs.gov/poverty-guidelines, showing that the poverty level for a single person in 2017 was $12,060. Thus, 250 percent of the 2017 federal poverty level for a single person was $30,150.

37 IRTF, IRMF, CDW, data current through Sept. 28, 2017. As discussed below, for purposes of administering the IRS's automatic levy program, the Federal Payment Levy Program (FPLP), the IRS adopted 250 percent of the federal poverty level as a measure that serves as a proxy for economic hardship.

38 The figure represents the income shown on the recent returns of 4,141 taxpayers who made payments to the IRS after their debts were assigned to private collection agencies, compared to the federal poverty level for the taxpayer's household size.

As Figure 1.1.1 above demonstrates, slightly less than half of the taxpayers (44 percent) have incomes that indicate they are at risk of economic hardship.

Of the 4,141 taxpayers described above who made payments after their debts were assigned to a PCA:

- 1,676 taxpayers, or 40 percent, agreed to installment agreements.[39] Almost half of these taxpayers, 46 percent, had incomes below 250 percent of the federal poverty level;
- 2,465 taxpayers, or 60 percent, made payments that were not pursuant to an installment agreement — their payments may have been "voluntary payments" solicited by the PCA, discussed below. Of these taxpayers, 43 percent had incomes below 250 percent of the federal poverty level.

The income characteristics of the 4,141 taxpayers, according to whether their payments were made pursuant to an installment agreement, are summarized in Figure 1.1.2 below:

FIGURE 1.1.2, Income Shown on Recent Returns Filed by 4,141 Taxpayers Who Made Payments After Their Debts Were Assigned to PCAs, Compared to the Federal Poverty Level and Dollars Collected

Income Group	Number (and percent) of Taxpayers with No Installment Agreement	Number (and percent) of Taxpayers with an Installment Agreement	Total	Dollars Collected (and percent)
Below Federal Poverty Level	477 (19 percent)	313 (19 percent)	790	$ 863,731 (14 percent)
At or Above Federal Poverty Level but Below 250 Percent of Federal Poverty Level	577 (23 percent)	450 (27 percent)	1,027	$ 1,303,384 (20 percent)
Subtotal, below 250 percent Federal Poverty Level	1,054 (43 percent)	763 (46 percent)	1,817	$ 2,167,114 (34 percent)
At or Above 250 Percent Federal Poverty Level	1,411 (57 percent)	913 (54 percent)	2,324	$ 4,215,883 (66 percent)
Overall	**2,465**	**1,676**	**4,141**	**$6,382,998**

As Figure 1.1.2 above shows, 14 percent of the dollars collected from these 4,141 taxpayers came from taxpayers whose incomes are below the federal poverty level.

As Figure 1.1.2 above also shows, of the 4,141 taxpayers, 1,817 (44 percent) had incomes below 250 percent of the federal poverty. Of these 1,817 taxpayers, 169 were recipients of Social Security

39 Of these 1,676 taxpayers, 67 entered into their installment agreement by contacting the IRS directly rather than through the PCA. As noted above, whether the installment agreement is organized by a PCA or by the IRS does not affect the extent to which PCAs receive commissions on payments taxpayers make pursuant to installment agreements.

retirement (SSA) or disability (SSDI) benefits.[40] Their incomes, and the amount collected from them, is shown in Figure 1.1.3 below.[41]

FIGURE 1.1.3, Taxpayers Who Paid After Their Debts Were Assigned to PCAs and Filed Recent Returns Showing Income Less Than 250 Percent of the Federal Poverty Level for Their Household Size

	Income Below the Federal Poverty Level			Income At or Above Federal Poverty Level and Below 250% of the Federal Poverty Level			
	Number of Taxpayers	Median Income ($)	Amount Collected ($)	Number of Taxpayers	Median Income ($)	Amount Collected ($)	Total
SSA Recipients	70	4,730	46,415	50	19,542	60,335	120
SSDI Recipients	26	3,436	33,721	23	24,999	16,302	49
Total	**96**	**4,201**	**80,136**	**73**	**20,003**	**76,637**	**169**

Taxpayers' SSDI payments or Supplemental Security Income (SSI) payments are not subject to levies pursuant to the Federal Payment Levy Program (FPLP).[42] At the National Taxpayer Advocate's urging, the Commissioner of Internal Revenue agreed that the debts of SSDI and SSI recipients would not be assigned to PCAs.[43] However, as shown above, TAS identified SSDI recipients among those whose debts were assigned to PCAs. When TAS asked the IRS to describe the obstacles that prevent it from honoring its commitment to exclude these taxpayers' debts from assignment to PCAs, the IRS specified that "the unpaid assessment file" system it uses to identify potential new inventory for PDC "is not able to distinguish the type of retirement or government payment."[44] The IRS requested the Social Security Administration to identify or verify accounts of taxpayers who receive SSDI or SSI, which would enable the IRS to systemically exclude these taxpayers' debts from assignment to PCAs. The Social Security Administration denied the request, and the IRS is considering whether and how to request the Social Security Administration to reconsider its position.[45]

The IRS could identify SSDI recipients without assistance from the Social Security Administration and it is unclear why the IRS has not done so. Information about Social Security Administration benefits and the nature of those benefits (retirement or disability) is included in the Information Returns Master

40 IRMF, a database stored in the CDW, currently contains third-party information documents through tax year 2016. It includes information from Form SSA-1099, on which Social Security benefits, including Social Security Disability Income (SSDI) (but not Supplemental Security Income (SSI), discussed below) is reported.

41 Additional income characteristics of the 1,676 taxpayers who entered into installment agreements is discussed below. For more detail about taxpayers who entered into installment agreements while their debts were assigned to a PCA, including those who did not file recent returns, *see* Research Study: *Study of Financial Circumstances of Taxpayers Who Entered Into Installment Agreements and Made Payments While Their Debts Were Assigned to Private Collection Agencies*, vol. 2, *infra*.

42 IRM 5.19.9.3.1(7)(f), *What is FPLP?* (Oct. 20, 2016).

43 National Taxpayer Advocate 2016 Annual Report to Congress 172, 186 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*).

44 IRS response to TAS information request (Oct. 06, 2017).

45 Letter from Stephen Evangelista, Social Security Administration Associate Commissioner, Office of Data Exchange and Policy Publications to Bill Banowski, IRS, Collection Planning & Enforcement Analysis (June 7, 2017), citing the IRS's request that the Social Security Administration share information regarding SSI recipients. The Small Business/Self-Employed Division (SB/SE), in its response to agenda items for a Nov. 9, 2017 meeting with TAS, reiterated that it had requested assistance in identifying both SSDI and SSI recipients.

File (IRMF), a database the IRS uses for other programs.[46] Instead, the IRS intends to first exhaust its efforts with the Social Security Administration before adopting an alternative method of systemically identifying SSDI and SSI recipients.[47] Until the IRS actually honors its commitment to exclude these taxpayers' debts from assignment to PCAs these vulnerable taxpayers will be solicited to make payments they may not be able to afford.

The IRS generally does not subject SSA retirement income to FPLP levies when the recipient's income is less than 250 percent of the federal poverty level, a measure that serves as a proxy for economic hardship.[48] Thus, the 120 taxpayers who received SSA retirement income, shown in Figure 1.1.3 above, would generally not be subject to FPLP levies. However, as noted, the analysis above encompasses only taxpayers who filed recent returns. To overcome this limitation, we estimated the incomes of taxpayers using a method similar to that adopted for the FPLP low income filter.[49] We identified 161 SSA retirement income recipients who would generally not be subject to FPLP levies, but who made commissionable payments while their debts were assigned to a PCA.

The IRS has in the past suggested that these taxpayers, although earning relatively small amounts, may have substantial assets with which to pay their tax debt.[50] We are unable to find any indication that this concern is justified. On the contrary, for the 120 SSA retirement income recipients whose incomes were less than 250 percent of the federal poverty level, who made payments after their debts were assigned to a PCA, and filed returns:

- Median income was $9,472;
- They received on average $35 in interest;
- They received on average $13 in dividends;
- They received on average $2,176 of other retirement income, such as pensions;
- None realized any capital gains, other than from the sale of stock; and
- They realized on average $18 from the sale of stock.[51]

46 The IRMF contains third-party information documents used, for example, by the IRS's Automated Underreporter matching program. Because the data on IRMF is generally at least a year old, relying on IRMF may mean, for example, that the debt of a taxpayer who received SSDI in 2016 would be excluded from assignment to a PCA although that taxpayer no longer received SSDI in 2017. The National Taxpayer Advocate believes this risk is outweighed by the harm to SSDI recipients whose debts are assigned to PCAs. Moreover, as discussed below, the IRS uses older data (such as a taxpayer's return from a previous return) to determine whether a taxpayer's account should be excluded from FPLP levies. *See* IRM 5.19.9.3.2.3 (2) *Low Income Filter (LIF) Exclusion* (Oct. 20, 2016), noting "If the taxpayer has filed an income tax return for one of the last three years and has no outstanding return delinquencies following the last return filed they will be processed through the LIF [low income filter]."

47 SB/SE response to agenda items for Nov. 9, 2017 meeting between TAS and SB/SE.

48 IRM 5.19.9.3.2.3, *Low Income Filter (LIF) Exclusion* (Oct. 20, 2016), which also describes conditions under which taxpayers can be excluded from the LIF. For a description of the TAS model to estimate the income and expenses of taxpayers whose federal payments had been subject to FPLP levies, which led to the adoption of the 250 percent proxy for economic hardship, see National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48 (Research Study: *Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

49 See IRM 5.19.9.3.2.3, *Low Income Filter (LIF) Exclusion* (Oct. 20, 2016). We estimated income using a subset of the most common income sources but did not apply the exclusion conditions.

50 *See* National Taxpayer Advocate 2016 Annual Report to Congress 172, 187 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*).

51 IRTF, IRMF, CDW, data current through Sept. 28, 2017.

Recent returns of taxpayers who entered into installment agreements while their debts were assigned to PCAs show: Median income of $38,021; 28 percent have incomes of less than $20,000; and Allowable Living Expenses exceeded total positive income for 45 percent of taxpayers.

These 120 taxpayers received in the aggregate $269,028 in income from assets.[52]

The IRS Recalls Debts From PCAs, and PCAs Are Required to Return Cases to the IRS, But the Reasons for Recalls and Returns Are Unclear

As of September 14, 2017, the IRS had recalled the debts of more than 3,800 taxpayers.[53] Of these recalled cases, about 700 were recalled because one of the statutory conditions prohibiting assignment of the debt applied (*e.g.*, the taxpayer was in an active installment agreement).[54] An additional 85 cases were recalled because the taxpayer's account was in Currently Not Collectible (CNC) hardship status.[55] For about 3,000, cases, however, the reason given for recall is "other."[56] The IRS expects to be able to provide a complete breakdown of the "other" category beginning in January 2018.[57]

In FY 2017, PCAs returned to the IRS the debts of about 1,500 taxpayers.[58] PCAs are required to return to the IRS as "unable to collect" those cases in which "the taxpayer indicates that payment of the balance due immediately or through a payment arrangement would leave him or her unable to pay necessary living expenses or a medical hardship is reported."[59] PCAs are also required to return cases to the IRS after requesting a single "voluntary payment," *i.e.*, a payment that does not fully pay the liability and is not made pursuant to an installment agreement.[60] These two conditions requiring return of a case are related, however. While PCAs are not permitted to request a voluntary payment "when the taxpayer expresses they are unable to pay," PCAs *are* permitted to request a voluntary payment when the taxpayer cannot pay the liability immediately or pursuant to an installment agreement, which itself suggests that the taxpayer is experiencing economic hardship.[61] PCAs are required to report the reasons for returning

52 *Id.*

53 IRS response to TAS information request (Oct. 06, 2017), indicating that the IRS had recalled the debts of 3,781 taxpayers as of Sept. 14, 2017.

54 *Id.*, indicating that 693 cases were recalled because a statutory exception applied.

55 *Id*. These accounts were designated as in currently not collectible (CNC) hardship status after assignment. IRS response to TAS information request (Dec. 19, 2017).

56 IRS response to TAS information request (Oct. 06, 2017), indicating that 3,003 cases had been recalled for the reason of "other."

57 IRS response to TAS information request (Dec. 19, 2017), clarifying that "the ability to detail the recall reasons in the 'other' category will be available for recalls beginning January 2018 and forward. The IRS won't have the ability to provide detail for any periods prior to January 2018."

58 IRS, *PDC Program Scorecard for Fiscal Year 2017*, showing the PCAs had returned debts of 1,538 taxpayers.

59 PPG section 12.3, *PCA Unable to Collect*.

60 PPG section 10.2.1, providing: "If the taxpayer cannot full pay, within 120 days or with a payment arrangement, the PCA will make one attempt to verbally secure a voluntary payment" and directing PCAs: "After making the one attempt to secure a voluntary payment, the PCA will hold the account 10 business days from the date the voluntary payment was request [sic] and initiate the return of the account back to the IRS."

61 PPG section 10.2 provides "When the taxpayer cannot full pay the tax debt within the Collection Statute Expiration Date (CSED) or 7 years, whichever less [sic], the PCA will attempt to secure a voluntary payment." PPG section 10.2.1, *Voluntary Payments*, provides that voluntary payments are not to be solicited "when the taxpayer expresses they are unable to pay."

cases to the IRS.[62] However, as the IRS has explained "[t]he voluntary payment information that we have received to date is inconsistent and we are in the process of refining the criteria for reporting the data. The PDC Project Office is working on a mechanism to capture the number of accounts with voluntary payments and the total voluntary payment dollars collected, verified by the IRS."[63]

With Unacceptable Frequency, Taxpayers Whose Debts Are Assigned to PCAs Are Placed in Installment Agreements They Cannot Afford

There were 2,102 taxpayers who entered into installment agreements and made commissionable payments while their debts were assigned to PCAs. Of these, 1,676 filed recent returns.[64] The recent returns of the 1,676 taxpayers who entered into installment agreements and made a payment while their debts were assigned to PCAs show:

- Median income of $38,021;
- 473 taxpayers, or 28 percent, have incomes of less than $20,000; and
- ALEs exceeded total positive income for 755, or 45 percent of taxpayers.[65]

Even when their debts are not assigned to PCAs, taxpayers agree to installment agreement payments they cannot afford.[66] Insight into why taxpayers whose debts were assigned to PCAs enter into installment agreements they cannot afford, apparently at a higher rate, has been hindered by the IRS's refusal to allow TAS to listen to calls between PCA employees and taxpayers.[67]

CONCLUSION

IRC § 6306(c) requires the IRS to outsource some tax debt. However, the PDC program as implemented has not generated net revenues and results in the IRS improperly paying commissions to PCAs for work they did not perform. In the meantime, the most vulnerable taxpayers are making payments and entering into installment agreements they cannot afford according to the IRS's own measures. The IRS should honor its commitment to taxpayers and do more to ensure that its PDC program operates in accordance with the law and respects taxpayers' rights.

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62 PPG section 17.1, *Production Management Reports*, section 17.3.2, *Return Tracking Report.*

63 IRS response to TAS information request (Oct. 06, 2017).

64 The income characteristics of all 2,102 taxpayers who entered into installment agreements, including the 426 who did not file returns, are described in Research Study: *Study of Financial Circumstances of Taxpayers Who Entered Into Installment Agreements and Made Payments While Their Debts Were Assigned to Private Collection Agencies*, vol. 2, *infra*.

65 IRTF, IRMF, CDW, data current through Sept. 28, 2017. The IRS publishes ALE standards, which determine how much money taxpayers need for basic living expenses. *See* IRS, *Collection Financial Standards*, https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards. We calculated the total monthly ALE for each taxpayer by summing the monthly national standards for housing, health, and transportation costs based on the zip code, primary and secondary taxpayer age, and total number of exemptions shown on each taxpayer's most recently filed return. The annual ALE total for a given taxpayer was computed by multiplying the monthly ALE total by twelve. A taxpayer was designated as below ALE when his or her income from that taxpayer's most recently filed return was lower than that taxpayer's annual ALE total.

66 *See* National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 53 ,60, (Research Study: *The Importance of Financial Analysis in Installment Agreements (IAs) in Minimizing Defaults and Preventing Future Payment Noncompliance*), reporting that nearly 40 percent of individual taxpayers entering into installment agreements in 2014 had incomes below their allowable living expenses.

67 TAS received 38 PDC cases during FY 2017. In 30 cases, the taxpayer asked for assistance in stopping contact from PCAs.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Do not pay commissions on payments taxpayers make that are the result of interaction with the IRS, rather than with PCAs.
2. Provide that the IRS will receive a credit for any improperly paid commissions, such as where a taxpayer enters into an installment agreement directly with the IRS and makes a payment before the recall of the cases is reflected on IRS databases.
3. Without waiting for collaboration from the Social Security Administration, use available IRS data to exclude the debts of SSDI recipients from assignment to PCAs.
4. Adopt a definition of "potentially collectible inventory" that does not include debts of Social Security retirement recipients whose incomes are less than 250 percent of the federal poverty level.
5. Require PCA employees to actively inquire, when speaking with taxpayers, whether a proposed payment arrangement will leave the taxpayer unable to pay reasonable basic living expenses, and to return such cases to the IRS.
6. Develop procedures for including a TAS representative in the process of monitoring or reviewing phone calls between taxpayers and PCAs.
7. Develop procedures for sending letters to taxpayers soliciting payment of their past due taxes more frequently than annually.

MSP #2 TELEPHONES: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment

RESPONSIBLE OFFICIAL

Kenneth Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Taxpayers have the *right to quality service*, and expect the IRS to answer their questions and assist with resolving their tax problems.[2] Despite the IRS's efforts to direct taxpayers to use its online services for assistance, many taxpayers are unwilling or unable to use these resources and still depend on more personal forms of communication. The IRS has steadily decreased the availability of face-to-face assistance at Taxpayer Assistance Centers (TACs),[3] leaving taxpayers with few other options for communicating with the IRS, such as writing a letter or making a phone call.[4]

Each year, the IRS receives over 95 million telephone calls on its toll-free lines.[5] It reported higher service levels during fiscal year (FY) 2017, including an increase in the level of service (LOS) on its Accounts Management (AM) lines from 53 percent in FY 2016 to 77 percent in FY 2017.[6] However, service was not consistently high across channels, as the LOS on its Consolidated Automated Collection Service (ACS) lines dropped from 70 percent in FY 2016 to just 47 percent in FY 2017.[7] The IRS does

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 IRS Restructuring and Reform Act of 1998 (RRA 98) § 3705(d), 105 Pub. L. No. 206, 112 Stat. 777 ("The Secretary of the Treasury or the Secretary's delegate shall provide, in appropriate circumstances, on telephone helplines of the Internal Revenue Service an option for any taxpayer to talk to an Internal Revenue Service employee during normal business hours. The person shall direct phone questions of the taxpayer to other Internal Revenue Service personnel who can provide assistance to the taxpayer."). *See also* RRA 98 § 3709, 105 Pub. L. No. 206, 112 Stat. 779.

3 *See* Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*, *infra.*

4 National Taxpayer Advocate 2015 Annual Report to Congress 3-13 (Most Serious Problem: *Taxpayer Service: The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way It Interacts With Taxpayers, But Its Plan May Leave Critical Taxpayer Needs and Preferences Unmet*).

5 IRS, Joint Operations Center (JOC), *Snapshot Reports: Enterprise Snapshot* (final week of each fiscal year (FY) for FY 2008 through FY 2017) (showing telephone call volumes exceeding 95 million in every year).

6 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017).

7 *Id.* The Consolidated Automated Collection Service (ACS) reporting included both ACS product lines in FY 2016 and included both ACS lines and the Installment Agreement/Balance Due lines in FY 2017).

not expect a high LOS in FY 2018, anticipating overall LOS below 40 percent.[8] Thus, in FY 2018, only four out of ten taxpayers calling to reach a live assistor will succeed.

The IRS's planned "Future State Initiative" asserts that taxpayers should "expect the same level of service when dealing with the IRS in the future as they have now from their financial institution or a retailer."[9] However, comparing the performance of IRS call centers to those in the private sector or even call centers at other government agencies demonstrates that IRS telephone service falls short of industry standards.

In fiscal year 2018, only four out of ten taxpayers calling to reach a live assistor will succeed.

To meet the industry standard, the IRS must treat telephone service as an essential part of an omnichannel service environment — one that enables taxpayers to engage with the IRS through the channel of their choice and be heard.[10] To create an omnichannel environment, the IRS must ensure all channels of communication are alive, active, and interconnected, instead of advancing one means of communication while neglecting others.

The National Taxpayer Advocate remains concerned that the IRS is treating its telephone operations as a dying relic of taxpayer service as it moves forward with its plan to substantially reduce telephone interactions with taxpayers and rely instead on more web-based services and tax practitioners.[11] This approach allows the IRS to focus on the channels of communication it prefers, but not where taxpayers might find the best form of assistance. The IRS's "Future State" approach to taxpayer service lacks a comprehensive strategy that:

- Advances its telephone service as an integral part of an omnichannel customer service environment;
- Incorporates additional call quality measures to assess a taxpayer's overall experience and ability to resolve issues on a call;[12]
- Implements best practices for accuracy-related oversight and incorporates metrics to evaluate its telephone assistors' rates of satisfaction and engagement in the work they perform;[13] and
- Upgrades its outdated phone hardware technology to provide alternatives to waiting in a calling queue, improved call routing features, and more extensive services to taxpayers.[14]

8 IRS, Wage & Investment (W&I), *Business Performance Review* (BPR) 4 (Nov. 9, 2017).

9 IRS, *Future State Initiative* (Aug. 27, 2017), https://www.irs.gov/newsroom/future-state-initiative.

10 For a discussion of telephone service measures, *see* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

11 The IRS reports that its focus will continue towards providing options for qualified customers online to reduce the need for telephone contact. IRS response to TAS information request (Nov. 29, 2017). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 3-13 (Most Serious Problem: *Taxpayer Service: The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way It Interacts With Taxpayers, But Its Plan May Leave Critical Taxpayer Needs and Preferences Unmet*).

12 *See* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

13 *Id*.

14 The percentage of IRS IT hardware in service beyond its useful life rose steadily from 40 percent at the start of FY 2013 to 64 percent at the start of FY 2017. *See* Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2017-20-051, *Sixty-four Percent of the Internal Revenue Service's Information Technology Infrastructure Is Beyond Its Useful Life* (Sept. 2017).

ANALYSIS OF PROBLEM

Background

The IRS tracks the total number of calls it receives on its toll-free assistance lines, which is known as the "Enterprise Total". Calls to the AM telephone lines account for over 75 percent of all "Enterprise Total" calls annually, and are where taxpayers go for answers to tax law and account inquiries.[15] The rest are a combination of calls to the Consolidated ACS lines, which include most of the IRS's compliance service operations, and other low-volume telephone lines.[16] Depending on which telephone number the taxpayer calls and how the caller responds to the prompts he or she encounters, the call may be routed to a Customer Service Representative (CSR) and categorized as an "Assistor Answered Call," or the call may be handled by the IRS's automated processes.

When the IRS reports on the services it provides over the telephone, it typically uses the CSR LOS as the measure of taxpayer access to an assistor.[17] The IRS reported its overall LOS increased from FY 2016 to FY 2017, particularly during filing season.[18] However, this increase should not be taken as evidence of fundamental improvement in the IRS's ability to provide service to taxpayers over the telephone.[19] Over the years, the IRS's approach to telephone service has been to switch resources from one group of phone lines to another, essentially plugging the holes and masking underlying problems.[20] While AM lines had a higher LOS in FY 2017, AM telephone assistors actually answered fewer calls than in 2016 despite having more telephone assistors available.[21] In 2017, the Installment Agreement/Balance Due line, which received over 8.6 million calls in FY 2017, was moved from the AM umbrella to be grouped instead with the IRS's Consolidated ACS lines.[22] While the IRS increased the amount of telephone assistors available on its Consolidated ACS lines in FY 2017,[23] the demand on those lines rose

To meet the industry standard, the IRS must treat telephone service as an essential part of an omnichannel service environment — one that enables taxpayers to engage with the IRS through the channel of their choice and be heard.

15 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017); IRM 21.1.1.1.3 (Oct. 1, 2017).

16 *Id*.

17 The IRS's formula for determining LOS is more complex than just number of calls received divided by number of calls answered. The Customer Service Representative (CSR) Level of Service (LOS) formula is: (Assistor Calls Answered + Automated Calls Answered (Info Messages)) divided by (Assistor Calls Answered + Automated Calls Answered (Info Messages) + Emergency Closed + Secondary Abandons + (Add either Calculated Busy Signal OR Network Incompletes) + (Add either Calculated Network Disconnects OR Total Disconnects)). IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017). Note that CSR LOS is the relative success rate of taxpayers that call for Customer Account Services (CAS) seeking assistance from a CSR. It does not represent the total number of callers who speak with a CSR.

18 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Apr. 22, 2017) (showing "Enterprise Total" LOS increased from 72 percent in filing season (FS) 2016 to 79 percent in FS 2017).

19 *See* National Taxpayer Advocate FY 2018 Objectives Report to Congress 6.

20 *Id*. at 13.

21 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017); IRS response to TAS information request (Dec. 12, 2017).

22 *Id.*

23 IRS response to TAS information request (filing season (FS) Nov. 29, 2017) (showing the amount of telephone assistors available on Consolidated ACS lines rose from 1,588 in FS 2016 to 1,944 in FS 2017).

at a substantially higher rate.[24] As a result, the LOS on Consolidated ACS lines declined substantially.[25] The current projections for FY 2018 show a sharp drop in LOS, as AM predicts it will only offer a 60 percent LOS during filing season and a 49 percent LOS during all other periods.[26] The "Enterprise Total" LOS, which includes AM and Consolidated ACS lines, is expected to be below 40 percent for FY 2018.[27]

In its Strategic Plan for FY 2014-2017, the IRS committed to serving taxpayers by directing them to "the most appropriate digital or assisted service channel."[28] However, the IRS has focused particularly on expanding online applications in hopes that this will allow it to deliver higher levels of service within current resources.[29] This plan fails to recognize the important role telephone service continues in customer service.

Over the years, the IRS's approach to telephone service has been to switch resources from one group of phone lines to another, essentially plugging the holes and masking underlying problems.

Telephone Service Is an Essential Part of an Omnichannel Taxpayer Service Environment

An omnichannel service environment "ensures the service level, responsiveness, and quality of service received on individual channels and across channels would be equally high."[30] This type of environment is customer-centric, designed to provide service that meets diverse needs and preferences taxpayers have for communication. Relying on software, online resources, and tax practitioners does not address the ongoing need for high quality telephone assistance.[31] Despite increased internet availability, over 13 million taxpayers do not have internet access in their homes, and over 41 million do not have broadband

24 Consolidated ACS lines saw an increase in calls in FY 2017, partially because the Installment Agreement/Balance Due line, which received 8,625,539 calls in FY 2017, was moved in 2017 from the Accounts Management (AM) umbrella to be grouped instead with the IRS's Consolidated ACS lines. IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017).

25 The LOS on Consolidated ACS lines dropped from 70 percent with an average 18 minute wait time in FY 2016 to just a 47 percent LOS in FY 2017 with wait times of a staggering 30 minutes. IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2017).

26 IRS, W&I, *BPR* 22 (Nov. 9, 2017).

27 *Id*. at 4.

28 IRS, *Strategic Plan FY 2014-2017*, https://www.irs.gov/pub/irs-pdf/p3744.pdf (including an objective to "Provide Timely Assistance Through a Seamless, Multichannel Service Environment to Encourage Taxpayers to Meet Their Tax Obligations and Accurately Resolve Their Issues").

29 IRS response to TAS information request (Dec. 12, 2017).

30 Aspect, *What Is an Omnichannel Experience?*, https://www.aspect.com/glossary/what-is-omni-channel-customer-service-experience.

31 National Taxpayer Advocate 2015 Annual Report to Congress 3-13 (Most Serious Problem: *Taxpayer Service: The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way It Interacts With Taxpayers, But Its Plan May Leave Critical Taxpayer Needs and Preferences Unmet*).

internet access there.[32] Vulnerable populations — seniors, low income taxpayers, and people with disabilities — are much less likely to have internet access available in their own home.[33]

Many taxpayers who do have internet access feel more comfortable receiving customer service over the phone, especially within the vulnerable populations previously mentioned.[34] TAS's Service Priorities Project Survey showed that among taxpayers who have internet access, only 60 percent chose the IRS's website as their first service channel of contact.[35] Over 20 percent chose the IRS's telephone lines as their primary channel of communicating with the IRS.[36] Service task complexity and the urgency of the task seem to influence the channel taxpayers choose for a service.[37] For instance, for a relatively simple task such as getting a form or instructions, or checking on a tax refund, most respondents chose to use the internet to obtain these services.[38] However, for services such as getting answers to tax law questions or assistance with an IRS notice, more respondents called or visited an IRS office.[39] Taxpayers also reported a higher success rate for resolving more complex issues like tax law questions over a phone call than for using online resources. For example, taxpayers reported a 72 percent "first contact resolution" rate (FCR) for phone calls concerning tax law compared to just 50 percent FCR for online inquiries about tax law.[40]

32 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

33 Home internet access is an especially important statistic when considering implications for the IRS, as many in these groups may feel uncomfortable entering personal information related to tax obligations online over a computer that is not their own. Only 53 percent of lower income individuals and 51 percent of older individuals have home internet access. Pew Research Center, *Internet/Broadband Fact Sheet* (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/internet-broadband/. These percentages could drop further as the Federal Communications Commission (FCC) scales back its Lifeline program funding internet access for low income communities. Ali Breland, *FCC Votes to Limit Program Funding Internet Access for Low-Income Communities*, The Hill (Nov. 16, 2017), http://thehill.com/policy/technology/360818-fcc-moves-to-limit-program-funding-internet-access-for-low-income.

34 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

35 *Id.*

36 *Id.*

37 *Id.* On November 29, 2017, TAS interviewed several members of the Taxpayer Advocacy Panel (TAP) Toll-Free Phone Lines Committee, a federal advisory committee comprised of citizen volunteers who work to improve IRS services by providing the taxpayers' perspective to various IRS operations. During the interview, one taxpayer noted, "Taxpayers often use the IRS telephone lines when facing challenging problems that they have not been able to resolve on their own. On the phone, the relationship becomes more personal as taxpayers can communicate and connect with the telephone assistor handling their call. The telephone assistor can also engage more fully with the taxpayer to get to the heart of his or her concerns." TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

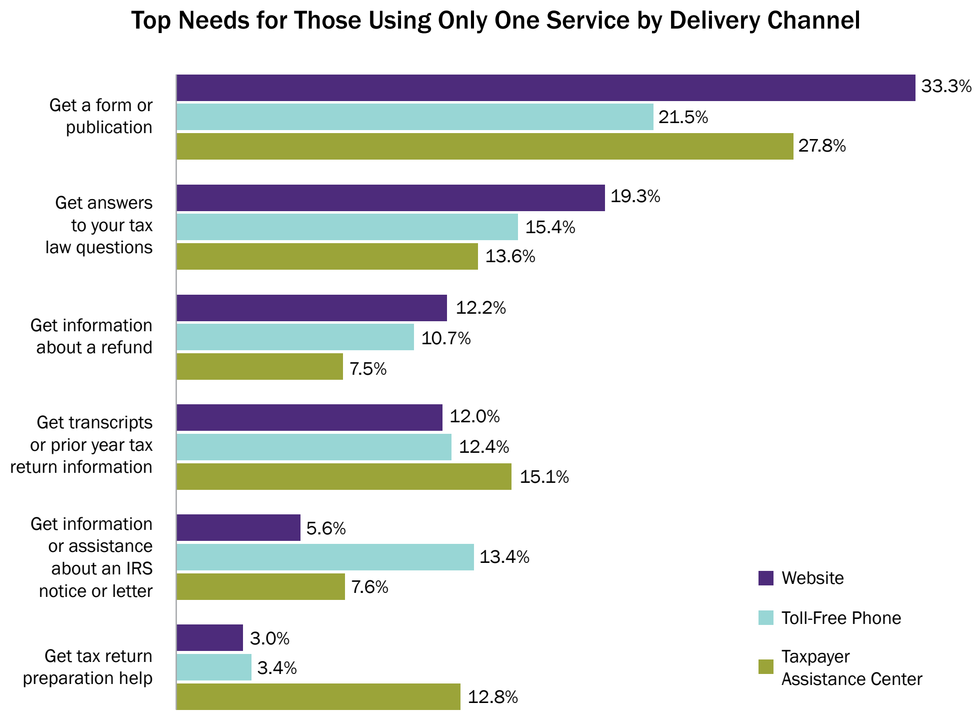
38 *Id.*

39 *Id.*

40 *Id. See also* Matthew Dixon, Karen Freeman, & Nicholas Toman, *Stop Trying to Delight Your Customers*, Harvard Business Review (July-Aug. 2010), https://hbr.org/2010/07/stop-trying-to-delight-your-customers (showing that 2.4 emails are used on average to resolve an issue, while just 1.7 calls are needed).

The following chart illustrates the frequency of service use by taxpayers by delivery channel:

FIGURE 1.2.1[41]



Rather than seeking to reduce the need for telephone communication with increased online resources,[42] the IRS should create a fluid omnichannel service environment in which taxpayers can begin a "support activity in one channel, and seamlessly transition to another."[43] The IRS's 2016 Customer Satisfaction Survey results for AM show that 46 percent of all callers reported using IRS.gov prior to calling its toll-free lines.[44] Thus, instead of driving taxpayers to faster but less helpful channels, the IRS must provide effective and consistent telephone service to complement information available on other channels in an omnichannel environment.[45]

41 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

42 IRS response to TAS information request (Nov. 29, 2017).

43 Aspect, *What Is an Omnichannel Experience?*, https://www.aspect.com/glossary/what-is-omni-channel-customer-service-experience. *See also* The Northridge Group, *State of Customer Experience 2017*, 5 (2017), https://www.northridgegroup.com/The-State-of-Customer-Service-Experience-2016 ("In business, we think about channels but customers just want to fix the problem they are trying to address. They begin a conversation with a brand in one channel and may attempt to continue it in another. Making that transition as seamless as possible through easy navigation, timely response and a consistent brand voice drives the most satisfying customer service experiences.").

44 IRS response to TAS information request (Dec. 12, 2017). A study by the Harvard Business Review suggests an even higher percentage, finding that 57 percent of inbound call to commercial call centers come from customers that attempted to use web resources first. Matthew Dixon, Karen Freeman, & Nicholas Toman, *Stop Trying to Delight Your Customers*, Harvard Business Review (July-Aug. 2010), https://hbr.org/2010/07/stop-trying-to-delight-your-customers.

45 *See* John Horrigan, Pew Research Center, *How Americans Get in Touch With Government* (May 24, 2004), http://www.pewinternet.org/2004/05/24/how-americans-get-in-touch-with-government/.

The IRS Should Use Qualitative Metrics That Capture the Caller's Overall Satisfaction to Evaluate and Improve Its Telephone Service

The IRS's current approach to telephone service does not incorporate an in-depth understanding of today's callers, nor has the IRS developed telephone service measures in terms of customer loyalty and satisfaction.[46] Operational measures, like the LOS, can yield a hollow result because they are only indicative of efficiency, not taxpayer satisfaction with the way the IRS handles calls or provides information.[47] Other measures used by the IRS, including adherence to telephone schedule and average speed of answer,[48] although important, are not necessarily outcomes in the mind of a caller and can mask problems that occur during the call if it is improperly handled.[49] While the IRS does use metrics that indicate quality, such as accuracy and professionalism,[50] these metrics should complement and be informed by measures gauging a taxpayer's overall experience on a call.[51] For example, the IRS should do more than just track the issue a taxpayer calls about, and collect information to understand why a taxpayer needed assistance with that particular issue and where any confusion arose. Similarly, metrics should be used to identify patterns of problems that IRS telephone assistors have trouble resolving.[52]

The metric that assesses the "single biggest driver of customer satisfaction" is the rate of FCR.[53] The IRS currently collects resolution data through its Quality Review Systems and the Customer Satisfaction Survey.[54] However, the response rate for Customer Satisfaction Surveys administered by the IRS is very

Instead of driving taxpayers to faster but less helpful channels, the IRS must provide effective and consistent telephone service to complement information available on other channels in an omnichannel environment.

46 "Just because the IRS does not operate on a profit margin like private sector companies does not make customer loyalty any less important. While the IRS does not directly "earn" profits as the result of a successful call, a customer-centric approach to telephone service would still benefit the IRS by improving its perception among taxpayers, increasing voluntary compliance, and reducing rework for the IRS down the road." TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

47 *See* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

48 IRS response to TAS information request (Dec. 12, 2017).

49 Darren Baguley, *Contact Centre Benchmarking*, Australian Institute of Management (June 1, 2008), http://blog.aim.com.au/contact-centre-benchmarking/.

50 IRS response to TAS information request (Dec. 12, 2017).

51 *See* Government Accountability Office (GAO), GAO-15-84, *Managing for Results: Selected Agencies Need to Take Additional Efforts to Improve Customer Service* 29 (Oct. 2014), http://www.gao.gov/assets/670/666652.pdf (emphasizing "the need for a single, centralized management framework for receiving customer feedback so that all information about the customers can be linked together to facilitate a more complete knowledge of the customer").

52 This type of qualitative information helps the IRS understand not just that inaccurate information was given, but why the telephone assistor gave the wrong information. *See* GAO, GAO-15-84, *Managing for Results: Selected Agencies Need to Take Additional Efforts to Improve Customer Service* 29 (Oct. 2014), http://www.gao.gov/assets/670/666652.pdf.

53 Jeff Rumburg, *MetricNet, Metric of the Month: First Contact Resolution* 5 (2011), http://www.thinkhdi.com/~/media/HDICorp/Files/Library-Archive/Insider%20Articles/First%20Contact%20Resolution.pdf. The first contact resolution rate is determined by measuring "the percentage of all calls that are resolved on the first attempt, without the agent needing to refer the customer to a colleague, their manager, or calling the customer back. International Finance Corp., *Measuring Call Center Performance: Global Best Practices* 7 (June 2010).

54 IRS response to TAS information request (Dec. 12, 2017).

First Contact Resolution is important because it shows whether telephone assistors are actually answering a caller's questions, not just their calls.

small.[55] TAS recommends that the IRS incorporate a specific resolution metric to be uniformly assessed on each call.[56] While there are multiple ways to measure FCR, the most important consideration is that the caller, not telephone assistor, makes the determination of whether a problem was resolved.[57]

FCR is important because it shows whether telephone assistors are actually answering a caller's questions, not just their calls.[58] The industry standard for FCR is above 70 percent.[59] Yet TAS's Service Priorities Project Survey showed that almost 40 percent of taxpayers calling the IRS felt the call did not fully resolve their problem.[60] Issues such as return preparation assistance, information on a notice, and information on a refund had particularly low resolution rates over the telephone.[61] These results show that taxpayers are not getting the full assistance they need over the phone, which can negatively impact voluntary compliance.

Along with measuring FCR, the IRS should monitor the subjects of taxpayer complaints to understand other reasons a taxpayer may not have been satisfied with a call. While the IRS has procedures for responding to individual complaints,[62] it currently has no official system to track taxpayer complaints about telephone service.[63] Compiling complaints would allow the IRS to know whether "customer concerns are localized, specific to a given function, agency-wide, or systemic."[64]

55 IRS response to TAS information request (Dec. 12, 2017). The IRS reports a 95 percent confidence level that the reported percentages are within +/- one percent confidence interval. However, for AM lines, less than one percent of all calls answered gets selected for the customer satisfaction survey, and just five percent of those selected participate in the survey. This limitation undercuts the value of administering such a measure, as those that did not respond to the survey could have very different opinions from the callers that did choose to complete the survey. In April 2017, the IRS eliminated customer satisfaction surveys for the Automated Under-reporter (AUR) and Compliance Center Exam (CCE) lines partially because of low response rates. Rather than eliminating satisfaction surveys, the IRS should consider using multiple other types of survey formats, such as mailed comment cards, online, or a callback number, to allow taxpayers to participate at their convenience.

56 *See* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

57 *See* Darren Baguley, *Contact Centre Benchmarking*, Australian Institute of Management (June 1, 2008).

58 "A call with the IRS should resolve the taxpayer's issue or at least identify the specific steps the taxpayer must take to do so. It is incredibly frustrating for a call to conclude with the taxpayer no better off than before the call began, especially if the taxpayer has spent a lengthy period waiting just to speak to a telephone assistor." TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

59 International Finance Corp., *Measuring Call Center Performance: Global Best Practices* 7 (June 2010).

60 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

61 *Id.*

62 *See* IRM 21.1.3.16 (Oct. 1, 2014); IRM 5.19.5.3.11(11) (July 25, 2014).

63 IRS response to TAS information request (Nov. 29, 2017) (noting that complaints are only tracked through the e-Trak system for general correspondence, which is not intended as a searchable database).

64 Government Accounting Office (GAO), GAO-15-84, *Managing for Results: Selected Agencies Need to Take Additional Efforts to Improve Customer Service* 29 (Oct. 2014), http://www.gao.gov/assets/670/666652.pdf.

Understanding trends across repeat customer calls and behavioral patterns would allow the IRS to better anticipate customers' needs and preempt future calls.[65] Creating a taxpayer-focused approach to measuring telephone service would likely help the IRS improve taxpayer loyalty and voluntary compliance, thereby protecting taxpayers from more costly and adversarial compliance and enforcement actions down the road.

IRS Telephone Assistors Need to Be Engaged With Ways to Improve Their Performance and Enhance Caller Satisfaction

TAS's review of relevant literature shows that keeping telephone assistors engaged in the service they provide is critical to improving call quality and caller satisfaction.[66] Unhappy telephone assistors make for unhappy callers.[67] Most telephone assistors are motivated by a desire to provide a service that satisfies a caller and helps resolve the problem.[68] While most IRS Customer Account Services (CAS) employees[69] recognize the importance of their work to organizational goals, many feel they don't have the knowledge or skills necessary to accomplish organizational goals.[70] Many of these employees are also dissatisfied with the training and resources available to help them get their job done.[71]

CAS employees reported particularly low levels of feeling personal empowerment with respect to work processes.[72] Many employees are concerned that their voices are not being heard at a leadership level, and feel their talents and training needs are not well assessed.[73] Telephone assistors are at the front lines of taking a relational approach to telephone service, and are key resources for improving taxpayer loyalty and detecting emerging service issues.[74] Therefore, the IRS needs to better listen and respond to its telephone assistors' concerns. The IRS should give telephone assistors a sense of ownership over their work by equipping them with the tools and issue-focused training to help resolve a caller's inquiry directly in as few steps as possible, thereby improving employee satisfaction and call quality.[75]

65 *See also* Matthew Dixon, Karen Freeman, & Nicholas Toman, *Stop Trying to Delight Your Customers*, Harvard Business Review (July–Aug. 2010), https://hbr.org/2010/07/stop-trying-to-delight-your-customers ("22 percent of repeat calls involve downstream issues related to the problem that prompted the original call, even if that problem itself was adequately addressed the first time around. Although companies are well equipped to anticipate and "forward-resolve" these issues, they rarely do so, generally because they're overly focused on managing call time.").

66 *See* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

67 Ian Jacobs *et al*., Forrester Research, *How to Measure and Improve the Contract Center Agent Experience* 1 (Apr. 16, 2015).

68 Audrey Gilmore, *Call Centre Management: Is Service Quality a Priority?*, 11 Managing Service Quality 153-59 (2001).

69 The IRS uses the Federal Employee Viewpoint Survey as a key indicator of employees' perceptions of the agency and employee satisfaction; however, the IRS does not isolate information specific to telephone assistors. Responses from the IRS CAS employees includes IRS telephone assistors. TAS recommends that the IRS incorporate more satisfaction measures specific to telephone assistors in the future. *See* IRS response to TAS information request (Dec. 12, 2017).

70 IRS response to TAS information request (Dec. 12, 2017) (showing that while 81 percent agree that they know how their work relates to the agency's goals and priorities, 19 percent of CAS employees did not feel the workforce had the job-relevant knowledge and skills necessary to accomplish organizational goals).

71 IRS response to TAS information request (Dec. 12, 2017) (showing only 44 percent of CAS employees were satisfied with resources and 44 percent were satisfied with training). In FY 2017, the IRS spent on average of just $87 on training per W&I employee, including CSRs. IRS response to TAS information request (Nov. 7, 2017).

72 IRS response to TAS information request (Dec. 12, 2017) (showing just 33 percent of CAS employees felt a feeling of personal empowerment).

73 IRS response to TAS information request (Dec. 12, 2017) (showing 45 percent of CAS employees feel their training needs are assessed and 49 percent agree that their talent is being used well in the workplace).

74 *See, e.g.*, Scott Ferguson, IRWeb, *Customer Early Warning System Keeps Small Problems From Becoming Big Ones* (June 7, 2016), http://irweb.irs.gov/AboutIRS/co/dcse/sehighlights/archive/50431.aspx ("Listening to employees and monitoring customer touch points helps identify issues as they occur or begin to develop, instead of reacting later to a potentially larger issue."). The IRS should make sure its employees are aware of and utilize more programs like the Customer Early Warning System (CEWS) to ensure its telephone assistors' voices are being heard and to identify ways to improve its telephone service.

75 Ian Jacobs *et al*., Forrester Research, *How to Measure and Improve the Contract Center Agent Experience* 7 (Apr. 16, 2015).

While most IRS Customer Account Services employees recognize the importance of their work to organizational goals, many feel they don't have the knowledge or skills necessary to accomplish organizational goals.

The IRS Should Use New Technology and Adopt Industry Best Practices to Improve Taxpayers' Experience on Its Telephone Lines

To modernize call center operations, the IRS should develop a relationship-oriented approach and reduce the effort callers must expend to get their problems resolved. Despite recommendations from TAS and Taxpayer Advocacy Panel (TAP),[76] the IRS has not embraced current technology that would allow it to:

- Reduce the time a taxpayer spends waiting in a calling queue;
- Integrate and store taxpayer information across calls and channels; and
- Allow and improve ability to answer more complex tax law questions throughout the year.

These changes can help improve caller satisfaction and help empower telephone assistors to better respond to the needs of taxpayers.[77]

The IRS Should Use Callback Technology to Reduce the Amount of Time a Taxpayer Spends Idle on the Phone

Implementing a callback function to its telephone service would allow the IRS to eliminate the burden caused by long wait times. Studies show that two of every three callers hang up if kept on hold for longer than two minutes.[78] However, taxpayers calling the IRS waited for 13 minutes on average for a telephone assistor to answer in FY 2017, while the average speed of answer on Consolidated ACS was over 30 minutes in FY 2017, indicating that those taxpayers who do get through to the IRS have a great need to speak with the IRS and are enormously patient.[79] In TAS's Service Priorities Project survey, taxpayers identified long hold times as one of the biggest reasons they were unable to resolve issues completely over the phone.[80]

There are several options modern technology offers to avoid long hold times that the IRS should consider:

- "Virtual Hold" technology allows taxpayers the option to have the next available customer service representative call them back, which results in *no wait time*.[81] TAS has previously recommended

76 *See* National Taxpayer Advocate 2014 Annual Report to Congress 1-12 (Most Serious Problem: *Access to the IRS: Taxpayers Are Unable to Navigate the IRS and Reach the Right Person to Resolve Their Tax Issues*); TAP, *2016 Annual Report* 24.

77 The proposals in this section are not intended to be an exhaustive list of ways to modernize telephone service. There are many other resources, such as such as speech analytics tools, available for the IRS to consider as well. *See* Karolina Kiwak, SearchCRM, *Top Five Benefits of Speech Analytics Tools for Contact Centers* (Apr. 28, 2017), http://searchcrm.techtarget.com/report/Top-five-benefits-of-speech-analytics-for-the-call-center.

78 *See, e.g.*, Taylor Jones, Arise, *Arise 2017 Customer Service Frustration Series: Phone Hold Times* (Feb. 2, 2017), http://www.arise.com/resources/blog/arise-2017-customer-service-frustration-series-phone-hold-times.

79 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (Sept. 30, 2017).

80 *See* Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

81 Silky Sinha, *8 Benefits of Call Back Technology for Your Contact Center*, Ameyo (Aug. 4, 2015), https://www.ameyo.com/blog/8-benefits-of-call-back-technology-for-your-contact-center.

this feature as a prudent investment that would substantially reduce unsuccessful calls to the IRS and prevent taxpayers from wasting time while waiting to speak with a telephone assistor.[82]

- "Scheduled CallBack" is an additional feature that allows the taxpayer the flexibility of receiving a call from the IRS during a window he or she specifies. This option also provides a telephone assistor enough time to view the previous history and the necessary information about the taxpayer contained in IRS systems before calling back, which leads to fewer calls abandoned while a caller waits in the queue and higher first-contact resolution.[83]

More than limiting the inconvenience, adding a callback function would grant access to service for taxpayers who have limited monthly cell phone minutes for phone calls, and those who otherwise could not afford to spend the time required for a call to the IRS. While the IRS has identified customer callback as its top priority telephone technology upgrade, it must take action to actually implement this system.[84]

Using Taxpayer-Centric Routing and Information Retention Technology Would Allow the IRS to Address Taxpayer Concerns More Quickly and Directly

The IRS should improve its call routing capabilities to allow a call to be directed to the appropriate department and telephone assistor who can resolve the taxpayer's issue. When a taxpayer calls the IRS's main line, he or she listens to a 30 second description of the availability of assistance on IRS.gov and then is presented with five routing options.[85] Taxpayers may be confused about which option is appropriate for their situation, or need assistance on multiple issues.[86] TAS has previously recommended that the IRS institute a system similar to a 311 system, where an initial operator would be able to ask questions to understand why a taxpayer is calling.[87] Then, the operator would match the taxpayer with the specific office within the IRS that handles his or her issue or case, which would improve FCR.[88] If a caller does have to be transferred, TAS recommends using expedited transitions between services to place the caller at the top of the queue for the appropriate telephone assistor.[89]

82 *See IRS Oversight: Hearing Before the H. Subcomm. of Financial Services and General Government Committee on Appropriations*, 115 Cong. 11 (2017) (statement of Nina E. Olson, National Taxpayer Advocate). TAP has also recommended this feature to the IRS in its annual report. *See* TAP, *2016 Annual Report* 24.

83 Silky Sinha, *8 Benefits of Call Back Technology for Your Contact Center*, Ameyo (Aug. 4, 2015), https://www.ameyo.com/blog/8-benefits-of-call-back-technology-for-your-contact-center.

84 While the IRS has included customer callback on its list of technology priorities, it is not as highly ranked as TAS would like. IRS response to TAS information request (Dec. 12, 2017).

85 This description is based off of a phone call made on December 10, 2017 by TAS to the IRS's main line for individuals, 800-829-1040.

86 *See* National Taxpayer Advocate 2014 Annual Report to Congress 1-12 (Most Serious Problem: *Access to the IRS: Taxpayers Are Unable to Navigate the IRS and Reach the Right Person to Resolve Their Tax Issues*).

87 *Id.*; *see also* Accenture, *Transforming Customer Services to Support High Performance in New York City Government* 6 (2013) (discussing how New York City's adoption of a 311 line has helped eliminate duplicative services, direct resources to areas of need, and achieve excellence in caller satisfaction).

88 *See* National Taxpayer Advocate 2014 Annual Report to Congress 1-12 (Most Serious Problem: *Access to the IRS: Taxpayers Are Unable to Navigate the IRS and Reach the Right Person to Resolve Their Tax Issues*) (noting a "persistent problem with requiring most taxpayer calls to be handled by a CSR who handles a range of issues" is that "the CSR speaking to the taxpayer may not have the expertise in the specific issue to assist the taxpayer.").

89 If a caller is being transferred, one option recommended by taxpayers to ease the transition is to use a "warm transfer," where the initial telephone assistor stays on the line to introduce the taxpayer and the situation to the appropriate telephone assistor. TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

In addition to ensuring the taxpayer is connected to the appropriate telephone assistor, the IRS should ensure that the taxpayer does not waste time repeating information once he or she has been connected. IRS telephone assistors should be able to access prior related contacts the taxpayer has had with the IRS over the phone or on other channels.[90] Information retention and sharing is essential to a successful omnichannel environment and allows taxpayers to avoid having to repeat sensitive information on multiple occasions.[91] Assistors should have access to "a unifying single database" retaining all of a taxpayer's prior interactions with the IRS to better understand and address their needs.[92] In certain instances, the IRS should give taxpayers the option of having one employee assigned to resolve a taxpayer's issue from start to finish.[93] While IRS telephone assistors are trained to handle many types of calls, taxpayers that have to make multiple calls to resolve an issue or were confused about information on the initial call should be able to choose between speaking with the first available assistor or waiting to speak with the same assistor who helped them initially.[94]

Information retention and sharing is essential to a successful omnichannel environment and allows taxpayers to avoid having to repeat sensitive information on multiple occasions. Assistors should have access to "a unifying single database" retaining all of a taxpayer's prior interactions with the IRS to better understand and address their needs.

90 *See* Bank Administration Institute, *Evolution of Contact Centers in Banking: Engaging and Empowering Agents in an Omnichannel Operating Environment* 10 (2015), https://www.avanade.com/~/media/asset/brochure/contact-centers-in-banking-report.pdf ("But, whether a request or transaction was begun online, in the branch, on an ATM or from their smartphone, customers still want an easy, seamless experience, without having to start over should they need assistance from the contact center.").

91 The Northridge Group, *State of Customer Experience 2017* (2017), https://www.northridgegroup.com/State-of-Customer-Experience-Report-2017. TAP has also recommended this feature to the IRS in its annual report, noting that the benefits of information retention technology help to reduce the risk of identity theft. *See* TAP, 2016 Annual Report 24.

92 Voice Over Internet Protocol (Voip-info), *Call Center Statistics*, (July 26, 2012), https://www.voip-info.org/wiki/view/Call+Center+Statistics; *see also* National Taxpayer Advocate 2016 Annual Report to Congress 109–120 (Most Serious Problem: *Enterprise Case Management (ECM): The IRS's ECM Project Lacks Strategic Planning and Has Overlooked the Largely Completed Taxpayer Advocate Service Integrated System (TASIS) As a Quick Deliverable and Building Block for the Larger ECM Project*) ("The age, number, and lack of integration across IRS case management systems as well as the lack of digital communication and record keeping cause waste, delay, and make it difficult for IRS employees, including those in TAS, to perform their jobs efficiently. They also create a burden on taxpayers, who must contend with IRS customer service representatives who may not be able to access the records they need to assist taxpayers or must do so on multiple systems").

93 South Africa's Nedbank, for instance, instituted an "AskOnce" promise, which guarantees that the representative who picks up the phone will own the customer's issue from start to finish. Matthew Dixon, Karen Freeman, & Nicholas Toman, *Stop Trying to Delight Your Customers*, Harvard Business Review (July–Aug. 2010), https://hbr.org/2010/07/stop-trying-to-delight-your-customers.

94 While the IRS has the capability to assign particular telephone assistors to a case, this feature is currently only available in very limited circumstances. IRS response to TAS information request (Nov. 29, 2017). This option should be made more widely available. *See* Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *infra* (noting the importance of having a single point of contact in identity theft cases).

IRS Telephone Assistors Should Answer Both "Basic" and "Complex" Tax Law Questions Throughout the Year

Beginning in 2014, the IRS limited the scope of tax law questions it would answer over the phone. Currently, IRS telephone assistors can only answer "basic" tax law questions during filing season, and no tax law questions at all outside of filing season.[95] This limitation sharply curtails what had once been a valuable feature, as the IRS telephone lines had provided the "fastest and best experience" for taxpayers seeking to get answers to tax law questions.[96] Under the current approach, however, the roughly 16 million taxpayers who file returns later in the year are unable to get answers to any tax law questions from the IRS.[97]

The IRS's inability to answer "complex" tax law questions over the telephone fails to meet the needs of taxpayers in today's omnichannel service environment. As more people begin to access information through other channels, contact center calls are often necessary to build on basic information a caller may have already found, frequently resulting in more complicated and issue-oriented calls.[98] Thus, more "complex" tax law questions are the exact type of questions that taxpayers need assistance with when they call the IRS.[99] Therefore, the IRS should allow taxpayers to ask tax law questions, basic and complex, throughout the year and ensure that its telephone assistors have the resources and training necessary to answer them completely.[100]

CONCLUSION

The National Taxpayer Advocate urges the IRS to evaluate and improve the overall quality of a taxpayer's experience on the phone as a part of the omnichannel service environment. Decreasing demand for phone assistance by offering online alternatives is simply not enough. The IRS needs to embrace interactive, person-to-person communication with taxpayers. Telephone service provides taxpayers an invaluable avenue to seek information that they may be unable or uncomfortable finding on other channels.

To fulfill its mission to "provide America's taxpayers with top quality service," the IRS should commit to taking steps to improve the quality of telephone service, as well as telephone technology. The IRS needs to modernize the way it measures success to better account for factors that impact customer satisfaction. In addition, keeping telephone assistors engaged will help improve the quality of telephone calls. Finally, using callback technology and a knowledge database can help resolve taxpayers' questions on first contact. Even in a reduced-resource environment, these changes should be prioritized as they

95 National Taxpayer Advocate FY 2018 Objectives Report to Congress.

96 *See* TIGTA, Ref. No. 2007-40-164, *The Internal Revenue Service Provides Helpful Tax Law Assistance but Still Has Problems With Tax Return Preparation Assistance* (Aug. 24, 2007).

97 National Taxpayer Advocate FY 2018 Objectives Report to Congress.

98 *See* Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol. 2, *infra*.

99 *See* Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (showing tax law as the second most frequent service task on the IRS's toll-free phone lines). "There is a difference in being able to read the law, and being able to understand and follow the law. Rather than just reading to taxpayers from information usually already available, IRS telephone assistors should work to engage with taxpayers and help them troubleshoot any issues they have." TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

100 The National Taxpayer Advocate is concerned that in FY 2017, the IRS spent on average just $87 on training per W&I employee, including CSRs, who are expected to be able to answer tax law questions on a broad variety of topics. IRS response to TAS information request (Nov. 7, 2017). *See* Most Serious Problem: *Employee Training: Changes to and Reductions in Employee Training Hinder the IRS's Ability to Provide Top Quality Service to Taxpayers*, *infra*.

can ultimately save money by increasing voluntary compliance and reducing future work for the IRS.[101] These changes would allow the IRS to focus on ways to improve taxpayer satisfaction from telephone interaction in an omnichannel customer service environment.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Develop a comprehensive strategy for improving its telephone service to be included in its next Strategic Plan and in its Annual Appropriation Requests, with specific initiatives to increase taxpayer satisfaction.
2. Incorporate qualitative measures, such as First Contact Resolution rate, used by other government agencies and in the private sector to measure a caller's overall experience and satisfaction with a call.
3. Provide telephone assistors additional issue-focused training to help resolve a caller's inquiry directly in as few steps as possible.
4. Upgrade phone hardware technology to provide virtual hold and scheduled callback options to callers.
5. Institute a system similar to a 311 system where an operator can transfer a taxpayer to the specific office within the IRS that handles his or her issue or case.
6. Reinstate the capability for taxpayers to receive year-round tax law assistance over the telephone, including a second-tier of assistance for more complex tax law issues.

101 "The IRS needs to shift its mindset from one that is constrained by dwelling on what it could potentially do if it had more resources to one of creativity that focuses on what it can do to reach its goals with its existing resources." TAP Toll-Free Phone Lines Interview (Nov. 28, 2017).

MSP #3 ONLINE ACCOUNTS: The IRS's Focus on Online Service Delivery Does Not Adequately Take Into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population

RESPONSIBLE OFFICIALS

Kenneth Corbin, Commissioner, Wage and Investment Operating Division
Paul Mamo, Director, Office of Online Services

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Since 2009, the National Taxpayer Advocate has advocated for and supports the IRS development of an online account application for taxpayers and their authorized representatives.[2] However, with approximately 41 million U.S. taxpayers without broadband at home and almost 14 million with no internet access at all at home, the IRS must continue to fully staff other service channels and it needs to upgrade its telephone technology to 21st century capabilities.[3] Taxpayers have a *right to quality service* and those taxpayers who want or need to interact with the IRS in a two-way conversation by telephone or face-to-face service should receive the same level of quality service as those who use the online self-help tools. The population of the United States is large and diverse in its taxpayer service needs, and a one-size-fits-all approach is not appropriate for a tax collection agency. Moreover, voluntary compliance and trust in the tax system are best promoted by person-to-person contact. In TAS's 2016 and 2017 survey on Taxpayers' Varying Abilities and Attitudes, approximately 50 percent disagreed with

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *See* National Taxpayer Advocate 2009 Annual Report to Congress 95-109 (Most Serious Problem: *The IRS Lacks a Servicewide e-Services Strategy*).

3 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*; Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*, *supra*; Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol 2, *infra*.

the statement "I feel secure sharing personal financial information over the Internet."[4] Thus, a multi-faceted, omnichannel service strategy based on the needs and preferences of taxpayers is required.[5]

As the IRS focuses on providing self-service tools for taxpayers, the National Taxpayer Advocate has the following concerns:

- The IRS's decision to prioritize online services over other service channels is resource-driven rather than based on research on taxpayer needs and preferences and the impact on compliance;
- Secure Access e-Authentication is a critical fraud prevention measure, but the 30 percent verification rate proves that it creates a barrier to entry for all taxpayer populations, not just the elderly and low income;[6]
- The low participation rates of the Taxpayer Digital Communications (TDC) pilot conducted by several IRS organizations illustrate the need to maintain and improve traditional service channels;
- The IRS should explore establishing a method for taxpayers to electronically submit documents or payments to the IRS which involves a less rigorous level of e-authentication; and
- The IRS has failed to make the policy decision to restrict third party access to current and future online applications.

ANALYSIS OF PROBLEM

Background

The IRS launched the online account application in Fall 2016.[7] The IRS adds additional features in increments. Currently, the application is limited to individual use and provides the following capabilities:[8]

- Details about current balance, with the balance broken down by year and tax type;
- Frequently asked questions about the account balance, with information on how to dispute a balance shown;
- Ability to view payments made within the past 18 months;
- Ability to make payments or apply for an installment agreement;
- Messages reminding the user of approaching filing and payment due dates;
- Ability to view a snapshot of tax record data for the current tax year; and

4 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

5 Organisation for Economic Co-operation and Development (OECD), *Technologies for Better Tax Administration: A Practical Guide for Revenue Bodies* 26 (2016) ("While many individuals and businesses are shifting to working digitally across many of the interactions they have, there are groups with legitimate needs that may never operate digitally (including the elderly and those with limited access to broadband services due to their geographic location for instance). Additionally, there are industries that have less access to technology, or that resist or feel less confident interacting with the tax administration through digital channels, that will still require support.").

6 IRS response to TAS information request (Nov. 22, 2017).

7 IRS News Release 2016-155, *IRS Launches New Online Tool to Assist Taxpayers with Basic Account Information* (Dec. 1, 2016); Luca Gattoni-Celli, *Olson Details IRS Online Account Requirements, Remains Skeptical*, 2016 TNT 96-5, Tax Notes Today, (May 18, 2016).

8 IRS response to TAS fact check (Dec. 19, 2017); IRS response to TAS information request (Nov. 22, 2017); Meeting with IRS Office of Online Service on Online Account Project Status Overview (Nov. 7, 2017); TAS user testing of online account application (Nov. 3, 2017).

- Ability to view and download transcripts for the past four tax years (including return transcripts, account transcripts, wage and income transcripts, and record of account transcripts).[9]

The IRS plans to develop the following capabilities in future increments:[10]

- Verify identity on the online account — the application, ID Verify, will enable potential victims of identity theft to self-report tax return details to either verify their information or confirm that identity theft has occurred;[11]
- View more than 18 months of past payments; and[12]
- Access copies or images of correspondence and notices.[13]

In addition, during usability testing of the online account, users expressed an interest in the IRS adding the following features to the account:[14]

- The ability to file taxes directly with the IRS;[15]
- Live Chat;
- The ability to retrieve tax records, including third party information reports;[16] and
- Graphs of data to show how income and taxes have changed over time.

Further, the IRS Office of Online Services (OLS) is in the process of developing a prototype for the online account for third parties such as preparers (tentatively referred to as "Tax Pro"). The prototype version of Tax Pro shared with TAS in June 2017 included the following capabilities:[17]

- View a list of current clients for whom the practitioner holds a valid authorization;
- View a list of the most recent updates, upcoming deadlines and activity history;
- View a list of recent correspondences with the IRS, including document attachments;
- Add a client by submitting an online request to a client for an authorization such as a Power of Attorney (POA), Tax Information Authorization (TIA), or Reporting Agent Authorization (RAA); and
- Print a blank form or upload a signed form.

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9 For a description of the different types of transcripts, see IRS, *Transcript Types and Ways to Order Them*, available at https://www.irs.gov/individuals/tax-return-transcript-types-and-ways-to-order-them (last visited Dec. 6, 2017).

10 IRS response to TAS information request (Nov. 22, 2017).

11 ID Verify will ultimately help the IRS determine whether to continue processing a flagged return. IRS response to TAS fact check (Dec. 19, 2017); Meeting with IRS Office of Online Service on Online Account Project Status Overview (Nov. 7, 2017).

12 TAS encourages the IRS to include at least two years of payments to assist the taxpayer in filing claims for refunds. *See* IRC § 6511.

13 As of December 19, 2017, the IRS has not approved nor made any decisions regarding timeframes or specific notices or correspondence that will be available on the application. This feature is currently on a list of potential future capacities. IRS response to TAS fact check (Dec. 19, 2017); IRS response to TAS information request (Nov. 22, 2017).

14 IRS response to TAS information request (Nov. 22, 2017) (Mediabarn conducted a series of user testing experiences in 2017 to test various prototypes of the online account).

15 The National Taxpayer Advocate has recommended that the IRS develop a platform to allow taxpayers to file directly with the agency at no cost. *See, e.g.*, National Taxpayer Advocate 2004 Annual Report to Congress 471-77 (Key Legislative Recommendation: *Free Electronic Filing for All Taxpayers*).

16 The National Taxpayer Advocate has recommended in the past that the IRS provide a platform for taxpayers to view or download third party information reports. *See, e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress, vol. 2, at 67-96 (Research Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).

17 IRS Office of Online Services email to TAS (June 21, 2017).

The IRS conducted focus groups on Tax Pro during the 2017 IRS Nationwide Tax Forums, during which tax professionals, not just limited to Circular 230 practitioners, tested the account and provided suggestions on how to make it more navigable, easy to understand, and recommended future capabilities. The results of the focus groups were generally positive. A few noteworthy recommended features include:[18]

- Providing an "action list" of upcoming items to complete;
- The capability to perform tax research within the account; and
- The capability to upload documents other than the authorization forms.

The IRS's Decision to Prioritize Online Services Over Other Service Channels is Resource-driven Rather than Based on Research on Taxpayer Needs and Preferences and the Impact on Compliance

Given the current budget environment, it is understandable that the IRS points taxpayers toward less costly self-service options. However, migration toward more online interaction between the IRS and taxpayers, at the expense of personalized services, will not save resources in the long term. The National Taxpayer Advocate has long advocated that the IRS develop the online account application, but only supports such development if it is only one component of a omnichannel service strategy.[19]

Digital interaction is not appropriate for certain populations, nor is it suitable for taxpayers with anything but simple and straightforward transactions and information needs. Once a taxpayer faces enforcement action, it is imperative that the IRS assist the taxpayer by learning the taxpayer's particular facts and circumstances to help bring him or her into compliance and to educate the taxpayer on how to avoid making similar mistakes in the future. The IRS can only accomplish this through personalized services. Further, if taxpayers face too many obstacles in their attempted interactions with the IRS, their frustrations will mount and their willingness to voluntarily comply in the future may suffer. Thus, the IRS has developed a strategy that places too much emphasis on the online account, without adequately

The IRS has developed a strategy that places too much emphasis on the online account, without adequately addressing the service needs and preferences of taxpayers or the compliance consequences of their failing to have their needs met.

18 IRS response to TAS information request (Nov. 22, 2017).

19 *See, e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress, vol. 2, at 67-96 (Research Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*). An omnichannel environment is one in which the level of service, responsiveness, and quality of service received on any one channel is equally high across channels. In addition, a taxpayer could seamlessly transition from one channel to another. Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*, *supra*; Literature Review: *Improving Telephone Service Through Better Quality Measures*, vol 2, *infra*.

Over the years TAS has conducted several important research studies and surveys of different taxpayer populations, which the IRS has completely ignored because the survey findings do not jive with the direction the IRS wishes to pursue.

addressing the service needs and preferences of taxpayers or the compliance consequences of their failing to have their needs met.[20]

Accordingly, the IRS needs to incorporate research on taxpayer needs and preferences into its 2018–2022 IRS Strategic Plan. Over the years, TAS has conducted several important research studies and surveys of different taxpayer populations, which the IRS has completely ignored because the survey findings do not jive with the direction the IRS wishes to pursue.[21] Moreover, we can offer a plethora of suggestions based on the dozen National Taxpayer Advocate Public Forums on Taxpayer Needs and Preferences we hosted throughout the country in 2016.[22] During these Public Forums, TAS specifically solicited comments about needs and preferences for the IRS's online account application from the various panels of witnesses representative of each community visited.[23]

In 2016 and 2017, TAS conducted a nationwide survey of U.S. taxpayers about their needs, preferences, and experiences with IRS taxpayer service conducted entirely by telephone (landline and cell phone).[24] The findings of this survey confirm the need to maintain an omnichannel service strategy. For example,

20 IRS response to TAS information request (Nov. 22, 2017). The IRS has contracted third parties to conduct usability testing for the individual online account and has been responsive to the user comments and suggestions regarding messaging, display, navigability, and features of the application. The IRS also conducted focus groups of the TaxPro prototype during the 2017 IRS Nationwide Tax Forums. It has also conducted online surveys of individual taxpayers which provide some evidence of how already-online taxpayers would like to interact with the IRS about some activities. However, it has not conducted comprehensive analysis of the online needs or taxpayer service needs of the U.S. taxpayer population, and it has ignored the significant work that the TAS has conducted in this regard. For a detailed discussion of the research, *see* National Taxpayer Advocate 2016 Annual Report to Congress 17-23, 123-24; National Taxpayer Advocate 2015 Annual Report to Congress 61-62.

21 For a description of TAS's research on taxpayers' service needs and preferences, *see* National Taxpayer Advocate 2016 Annual Report to Congress 17-23 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*); National Taxpayer Advocate 2016 Annual Report to Congress 121-37 (Most Serious Problem: *Online Accounts: Research into Taxpayer and Practitioner Needs and Preferences is Critical as the IRS Develops an Online Account System*). *See also*, Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*; National Taxpayer Advocate 2015 Annual Report to Congress, vol. 2, 101-10 (Research Study: *Understanding the Hispanic Underserved Population*); National Taxpayer Advocate 2014 Annual Report to Congress, vol. 2, 1-26 (Research Study: *Low Income Taxpayer Clinic Program: A Look at Those Eligible to Seek Help From the Clinics*); National Taxpayer Advocate, *Characteristics of Low Income Taxpayers and Implications for Tax Administration*, Presentation to the Services & Enforcement Executive Steering Committee (Jan. 8, 2015).

22 For a more detailed discussion of the Public Forums, see National Taxpayer Advocate FY 2017 Objectives Report to Congress 1-52 (Preface: *National Taxpayer Advocate's Introductory Remarks, Including an Update on the National Taxpayer Advocate Public Forums on Taxpayer Needs and Preferences*).

23 For details on the National Taxpayer Advocate Public Forums on Taxpayer Service Needs and Preferences, including submitted written statements from panelists as well as full transcripts of the forums, *see* https://taxpayeradvocate.irs.gov/public-forums (last visited Apr. 20, 2017).

24 *See* Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*; *See* National Taxpayer Advocate 2016 Annual Report to Congress, vol. 2, at 1-30 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*).

survey results detailed below show that a significant percentage of taxpayers may not be able to access the internet or do not feel skilled at conducting research on the interest.

The survey has shown that approximately 41 million U.S. taxpayers have no broadband access at all in their homes.[25] Taxpayers with internet service connections slower than broadband will likely experience delays when attempting to access large files or complex web pages — including irs.gov which has over 135,000 web pages.[26] Vulnerable populations, including low income taxpayers, elderly taxpayers, and taxpayers with disabilities, are especially impacted by this issue, as illustrated in the chart below:

FIGURE 1.3.1, No Broadband Access by Demographic Group[27]

Taxpayer Population	Estimated Percentage
Not Low Income	21.8%
Low Income	35.5%
Senior	41.7%
Disabled	31.2%

In addition, almost 14 million U.S. taxpayers have no internet access at all at home, most significantly an issue in the vulnerable populations.[28]

As illustrated below, the vulnerable populations also feel less skilled conducting internet research.

FIGURE 1.3.2, Percentage of Survey Respondents Who Disagreed with the Statement "I am skilled at doing research on the Internet."[29]

Taxpayer Population	Estimated Percentage
Not Low Income	7.0%
Low Income	14.1%
Senior	22.9%
Disabled	17.8%

Further, the study confirmed that the web is suitable for certain types of service needs. For example, the survey showed that taxpayers were more likely to be satisfied using the web channel to obtain a form than any of the other channels. In fact, 76 percent of respondents indicated that they used the web as the first channel to obtain a form or publication. In addition, approximately 42 percent of respondents

25 See Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

26 IRS response to TAS fact check (Dec. 19, 2017). Prior to the recent irs.gov launch, organizations across the agency conducted a content cleanup effort in to reduce redundant, inaccurate, or outdated content on the website. IRS.gov now has a total of over 140,000 web pages, static files (*e.g.*, PDFs), and other content items.

27 See Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

28 See National Taxpayer Advocate 2016 Annual Report to Congress, vol. 2, 1-30 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*).

29 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

used the web as their first channel (compared to 37 percent using the phone) to obtain information about an IRS notice or letter. The IRS should review the results of this survey to understand the service needs and preferences of taxpayers before they make any long term strategic decisions on taxpayer services.[30]

In addition to the above-noted research, the IRS, in collaboration with the TAS, should undertake a comprehensive study of taxpayer needs and preferences by taxpayer segment, using surveys (telephone, online, and mail), focus groups, town halls, public forums, and research studies. These initiatives should be designed to determine taxpayer needs and preferences, and not be biased by the IRS's own desired direction.

Secure Access e-Authentication Is a Critical Fraud Prevention Measure, but the 30 Percent Verification Rate Proves it Creates a Barrier to Entry for All Taxpayer Populations, Not Just the Elderly and Low Income

To gain access to the online account application, taxpayers are required to pass a multi-factor e-authentication process, called Secure Access.[31] For calendar year 2017 through September 30 (before the IRS suspended Secure Access due to the Equifax breach, discussed below), only about 30 percent of the taxpayers who attempted to verify their identity through Secure Access in order to use the online account were able to do so.[32]

While it is crucial to protect the integrity of taxpayer data, Secure Access e-authentication creates a barrier to access during normal operation of the program. We are not suggesting that the IRS reduce its security protections. To the contrary, we believe protecting the security of taxpayer information is absolutely essential. The IRS must recognize that providing necessary security has implications for how many taxpayers will be able to access online accounts and how many will need to use other service channels, such as telephones or taxpayer assistance centers (TACs).

The IRS suspended Secure Access in mid-October until early December due to the data breach at Equifax, the company contracted by the IRS to verify taxpayers' identities for the program. This suspension impacted several online applications, including the online account, the TDC Secure Messaging system, Get Transcript, Identity Protection Personal Identification Number (IP PIN) issuance, and e-services for practitioners. For the online account program and TDC pilot, existing account holders were not impacted, but the suspension of Secure Access prevented new users from creating accounts.[33] This is clearly disruptive at best, but it may also drive taxpayers away from IRS online applications if they fear that their confidential information is in jeopardy of being hacked.

30 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

31 For more details about the multi-factor e-authentication requirements, *see* National Taxpayer Advocate 2016 Annual Report to Congress 121-37 (Most Serious Problem: *Online Accounts: Research into Taxpayer and Practitioner Needs and Preferences Is Critical as the IRS Develops an Online Taxpayer Account System*).

32 IRS response to TAS fact check (Dec. 19, 2017); IRS response to TAS information request (Nov. 22, 2017). The verification rate drops to 27 percent when excluding those taxpayers who opted to receive an activation code by mail rather than by mobile phone. The mail option is particularly relevant to taxpayers who have pay-as-you-go mobile phones or a business/family plan mobile phone not associated with the taxpayer's name. *See* IRS, *Secure Access: How to Register for Certain Online Self-Help Tools*, https://www.irs.gov/individuals/secure-access-how-to-register-for-certain-online-self-help-tools (last visited Nov. 26, 2017).

33 Steven Overly, *IRS Temporarily Suspends Contract with Equifax*, Politico (Oct. 12, 2017).

Before the Equifax data breach, taxpayers were already apprehensive about sharing their personal financial information over the internet. Specifically, in TAS's 2016 and 2017 survey on Taxpayers' Varying Abilities and Attitudes, approximately 50 percent disagreed with the statement "I feel secure sharing personal financial information over the Internet."

Before the Equifax data breach, taxpayers were already apprehensive about sharing their personal financial information over the internet. Specifically, in TAS's 2016 and 2017 survey on Taxpayers' Varying Abilities and Attitudes, approximately 50 percent disagreed with the statement "I feel secure sharing personal financial information over the Internet."[34] This episode likely increased the apprehension found by the TAS survey. It also solidifies the need to fully staff other service channels, because if one service channel is unexpectedly suspended, the users of the suspended channel should have other options to communicate with the IRS.

The Low Participation Rates of the TDC Pilot Conducted by Several IRS Organizations Illustrate the Need to Maintain and Improve Traditional Service Channels

Several organizations within the IRS, including Small Business/Self Employed (SB/SE) Exam, Large Business and International (LB&I), and TAS, conducted a pilot of the TDC Secure Messaging system beginning as early as December 2016.[35] The SB/SE and TAS pilots used the same e-authentication requirements as the online account, Secure Access.[36] TDC enables the participating IRS organizations to send and receive electronic webmail, along with certain digital documents (including uploaded scanned or photographed documents), to and from taxpayers through a secure portal. Taxpayers can communicate within the system using computers, smartphones or tablets.[37]

TAS's TDC pilot included unrepresented taxpayers with Earned Income Tax Credit (EITC) or levy cases. Fewer than ten taxpayers opened accounts out of the more than 700 taxpayers who were offered to participate in the pilot. Many pilot participants (both TAS case advocates and taxpayers) noted that the e-authentication requirements were the main reason for not opening an account. They also noted that it was simply easier to fax the information rather than scan and upload. Many taxpayers either deemed the process too burdensome or did not have the necessary information to pass Secure Access.[38]

34 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra* (95 percent confidence level).

35 SB/SE Exam began piloting TDC in December 2016 and TAS began the pilot in April 2017. Karen Shiller, SB/SE Commissioner, *Changing the Face of Taxpayer Communication in Exam* (May 2016). TAS is conducting the pilot in the following four offices: Dallas, Nashville, New Orleans, and Cleveland. The TAS pilot only includes unrepresented taxpayers involved in Earned Income Tax Credit (EITC) or levy cases. IRS SERP Alert 17A0048, *Secure Messaging Pilot for SBSE Correspondence Exam (TDC)* (Feb. 6, 2017); IRS SERP Alert 16A0336, *Secure Messaging Pilot for SBSE Correspondence Exam (TDC)* (Dec. 20, 2016); Luca Gattoni-Celli, *IRS Plans to Launch Secure Messaging Pilots for Exams*, TAS, 2017 TNT 24-5, Tax Notes Today (Feb. 2, 2017). In August 2017, the Office of Appeals launched a 90-day pilot of a new web-based virtual conference option for taxpayers and their representatives. In late October, Appeals decided to extend the pilot through the end of February 2018. However initial results of the pilot were not available as of the date Appeals responded to the TAS fact check. IRS Office of Appeals response to TAS fact check (Dec. 12, 2017).

36 The LB&I TDC pilot did not include e-authentication requirements because alternate authentication was deemed reliable and less burdensome to the participants. LB&I response to TAS fact check (Dec, 15, 2017).

37 TAS Communications, Stakeholder Liaison, and Online Services *TAS Focus Group Report: Taxpayer Digital Communication (TDC) Pilot* (Nov. 2017).

38 *Id.*

The SB/SE Exam pilot includes taxpayers who claimed itemized deductions, claimed an education credit, and who were selected for a correspondence exam. The pilot uses TDC as an alternative communications channel for correspondence exams where examiners need to receive documents and other explanations from individual filers or their representatives to substantiate filing claims. Preliminary results from the pilot show almost 24 percent of the taxpayers who were sent an invitation to participate in the pilot attempted to create an account (2,194 attempts to create an account out of 9,149 invitations to participate in the pilot). Of the taxpayers who responded at all to the invitation to participate in the pilot, the rate was nearly 48 percent (2,194 attempts to create an account out of the 4,598 taxpayers who responded through any channel).[39] Of those attempts to create an account, less than half (971 out of 2,194) succeeded in opening an account.[40] The top reasons provided for not opening an account were as follows:[41]

- The program was perceived to be too much trouble;
- The taxpayer did not see the stuffer;
- The taxpayer thought the offer was a scam;
- The taxpayer could not pass e-authentication requirements;
- The taxpayer is "too old fashioned" to use the online service; and
- The taxpayer could not access the website.

LB&I's pilot uses TDC to facilitate fee disputes with pharmaceutical companies resulting from their annual branded prescription drug compliance filings, required under the Affordable Care Act (ACA). Due to the nature of the pilot, the LB&I TDC pilot did not include e-authentication requirements because alternate manual authentication was deemed reliable and less burdensome to the participants.[42] Of the 115 offers to participate in the pilot, about 16 companies opened an account (with 56 total users).

The results of the TDC pilot provide useful information on the ability of taxpayers to participate in the IRS online applications with Secure Access e-authentication requirements. The initial results of the pilots show a low participation rate, which further supports the need for the IRS to maintain high levels of service on traditional service channels such as phone and in-person at the TACs.

TAS's Taxpayer Digital Communication pilot included unrepresented taxpayers with Earned Income Tax Credit or Levy cases. Fewer than ten taxpayers opened accounts out of the more than 700 taxpayers who were offered to participate in the pilot.

39 IRS response to TAS fact check (Dec. 19, 2017); SB/SE response to TAS fact check (Dec. 18, 2017).

40 IRS response to TAS information request (Nov. 22, 2017).

41 The SB/SE Exam pilot involved attaching a stuffer to the first page of the initial contact letter. A week later, SB/SE Exam also mailed Letter 5919, reminding taxpayers secure messaging was an option. IRS response to TAS information request (Nov. 22, 2017).

42 IRS response to TAS fact check (Dec. 19, 2017); LB&I response to TAS fact check (Dec, 15, 2017); IRS response to TAS information request (Nov. 22, 2017).

The IRS Should Explore Establishing a Method for Taxpayers to Electronically Submit Documents or Payments to the IRS Which Involves a Less Rigorous Level of E-authentication

During the TAS TDC pilot, participants raised concerns about the unnecessarily burdensome e-authentication requirements where the taxpayer merely wanted to electronically submit documents.[43] They raised a valid point — When confidential taxpayer information is only flowing *into* the IRS, there is little risk that the IRS will wrongly disclose information.

For example, when a taxpayer is submitting documentation for an audit or providing evidence of economic hardship for TAS, the taxpayer is not receiving information from the IRS. In such circumstances, it seems unnecessarily burdensome to require the user of the online application to pass the strict multi-factor requirements of Secure Access.[44] A taxpayer submitting documentation by mail or fax is not subject to authentication requirements, because the IRS does not disclose confidential tax return information in this one-way inbound communication.

While Secure Access is absolutely essential to protect taxpayer information on many online applications where the user can gain access to confidential tax return information, we do not believe the risk is as high when the taxpayer is submitting information to the IRS, but the IRS does not disclose information to the taxpayer. There is likely a lower risk that an identity thief would take the initiative to submit documents, or especially payments, to the IRS in the taxpayer's name. The IRS should evaluate the feasibility of creating a method to electronically submit documents or payments to the IRS with reduced e-authentication standards. The platform could be the digital equivalent to faxing or mailing documents to the IRS. It is our understanding that the IRS already tested a program with lower e-authentication requirements with the IRS ID.me authentication pilot. The pilot involved potential identity theft victims submitting confidential information online to verify their identity.[45] The third-party vendor performing the verification required significantly less information than the current Secure Access requirements. Unlike Secure Access, the pilot did not request loan account numbers or require the participant to have a text-enabled phone plan associated with the taxpayer's name or address.[46] While the verification rate for the pilot was only approximately 50 percent, it is still significantly higher than the verification rate experienced by Secure Access. We are not recommending that the IRS use the same e-authentication procedure as the ID.me authentication pilot, but we believe it is merely one example of a way the IRS could reduce the burden on taxpayers, especially when the flow of information is one-way, from the taxpayer to the IRS.

Since 2005, the National Taxpayer Advocate has recommended that the IRS restrict third party access to online account applications to only those practitioners subject to IRS oversight under Circular 230.

43 TAS Communications, Stakeholder Liaison, and Online Services, *TAS Focus Group Report: Taxpayer Digital Communication (TDC) Pilot* (Nov. 2017).

44 For a detailed description of the information required to pass Secure Access requirements, *see* IRS, *Secure Access: How to Register for Certain Online Self-Help Tools*, https://www.irs.gov/individuals/secure-access-how-to-register-for-certain-online-self-help-tools (last visited Dec. 5, 2017).

45 For information about the ID.me pilot, *see* IRS, *Identity Verification Service*, https://www.irs.gov/identity-theft-fraud-scams/idverify (last visited Dec. 20, 2017).

46 A3 Executive Governance Board, *Authentication, Authorization, and Access (A3): Presentation to the A3 EGB*, Slide 7 (Nov. 9, 2017); IRS, *Identity Verification Service*, https://www.irs.gov/identity-theft-fraud-scams/idverify (last visited Dec. 20, 2017).

The IRS Has Failed to Make the Policy Decision to Restrict Third Party Access to Current and Future Online Applications

Before the IRS progresses too much further designing features for existing and future online applications, it must make critical policy decisions regarding third party access to these applications. Since 2005, the National Taxpayer Advocate has recommended that the IRS restrict third party access to online account applications to only those practitioners subject to IRS oversight under Circular 230.[47] Such practitioners include attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents.[48] In addition, pursuant to Revenue Procedure 2014-42, preparers who have obtained the voluntary Annual Filing Season Program (AFSP) Record of Completion can represent taxpayers before the IRS during an examination of a tax return or claim for refund they prepared.[49] To receive the record of completion, the preparer must consent to be subject to the duties and restrictions relating to practice before the IRS in § 10.51 of Circular 230 for the entire period covered by the record of completion.[50] Therefore, preparers who have the voluntary record of completion are subject to Circular 230. Once the IRS strengthens the testing requirements in the AFSP, the IRS should expand online account access to those preparers who obtain the AFSP record of completion.[51] The IRS can monitor and enforce this requirement, because it has the preparer tax identification numbers (PTINs) for these individuals.

The IRS has not taken any definitive actions to support the restriction of third party access. In fact, when the IRS conducted focus group sessions on Tax Pro during each of the 2017 IRS Nationwide Tax Forums, it did not attempt to limit participation to only Circular 230 practitioners.[52] If the IRS does not make these policy decisions soon, online account development might progress to a point where it would be difficult to undo any launched capabilities that are inconsistent with this very important taxpayer protection. It could also wrongly create expectations of non-Circular 230 professionals if it invites these professionals to test the prototype of the application.

Without instituting safeguards on third party access to the system, the IRS could inadvertently perpetuate preparer misconduct. Uncredentialed preparers could gain access, interact with the IRS on the taxpayer's behalf, and potentially address notices, proposed adjustments, or even proposed correctable errors without the taxpayer's consent or knowledge.[53] Although the vast majority of return preparers are conscientious and ethical, the IRS has ample evidence and experience showing that there

47 *See*, *e.g.*, National Taxpayer Advocate 2005 Annual Report to Congress 249-59 (Most Serious Problem: *Accessibility of E-Services For Tax Practitioners*).

48 31 U.S.C.§ 10.3.

49 Rev. Proc. 2014–42, § 4.05(2)(a), I.R.B. 2014-29 (July 14, 2014).

50 Rev. Proc. 2014–42, I.R.B. 2014-29 (July 14, 2014).

51 The National Taxpayer Advocate supports providing access to certain preparers, but only if they have satisfied robust minimum competency standards, which include a one-time "entrance" examination to ensure basic competency in return preparation and continuing education courses to ensure preparers keep up to date with the many frequent tax-law changes. The current voluntary Annual Filing Season Program does not satisfy this threshold. For a detailed description of these recommendations, *see* National Taxpayer Advocate 2016 Annual Report to Congress 121-37 (Most Serious Problem: *Online Accounts: Research into Taxpayer and Practitioner Needs and Preferences is Critical as the IRS Develops an Online Taxpayer Account System*); National Taxpayer Advocate 2015 Annual Report to Congress 64-70 (Most Serious Problem: *Preparer Access to Online Accounts: Granting Uncredentialed Preparers Access to an Online Taxpayer Account System Could Create Security Risks and Harm Taxpayers*).

52 IRS response to TAS information request (Nov. 22, 2017).

53 For more detail on the National Taxpayer Advocate's position on the proposed correctable error legislation, *see* The National Taxpayer Advocate's 2014 Annual Report to Congress: Hearing Before the H. Comm. on Oversight and Government Reform, Subcomm. on Government Operations, 114th Cong. 34-5 (2015) (written testimony of Nina E. Olson, National Taxpayer Advocate).

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is a subset of return preparers who are negligent or commit refund fraud.[54] We received overwhelming support for this recommended restriction at the 2016 National Taxpayer Advocate Public Forums conducted around the country.[55]

CONCLUSION

The National Taxpayer Advocate believes that the IRS online account application is an essential addition to a omnichannel service delivery approach. The application benefits those taxpayers and representatives who have the ability to access the program and who prefer this service channel. However, not all taxpayers have the ability to access the program due to various reasons, including lack of broadband access, inability to pass the strict multi-factor e-authentication requirements, or simply that their service need is complicated and they need to understand how the rules apply to their particular facts and circumstances. Accordingly, the IRS should continue to provide personalized services to taxpayers. Finally, the IRS should restrict third party access to such application to those practitioners who are subject to IRS oversight pursuant to Circular 230.

54 The National Taxpayer Advocate's 2014 Annual Report to Congress: *Hearing Before the H.R. Comm. on Oversight and Government Reform, Subcomm. on Government Operations*, 114th Cong. 18-20 (Apr. 15, 2015) (written testimony of Nina E. Olson, National Taxpayer Advocate); *See* National Taxpayer Advocate 2014 Annual Report to Congress 543-44; National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 71-78; National Taxpayer Advocate 2013 Annual Report to Congress 61-74 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS Is Enjoined from Continuing its Efforts to Effectively Regulate Return Preparers*).

55 For details on the National Taxpayer Advocate Public Forums on Taxpayer Service Needs and Preferences, including submitted written statements from panelists as well as full transcripts of the forums, see https://taxpayeradvocate.irs.gov/public-forums (last visited Mar. 30, 2017).

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Maintain a omnichannel approach to taxpayer service delivery to meet the needs and preferences of taxpayers and representatives who either cannot or prefer not to use the online account application for their particular interaction with the agency.
2. The Commissioner of Wage & Investment, the Director of Online Services, and the National Taxpayer Advocate should jointly undertake a collaborative and comprehensive study of taxpayer needs and preferences by taxpayer segment, using surveys (telephone, online, and mail), focus groups, town halls, public forums, and research studies (including TAS research studies and literature reviews). These initiatives should be designed to determine taxpayer needs and preferences, and not be biased by the IRS's own desired direction. This study should contain recommendations jointly agreed to by the principals for a comprehensive 21st century taxpayer service strategy.
3. Explore establishing a method for taxpayers to electronically submit documents or payments to the IRS which involves a less rigorous level of e-authentication.
4. Restrict third party access to those practitioners subject to Circular 230 oversight. Once the IRS strengthens the AFSP examination requirements, the IRS should permit ASFP Record of Completion holders to gain access to the application.
5. Upgrade phone technology to the 21st century, including call-backs.[56]

56 See Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*, *supra*.

MSP #4 AUDIT RATES: The IRS Is Conducting Significant Types and Amounts of Compliance Activities That It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections

RESPONSIBLE OFFICIALS

Kirsten Wielobob, Deputy Commissioner, Services and Enforcement
Kenneth Corbin, Commissioner, Wage and Investment Division
Mary Beth Murphy, Commissioner, Small Business/Self-Employed Division
Doug O'Donnell, Commissioner, Large Business and International Division
Sunita Lough, Commissioner, Tax Exempt and Government Entities Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

DEFINITION OF PROBLEM

The National Taxpayer Advocate has previously written about the issue of "real" vs "unreal" audits.[2] Under Internal Revenue Code (IRC) § 7602(a)(1), the IRS has the authority to examine any books, papers, records, or other data that may be relevant to ascertain the correctness of any return.[3] This type of examination can be referred to as a traditional or "real" audit. However, the IRS interprets this IRC provision narrowly and takes the position that a host of taxpayer compliance contacts through programs and procedures such as math error corrections, Automated Underreporter (AUR), identity and wage verification, and Automated Substitute for Return (ASFR) are not classified as "real" audits.[4] Yet these contacts, or "unreal" audits, where taxpayers must provide documentation or information to the IRS, comprise the majority of compliance contacts and eclipse "real" audit figures.[5] And to taxpayers, these "unreal" audits may feel very much like a "real" examination, in particular a correspondence examination.[6] This distinction between "real" and "unreal" audits has real-world consequences that impact taxpayer rights, including *the right to challenge the IRS's position and be heard*, *the right to appeal an IRS decision in an independent forum*, *the right to finality*, and *the right to a fair and just tax system*.

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2 *See* National Taxpayer Advocate 2016 Annual Report to Congress 27-29 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*); National Taxpayer Advocate 2011 Annual Report to Congress 24 (Introduction to Revenue Protection Issues: *As the IRS Relies More Heavily on Automation to Strengthen Enforcement, There is Increased Risk It Will Assume Taxpayers Are Cheating, Confuse Taxpayers About Their Rights, and Sidestep Longstanding Taxpayer Protections*); Nina Olson, *What's an Audit, Anyway?*, National Taxpayer Advocate Blog (Jan. 25, 2012), https://taxpayeradvocate.irs.gov/news/what's-an-audit-anyway. In its response to our standard request that the IRS verify the data cited in this discussion, the IRS objected to our use of the terms "real audits" and "unreal audits" and requested that we not use them. Its response stated:

> An audit is defined per the Code as an examination of books and records, and is subject to limitations (*i.e.*, only one inspection of a taxpayer's books shall be made each taxable year — unless there is evidence of fraud, malfeasance, etc. [See IRC §] 7605(b), Policy Statement P-4-3). Other contacts with a taxpayer (*e.g.*, to verify or adjust a discrepancy between the taxpayer's return and third-party information returns) do not meet the definition of an inspection of the books and records within the meaning of [section] 7605(b) of the Code. Taxpayers may not always make such a distinction. However, the IRS must follow the law and properly distinguish an audit versus a contact. *The terms "real" and "unreal" are inaccurate, misleading and a mischaracterization of IRS' interactions with taxpayers* [emphasis added].

The National Taxpayer Advocate disagrees and believes the use of the terms "real audits" and "unreal audits" are appropriate for purposes of this discussion. As the IRS notes, taxpayers generally do not make a distinction. Receipt of a notice stating that the IRS will increase the taxpayer's liability unless the taxpayer responds and provides acceptable documentation to support his or her return position feels like an audit, regardless of whether it is technically an audit within the definition of IRC § 7605(b), a math-error adjustment, or a document-matching adjustment made by the IRS's Automated Underreporter (AUR) program. Moreover, as this Most Serious Problem demonstrates, the National Taxpayer Advocate believes the IRS's reporting of statistics, which focus heavily on the audit rate, understates the true level of IRS compliance activity, which includes "real" and "unreal" audits.

3 *See* Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, 7609*, *infra*.

4 *See* Rev. Proc. 2005-32, § 4.03, 2005-23 I.R.B. 1206.

5 *See* National Taxpayer Advocate 2016 Annual Report to Congress 27-28 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*). In addition to the "unreal" audits mentioned here, other IRS functions may conduct work that may be similar to an "unreal" audit. For example, in additional to "real" examinations, the Tax Exempt and Government Entities (TE/GE) Exempt Organizations function conducts compliance checks "to determine whether an organization (*i.e.*, taxpayer) is adhering to recordkeeping and information reporting requirements." When TE/GE conducts a compliance check, the taxpayer is contacted and may be asked to submit information. Although the taxpayer is not required to respond to a compliance check, TE/GE may ultimately select the case (whether the taxpayer responds or not) for a "real" audit where appeal rights would be available. However, to the taxpayer, the pre-audit compliance contact may feel very similar to an audit in that the IRS is contacting them regarding information filed on a form or return. *See* IRS, *Tax Exempt and Government Entities FY 2018 Work Plan* 8 (Sept. 28, 2017), https://www.irs.gov/pub/irs-tege/tege_fy2018_work_plan.pdf; IRS, Tax Exempt and Government Entities Business Performance Review FY 2017: Second Quarter 17; *See also* IRS Pub. 4386, *Compliance Checks: Examination, Audit or Compliance Check?* (Apr. 2006); Internal Revenue Manual (IRM) 4.75.9.2.2, *Compliance Check Workstreams* (Aug. 9, 2016).

6 *See*, *e.g.*, *Effectively Representing Your Client Before the IRS: A Practical Manual for the Tax Practitioner with Sample Correspondence and Forms* 3-9 (Keith Fogg ed., 2015) (noting that "to millions of taxpayers, receipt of a notice from one of the Service's information-matching return programs feels very much like an examination or investigation"). A description of the three different types of IRS examinations is provided below.

The IRS's "Future State" Initiative calls for the increased use of these types of "unreal" audit programs, which will undoubtedly impact many more taxpayers.[7] It is therefore crucial for the IRS to reevaluate and revise its current guidance about what constitutes an audit, through the lens of the Taxpayer Bill of Rights.

The National Taxpayer Advocate is concerned that the narrow definition of "real" audits:

- Causes the IRS to publicly report misleading information. For instance, the IRS only reports "real" audit statistics, which skews the audit rate and understates the IRS's actual level of compliance contacts with taxpayers. It also causes the IRS to not completely and accurately report its return on investment (ROI) for compliance activities, as the IRS does not include all "unreal" audit programs in its ROI calculations;
- Limits a taxpayer's ability to appeal to the IRS Office of Appeals ("Appeals"), as a taxpayer who disagrees with an "unreal" audit's proposed assessment generally receives a statutory notice of deficiency, without the opportunity to seek an administrative review with Appeals to resolve the issue; and
- Circumvents statutory taxpayer protections from unnecessary audits as, under the IRS's current position, taxpayers that are subjected to an "unreal" audit may face a "real" audit and other "unreal" audits at a later time.[8]

ANALYSIS OF PROBLEM

Background

Traditional or "Real" Audits

As noted above, under IRC § 7602(a)(1) the IRS has the authority to examine any books, papers, records, or other data that may be relevant to ascertain the correctness of any return.[9] The IRS conducts three types of traditional examinations or "real" audits: correspondence, field, and office.[10] A correspondence exam is conducted by mail for a single tax year and generally involves no more than a few issues that the IRS believes can be resolved by producing documents.[11] A field exam deals with more complex issues and involves a face-to-face meeting between the taxpayer and an IRS revenue agent, at the taxpayer's home or place of business.[12] Finally, an office audit is conducted at a local IRS office

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7 *See*, *e.g.*, IRS, *Exploring the IRS Future State: Balancing Taxpayer Needs with IRS Budget and Resource Constraints*, adapted from ABA National Institute on Tax Controversy, Las Vegas, NV 16 (Dec. 9, 2016), https://www.irs.gov/pub/newsroom/future_state_aba.pdf (noting that one of the focus areas of Small Business/Self Employed (SB/SE) and Wage & Investment (W&I) is issue identification and filing resolution to "maximize prerefund automatic issue identification and self-correction").

8 *See* IRC §7605(b). This section provides "no taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

9 *See* Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, 7609*, *infra*.

10 Part 4 of the IRM discusses the IRS's examination process. For a good discussion of the different types of IRS examinations, see *Effectively Representing Your Client Before the IRS: A Practical Manual for the Tax Practitioner with Sample Correspondence and Forms* 3-9, 10 (Keith Fogg ed., 2015). *See also* National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 71 (discussing the differences between field and correspondence audits).

11 *See* National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 71 (discussing the differences between field and correspondence audits).

12 *See* IRM 4.10.3.3.2, *Where to Conduct Interviews* (Feb. 26, 2016).

and generally involves issues that are more complex than those found in correspondence exams but less complex than field ones.[13]

Typically, in the "real" audit context, before issuing a statutory notice of deficiency, which enables a taxpayer to petition the Tax Court, the IRS will issue a 30-day letter to the taxpayer offering the opportunity to request an administrative appeal with IRS Appeals.[14] In addition, under IRC § 7605(b), taxpayers are protected from unnecessary examinations and the IRS is generally allowed to conduct only one inspection of a taxpayer's books of account for each taxable year.[15]

Other Compliance Contacts or "Unreal" Audits

The IRS also conducts a host of other compliance contacts with taxpayers, which can be categorized as "unreal" audits, and often solely rely on matching third-party documentation against the taxpayer's return.[16] These contacts include:

- **Math or Clerical Error –** Congress has given the IRS authority to circumvent normal deficiency procedures in certain circumstances. IRC § 6213(b) authorizes the IRS to make a summary assessment of tax due where that addition is the result of a mathematical or clerical error on a return. To make this summary assessment, the IRS must explain the error to the taxpayer.[17] The taxpayer has 60 days from the date of the notice to request that the IRS abate the tax.[18] The IRS cannot begin to collect the tax due until the taxpayer has agreed to it or until the 60 days have passed.[19] If the taxpayer requests the tax be abated, the IRS must first use the deficiency procedures under IRC § 6212 to increase the tax shown on the return.[20] It is also the only way for the taxpayer to preserve the right to challenge the adjustment in the Tax Court — the only prepayment judicial forum.[21]

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13 *See* IRM 4.10.3.3.2, *Where to Conduct Interviews* (Feb. 26, 2016).

14 *See* IRS Publication 3498-A, *The Examination Process (Audits by Mail)* (Jan. 2014), available at http://www.irs.gov/pub/irs-pdf/p3498a.pdf. For times for requesting appeals conferences, see IRM 4.19.13.14.2, *Transfer to Appeals* (Jan. 1, 2016).

15 IRC § 7605(b) provides "no taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." *See also* Treas. Reg. § 601.105(j) (limiting the IRS's ability to reopen a case closed after examination to situations such those where there is evidence of fraud).

16 In the case of an information return that turned out to be inaccurate, courts have held that "the Commissioner would not be able to choose to rely solely upon the naked assertion that the taxpayer received a certain amount of unreported income for the tax period in question." *See Portillo v. Comm'r*, 932 F.2d 1128 (5th Cir. 1991).

17 IRC § 6213(b)(1).

18 IRC § 6213(b)(2)(A).

19 IRC § 6213(b)(2)(B).

20 IRC § 6213(b)(2)(A).

21 IRC § 6213(b)(1). For a discussion of the National Taxpayer Advocate's concerns regarding the IRS's math error authority, *see* National Taxpayer Advocate 2015 Annual Report to Congress 329-39 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*); National Taxpayer Advocate 2014 Annual Report to Congress, 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*); National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 116-20 (*Math Errors Committed on Individual Tax Returns – A Review of Math Errors Issued on Claimed Dependents*). *See also*, Nina E. Olson, *Why Correctible Error Authority Raises Significant Taxpayer Rights Concerns – Part 1*, National Taxpayer Advocate Blog (Aug. 9, 2017), https://taxpayeradvocate.irs.gov/news/why-correctible-authority-error-raises-significant-taxpayer-rights-concerns-part-1; Nina Olson, *Correctible Error Authority Part 2: Why Correctible Error Authority Creates More Problems Than It Resolves*, National Taxpayer Advocate Blog (Aug. 16, 2017), https://taxpayeradvocate.irs.gov/news/correctible-error-authority-part-2-why-correctible-error-authority-creates-more-problems-than-it-resolves; Nathan J. Richman, *Expanding Math Error Authority Could Worsen Two Tax Systems Issues*, Tax Notes Today (July 5, 2017).

- **Automated Underreporter (AUR) –** The IRS's AUR program uses third party (*e.g.*, employers, banks, or brokers) documents submitted to the IRS. The IRS matches amounts reported on tax returns with the information returns.[22] This computer matching begins after the original return due date and is not a real-time process. The IRS will send the taxpayer a notice either notifying them of this adjustment or requesting additional information. If the taxpayer does not respond to these notices, the IRS will issue a statutory notice of deficiency.[23]
- **IRS Programs Used to Stop Identity Theft and Refund Fraud**[24] **–** The return integrity program, a process critical to the IRS's strategy to address identity theft and detect and prevent improper fraudulent refunds, is complex and multifaceted.[25] The Return Integrity & Compliance Services (RICS) Return Integrity Operations (RIO) — a part of the Wage & Investment (W&I) Division — uses filters, rules, data mining models, and manual reviews to identify potentially false returns, usually through wages or withholding reported on the returns, to stop fraudulent refunds before the IRS issues them.[26] If one of these systems flags a return as potentially fraudulent, the return goes through the Taxpayer Protection Program (TPP), which verifies the identity of the taxpayer, and/or the Income Wage Verification (IWV) program, which verifies that the taxpayer's wages and withholding are accurate, for further scrutiny.[27]
- **Automated Substitute for Return (ASFR) –** ASFR is an IRS program for enforcing filing compliance by taxpayers who have not filed individual tax returns, but have incurred a "significant" tax liability.[28] The program estimates the liability by computing tax, penalties, and interest based upon information reported to the IRS by third parties.[29] When a taxpayer with reported income is delinquent in filing a return, the IRS attempts to secure the return through correspondence. If the attempt is unsuccessful, the IRS is authorized by IRC § 6020(b) to

22 Some of the third-party forms used to match taxpayer data include Forms W-2 and Forms 1099 for miscellaneous, brokerage, interest, dividend, and cancellation of debt income.

23 IRM 4.19.2.2, *Overview* (Oct. 4, 2016).

24 For more information about these programs, *see* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected By These Systems, Resulting in Refund Delays*, *infra*; Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *infra*.

25 IRM 25.25.1.1, *Program Scope and Objectives* (Oct. 4, 2017).

26 IRM 25.25.6.1, *Program Scope and Objectives* (July 14, 2017). *See also* IRM 25.25.2.1(1), *Purpose and Program Goals* (Mar. 29, 2017). The IRS electronically screens tax returns using three independent systems: the Dependent Database (DDb), the Return Review Program (RRP), and the Electronic Fraud Detection System (EFDS).

27 *See* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected By These Systems, Resulting in Refund Delays*, *infra*; National Taxpayer Advocate 2016 Annual Report to Congress, 149-60, (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*). *See also* National Taxpayer Advocate 2015 Annual Report to Congress, 45-55, 180-87; National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, 44-90; National Taxpayer Advocate 2013 Annual Report to Congress 75-83; National Taxpayer Advocate 2012 Annual Report to Congress 42-67, 95-110; National Taxpayer Advocate 2011 Annual Report to Congress 48-73; National Taxpayer Advocate 2009 Annual Report to Congress 307-17; National Taxpayer Advocate 2008 Annual Report to Congress 79-94; National Taxpayer Advocate 2007 Annual Report to Congress 96-115; National Taxpayer Advocate 2005 Annual Report to Congress 25-54, 180-91; National Taxpayer Advocate 2004 Annual Report to Congress 133-36; and National Taxpayer Advocate 2003 Annual Report to Congress 175-81.

28 IRM 5.18.1.2, *Automated Substitute for Return (ASFR) Program Overview* (Apr. 6, 2016). To meet ASFR processing criteria, the proposed tax liability must meet or exceed a predetermined dollar threshold established by the IRS for the ASFR program.

29 *Id.* The IRS can use information returns (e.g., Forms W-2 and 1099) filed by employers, banks, and other third parties to report various types of payments to individuals. These payments include wages, interest, and dividends, as well as payments to self-employed taxpayers for services rendered. The IRS collects and maintains this information through the Information Return Program (IRP).

prepare a substitute return for the taxpayer.[30] However, due to resource constraints, the IRS has significantly reduced its usage of the ASFR program.[31]

Although "unreal" audits may feel much like "real" audits to taxpayers, they do not carry the same protections as "real" ones. In the "unreal" audit context, taxpayers generally do not have the opportunity to seek administrative review with Appeals prior to the IRS issuing a statutory notice of deficiency.[32] For math error notices, taxpayers must respond within 60 days and request an abatement of the tax or the IRS can summarily assess the tax without resorting to deficiency procedures.[33]

In addition, "unreal" audits do not carry the same IRC § 7605(b) protections against repeat examinations as "real" audits. Although Treasury regulations provide only one example of an inspection of a taxpayer's books and records that is not an examination within the meaning of IRC §7605(b),[34] the IRS takes a more expansive view. In Revenue Procedure 2005-32, the IRS lists four broad categories of taxpayer contacts or other actions that it does not consider to be examinations and inspections.[35] Explicitly included in these categories are math error, AUR, and ASFR "unreal" audit contacts.[36] Therefore, a taxpayer subject to an "unreal" audit may be subject to a "real" audit at a later time.

The National Taxpayer Advocate has previously noted in the Affordable Care Act (ACA) context how there may be virtually no distinction between how the IRS conducts an "unreal" versus a "real" audit. For example, when the IRS notices information reported by the Marketplace regarding a taxpayer's Advanced Premium Tax Credit (APTC) does not match information regarding the credit on the taxpayer's return, or the APTC was not reconciled on Form 8962, *Premium Tax Credit (PTC)*, the IRS will delay processing of the return and issue Letter 12C requesting a corrected Form 8962, or Form 1095-A, *Health Insurance Marketplace Statement*, to support the credit and reconcile the APTC. Depending on the type of PTC discrepancy, the IRS refers the return either to Examination to work as a traditional audit or to the Automated Questionable Credit (AQC) program for a similar "audit" process. If referred to AQC, Letter 4800C, *Questionable Credit 30 Day Contact Letter*, which proposes an adjustment and requests Form 1095-A, will be sent to the taxpayer. The letter states, "This is not an audit. Your return may be examined in the future;" however, the AQC process and the documentation

30 IRC § 6020(b) provides: "(b) Execution of return by Secretary. — (1) Authority of Secretary to execute return. — If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. (2) Status of returns. — Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes." IRM 5.18.1.1.2, Authority (Dec. 13, 2017).

31 Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2017-30-078, *A Significantly Reduced Automated Substitute for Return Program Negatively Affected Collection and Filing Compliance* (Sept. 2017); The reduction in ASFR cases can be seen in Figures 1.4.1, 1.4.2, and 1.4.3 below. *See also* National Taxpayer Advocate 2015 Annual Report to Congress 188-95 (Most Serious Problem: *Current Selection Criteria for Cases in the ASFR Program Create Rework and Impose Undue Taxpayer Burden*).

32 As described below, in an AUR case, if a taxpayer makes a request for Appeals review with less than 365 days left in the period of limitations on assessment then this request will be denied. However, if there are more than 365 days left in the period of limitations on assessment, a taxpayer may request Appeals review an AUR case. However, it appears that taxpayers are not formally informed of this Appeals opportunity but would have to affirmatively make such a request. *See* IRM 4.19.3.21.1.8(1), *Appeals* (Aug. 22, 2017). This approach violates both the *right to be informed* and the *right to appeal an IRS decision in an independent forum*.

33 *See* IRC § 6213(b).

34 *See* Treas. Reg. § 301.7605-1(h) (providing that certain withholding agreements between the IRS and alien individuals are not examinations).

35 Rev. Proc. 2005-32, § 4.03, 2005-23 I.R.B. 1206.

36 *See also* IRS Chief Counsel Memorandum, *ASFR Questions Involving Subsequently Filed Delinquent Original Returns* (Mar. 29, 2005) (providing that IRS preparation of an ASFR is not considered an examination).

requirements imposed on the taxpayers under AQC are substantially similar to those in an examination. In fact, both the AQC and Exam request similar documentation for PTC verification.[37] Thus, there are situations where the IRS is essentially conducting a "real" audit under the guise of an "unreal" audit, thereby circumventing statutory protections against repeat examinations.

By Narrowly Defining "Real" Audits, the IRS Is Publicly Reporting Misleading Information Regarding Its Compliance Contacts With Taxpayers and Return on Investment

The IRS Does Not Include Unreal Audits in its Published Audit Rate Statistics

The IRS's classification system, which distinguishes between "real" and "unreal" audits, results in the IRS publicly reporting misleading information regarding the extent of its compliance contacts with taxpayers. The IRS, in its annually-released Data Book, publishes a variety of statistics regarding its enforcement efforts, including examinations.[38] These Data Book figures show a consistent decline in the IRS's audit rate over the last several years, which has been noted by the press and others.[39] However, the IRS's audit rate figures only take into account "real" audits. Other compliance contacts, or "unreal" audits, are not included in the IRS's audit calculations.[40]

As shown in the Figures 1.4.1, 1.4.2, and 1.4.3, TAS performed an analysis of both "real" and "unreal" IRS audits of individuals for fiscal years (FYs) 2014 through 2016.

37 National Taxpayer Advocate 2015 Annual Report to Congress 173-76 (Most Serious Problem: *Affordable Care Act (ACA) – Individuals: The IRS Is Compromising Taxpayer Rights As It Continues to Administer the Premium Tax Credit and Individual Shared Responsibility Payment Provisions*); Automated Questionable Credit (AQC) requests "documentation proving premium payments, copies of insurance enrollment forms, invoices, or statements from the insurance providers that include the names of those covered by the benefits." Exam requests "copies of insurance enrollment forms, invoices, or statements from your insurance providers."

38 *See*, *e.g.*, IRS Data Book 2016.

39 *See*, *e.g.*, Kevin McCoy, *Your Odds of Facing an IRS audit Are 1-in-143*, U.S.A. Today, (Mar. 6, 2017) https://www.usatoday.com/story/money/2017/03/06/your-odds-facing-irs-audit-1--143/98808612/ (noting that IRS audit rates fell to a 14-year low in 2016); TIGTA, Ref. No. 2017-30-072, *Trends in Compliance Activities Through Fiscal Year 2016* 51 (Sept. 2017) (showing a decline in the audit rate for individual and business tax returns between fiscal years 2012 and 2016); *See also* IRS, *Prepared Remarks of John A. Koskinen Before the National Press Club* (Apr. 5, 2017) (Then Commissioner Koskinen noted the decline in the IRS's audit rate and stated, "Last year, we audited about 1 million people. That may sound like a lot, but it's less than one percent of individual returns filed. It's also the lowest number of audits in more than a decade."), https://www.irs.gov/newsroom/prepared-remarks-of-john-a-koskinen-before-the-national-press-club-washington-dc-april-5-2017.

40 *See* TIGTA, Ref. No. 2017-30-072, *Trends in Compliance Activities Through Fiscal Year 2016* 18 (Sept. 2017) (noting that "In addition to correspondence and face-to-face examinations, the IRS also uses several computer-matching and automated error-checking programs to verify the accuracy of tax returns. These routines often identify and recommend adjustments to tax liabilities. However, these adjustments are not included in the traditional examination coverage calculations and are not reported separately as enforcement efforts."). In its Data Book, the IRS does provide some limited information regarding its AUR, ASFR, and math error programs. However, as noted, these programs are not included in the IRS's audit rate calculations. *See* IRS Data Book 2016 at 35.

FIGURE 1.4.1, Real vs. Unreal Audits: FY 2014 Occurrences Compared to Returns Filed in Calendar Year 2013[41]

Adjusted Gross Income Category	FY 2014 Exams	Exam (Audit) Coverage Rate %	FY 2014 ASFR	FY 2014 AUR	FY 2014 Math Error	FY 2014 Taxpayer Protection Program	FY 2014 Wage Verification	Combined	Calendar Year 2013 Returns	Combined Coverage Rate %
No adjusted gross income	263,615	10.4%	190,941	13,559	33,549	127,291	251,440	837,579	2,534,533	33.0%
$1 under $25,000	458,310	0.8%		954,859	759,140	376,372	601,495	2,995,755	55,591,101	5.4%
$25,000 under $50,000	162,455	0.5%		1,109,790	505,006	88,941	200,301	2,017,617	33,478,934	6.0%
$50,000 under $75,000	92,650	0.5%		569,566	291,884	41,692	69,748	1,044,793	18,918,026	5.5%
$75,000 under $100,000	58,286	0.5%		359,315	181,699	22,884	34,423	645,930	12,052,040	5.4%
Subtotal - under $100,000	**1,035,316**	**0.8%**	**190,941**	**3,007,089**	**1,771,278**	**657,180**	**1,157,407**	**7,541,674**	**122,574,634**	**6.2%**
$100,000 under $200,000	92,649	0.6%		603,650	238,184	29,927	52,980	1,003,331	15,449,869	6.5%
$200,000 under $500,000	64,930	1.6%		206,282	47,485	11,962	44,701	369,257	4,147,849	8.9%
$500,000 under $1,000,000	22,439	3.2%		38,965	6,562	3,087	26,054	95,399	697,262	13.7%
$1,000,000 under $5,000,000	18,937	5.5%		18,429	3,270	1,389	26,662	67,428	345,656	19.5%
$5,000,000 under $10,000,000	2,477	9.2%		1,129	321	112	3,945	7,834	26,832	29.2%
$10,000,000 or more	2,505	14.2%		568	339	59	3,228	6,560	17,590	37.3%
Total	**1,239,253**	**0.9%**	**190,941**	**3,876,112**	**2,067,439**	**703,716**	**1,314,977**	**9,091,483**	**143,259,692**	**6.3%**

41 Data from the Automated Information Management System (AIMS), Individual Returns Transaction File (IRTF), Individual Master File (IMF), and Notice Delivery System from the Compliance Data Warehouse (CDW). The number of audits represent tax returns for which the IRS closed its audit in FY 2014. The statistics for returns secured through Automated Substitute for Return (ASFR) are from the IRS fiscal year (FY) 2014 Collection Activity Report No. 5000-139 (Oct. 9, 2014). Because ASFR returns are not filed by the taxpayer, no adjusted gross income (AGI) is associated with the return; however, these returns actually have a AGI (but unrecorded). Therefore, the combined coverage rate percentage for the no AGI category is somewhat overstated. The number of taxpayers receiving an Automated Underreporter (AUR) contact are those who received a CP 2000 or CP 2501 notice from the IRS in FY 2014. The combined coverage rate removes duplicates, so that a tax return is only counted once even if affected by two or more of these compliance programs in FY 2014. The coverage rate is computed by dividing by the number of individual income tax returns filed in each AGI category for Calendar Year 2013.

FIGURE 1.4.2, Real vs. Unreal Audits: FY 2015 Occurrences Compared to Returns Filed in Calendar Year 2014[42]

Adjusted Gross Income Category	FY 2015 Exams	Exam (Audit) Coverage Rate %	FY 2015 ASFR	FY 2015 AUR	FY 2015 Math Error	FY 2015 Taxpayer Protection Program	FY 2015 Wage Verification	Combined	Calendar Year 2014 Returns	Combined Coverage Rate %
No adjusted gross income	257,217	10.5%	184,776	12,597	29,633	120,729	94,276	564,475	2,455,720	23.0%
$1 under $25,000	476,122	0.9%		936,516	705,570	1,019,482	467,285	3,202,112	55,345,582	5.8%
$25,000 under $50,000	150,849	0.4%		1,110,611	508,272	360,772	166,826	2,132,672	33,654,191	6.3%
$50,000 under $75,000	82,524	0.4%		563,110	272,084	161,619	71,445	1,070,202	19,114,016	5.6%
$75,000 under $100,000	54,557	0.4%		354,911	168,328	92,758	46,955	666,242	12,302,459	5.4%
Subtotal - under $100,000	**1,021,269**	**0.8%**	**184,776**	**2,977,745**	**1,683,887**	**1,755,360**	**846,787**	**7,635,703**	**122,871,968**	**6.2%**
$100,000 under $200,000	91,018	0.6%		608,617	230,602	137,675	91,753	1,054,229	16,272,703	6.5%
$200,000 under $500,000	58,988	1.3%		213,372	52,063	65,329	74,213	407,059	4,503,701	9.0%
$500,000 under $1,000,000	22,842	3.2%		34,544	7,912	19,472	36,434	102,819	708,224	14.5%
$1,000,000 under $5,000,000	22,201	7.1%		12,656	3,262	10,652	31,173	65,478	311,420	21.0%
$5,000,000 under $10,000,000	3,457	16.4%		663	297	994	3,931	7,914	21,104	37.5%
$10,000,000 or more	3,744	29.3%		338	288	620	2,743	6,007	12,766	47.1%
Total	**1,223,519**	**0.8%**	**184,776**	**3,847,935**	**1,978,311**	**1,990,102**	**1,087,034**	**9,279,209**	**144,701,886**	**6.4%**

42 Data from AIMS, IRTF, IMF, and Notice Delivery System from CDW. The number of audits represent tax returns for which the IRS closed its audit in FY 2015. The statistics for returns secured through ASFR are from the IRS FY 2015 Collection Activity Report No. 5000-139. Because ASFR returns are not filed by the taxpayer, no AGI is associated with the return; however, these returns actually have a AGI (but unrecorded). Therefore, the combined coverage rate percentage for the no AGI category is somewhat overstated. The number of taxpayers receiving an AUR contact are those who received a CP 2000 or CP 2501 notice from the IRS in FY 2015. The combined coverage rate removes duplicates, so that a tax return is only counted once even if affected by two or more of these compliance programs in FY 2015. The coverage rate is computed by dividing by the number of individual income tax returns filed in each AGI category for Calendar Year 2014.

FIGURE 1.4.3, Real vs. Unreal Audits: FY 2016 Occurrences Compared to Returns Filed in Calendar Year 2015[43]

Adjusted Gross Income Category	FY 2016 Exams	Exam (Audit) Coverage Rate %	FY 2016 ASFR	FY 2016 AUR	FY 2016 Math Error	FY 2016 Taxpayer Protection Program	FY 2016 Wage Verification	Combined	Calendar Year 2015 Returns	Combined Coverage %
No adjusted gross income	151,639	6.3%	50,722	12,210	32,606	123,151	60,811	402,349	2,392,293	16.8%
$1 under $25,000	409,246	0.8%		771,410	681,795	1,182,997	313,754	3,157,201	54,347,216	5.8%
$25,000 under $50,000	156,209	0.5%		961,431	483,641	425,734	106,362	2,056,907	33,929,692	6.1%
$50,000 under $75,000	74,014	0.4%		498,649	257,347	184,367	45,817	1,023,476	19,389,871	5.3%
$75,000 under $100,000	60,343	0.5%		317,359	160,690	113,611	32,126	657,091	12,566,667	5.2%
Subtotal - under $100,000	**851,451**	**0.7%**	**50,722**	**2,561,059**	**1,616,079**	**2,029,860**	**558,870**	**7,297,024**	**122,625,739**	**6.0%**
$100,000 under $200,000	99,155	0.6%		570,898	227,269	200,413	76,680	1,112,913	17,258,123	6.4%
$200,000 under $500,000	46,596	0.9%		208,363	53,183	110,113	78,921	451,177	4,985,176	9.1%
$500,000 under $1,000,000	15,258	1.9%		32,577	6,517	32,940	42,058	112,373	801,738	14.0%
$1,000,000 under $5,000,000	15,529	4.2%		12,327	3,000	20,069	37,899	76,985	365,701	21.1%
$5,000,000 under $10,000,000	2,518	9.6%		603	289	1,943	5,049	9,032	26,111	34.6%
$10,000,000 or more	2,849	17.4%		318	297	1,471	3,554	7,470	16,390	45.6%
Total	**1,033,356**	**0.7%**	**50,722**	**3,386,145**	**1,906,634**	**2,396,809**	**803,031**	**9,066,974**	**146,078,978**	**6.2%**

43 Data from AIMS, IRTF, IMF, and Notice Delivery System from CDW. The number of audits represent tax returns for which the IRS closed its audit in FY 2016. The statistics for returns secured through ASFR are from the IRS FY 2016 Collection Activity Report No. 5000-139 (Oct. 3, 2016). Because ASFR returns are not filed by the taxpayer, no AGI is associated with the return; however, these returns actually have a AGI (but unrecorded). Therefore, the combined coverage rate percentage for the no AGI category is somewhat overstated. The number of taxpayers receiving an AUR contact are those who received a CP 2000 or CP 2501 notice from the IRS in FY 2016. The combined coverage rate removes duplicates, so that a tax return is only counted once even if affected by two or more of these compliance programs in FY 2016. The coverage rate is computed by dividing by the number of individual income tax returns filed in each AGI category for Calendar Year 2015.

As these figures show, the IRS's counting of only "real" audits in its public audit rate skews this rate and grossly understates the extent of its taxpayer compliance contacts. For example, in FY 2014, the IRS conducted "real" audits of over 1.2 million tax returns (an audit rate of 0.9 percent). However, the IRS conducted "unreal" audits of almost 8.2 million additional tax returns through its math error, AUR, identity and wage verification, and ASFR programs. When combining the IRS's "unreal" audits with its "real" ones, the coverage rate rose to 6.3 percent.

In FY 2015, the IRS conducted slightly fewer "real" audits than in FY 2014 and its reported audit rate declined to 0.8 percent. However, the IRS conducted over 900,000 more "unreal" audits than the prior year, with the total number of "unreal" audits reaching almost 9.1 million. Therefore, the IRS's combined coverage rate rose to 6.4 percent. In FY 2016, the IRS conducted fewer "real" audits than in FY 2015 and its audit rate slightly dipped to 0.7 percent. But again, the IRS conducted approximately 8.5 million "unreal" audits and the combined coverage rate was still over six percent. Thus, by reporting only its "real" audit activity, the IRS is masking the true extent of its compliance activities, which touch millions more tax returns each year. In addition, if the IRS would report the full extent of its compliance contacts with taxpayers, it might serve as a deterrent for those taxpayers who are noncompliant (or are considering noncompliance) due to the IRS's low "real" audit rate. Finally, a more accurate portrayal of the IRS's compliance activities would provide better information as to the level of resources needed for customer service, because audits, "real" or "unreal", often generate calls to the IRS.

In fiscal year 2014, the IRS conducted "real" audits of over 1.2 million tax returns (an audit rate of 0.9 percent). However, the IRS conducted "unreal" audits of almost 8.2 million additional tax returns through its math error, Automated Underreporter, identity and wage verification, and Automated Substitute for Return programs. When combining the IRS's "unreal" audits with its "real" ones, the coverage rate rose to 6.3 percent.

The IRS Does Not Calculate Its Return on Investment (ROI) for Certain "Unreal" Audit Categories

In addition to underreporting the extent of its actual compliance contacts with taxpayers, the IRS is also not fully transparent in reporting its ROI for all its "unreal" compliance contacts. The IRS provides annual ROI information to Congress regarding its major enforcement efforts as part of the budget process.[44] As expected, the IRS provides ROI information for its "real" audit activities (*i.e.*, correspondence, field, and office examinations).[45] The IRS also reports ROI for the "unreal" audit

44 *See* Department of the Treasury Internal Revenue Service, *Congressional Justification for Appropriations and Annual Performance Report and Plan FY 2018*, http://cfo.fin.irs.gov/SPB/BudgetFormulation/FY_2018/IRS_FY_2018_CJ.pdf. As noted in this report and as a matter of basic definition, return on investment (ROI) is calculated by dividing revenue by cost.

45 IRS response to TAS research request (Oct. 20, 2017); Department of the Treasury Internal Revenue Service, *Congressional Justification for Appropriations and Annual Performance Report and Plan FY 2018* 61, http://cfo.fin.irs.gov/SPB/BudgetFormulation/FY_2018/IRS_FY_2018_CJ.pdf.

categories of ASFR and AUR.[46] However, it does not report ROI for the "unreal" audit categories of math error, identity theft, and wage verification.[47] Therefore, the IRS is not providing a complete and accurate picture of its actual ROI for all compliance contacts with taxpayers.

"Unreal" Audits Have an Adverse Impact on Taxpayer Rights and Circumvent Statutory Protections That Are Present During "Real" Audits

"Unreal" Audits Foreclose Taxpayer Appeal Rights

As noted above, a hallmark of the "real" audit process is an opportunity for taxpayers to generally seek impartial Appeals review of an IRS proposed adjustment prior to receiving a statutory notice of deficiency.[48] Appeals can take a fresh look at a taxpayer's case and consider settling it based on hazards of litigation, something that is not typically considered during an IRS examination.[49]

To a taxpayer, "unreal" audits may look and feel similar to IRS correspondence examinations in that they are conducted by mail, may cover limited issues, and ask a taxpayer to respond or produce documents. However, unlike "real" audits, taxpayers do not have an opportunity to request Appeals review of an "unreal" audit case and have their documentation considered by an impartial third party prior to receiving a statutory notice of deficiency. The impact of no or limited appeal rights in "unreal audits" is as follows:

- The issue of appeal rights is most pronounced in math error cases, where the onus is on the taxpayer to respond to an IRS notice and request an abatement within 60 days.[50] If the taxpayer does not request an abatement within this time frame, he faces an IRS summary assessment and will not receive a statutory notice of deficiency, thereby losing the opportunity to go to Tax Court. The taxpayer's only recourse would be to pay the tax, file a refund claim with the IRS, and litigate in federal refund forums. A taxpayer does not have the opportunity to seek Appeals review in math error cases. However, if the issue in the math error notice arose during a "real"

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46 IRS response to TAS research request (Oct. 20, 2017). ASFR is included in the ROI for the IRS's collection program while AUR ROI is reported as a separate category. Department of the Treasury Internal Revenue Service, *Congressional Justification for Appropriations and Annual Performance Report and Plan FY 2018* 61, http://cfo.fin.irs.gov/SPB/BudgetFormulation/FY_2018/IRS_FY_2018_CJ.pdf. The IRS classifies the revenue from its examination, ASFR, and AUR programs as "revenue protected." IRS response to TAS research request (Oct. 20, 2017).

47 IRS response to TAS research request (Oct. 20, 2017). The IRS classifies the revenue from these three programs as "revenue protected." It should be noted that a case from an "unreal" audit program in which ROI is not calculated (*e.g.*, math error) could figure into an ROI calculation if it turns into a formal or "real" audit.

48 *See* IRS Publication 3498-A, *The Examination Process* (Audits by Mail) (Jan. 2014), http://www.irs.gov/pub/irs-pdf/p3498a.pdf. For times for requesting appeals conferences, see IRM 4.19.13.14.2, *Transfer to Appeals* (Jan. 1, 2016).

49 *See* IRM 8.6.4.1, *Fair and Impartial Settlements per Appeals Mission* (Oct. 26, 2007) (noting "A fair and impartial resolution is one which reflects on an issue-by-issue basis the probable result in event of litigation, or one which reflects mutual concessions for the purpose of settlement based on relative strength of the opposing positions where there is substantial uncertainty of the result in event of litigation.").

50 For a discussion of the National Taxpayer Advocate's concerns regarding the IRS's math error authority, *see* National Taxpayer Advocate 2015 Annual Report to Congress 329-39 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*); National Taxpayer Advocate 2014 Annual Report to Congress, 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*); National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 116-20 (*Math Errors Committed on Individual Tax Returns – A Review of Math Errors Issued on Claimed Dependents*). *See also*, Nina E. Olson, *Why Correctible Error Authority Raises Significant Taxpayer Rights Concerns – Part 1*, National Taxpayer Advocate Blog (Aug. 9, 2017), https://taxpayeradvocate.irs.gov/news/why-correctible-authority-error-raises-significant-taxpayer-rights-concerns-part-1; Nina E. Olson, *Correctible Error Authority Part 2: Why Correctible Error Authority Creates More Problems Than It Resolves*, National Taxpayer Advocate Blog (Aug. 16, 2017), https://taxpayeradvocate.irs.gov/news/correctible-error-authority-part-2-why-correctible-error-authority-creates-more-problems-than-it-resolves; Nathan J. Richman, *Expanding Math Error Authority Could Worsen Two Tax Systems Issues*, Tax Notes Today (July 5, 2017).

The IRS plans, as part of its "Future State" Initiative, to enhance its use of these "unreal" audits, meaning that more and more taxpayers will be subject to these audit-like contacts where taxpayer rights are diminished or curtailed altogether.

audit, the taxpayer would generally receive a 30-day letter offering an opportunity to go to Appeals prior to petitioning the Tax Court.

- In an AUR case, the IRS may have received an erroneous Form W-2 or 1099 that triggered an AUR notice. In a "real" audit, a taxpayer would be able to challenge an erroneous form during the exam or in Appeals prior to the IRS issuing a statutory notice of deficiency. However, in an AUR case, taxpayers' opportunity to request Appeals review prior to the issuance of a statutory notice of deficiency is limited.[51]
- In wage and identity verification program cases, which occur in a pre-refund environment, a taxpayer may have his refund held while the IRS conducts authentication and verification. Although the taxpayer may receive a notice notifying her of the hold, she might not hear anything from the IRS for weeks or months. The taxpayer may not be able to reach an IRS customer service representative (CSR) regarding the issue, and even if she does reach a CSR, the CSR does not have access to the appropriate IRS databases.[52] Although the IRS's position is that taxpayer contacts from these programs are not "real" audits, they are compliance touches that feel like "real" audits to taxpayers and have real-world consequences such as a lack of Appeal rights or refund holds without adequate information as to when the refund may be released.
- A taxpayer in an ASFR case may have third-party documentation that would reduce his tax liability. In the "real" audit context, this information would be considered in the examination and the taxpayer could seek Appeals review of the examination. However, although taxpayers may be able to request IRS reconsideration of an ASFR determination through the audit reconsideration process, it appears that they cannot seek formal Appeals review of an ASFR determination prior to the IRS issuing a statutory notice of deficiency.[53]

The lack of the opportunity to seek Appeals review in the "unreal" audit context directly and profoundly impacts taxpayer rights, including the *right to challenge the IRS's position and be heard*, the *right to appeal an IRS decision in an independent forum*, the *right to finality*, and the *right to a fair and just tax system*. The taxpayer rights issues are particularly glaring because, as shown in Figures 1.4.1, 1.4.2, and 1.4.3 above, "unreal" audits disproportionately impact low and middle-income taxpayers, who are least

51 In an AUR case, if a taxpayer makes a request for Appeals review with less than 365 days left in the period of limitations on assessment then this request will be denied. However, if there are more than 365 days left in the period of limitations on assessment, a taxpayer may request Appeals review an AUR case. However, it appears that taxpayers are not formally informed of this Appeals opportunity but would have to affirmatively make such a request. *See* IRM 4.19.3.21.1.8(1), *Appeals* (Aug. 22, 2017).

52 The National Taxpayer Advocate has raised concerns that the IRS's filters are too broad and unnecessarily identify legitimate returns as potentially fraudulent. *See* National Taxpayer Advocate 2016 Annual Report to Congress, 149-60 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*).

53 *See* IRM 4.13.5, *Exam SFR Reconsiderations* (Dec. 16, 2015). For the National Taxpayer Advocate's concerns about the ASFR program, see National Taxpayer Advocate 2015 Annual Report to Congress 188-95 (Most Serious Problem: *Current Selection Criteria for Cases in the ASFR Program Create Rework and Impose Undue Taxpayer Burden*).

able to afford representation to challenge the IRS. Further, the IRS plans, as part of its "Future State" Initiative, to enhance its use of these "unreal" audits, meaning that more and more taxpayers will be subject to these audit-like contacts where taxpayer rights are diminished or curtailed altogether.[54]

"Unreal" Audits Circumvent Statutory Taxpayer Protections

As noted above, "unreal" audits do not carry the same IRC § 7605(b) protections against repeat examinations as "real" audits. The IRS takes a broad view of taxpayer compliance contacts or other actions that it does not consider to be examinations and inspections.[55] As discussed, explicitly included in these categories are math error, AUR, and ASFR "unreal" audit contacts.[56] Therefore, the IRS can circumvent statutory protections against repeat audits by conducting an "unreal" audit and then subsequently performing a "real" audit.

If the IRS were to change its position set forth in Revenue Procedure 2005-32 to consider certain "unreal" audits to be "real" audits, it would protect taxpayers from multiple reviews of the same return, force the IRS to identify *all* issues relating to that return that require some sort of documentation, and address those issues as early as possible in one proceeding.

The National Taxpayer Advocate understands the need of the IRS to conduct "unreal" audits for limited issues. However, to taxpayers, these "unreal" audits may feel like a "real" IRS correspondence examination. If the IRS were to change its position set forth in Revenue Procedure 2005-32 to consider certain "unreal" audits to be "real" audits, it would protect taxpayers from multiple reviews of the same return, force the IRS to identify *all* issues relating to that return that require some sort of documentation, and address those issues as early as possible in one proceeding.

The National Taxpayer Advocate recognizes that there are limited circumstances (such as a basic math error correction) where an IRS compliance contact does not constitute a "real" audit. For example, in true math error situations where the IRS has identified errors such as switching digits, transferring information incorrectly from one schedule to the other, or forgetting to include a schedule, the IRS should not be required to hold a return for months while it conducts a thorough review before it issues a refund to ensure it did not miss any other errors on the return. However, as a general matter and contrary to the IRS's position, the National Taxpayer Advocate believes that for purposes of IRC § 7602, an audit generally includes both pre-refund and post-refund examinations of returns that,

54 *See, e.g.*, IRS, *Exploring the IRS Future State: Balancing Taxpayer Needs with IRS Budget and Resource Constraints*, adapted from ABA National Institute on Tax Controversy, Las Vegas, NV 16 (Dec. 9, 2016), https://www.irs.gov/pub/newsroom/future_state_aba.pdf (noting that one of the focus areas of SB/SE and W&I is issue identification and filing resolution to "maximize prerefund automatic issue identification and self-correction").

55 Rev. Proc. 2005-32, § 4.03, 2005-23 I.R.B. 1206.

56 *Id. See also* IRS Chief Counsel Memorandum, *ASFR Questions Involving Subsequently Filed Delinquent Original Returns* (Mar. 29, 2005) (providing that IRS preparation of an ASFR is not considered an examination). Identity and wage verification programs are not explicitly mentioned in the revenue procedure and did not exist in the form that they do today at the time that the revenue procedure was released. However, like the other "unreal" audit programs mentioned in the revenue procedure, the IRS would presumably not consider these programs to be examinations and inspections.

…there are "unreal" audit situations that clearly look like an audit, walk like an audit, quack like an audit, and should be considered a "real" audit.

like correspondence examinations, require the taxpayer to provide some level of documentation. This definition recognizes that certain "unreal" audits bear a close resemblance to "real" ones and would afford taxpayers appropriate rights and protections. As illustrated by the ACA example above, there are "unreal" audit situations that clearly look like an audit, walk like an audit, quack like an audit, and should be considered a "real" audit.

CONCLUSION

The IRS conducts the overwhelming majority of its compliance contacts with taxpayers through "unreal" audits, and this practice is expected to only increase with the IRS's "Future State" Initiative.[57] By not including "unreal" audits in its audit rate calculations, the IRS is publicly reporting incomplete and misleading information concerning the extent of its compliance touches with taxpayers and not providing a full picture of its return on investment. More accurate reporting of this information might benefit the IRS in deterring noncompliance and provide useful data regarding resource allocation. In addition, "unreal" audits adversely impact taxpayer Appeal rights and statutory protections that exist for "real" audits. Because of the prevalence of "unreal" audits, the IRS should revisit its classification approach and provide taxpayers with additional opportunities for Appeals review of "unreal" audit cases and increased protections against repeat reviews of cases.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. In collaboration with the National Taxpayer Advocate, conduct a comprehensive review of its audit definition under Revenue Procedure 2005-32 to reflect IRS compliance activity today, and the application of the Taxpayer Bill of Rights.
2. Include "unreal" audits in its audit rate and ROI calculations to properly reflect the actual compliance activity that it conducts.
3. Grant taxpayers the opportunity to seek Appeals review in certain "unreal" audit cases, such as in certain math error and AUR cases where Appeal rights do not already exist.
4. Where practicable, address all issues in a "real" audit rather than conducting an "unreal" audit and then subsequently conducting a "real" audit.

57 *See*, *e.g.*, IRS, *Exploring the IRS Future State: Balancing Taxpayer Needs with IRS Budget and Resource Constraints*, adapted from ABA National Institute on Tax Controversy, Las Vegas, NV 16 (Dec. 9, 2016), https://www.irs.gov/pub/newsroom/future_state_aba.pdf (noting that one of the focus areas of SB/SE and W&I is issue identification and filing resolution to "maximize prerefund automatic issue identification and self-correction").

MSP #5

EXEMPT ORGANIZATIONS: Form 1023-EZ, Adopted to Reduce Form 1023 Processing Times, Increasingly Results in Tax Exempt Status for Unqualified Organizations, While Form 1023 Processing Times Increase

RESPONSIBLE OFFICIAL

Sunita Lough, Commissioner, Tax Exempt and Government Entities Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Finality*
- *The Right to Quality Service*

DEFINITION OF PROBLEM

The IRS introduced Form 1023-EZ, *Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, in July 2014.[2] The form was adopted in large part to reduce inventory backlogs for processing Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*.[3] By mid-2015, the volume of Form 1023-EZ applications exceeded Form 1023 applications.[4] In July 2016, the Form 1023-EZ user fee was reduced from $400 to $275, further fueling the shift from the use of Form 1023 to Form 1023-EZ.[5] Virtually all Form 1023-EZ applications are approved.[6]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Organizations with total assets in excess of $250,000 and those expecting annual gross receipts to exceed $50,000 are not eligible to use Form 1023-EZ. Rev. Proc. 2017-5, § 6.05, 2017-1 I.R.B. 230 (Jan. 3, 2017).

3 *See, e.g.*, National Taxpayer Advocate 2015 Objectives Report to Congress 47 (Area of Focus: *Despite Improvements, TAS Remains Concerned About IRS Treatment of Taxpayers Applying for Exempt Status*).

4 *Form 1023-EZ Update Report* 2, https://www.irs.gov/pub/irs-tege/form_1023ez_update_report_final.pdf, referenced in *Tax Exempt and Government Entities FY 2017 Work Plan* 2 (Sept. 28, 2016, as amended Mar. 8, 2017).

5 Rev. Proc. 2016–32, § 3, 2016-22 I.R.B. 1019 (May 31, 2016). For the third quarter of fiscal year (FY) 2017, of 65,059 Form 1023 and Form 1023-EZ applications, 41,806, or 64 percent, were submitted on Form 1023-EZ. Tax Exempt and Government Entities (TE/GE) FY 2017 Third Qtr. Business Performance Review (BPR) at 16 (Oct. 2017).

6 *See Form 1023-EZ Update Report* 4, https://www.irs.gov/pub/irs-tege/form_1023ez_update_report_final.pdf, referenced in *Tax Exempt and Government Entities FY 2017 Work Plan* 2 (Sept. 28, 2016, as amended Mar. 8, 2017), noting the 94 percent approval rate of Form 1023-EZ applications.

This year's TAS study of a representative sample of approved Form 1023-EZ applicants from 20 states that post articles of incorporation online, similar to the studies TAS carried out in 2015 and 2016, found that 42 percent of approved organizations do not meet the organizational test. When organizations from four additional states that now post articles of incorporation online are included, the rate rises to 46 percent.

As the IRS is aware, it erroneously approves Form 1023-EZ applications:

- A 2015 TAS study of organizations in 20 states that post articles of incorporation online showed that 37 percent of approved entities did not meet the organizational test for qualification as an Internal Revenue Code (IRC) § 501(c)(3) organization;[7]
- A similar study TAS carried out in 2016 found that 26 percent of approved organizations did not meet the organizational test;[8] and
- The IRS's own 2016 analysis showed that Form 1023-EZ applications failed a pre-determination review more than 25 percent of the time.[9]

The problem of erroneous approvals has persisted. This year's TAS study of a representative sample of approved Form 1023-EZ applicants from 20 states that post articles of incorporation online, similar to the studies TAS carried out in 2015 and 2016, found that 42 percent of approved organizations do not meet the organizational test. When organizations from four additional states that now post articles of incorporation online are included, the rate rises to 46 percent. The organizations in this year's sample included four churches, two limited liability corporations, and a school. These organizations are not eligible to file Form 1023-EZ.[10]

The time needed to process Form 1023, which was nearly a year prior to the adoption of Form 1023-EZ, decreased to 96 days in fiscal year (FY) 2016.[11] However, the time needed to process Form 1023 has begun to rise, and was 113 days for FY 2017. Thus, the adoption of Form 1023-EZ may have been only a short-term "solution" to the problem of long processing times for Form 1023 — a solution that comes with a high cost to the integrity of the U.S. tax exempt sector.

7 The study was of a representative sample of corporations that had obtained exempt status on the basis of a Form 1023-EZ and were organized in one of 20 states that make articles of incorporation available online at no cost. National Taxpayer Advocate 2015 Annual Report to Congress vol. 2, 1-31 (*Study of Taxpayers That Obtained Recognition As IRC § 501(c)(3) Organizations on the Basis of Form 1023-EZ*). The "organizational test" generally requires an applicant's organizing document to contain adequate purpose and dissolution clauses. *See* Treas. Reg. §§ 1.501(c)(3)-1(b)(1)(i)(a), (b); 1.501(c)(3)-1(b)(4); 1.501(c)(3)-1(b)(2).

8 National Taxpayer Advocate 2016 Annual Report to Congress 254 (Most Serious Problem: *Form 1023-EZ: The IRS's Reliance on Form 1023-EZ Causes It to Erroneously Grant Internal Revenue Code § 501(c)(3) Status to Unqualified Organizations*).

9 *Id.*

10 See Rev. Proc. 2016-5, § 3.06, 2016-30 I.R.B. 188 (Jan. 4, 2016); Rev. Proc. 2017-5, § 6.05(2), 2017 I.R.B. 230 (Jan. 3, 2017), discussed below.

11 TE/GE response to TAS information request (Aug. 31, 2017).

ANALYSIS OF PROBLEM

Background

In 2015, TAS studied a representative sample of corporations in 20 states that make articles of incorporation viewable online at no cost whose Form 1023-EZ application was approved.[12] A review of the corporations' articles of incorporation revealed that 37 percent did not meet the organizational test.[13] Even though they had received a favorable determination from the IRS granting them tax-exempt status and making contributions to them eligible for a tax deduction by the donor, they did not qualify for IRC § 501(c)(3) status as a matter of law.[14] TAS conducted a similar study in 2016, using the same data collection instrument as for the 2015 study, and concluded that 26 percent of organizations in the representative sample did not meet the organizational test.[15] The results of the 2015 and 2016 studies are statistically valid at the 95 percent confidence level with a margin of error no greater than +/-5 percent.

At the conclusion of the 2015 study, TAS shared with Tax Exempt and Government Entities (TE/GE) the Employer Identification Numbers of taxpayers whose articles of incorporation, according to TAS, did not meet the organizational test. TE/GE did not agree with TAS's conclusions in every case, but conceded that there was an "organizational test non-compliance rate" of 17 percent.[16]

The IRS Continues to Approve Form 1023-EZ Applications at an Unacceptably High Rate

In 2017, TAS again studied a representative sample of corporations in 20 states that make articles of incorporation viewable online at no cost whose Form 1023-EZ application was approved.[17] The four

12 In all 20 states, the articles are viewable at no charge to the public, except for Texas, which charges $1 per search. Because TAS used the IRS's account with the Texas Secretary of State to access the database, TAS did not incur this charge.

13 An applicant seeking to qualify as an organization described in IRC § 501(c)(3) must demonstrate that it meets an "organizational test" and an "operational test." Treas. Reg. § 1.501(c)(3)–1(a)(1). The "organizational test" requires an applicant's "organizing document" to establish that it is "organized and operated exclusively" for one of eight enumerated exempt purposes. IRC § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(b)(1)(i). Treas. Reg. § 1.501(c)(3)-1(b)(4) provides that "[a]n organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed for one or more exempt purposes…" and notes "an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders."

14 National Taxpayer Advocate 2015 Annual Report to Congress vol. 2, 1-31 (*Study of Taxpayers That Obtained Recognition As IRC § 501(c)(3) Organizations on the Basis of Form 1023-EZ*).

15 National Taxpayer Advocate 2016 Annual Report to Congress 256-57 (Most Serious Problem: *Form 1023-EZ: The IRS's Reliance on Form 1023-EZ Causes It to Erroneously Grant Internal Revenue Code § 501(c)(3) Status to Unqualified Organizations*).

16 *Id*. at 256.

17 This year's study considered Form 1023-EZ applications approved between July 1, 2016 and June 30, 2017. Organizations were in the following 20 states: Alaska, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, and Texas. As in the previous studies, our findings are dependent upon the State posting the information accurately on the website.

states in the 2015 and 2016 studies that have adopted the *cy pres* doctrine remained the same in the 2017 study.[18]

TE/GE now releases to the public a data file that includes information for approved Form 1023-EZ applications beginning in mid-2014, when Form 1023-EZ was introduced.[19] Out of these organizations, TAS Research identified a representative, random sample of 337 organizations from the same 20 states as in the 2015 and 2016 random samples for further analysis. Like the results of the 2015 and 2016 studies, the results of the 2017 study are statistically valid at the 95 percent confidence level with a margin of error no greater than +/-5 percent.[20]

Out of the 337 organizations in the sample, 143 organizations, or 42 percent, do not meet the organizational test and therefore do not qualify as IRC § 501(c)(3) organizations as a matter of law. Figure 1.5.1 shows the rate at which TE/GE's Exempt Organization (EO) function erroneously approved Form 1023-EZ applications over the past three years for organizations in the 20 states that were included in each TAS study. It also shows that when organizations from four additional states are included, as described below, the rate rises to 46 percent.[21]

In addition to selecting a valid sample of 337 organizations from the 20 states that were included in the 2015 and 2016 studies, this year we expanded the sample to include 58 representative cases from four more states that now make articles of incorporation available online at no charge.[22] Of the combined 395 organizations, 182, or 46 percent, did not meet the organizational test. This is due to the fact that two-thirds of organizations in the four new states (39 out of 58) failed to meet the test. One of the 58 organizations was a church and therefore not eligible to use Form 1023-EZ. Further research is needed to ascertain the reason for the higher rate of erroneous approvals for organizations from the four additional states, compared to the original 20 states.

18 In states that have adopted the *cy pres* doctrine, a nonprofit corporation's articles need not include a specific dissolution provision because by operation of state law the organization's assets would be distributed upon dissolution for one or more exempt purposes, or to the federal government, or to a state or local government, for a public purpose. As in the 2015 and 2016 studies, the states in the 2017 study that have adopted the *cy pres* doctrine are Massachusetts, Missouri, Ohio, and Texas. However, we reviewed dissolution clauses of all the organizations in our sample, because if the creating document contains a dissolution provision that is defective, state law or court action would not cure the defect. *See* Elizabeth Ardoin, *2004 EO CPE Text Organizational Test – IRC 501(c)(3)* 12, Q.11, https://www.irs.gov/pub/irs-tege/eotopicd04.pdf.

19 The data file is available at https://www.irs.gov/charities-non-profits/exempt-organizations-form-1023ez-approvals. The data is based on information provided by applicants on Forms 1023-EZ that were approved by the IRS.

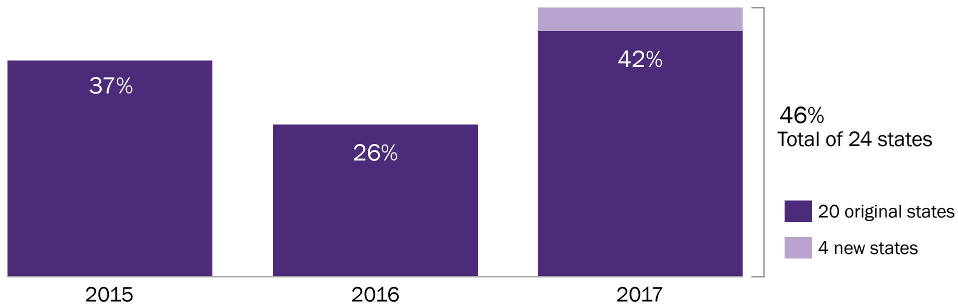
20 Study findings can be projected to the population of 20,106 organizations from the original 20 states in our study.

21 The data reflects the result of the 2015-2017 TAS studies. The Form 1023-EZ applications of organizations in the 2015 TAS study were approved between July 1, 2014 and March 27, 2015. The Form 1023-EZ applications of organizations in the 2016 study were approved between July 1, 2015 and June 30, 2016. The Form 1023-EZ applications of organizations in the 2017 study were approved between July 1, 2016 and June 30, 2017.

22 The additional four states are Arizona, Georgia, Virginia, and Vermont. None of these states have adopted the doctrine of *cy pres*. *See* Rev. Proc. 82–2, 1982–1 C.B. 367.

FIGURE 1.5.1

Erroneous Approval Rate Found in Review of Form 1023-EZ Applications



Another cause for concern is the absence of some organizations' articles of incorporation on databases of states that post articles of incorporation online. Of organizations in the same 20 states as in the 2015 and 2016 studies, the initial sample size was 350. However, articles of incorporation for 13 organizations in the sample (four percent) were not found on the official site for the state in which, according to the application, the organization was formed. We excluded these organizations from our sample, resulting in a sample size of 337. Of organizations in the additional four states that made articles of incorporation available online at no cost in 2017, the initial sample size was 60. However, articles of incorporation for two of the organizations, or three percent, were not found on the official site for the state in which, according to the application, the organization was formed, and we excluded these organizations from this sample, resulting in a sample size of 58. The lack of availability of articles of incorporation raises concerns about the very existence of these entities and about the motives of the applicants who attested, under penalty of perjury, that articles of incorporation had been filed.

An example of an inadequate purpose clause we encountered in this year's study was one organization's statement, in its entirety: "Establishment and operation of a farmer's market." The IRS has opined that a farmer's market whose primary purpose and activity was the conduct of a regular business of a kind ordinarily carried on for profit did not qualify for exempt status under IRC § 501(c)(3).[23] A different organization in the sample has no purpose clause at all, and its entire dissolution clause provides: "No assets will be acquired during the course of business. Plan to apply for exemption status with the IRS." Yet another organization's dissolution clause provides: "The assets of this non-profit will be distributed evenly amongst the families of the team [team name]. The team will have authority to donate said assets to another non-profit organization within the [named city] Metro area." Still another organization, on the date it filed its Form 1023-EZ as well as on the date it was given a favorable determination ruling, had been involuntarily dissolved by the state in which it was incorporated. It was still in that status on December 1, 2017, when we last consulted the state website. None of these organizations are described in IRC § 501(c)(3). All of them are holding themselves out as having IRC § 501(c)(3) status, supported by determination letters from the IRS.

23 *See* Non Docketed Service Advice Review 19990219, 1999 WL 33949267 (July 30, 2017). *See also* the IRS letter ruling denying IRC § 501(c)(3) status to an organization operated for the purpose of facilitating sales for the benefit of vendors at its farmers' market, reported at 2017 TNT 227-22 (Nov. 28, 2017). An organizing document that expressly empowers the organization to engage in activities which are not in furtherance of one or more exempt purposes (other than as an insubstantial part of its activities) does not meet the organizational test. Treas. Reg. § 1.501(c)(3)–1(b)(1)(i)(b).

Some organizations in our sample would not likely qualify for exempt status even if they met the organizational test.[24] For example, one organization's website solicits donations for research about a specific illness that affects the organizer's child.[25] The only indication that contributions could be used other than for the benefit of the organizer's child is the statement that other named, well-known IRC § 501(c)(3) organizations "will benefit from all proceeds raised." Thus, serious questions of inurement are presented by this organization's website.

Evidently interested in learning more about its use of Form 1023-EZ, TE/GE plans to engage an independent consultant, MITRE, to "conduct an independent assessment of the efficacy of Form 1023-EZ."[26] The focus of the MITRE study is "measuring and evaluating EO's current pre- and post-determination sampling practices and to identify applications in need of closer inspection prior to making a determination."[27] TE/GE intends to measure the efficacy of Form 1023-EZ sampling practices primarily by comparing Form 1023-EZ determinations and subsequent compliance by Form 1023-EZ filers with corresponding data for Form 1023 filers.[28] Investigating how to improve procedures for reviewing *every* application for IRC § 501(c)(3) status — before conferring that status — does not appear to be the primary purpose of the project.

The Adoption of Form 1023-EZ Alleviated Form 1023 Processing Backlogs, But the Improvement May Be Temporary

Prior to the introduction of Form 1023-EZ, the increased number of applications for exempt status and the decrease in the number of EO employees who handle them was a recurring theme in the National Taxpayer Advocate's Annual Reports to Congress.[29] By the first half of FY 2014, average cycle time (the number of days that elapse between the date the application was received and the date it was closed) for all approved applications was 315 days.[30] TE/GE's announced goal was to process all applications

24 As noted above, to qualify for IRC § 501(c)(3) status, an organization must also satisfy the "operational test" which is met if: the organization engages primarily in activities which accomplish one or more of the eight exempt purposes specified in IRC § 501(c)(3); no more than an insubstantial part of its activities is not in furtherance of an exempt purpose; and it is operated to further public rather than private interests. *See* Treas. Reg.§ 1.501(c)(3)-1(c)(1), (d)(1)(ii). We did not attempt to develop a conclusion about whether organizations in our sample met the operational test. However, an EO Determinations employee reviewing a Form 1023-EZ application would consult relevant information such as the organization's website in making a determination as to exempt status. *See* Internal Revenue Manual 7.20.9.4.6, *Pre-determination Review and Tax Examiner Referral Cases (Specialist)* (June 27, 2016).

25 The organization's articles of incorporation do not contain any purpose clause and thus the organization does not meet the requirements for IRC § 501(c)(3) status on that basis alone.

26 TE/GE FY 2017 Third Qtr. BPR 5 (Oct. 2017).

27 TE/GE response to TAS fact check request (Dec. 8, 2017).

28 TE/GE explains, "The scope of the work will include quantifying the accuracy and precision of current 1023-EZ sampling practices, comparing the 1023-EZ data with the 1023 data to look for variances or other anomalies. MITRE will review our pre-determination sampling methodology and compare determination results, subsequent Form 990 filings, and audit results for entities using the 1023-EZ against those of organizations that submitted full 1023 filings before the EZ was created. MITRE will also stratify the 1023-EZ population to determine whether the sampling strategy can be made more efficient. It will also investigate models for identifying entities that are potentially non-compliant."

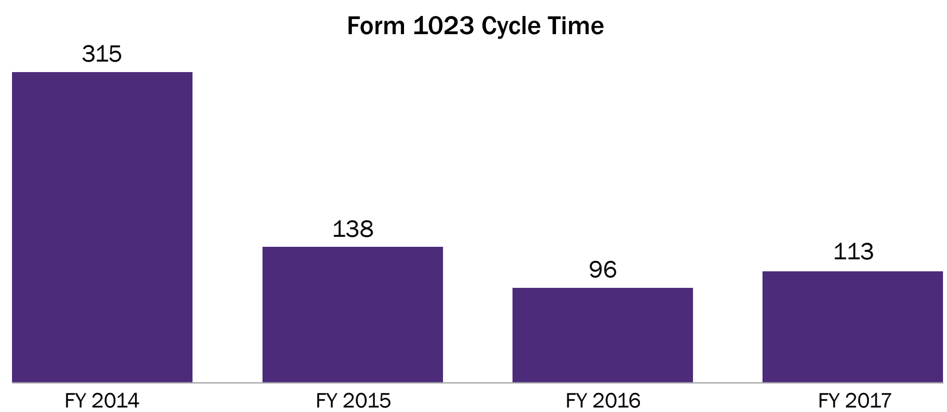
29 National Taxpayer Advocate 2013 Annual Report to Congress 165 (Most Serious Problem: *The IRS Continues to Struggle with Revocation Processes and Erroneous Revocations of Exempt Status*); National Taxpayer Advocate 2012 Annual Report to Congress 192 (Most Serious Problem: *Overextended IRS Resources and IRS Errors in the Automatic Revocation and Reinstatement Process Are Burdening Tax-Exempt Organizations*); National Taxpayer Advocate 2011 Annual Report to Congress 442 (Most Serious Problem: *The IRS Makes Reinstatement of an Organization's Exempt Status Following Revocation Unnecessarily Burdensome);* National Taxpayer Advocate 2007 Annual Report to Congress 210 (Most Serious Problem: *Determination Letter Process*); National Taxpayer Advocate 2004 Annual Report to Congress 193, 203 (Most Serious Problem: *Application and Filing Burdens on Small Tax-Exempt Organizations*).

30 National Taxpayer Advocate 2015 Objectives Report to Congress 47-48 (Area of Focus: *Despite Improvements, TAS Remains Concerned About IRS Treatment of Taxpayers Applying for Exempt Status*). Virtually all applications were for exempt status under IRC § 501(c)(3) rather than under another subsection such as (c)(4).

within six months.[31] By the end of FY 2015, Form 1023 cycle time had been reduced to 138 days. At the beginning of FY 2016, TE/GE realigned more than 20 percent of the EO Determinations specialists who evaluated Form 1023 applications to the EO Examination function.[32] By the end of FY 2016, Form 1023 cycle time was 96 days but for FY 2017 increased to 113 days.[33]

Figure 1.5.2 shows the average cycle time for Form 1023 applications in recent years.

FIGURE 1.5.2



Cycle time for Form 1023-EZ has always hovered at around 14 days.[34] This cycle time is achievable because it takes only a little more than 30 minutes of direct time on average to evaluate a Form 1023-EZ application.[35] Thirty minutes or so may be sufficient to ascertain whether an applicant checked the appropriate boxes on Form 1023-EZ, signed the form, and paid the user fee, but it is difficult to

31 Jeff Carlson, *IRS Making Progress in Improving 501(c)(3) Application Process, Says Koskinen*, CCH News (Apr. 8, 2014), reporting on Commissioner Koskinen's testimony before the House Appropriations Committee Subcommittee on Financial Services and General Government on the FY 2015 IRS budget at http://tst-news.cchgroup.com.php56-7.ord1-1.websitetestlink.com/2014/04/08/irs-making-progress-in-improving-501c3-application-process-says-koskinen/.

32 TE/GE response to TAS information request (Aug. 31, 2017), noting that in FY 2015, there were 134 full-time equivalent EO Determinations specialists, who evaluate applications submitted on Form 1023; Form 1024, *Application for Recognition of Expemption Under Section 501(a) or for Determination Under Section 120*; Form 8940, *Request for Miscellaneous Determination*; and Form 1028, *Application for Recognition of Exemption*; and other letter applications (other than Form 1023-EZ). In FY 2016, TE/GE realigned 31 one full-time equivalent EO Determinations specialists to EO Exam. As of the third quarter of FY 2017, there were 75 full-time Determinations specialists evaluating these applications.

33 TE/GE response to TAS information request (Oct. 20, 2017). The response also noted that EO Determinations "has no plans to reassign any FTEs [full-time equivalent employees] to other areas of EO or other TE/GE functions. However, EO Determinations does anticipate a reduction of case working revenue agents within the Determinations' function due to attrition (retirements, competitive selections for other positions, etc.)." The response also notes that the EO Rulings and Agreements function "plans to solicit 20 Grade 11 revenue agents from EO Examinations to assist with processing EO Determinations cases for a NTE [not to exceed] one year period."

34 TE/GE response to TAS information request (Oct. 20, 2017). The number of full-time equivalent employees who process Form 1023-EZ applications has been stable, at approximately 29. TE/GE responses to TAS information request (Aug. 31, 2017 and Oct. 20, 2017).

35 TE/GE FY 2017 Third Qtr. BPR, at 16 (Oct. 2017), reporting that determination hours per case for Form 1023-EZ applications averaged 36 minutes in FY 2017. In contrast, it took 2.6 hours on average to evaluate a Form 1023 application in FY 2017. When a Form 1023-EZ application is selected for review as part of TE/GE's pre-determination process, the review takes an average of 2.6 hours. TE/GE response to TAS fact check request (Dec. 8, 2017), noting that this estimate includes only time directly attributable to the case by the Revenue Agent. As of June 30, 2017, audits of Form 1023-EZ filers were taking on average 14.6 hours. TE/GE FY 2017 Third Qtr. BPR, at 30 (Oct. 2017) (describing audits of cases assigned project code 8004).

By the end of FY 2015, Form 1023 cycle time, which had been 315 days in the first half of 2014, had been reduced to 138 days and by the end of FY 2016, cycle time was 96 days; the FY 2017 cycle time for Form 1023 increased to 113 days.

understand how an actual determination as to exempt status can be made in that amount of time. The National Taxpayer Advocate has always maintained that Form 1023-EZ should solicit additional information sufficient to allow the IRS to make a reasoned determination and at the same time drive compliant behavior when organizations are forming.[36]

In response to the National Taxpayer Advocate's September 26, 2016 Taxpayer Advocate Directive (TAD), the IRS agreed to revise Form 1023-EZ to require applicants to submit a brief narrative statement of their actual or planned activities.[37] This welcomed change may reduce the rate at which TE/GE erroneously approves Form 1023-EZ applications. The Deputy Commissioner for Services and Enforcement rescinded that portion of the TAD in which the National Taxpayer Advocate ordered the IRS to also require submission of organizing documents (unless the documents are already retrievable from a state online database) and summary financial information such as past and projected revenues and expenses.

CONCLUSION

As the National Taxpayer Advocate has always maintained, Form 1023-EZ does not elicit enough information from applicants to allow the IRS to determine whether they qualify for IRC § 501(c)(3) status, yet approval of a Form1023-EZ application is virtually guaranteed. Consequently, the IRS continues to erroneously approve Form 1023-EZ applications at an unacceptably high rate. The damage to the integrity of the tax-exempt sector caused by recognizing organizations as exempt under IRC § 501(c)(3) when they do not meet the basic requirements for that status outweighs the benefit of reduced Form 1023 cycle time. Moreover, because Form 1023 cycle time has now begun to rise, any such benefit may have been temporary.

36 *See, e.g.*, National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 35, 64 (Area of Focus: *Despite Improvements, TAS Remains Concerned About IRS Treatment of Taxpayers Applying for Exempt Status*) referencing the desirability of requiring from applicants seeking IRC § 501(c)(3) status: (1) the articles of incorporation (2) the bylaws (3) a narrative statement and (4) attestations of core requirements such as having a conflicts of interest policy — all of which drive better practices and behavior at the outset of the entity's existence.

37 Memorandum from the Deputy Commissioner for Services and Enforcement to the National Taxpayer Advocate (Oct. 25, 2016) sustaining in part National Taxpayer Advocate TAD 2016-1, *Revise Form 1023-EZ to Require Additional Information from Applicants, Require Review of Such Additional Information Before Making a Determination, and Explain Your Conclusions With Respect to Each of 149 Organizations Identified by TAS* (Oct. 5, 2016). *See also* T.D. 9819, 82 Fed. Reg. 29730-01 (June 30, 2017), final Treasury regulations that permit the IRS to adopt Form 1023-EZ and note in the preamble that the regulations are sufficiently flexible to allow revision of Form 1023-EZ to require filers to submit information regarding their proposed activities.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Require Form 1023-EZ applicants, other than corporations in states that make articles of incorporation publicly available online at no cost, to submit their organizing documents.
2. Require Form 1023-EZ applicants to submit summary financial information such as past and projected revenues and expenses.
3. Revise Form 1023-EZ to include a question about whether the organization has a conflicts of interest policy.
4. Accept electronically Form 1023-EZ supporting documents, such as articles of incorporation.
5. Make a determination about qualification as an IRC § 501(c)(3) organization only after reviewing a Form 1023-EZ applicant's narrative statement of actual or planned activities, organizing documents, and any other supporting documents.
6. Make the primary purpose of the contract with MITRE to investigate how to improve procedures for reviewing every application for IRC § 501(c)(3) status, before conferring that status.

MSP #6

PASSPORT DENIAL AND REVOCATION: The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights

RESPONSIBLE OFFICIALS:

Mary Beth Murphy, Commissioner, Small Business/Self Employed Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

In 2015, Congress passed the Fixing America's Surface Transportation (FAST) Act, which requires the Department of State to deny an individual's passport application and allows the Department of State to revoke or limit an individual's passport if the IRS has certified the individual as having a seriously delinquent tax debt.[2] Although the IRS does not plan to implement the passport certification program until early 2018, the proposed IRS procedures and policies raise concerns about how the program will harm taxpayers and infringe upon their rights. Currently, an estimated 270,000 taxpayers meet the criteria for a seriously delinquent tax debt and do not meet one of the statutory exceptions or discretionary exclusions to certification.[3] The IRS expects to certify 2,700 taxpayers when it initially implements the program in early 2018, and continue with certifications throughout the year in phases based on taxpayer response rates.[4] At this time, the IRS will not be sending recommendations or requests to the Department of State to revoke taxpayers' passports; although, the Department of State will revoke passports in accordance with its longstanding procedures.[5] Nonetheless, taxpayers will be harmed when their passport applications are denied. The National Taxpayer Advocate is concerned that:

- The IRS's failure to provide adequate notice prior to certifying a taxpayer's seriously delinquent tax debt infringes on taxpayer rights and constitutional due process protections;
- The IRS's refusal to exclude taxpayers who already have open TAS cases or who are pursuing other administrative rights frustrates the purpose of the law and jeopardizes taxpayer rights;
- Taxpayers may be unable to resolve their tax debts and have their certifications reversed within the 90-day holding period for passport applications; and

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Pub. L. No. 114-94, Div. C, Title XXXII, § 32101, 129 Stat. 1312, 1729-32 (2015) (codified as IRC § 7345) (hereinafter FAST Act).

3 These numbers reflect the number of taxpayers who meet certification criteria and do not qualify for an exception as of October 2017. Small Business/Self Employed Division (SB/SE) response to TAS's information request (Oct. 18, 2017).

4 SB/SE response to TAS information request (Oct. 18, 2017).

5 SB/SE response to TAS Fact Check (Dec. 18, 2017).

- Notices to taxpayers leave out important information related to taxpayer rights.

ANALYSIS OF PROBLEM

Background

Prior to passing the FAST Act, Congress had introduced multiple bills to deny passport applications or revoke passports for taxpayers with a seriously delinquent tax debt.[6] Congress was concerned about challenges the IRS faced in collecting unpaid tax debt and the significant amount of unpaid federal tax debt owed by passport holders, and it believed it could increase tax compliance by linking passport issuance with paying a tax debt.[7] Under the FAST Act, a seriously delinquent tax debt is an "unpaid, legally enforceable federal tax liability of an individual," which:

- Has been assessed;
- Is greater than $50,000 (adjusted for inflation);[8] and
- Meets either of the following criteria: (1) a notice of lien has been filed under Internal Revenue Code (IRC) § 6323 and the Collection Due Process (CDP) hearing rights under IRC § 6320 have been exhausted or lapsed; or (2) a levy has been made under IRC § 6331.[9]

There are statutory exceptions, which include a debt:

- That is being timely paid through an installment agreement (IA) or offer in compromise (OIC);
- For which collection is suspended because the taxpayer requested a CDP hearing or a CDP hearing is pending; or
- For which collection is suspended because the taxpayer has requested relief from joint liability (known as innocent spouse relief).[10]

In addition, the IRS has created discretionary exclusions in its Internal Revenue Manual (IRM) for debts that:

- Are determined to be in currently not collectible (CNC) status due to hardship;[11]

6 *See e.g.*, S. 2132, 112th Cong. § 305 (2012); H.R. 3146, 113th Cong. § 4 (2013); S. 1269, 114th Cong. § 1001 (2015).

7 S. Rep. No. 114-45, at 57 (2015). In 2011, the Government Accountability Office found that during fiscal year (FY) 2008, over 224,000 passports (over one percent of the 16 million passports issued during FY 2008) were issued to persons owing over $5.8 billion in unpaid federal taxes. Government Accountability Office (GAO), GAO 11-272, *Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes* (Mar. 2011), http://www.gao.gov/new.items/d11272.pdf.

8 At the time of drafting this discussion, TAS was not aware of any inflation adjustment to the $50,000 amount. On January 8, 2017, the IRS published its Internal Revenue Manual (IRM) related to the passport program, which announced that this amount would be increased to $51,000 as of January 1, 2018. IRM 5.19.1.5.19.2, *Seriously Delinquent Tax Debt* (Jan. 8, 2018). Because of the late timing of this announcement, this discussion and the data cited within use $50,000 as the relevant amount.

9 FAST Act § 32101(a) (codified as IRC § 7345(b), 32101(f)). Generally, the IRS must notify the taxpayer of the right to a collection due process (CDP) hearing 30 days prior to issuing the first levy for the taxable period. IRC § 6330(a)(1). However, the Code provides exceptions, such as for levies where the collection of tax is in jeopardy or levies of a taxpayer's state income tax refund. In these cases, the CDP hearing shall occur within a reasonable time after the levy. IRC § 6330(f).

10 FAST Act § 32101(a) (codified as IRC § 7345(b)(2)).

11 Currently not collectible (CNC) status removes taxpayer accounts from active collection inventory. IRM 5.19.17.2, *Currently not Collectible (CNC) Procedures* (Oct. 5, 2017). The IRS places taxpayer accounts into CNC Hardship status when "collection of the liability would create a hardship for taxpayers by leaving them unable to meet necessary living expenses." IRM 5.19.1.1.6.5.2, *Hardship CNC Closing Codes* (Mar. 1, 2016).

- Result from identity theft;
- Belong to a taxpayer in a disaster zone;
- Belong to taxpayer in bankruptcy;
- Belong to a deceased taxpayer;
- Are included in a pending OIC or pending IA; and
- For which there is a pending claim and the resulting adjustment is expected to result in no balance due.[12]

The law delays certification for taxpayers in a combat zone[13] and provides an exception allowing the Department of State to issue a passport in emergency circumstances or for humanitarian reasons.[14] If a certification is found to be erroneous, the debt is fully satisfied, it becomes legally unenforceable, or it ceases to be a seriously delinquent tax debt due to a statutory exception, the IRS must reverse the certification and notify the Department of State and the taxpayer.[15] The IRS will systemically send certifications and decertifications to the Department of State on a weekly basis, with decertifications required by law to generally be sent within 30 days of a taxpayer meeting the criteria.[16]

The IRS's failure to provide adequate notice prior to certifying the taxpayer's seriously delinquent tax debt infringes on taxpayer rights and constitutional due process protections

Under the statute, the IRS must notify the taxpayer of a certification or decertification around the same time as it transmits it to the Department of State.[17] The IRS also must include in its CDP hearing notices, information about the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports.[18] The IRS's failure to provide any additional notice beyond these requirements impairs the taxpayer's *right to be informed* and *right to challenge the IRS's position and be heard* because taxpayers may not learn the IRS has certified their tax debts until after certification.

The IRS does not send a stand-alone notice prior to certification and there is no holding period — once the IRS sends the certification notice to the taxpayer, passport denial can occur at any time because the certification is sent to the Department of State at that same time. Thus, the IRS does not provide a meaningful opportunity to contest the certification before it occurs.

12 IRM 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Jan. 8, 2018).

13 FAST Act § 32101(d) (codified at IRC § 7508(a)).

14 FAST Act § 32101(e)(1)(B).

15 FAST Act § 32101(a) (codified at IRC § 7345(c)).

16 FAST Act § 32101(a) (codified at IRC § 7345(c)(2)). An erroneous certification requires the decertification notice to be sent to the Department of State as soon as practicable. *Id. See* IRM 5.19.1.5.19.8, *Certification Process* (Jan. 8, 2018); IRM 5.19.1.5.19.9, *Reversal of Certification* (Jan. 8, 2018).

17 The statute requires "contemporaneous notice." The notice must explain the taxpayer's right to bring suit in U.S. Tax Court or a U.S. district court to determine whether the certification was erroneous or whether the IRS has failed to reverse it. FAST Act § 32101(a) (codified as IRC § 7435(d)).

18 FAST Act § 32101(b) (codified as IRC §§ 6320(a)(3)(E), 6331(d)(4)(E)).

Example of How Passport Certification Process Will Work

1 Taxpayer's liability exceeding $50,000 is assessed

↓

2 The IRS notifies the taxpayer of collection action through a Notice of Federal Tax Lien or a Notice of Intent to Levy. This Notice provides Collection Due Process (CDP) hearing rights and explains that the IRS may certify the tax debt to the Department of State if the taxpayer does not act.

↓

3 Taxpayer does not request CDP rights or the CDP hearing has been completed. If a Notice of Intent to Levy was issued, the IRS proceeds to make the levy.

↓

4 IRS certifies the taxpayer's seriously delinquent tax debt. The IRS contemporaneously:

Sends notice to taxpayer of the certification and Transmits the certification to the Department of State

↓

5 Taxpayer applies for a new passport and the Department of State notifies the taxpayer that it will hold the application open for 90 days while the taxpayer resolves the tax liability.

↓

6 Taxpayer contacts the IRS to enter into an installment agreement (IA). Due to difficulty reaching the IRS, compiling financial information, and providing the information required (including filing past returns), the IA is not considered "pending" until almost three months have passed.

↓

7 The IRS places a transaction code on the taxpayer's account, reflecting the pending IA, which meets a decertification criterion.

↓

8 The Department of State rejects the taxpayer's passport because 90 days have elapsed and its systems do not reflect the taxpayer has been decertified.

↓

9 Within 30 days of the IA being accepted for processing, the decertification is transmitted to the Department of State as part of a weekly batch.

↓

10 Within 45 days of the taxpayer's IA being accepted for processing, the Department of State processes the decertification and updates its system.

↓

11 The taxpayer now must pay $135 to reapply for the passport and wait the routine 4-6 weeks for the application to be processed.

This lack of notice may violate the Due Process Clause of the Constitution, which protects the right to travel internationally.[19] In the context of passport denial for unpaid child support,[20] the Court of Appeals for the Second Circuit has found that statute meets due process requirements because it provides for notice and an opportunity to be heard prior to the state agency certifying the unpaid child support to the federal government.[21] In the unpaid child support cases, a Pre-offset Notice (PON) must be issued for all new cases within the U.S. Passport Denial Program. There is then a 30-day holding period after the notice to the taxpayer and before the Department of State is notified and passport denial can occur. The primary focus of the PON is on the pending consequences of not resolving the unpaid amount, including passport denial.[22] In contrast, the IRS does not send a stand-alone notice prior to certification and there is no holding period — once the IRS sends the certification notice to the taxpayer, passport denial can occur at any time because the certification is sent to the Department of State at that same time.[23] Thus, the IRS does not provide a meaningful opportunity to contest the certification before it occurs.

The passport language in the CDP notice may not constitute effective notice because it is buried within four or more pages of other information and is delivered at a time when the taxpayer is focusing on resolution of the debt and claiming CDP rights.[24] Additionally, over three-quarters of the individual taxpayers potentially eligible to be certified did not receive the benefit of the passport language in the CDP notice at all because they received their CDP notices prior to the IRS including it.[25] Despite TAS's request, the IRS has no intention of giving these taxpayers additional, advanced notice. Finally, the IRS's approach to providing notice ignores behavioral research[26] and creates extra work for the IRS, who must process the certification and then reverse it when the taxpayer resolves the liability or meets an exclusion criterion. A stand-alone notice, focussing specifically on the harm that will occur, issued 30 days prior to certification (90 days for taxpayers outside the United States) would protect taxpayer rights and motivate taxpayers to resolve their tax debts quickly, which is the purpose of the statute.

19 *See e.g.*, *Kent v. Dulles*, 357 U.S. 116 (1958). Article 13 of the Universal Declaration of Human Rights states "Everyone has the right to leave any country, including his own, and to return to his country." United Nations, Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 (1948).

20 The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 requires the Department of State to deny a passport application and allows it to revoke or limit a passport if the person owes delinquent child support exceeding $5,000 (subsequently lowered to $2,500). Pub. L. No. 104-193, 110 Stat. 2252 (codified as 42 U.S.C. § 652(k)(1)).

21 *Weinstein v. Albright*, 261 F.3d 127 (2nd Cir. 2001), *aff'g* 2000 WL 1154310 (S.D.NY 2000).

22 *See* Federal Parent Locator Service, *Federal Offset Program Technical Guide*, Appendix I-17 (Dec. 10, 2012), https://www.acf.hhs.gov/sites/default/files/ocse/fop_user_guide.pdf.

23 As discussed below, once a certified taxpayer applies for a passport, the Department of State will hold the passport application open for a "holding period" of 90 days. However, this is different from the holding period in the child support context because the taxpayer is unable to receive a new or renewed passport during this time, at least until the tax debt is resolved. The holding period in the child support context provides time for the person to resolve the debt beforehand and if the person does so, there is never a period when the person cannot receive a new or renewed passport.

24 The CDP letter spans at least four pages and includes other information such as how to request a CDP hearing, other actions the IRS may take (such as a lien or levy), and interest and penalty charges. IRS, Letter 1058, *Notice of Intent to Levy and Notice of Your Right to a Hearing* (Jan. 2017).

25 These taxpayers owe over $50,000 in unpaid assessments and received a CDP notice by December 31, 2016, which was not undeliverable, unclaimed, or refused, and did not receive a subsequent CDP notice in 2017. Some of the total number of taxpayers with tax debts of more than $50,000 will meet statutory or discretionary exclusion criteria.

26 By applying behavioral insights, such as the concept of salience, the IRS could increase taxpayers' attention to the passport notices by ensuring the communications are novel (not buried within another notice) and are sent at the time when they are relevant to the taxpayer — shortly before the certification will occur and the taxpayer can still act to avoid certification. *See* National Taxpayer Advocate 2016 Annual Report to Congress 50-63 (Most Serious Problem: *Voluntary Compliance: The IRS Is Overly Focused on So-Called "Enforcement" Revenue and Productivity, and Does Not Make Sufficient Use of Behavioral Research Insights to Increase Voluntary Tax Compliance*).

Over three-quarters of the individual taxpayers potentially eligible to be certified did not receive the benefit of the passport language in the Collection Due Process (CDP) notice at all because they received their CDP notices prior to the IRS including it.

The IRS's refusal to exclude taxpayers who are experiencing significant hardship and have already open TAS cases, or who are exercising administrative rights frustrates the purpose of the law and jeopardizes taxpayer rights

The passport certification program was intended to assist the IRS with difficult to collect, unpaid tax debts.[27] For taxpayers who are actively working with the IRS to resolve their debts, it is unclear what purpose is served by certifying their tax debts. In the context of private debt collection, the IRS has agreed to not refer open TAS cases to private collection agencies.[28] The National Taxpayer Advocate has repeatedly raised to the then-Commissioner of Internal Revenue and the Commissioner of the Small Business/Self Employed Operating Division the need to exclude already open TAS cases from the inventory of taxpayers whose debts the IRS will certify as seriously delinquent. The IRS has significant discretion to provide certification exclusions.[29] Taxpayers are excluded from certification if they receive CNC hardship status, but taxpayers with similar circumstances who come to TAS because they experience a significant hardship and have been unable to obtain a collection alternative or otherwise resolve their debt on their own would be certified.[30]

Despite this disparate treatment among similarly situated taxpayers, the IRS stated one of its reasons for not excluding TAS cases was to avoid disparate treatment among taxpayers with seriously delinquent tax debts.[31] The IRS also stated that excluding a taxpayer who did not meet an exception would defeat the purpose of the statute. This response is ludicrous, given the IRS itself has created non-statutory exceptions that somehow have not "defeated the purpose of the statute."[32] Moreover, TAS accepts cases only from taxpayers who are suffering or are about to suffer a significant hardship, as defined in the Internal Revenue Code and Treasury Regulations,[33] and only keeps cases open if taxpayers are working to achieve a resolution.[34] Once a case is closed, taxpayers would be certified if they did not meet an exclusion. In fiscal year 2017, TAS closed approximately 2,700 balance due cases where the taxpayer owed more than $50,000 and received full or partial relief.

27 "The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued… The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one's tax debts." S. Rep. No. 114-45, at 57 (2015).

28 National Taxpayer Advocate FY 2018 Objectives Report to Congress, vol. 2, 97.

29 The statute states: "If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt…" FAST Act § 32101(a) (codified as IRC § 7345(a)).

30 IRM 5.16.1.2.9, *Hardship* (Aug. 25, 2014) provides a definition of "hardship" for CNC status. Treas. Reg. § 301.7811(a)(4)(2) provides the definition of a "significant hardship" for the purposes of issuing a Taxpayer Assistance Order (TAO).

31 Email from SB/SE Commissioner to National Taxpayer Advocate (Sept. 20, 2017) (on file with TAS).

32 *See* IRM 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Jan. 8, 2018).

33 IRC § 7811(a)(2); Treas. Reg. § 301.7811(a)(4)(ii).

34 IRM 13.1.21.1.3.19, *No or Partial Reply from Taxpayer* (Feb. 2, 2011).

The IRS also considered the following factors in deciding not to exclude TAS cases:

- "Only" 10 percent of open TAS cases met passport certification criteria;
- Only taxpayers who are in the process of applying for or renewing a passport would be affected;
- TAS can expedite decertification if it identifies a case meeting exclusion criteria;
- If TAS and the IRS come to a resolution that meets one of the exclusion criteria, the taxpayer will be systemically decertified; and
- The Department of State applies a 90-day holding period before a passport application is denied.[35]

As of October 1, 2017, there were approximately 800 TAS cases where the taxpayer had an aggregate, unpaid, assessed tax liability of more than $50,000, and the taxpayer did not qualify for either a statutory exception or a discretionary exclusion as defined in the IRM.[36] The IRS is incorrect that only taxpayers currently seeking a passport or renewal are affected because the statute also provides the Department of State with the authority to revoke passports,[37] and there may be situations where taxpayers need a new passport in the future before they can resolve their tax debts. Certifying a taxpayer already trying to resolve their tax debt, only to require TAS to request and the IRS to process a manual expedited decertification, makes little sense from a resource and taxpayer rights perspective. As discussed below, the expedited decertification procedures and 90-day holding period may not provide relief.

As of October 1, 2017, there were approximately 800 TAS cases where the taxpayer had an aggregate, unpaid, assessed tax liability of more than $50,000, and the taxpayer did not qualify for either a statutory exception or a discretionary exclusion as defined in the Internal Revenue Manual.

Although the statute only references administrative rights provided as part of a CDP hearing, the legislative history makes clear Congress intended to "permit revocation of a passport only after the IRS has followed its examination and collection procedures under current law and the taxpayer's administrative and judicial rights have been exhausted or lapsed."[38] One of a taxpayer's administrative rights and rights under the Taxpayer Bill of Rights (TBOR) is to seek assistance from TAS. When one reads IRC § 7811[39] in harmony with the FAST Act, it is clear taxpayers who are already seeking assistance from TAS should be excluded. Similarly, there are other administrative remedies that

35 Email from SB/SE Commissioner to National Taxpayer Advocate (Sept. 20, 2017) (on file with TAS).

36 IRC § 7345(b)(2). IRM 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Jan. 8, 2018). This analysis does not include as an exclusion any taxpayer who has an offer in settlement. Taxpayers in ZIP codes that were declared disaster areas were determined from analyzing the zip codes where the disaster declaration lasts past October 1, 2017, as defined by the following website: http://www.icce.irs.gov/fema/.

37 FAST Act § 32101(e)(2). *But see* SB/SE response to TAS information request (Oct. 18, 2017) (stating the IRS will not be making requests to the Department of State to revoke taxpayers' passports).

38 H.R. Rep. No. 114-357, at 531-32 (2015).

39 IRC § 7811 authorizes the National Taxpayer Advocate to issue a TAO when a taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered.

Certifying a taxpayer already trying to resolve their tax debt, only to require TAS to request and the IRS to process, a manual expedited decertification, makes little sense from a resource and taxpayer rights perspective.

should be excluded. Notably, Congress specified "examination and collection procedures *under the law* [emphasis added]" but did not make the same specification for other administrative rights, which include: Equivalent Hearings,[40] Collection Appeals Program (CAP) procedures,[41] and the Post Appeals Mediation program.[42] As noted earlier, the IRS has wide discretion to establish administrative exclusions to certification. Refusing to exclude taxpayers working with TAS or exercising established administrative rights does not achieve the purpose of the law and violates taxpayer rights.

Taxpayers may be unable to resolve their tax problems and have their passport applications approved during the 90-day holding period for keeping passport applications open

The Department of State will hold passport applications of certified taxpayers open for 90 days before denying them to allow the taxpayers to resolve their tax debts. However, the IRS errs by designing its policies and procedures under the assumption that the 90-day period will provide relief to most taxpayers. The IRS cites the 90-day period as a reason for not excluding open TAS cases, but this argument ignores the reality of TAS casework — it tends to be complex, cannot be resolved through normal IRS channels, and often takes additional time. Notwithstanding that TAS works cases expeditiously and holds its employees accountable for taking timely actions,[43] the average TAS collection case stays open for 88 days, from receipt to completion of all actions necessary to resolve the taxpayer's problem.[44] When you combine this time with the up to 30 days required for transmitting the decertification, the 90-day holding period will be unhelpful for many taxpayers with TAS cases.

Taxpayers trying to resolve their tax debts on their own may be unable to do so within the 90-day period because during the 2017 filing season, the level of service on the IRS's Balance Due phone line was only 40 percent and the average hold time was 47 minutes.[45] Furthermore, the Department of State passport hold letter advises "it may take an additional 45 days after you resolve your debt with the IRS

40 Equivalent Hearings (EHs) hold the same purpose as CDP hearings — to provide the taxpayer with the opportunity to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability. IRM 5.19.8.4.3, *Equivalent Hearing (EH) Requests and timeliness of EH Requests* (Nov. 1, 2007). *See generally* IRC § 6330(c)(2).

41 The Collection Appeals Program (CAP) is an administrative program that allows a taxpayer to appeal certain collection actions or proposed collection actions and is available in a wider set of circumstances than a CDP hearing. IRM 8.24.1, *Collection Appeals Program and Jeopardy Levy Appeals, Collection Appeals Program (CAP)* (Dec. 2, 2014).

42 IRC § 7123 requires the IRS to establish procedures for nonbinding mediation on any issue unresolved after appeals procedures or an unsuccessful attempt to enter into a closing agreement or OIC.

43 TAS evaluates employee performance by looking at factors such as "substantive actions to move case towards resolution," "initial actions taken timely," and "follow-up actions timely." TAS Case Quality Attributes (FY 2017).

44 TAS Report, *TAS Relief Rate by Primary Core Issue Code (PCIC) by Business Operating Division (BOD), FY 2017: October 10 through September 12* (Oct. 1, 2017).

45 *See* IRS, Joint Operations Center, *Snapshot Reports: Product Line Detail: Installment Agreement/Balance Due* (week ending April 22, 2017). *See* Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*, *supra.*

for the information to be cleared from our system."[46] The IRS's expedited decertification procedures may not provide relief for taxpayers close to the end of the 90-day period. After the taxpayer has met the expedited decertification criteria, the account has been correctly marked, and an IRS employee has received supervisory approval to submit the request form to the Collection Policy Passport Analyst, it can still take up to an additional ten days for the decertification to reach the Department of State.[47] Once the Department of State rejects the passport application, the applicant forfeits the application and processing fees ($135 for new adult applicants) and must reapply.[48]

Notices to taxpayers leave out important information related to their rights

Although the IRS provided draft versions of Notice CP 508C, *Passport Denied or Revoked Due to Serious Tax Delinquency*, to TAS for review, it rejected TAS's suggestions and proceeded to publish the notice without negotiating TAS's recommendations. Notice CP 508C provides only two options for taxpayers to prevent Department of State from denying, revoking, or limiting a taxpayer's passport: full payment of the liability or alternate payment arrangements, such as an IA or OIC. The notice lacks any language about other situations where tax debts may be excluded from the program, such as if the taxpayer is a victim of identity theft or qualifies for CNC hardship. In response to TAS's recommendation to include this information, the IRS stated that the information was not appropriate for the notice, it was included on irs.gov, and it is not included on the notice of levy or any other collection action letters.[49] Because the CP 508C is the only stand-alone notice the taxpayer receives regarding passport certification, it is the most appropriate place for informing the taxpayer about exceptions to certification. While including this information on irs.gov is helpful, failing to include it on the passport certification notice is inconsistent with the TBOR, which states taxpayers "are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence."[50] The fact that the information does not appear in any other collection notices makes it even more crucial for the information to appear on the CP 508C.

The CP 508C notice also fails to inform taxpayers that if they have emergency or humanitarian reasons for needing to travel, the Department of State can make an exception and they should contact the Department of State directly. The IRS rejected TAS's recommendation to add such language because the statute places the responsibility on the Department of State to administer this exception and Department of State sends out its own notice when denying a passport application.[51] The fact that the Department of State administers this exception provides an argument for including this information: without explaining this exception and directing taxpayers to the Department of State, the IRS is inviting additional calls from taxpayers who believe the IRS may be able to help in these situations. In the age of limited resources, the IRS could save itself work by adding a single sentence to this notice. Additionally, the Department of State letter does not include any information about the emergency and humanitarian exception and could mislead a taxpayer experiencing an emergency to believe they must

46 Dept of State, Letter 695 – Debts, Clearance Holds, 06 - IRS – Seriously Delinquent Tax Debt (May 20, 2015).

47 To meet the criteria for expedited decertification, the taxpayer must have a pending application for passport or renewal, and either be traveling outside the United States within 45 days or reside outside the United States with an urgent need for a passport. IRM 5.19.1.5.19.9.1, *Expedited Decertification* (Jan. 8, 2018).

48 Dept of State, Letter 696, Denial – Not Entitled to U.S. Passport, 05- Denial – IRS (July 2016); Dept of State, United States Passport Fees, https://travel.state.gov/content/dam/passports/FeeChart/PassportFeesChart_TSG_January 2017.pdf (Jan. 2017).

49 TAS, Internal Management Document 5164, IRS response (Aug. 4, 2017).

50 IRS, Publication 1, *Your Rights as a Taxpayer* (June 2014).

51 TAS, Internal Management Document 5164, IRS response (Aug. 4, 2017).

work with the IRS.[52] Another shortcoming of the Department of State letter is the lack of information about TAS. If a taxpayer has been trying to work with the IRS unsuccessfully, or is suffering from a significant hardship, the taxpayer should be directed to TAS, not the IRS. Although TAS did not have the opportunity to provide comments or suggestions on the Department of State passport denial letters, we will independently approach the Department of State to advocate for the rights of taxpayers subject to IRS's certification.

Taxpayers have a constitutional right to travel, and the IRS risks abridging this right by declining to adopt additional taxpayer protections, such as stand-alone pre-certification notices that provide taxpayers with the *right to challenge the IRS's position and be heard*.

CONCLUSION

When the IRS begins implementing the passport certification program in early 2018, taxpayers will be harmed from the moment they need to apply for a passport and are denied due to the IRS's certification. The statute itself provides some taxpayer protections, such as requirements for including passport language in CDP notices and exceptions for taxpayers who are actively paying as part of an IA or OIC. However, taxpayers have a constitutional right to travel, and the IRS risks abridging this right by declining to adopt additional taxpayer protections, such as stand-alone pre-certification notices that provide taxpayers with the *right to challenge the IRS's position and be heard*. Despite the broad discretion provided by Congress, the IRS has refused to exclude taxpayers suffering a significant hardship and actively working with TAS, and those pursuing administrative remedies not specifically listed in the statute. By going after taxpayers who are already actively trying to resolve their tax problems, the IRS fails to follow the spirit of the law and infringes on a taxpayer's *right to challenge the IRS's position and be heard* and *right to a fair and just tax system*.

52 The letter states "Neither this passport agency nor the Department of State has information concerning your seriously delinquent tax debt. You may contact the IRS at…" and "If you have urgent travel, you should contact the IRS at the number listed above immediately." Dept of State, Letter 695 – Debts, Clearance Holds, 06 - IRS – Seriously Delinquent Tax Debt (May 20, 2015).

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Provide a stand-alone notice to all taxpayers 30 days (90 days for taxpayers outside the United States) prior to certifying their seriously delinquent tax debts that discusses the specific harm that will occur and outlines all options available to taxpayers to avoid or reverse certification.
2. Exercise its discretionary authority to exclude from passport certification any taxpayers who already have an open case with TAS at the time the IRS would otherwise certify their seriously delinquent tax debts.
3. Exercise its discretionary authority to exclude from passport certification any taxpayers who have requested certain alternative administrative remedies, including an Equivalent Hearing, a Collection Appeals Program (CAP) Appeal, or Post Appeals Mediation, and delay certification for these taxpayers until they receive a final determination from these programs.
4. Revise its procedures for expedited decertification to transmit the decertification to the Department of State within two business days after the Collection Passport Policy Analyst receives the approved request form.
5. Update Notice 508C to include information about all ways in which a taxpayer can become eligible for decertification and advise taxpayers to contact the Department of State if they have an emergency or humanitarian need to travel.

MSP #7 EMPLOYEE TRAINING: Changes to and Reductions in Employee Training Hinder the IRS's Ability to Provide Top Quality Service to Taxpayers

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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The IRS is charged with administering the Internal Revenue Code (IRC), a massive document encompassing approximately four million words.[2] The IRC is a living document as Congress continually enacts new laws; over one change to the tax code per day on average,[3] requiring employees to be up to date on the latest changes in order to assist taxpayers and fulfill the IRS mission to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."[4] However, the IRS has reduced its employee

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 To determine the number of words in the IRC, TAS downloaded Title 26 of the U.S. Code (*i.e.*, the Internal Revenue Code) from the website of the U.S. House of Representatives, http://uscode.house.gov. We copied the file into Microsoft Word, and used the "word count" feature to compute the number of words. The online version of Title 26 we used was current through November 14, 2017. The printed code contains certain information that does not have the effect of law, such as a description of amendments that have been adopted, effective dates, cross references, and captions. The word count feature also counts page numbers, the table of contents, and the like. Therefore, our count somewhat overstates the number of words that are officially considered a part of the tax code, although as a practical matter, a person seeking to determine the law will likely have to read and consider many of these additional words, including effective dates, cross references, and captions. Other attempts to determine the length of the Code may have excluded some or all of these components, but there is no clearly correct methodology to use, and we found no easy way to selectively delete information from a document of this length.

3 Unpublished data provided by Wolters Kluwer Tax & Accounting to TAS (Dec. 8, 2016). This analysis shows nearly 5,900 changes to the tax code since 2001. Wolters Kluwer notes there is some subjectivity in computing these numbers because the counts are tied to how legislation is written. In general, an "Act Finding List" lists every Act section (or portion thereof) in a given Public Law and the corresponding amendment(s) it makes to the IRC. For example, assume an Act adds three new sections to the IRC. If the Act contains three sections that each adds one Code section, Wolters Kluwer would count three Code changes. But if the Act contains one section that adds a new Part to the IRC and that Part, in turn, contains the same three new Code sections, Wolters Kluwer would count one Code change.

4 IRS, *The Agency, its Mission and Statutory Authority*, https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority.

training budget by nearly 75 percent since fiscal year (FY) 2009.[5] Not only has the budget for training drastically declined, but the way in which employees receive that training has shifted from in-person, face-to-face training to virtual training. The National Taxpayer Advocate is particularly concerned that:

- In FY 2017, the IRS spent $489 (about three percent of its budget) per employee on training compared to about $1,450 per employee in FY 2009.[6]
- Wage and Investment (W&I), with the most employees of any operating division, spends only $87 per employee per year for training.[7]
- Face-to-face training has been replaced by virtual training.[8]
- The IRS provides only 19 hours of training per employee in at least one key job series, which includes nearly five hours of mandatory briefings, leaving only 14 hours of substantive training.[9]
- The number of courses available to employees in key job series declined.[10]

IRS employees cannot be expected to provide competent advice and adequate service to taxpayers who present myriad issues when they do not receive training timely or effectively. The downstream consequences to the IRS and taxpayers, including rework, misleading or incomplete advice, improper compliance actions, and distrust in the IRS serve to further degrade the relationship between the IRS and taxpayers and violate the taxpayer *rights to be informed*, *to quality service*, and *to a fair and just tax system*. Employees must receive timely, comprehensive, and effective training in order to protect taxpayer rights and provide top quality service to taxpayers. In light of current tax reform legislation, the National Taxpayer Advocate is concerned with how the IRS will effectively and efficiently train employees on the new tax laws in addition to providing regular substantive training given the budget and hours currently dedicated to training.

5 IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017); IRS response to TAS fact check (Dec. 15, 2017). While the budget for training has increased by approximately $17 million since a low point of approximately $22.6 million in fiscal year (FY) 2013, the reduction from previous years of over $113 million spent on training is drastic.

6 IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017). IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 15, 2017). The IRS had 105,783 employees as of the last week of FY 2009 and spent $153,155,686 on training. Per employee, the IRS spent $1,448 in FY 2009 and only $489 in FY 2017. IRS response to TAS information request (Nov. 22, 2013 and Dec. 7, 2017). IRS response to TAS fact check (Dec. 15, 2017).

7 IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017). IRS response to TAS information request (Nov. 7, 2017).

8 In FY 2009, the IRS offered 314 face-to-face trainings for the Office of Appeals 0592 job series. In FY 2017, only 13 face-to-face trainings were available to these employees, a reduction of nearly 96 percent. IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017).

9 IRS response to TAS information request (Nov. 7, 2017). For example, employees in the Tax Exempt and Government Entities (TE/GE) 0592 job series received 18.75 hours of training per employee, not even three full work days of training in an entire year. The IRS-wide position description for the Tax Examining Technician details that these employees must possess extensive knowledge of individual and business tax law, forms, regulations, collection techniques, notices, and many other IRS documents. IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017). IRS, *Standard Position Description GGS-0592-07* (June 18, 2003). All IRS employees in FY 2017 were required to take a series of briefings accounting for at least 4.83 hours of training. Those courses were: Information Systems Security Refresher, Unauthorized Access (UNAX) Awareness, Facilities Management and Security Services Physical Security Briefing, Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) Briefing Refresher, Records Management Awareness, Privacy, and Information Protection & Disclosure Refresher.

10 For instance, employees in the Office of Appeals 0592 job series had 213 course options in FY 2013 compared to 153 course options in FY 2017. IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017). It is important to note that many of the course offerings are mandatory briefings on topics such as physical safety and other required non-tax law substantive courses such as time entry instruction or voicemail tutorials.

ANALYSIS OF THE PROBLEM

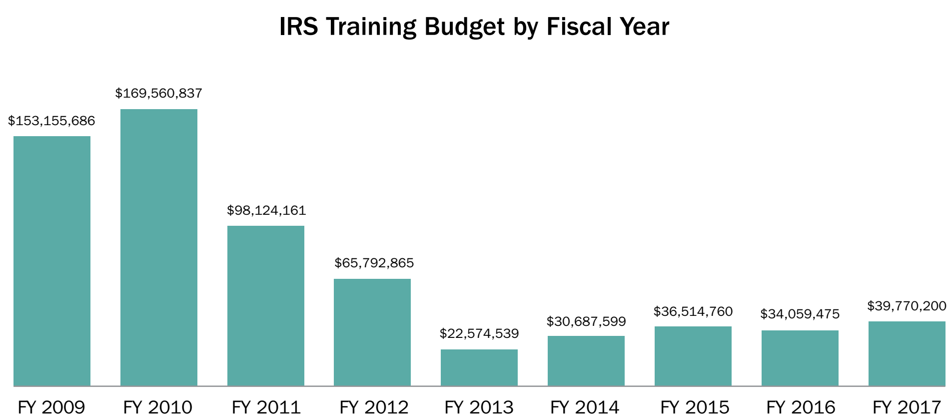
Background

In FY 2017, the IRS allocated $39.8 million of its over $11 billion budget to training its employees, or just over 0.3 percent of the total budget.[11] Taking actual dollars appropriated to the IRS, the IRS budget has declined just under $300 million in raw dollars since FY 2009 or about 2.5 percent, while at the same time, it has cut its training budget by nearly 75 percent.[12] The IRS has faced many years of reduced budgets, including additional cuts due to sequestration in FY 2013.[13]

Cuts to Training Far Exceed Cuts to the Overall IRS Budget

Sequestration resulted in an eight year low of spending on training in FY 2013, with only $22.6 million spent on training for all employees.[14] However, despite a restoration of spending on training of slightly over $17 million by the end of FY 2017, budgets across the IRS divisions for training have increased unevenly.[15]

FIGURE 1.7.1[16]



Taking actual dollars appropriated to the IRS, the IRS budget has declined just under $300 million in raw dollars since fiscal year 2009 or about 2.5 percent, while at the same time, it has cut its training budget by nearly 75 percent.

11 IRS response to TAS fact check (Dec. 7. 2017). Department of Treasury, *2017 Treasury Operating Plan* 32.
12 *Id*. at 1 and 32.
13 Budget Control Act of 2011, Pub. L. No. 112-25.
14 IRS response to TAS information request (Nov. 22, 2013).
15 IRS response to TAS fact check (Dec. 7, 2017).
16 *Id.*

The IRS Has Slashed the Wage & Investment Division (W&I) Training Budget

The W&I mission is to "provide Wage and Investment customers top quality service by helping them understand and comply with applicable tax laws and to protect the public interest by applying the tax law with integrity and fairness to all."[17] Being the largest of the IRS operating divisions, W&I serves over 123 million[18] individual taxpayers and boasts nearly 35,000 employees or about 43 percent of all IRS employees.[19] Yet, between the low point of FY 2013 IRS spending on training and the end of FY 2017, the training budget for W&I actually decreased by nearly $1 million, a decrease of over 24 percent.[20] W&I is spending only $87 per employee per year for training, which is more than 81 percent less than the IRS spends on average per employee.[21]

W&I employees are the face and the voice of the IRS. W&I maintains the Taxpayer Assistance Centers (TACs)[22] and provides many of the employees answering the IRS main toll-free line.[23] An individual taxpayer needing to resolve an IRS issue, ask a question, make a payment, request a form, or complete many other routine tasks is most likely to speak to a W&I employee, yet the IRS is spending almost nothing to provide training to these customer-facing employees.

The National Taxpayer Advocate and her staff attend many industry gatherings, speak at conferences and events, and hear directly from taxpayers and practitioners.[24] A common concern expressed by taxpayers and practitioners alike is that they are not receiving accurate advice or resolving their issues when they contact the IRS. When W&I is only able to spend $87 per employee per year for training, it is not surprising that taxpayers are unable to rely on the advice received or be confident in the answer provided by the IRS. The National Taxpayer Advocate frequently hears that employees rely on scripts to answer taxpayer questions. If the issue is beyond the scope of the script, the taxpayer cannot be assisted by that employee. A lack of training undermines the taxpayers' *right to be informed* and the *right to quality service* and erodes trust and confidence in the IRS and prevents employees from having the tools to effectively do their jobs.

17 IRS, *Mission*, http://www.irs.gov/pub/irs-news/ir-98-59.pdf (last visited Nov. 15, 2017).

18 *Id.*

19 IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017).

20 IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017).

21 IRS response to TAS information request (Nov. 7, 2017).

22 For a more detailed discussion of Taxpayer Assistance Centers (TACs), see Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*, *infra*.

23 For a more detailed discussion of the IRS telephone service, see Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*, *infra*.

24 One method that anyone can use to report a systemic IRS issue to TAS is through the Systemic Advocacy Management System (SAMS). https://www.irs.gov/advocate/systemic-advocacy-management-system-sams. For example, the National Taxpayer Advocate recently met with attorney from the Southeast Regional Bar Association at their liaison meeting. Several attorneys in attendance related issues with completing tasks at TACs (Oct. 20, 2017). The tasks in question, making payments and filing a return do not require appointments, yet these practitioners were turned away for not having appointments. For a more detailed discussion of TACs, see Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*, *infra*. *See also* https://taxpayeradvocate.irs.gov/news/nta-blog-taxpayer-assistance-center-service-continues-to-decline-impairing-taxpayers-ability-to-receive-in-person-assistance?.

Training Dollars Vary Wildly by Operating Division

Many IRS operating divisions handle extremely difficult, technical cases and require specialized training to address the issues presented by these cases. As a result, spending in highly technical job series and divisions will necessarily cost more money in order to provide appropriate training. For example, the Criminal Investigation division spent about $2,000 per employee in FY 2017.[25] However, it is baffling that W&I employees received only $87 worth of training per employee while these employees deal directly with over 123 million taxpayers, and Agency Wide Shared Services employees, who provide payroll, facilities, physical security, travel, credit card, cross-functional administrative and procurement support to the operating divisions, received over $479 of training per employee.[26] In other words, employees who assist taxpayers directly in key taxpayer service functions receive 80 percent less training dollars per employee than employees who manage internal administrative functions such as payroll.

Employees in Key Job Series Receive Very Little Training

TAS identified key job series in the IRS operating divisions, by division, where employees need technical knowledge and work directly with taxpayers or on taxpayer cases.[27] Within these categories of employees and across the operating divisions, training hours delivered to the employees varies widely. In the Tax Exempt and Government Entities (TE/GE) Division job series 0592, Tax Examining Technician, the employees received an average of 19 hours of training per employee, while W&I employees in the same job series received almost 65 hours of training per employee.[28]

The IRS-wide position description for the Tax Examining Technician details that these employees must possess extensive knowledge of individual and business tax law, forms, regulations, collection techniques, notices, and many other IRS documents.[29]

Additional duties include:

- Responding to taxpayer inquiries regarding tax return preparation, including schedules and documentations;
- Analyzing and resolving tax processing problems, including adjusting accounts, issuing manual refunds and computing tax, penalties and interest; and
- Recommending lien and/or levy action.[30]

After backing out required courses such as ethics, unauthorized account access and physical safety briefing, TE/GE Tax Examining Technicians receive only 14 hours per employee of training per year.[31]

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25 IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017); IRS response to TAS information request (Nov. 7, 2017).

26 *Id.*

27 TAS looked at training made available to tax examining technicians, revenue agents, revenue officers, customer service specialists, bankruptcy specialists, and tax analysts.

28 IRS response to TAS information request (Nov. 7, 2017). IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017). Wage and Investment (W&I) hired over 1,000 new employees in this job series in FY 2017, while TE/GE had no new hires in FY 2017. As a result, W&I employees may have received, on average, more training per employee due to the length of the new hire training courses. However, it is important to note that W&I had over 4,700 existing employees in this job series compared to TE/GE's slightly over 100 employees. IRS response to TAS fact check (Dec. 15, 2017).

29 IRS, *Standard Position Description GGS-0592-07* (June 18, 2003).

30 *Id.*

31 IRS response to TAS information request (Nov. 7, 2017). IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017).

In other words, employees who assist taxpayers directly in key taxpayer service functions receive 80 percent less training dollars per employee than employees who manage internal administrative functions such as payroll.

How can an employee responsible for the duties detailed in the position description possibly be informed of all changes to the law, forms, regulations, notices, etc., in only 14 hours of training per year?

In-person Training Continues to Decrease in Certain Key Job Series

In FY 2013, the IRS cut most in-person training in response to sequestration. While hours of in-person training have increased in certain key job series, several have been cut even further from the low FY 2013 levels.[32] Revenue Agents in Small Business/Self-Employed (SB/SE) and TE/GE received even less in-person training in FY 2017 than in FY 2013. SB/SE Revenue Agents received almost 36 hours of in-person training per employee in FY 2013, while in FY 2017 they received only 21 hours of in-person training.[33] TE/GE Revenue Agents received nearly 27 hours of in-person training per employee in FY 2013 while in FY 2017 those same employees received less than seven hours of in-person training.[34] While the National Taxpayer Advocate understands that costs associated with in-person training are expensive, learning directly with other employees and exchanging ideas and strategies face-to-face helps employees learn from each other. Moreover, in-person training is highly effective in promoting problem solving, and it enables instructors to identify areas in need of clarification and additional instruction.

The IRS Can Use Many Strategies to Deliver In-Person Training

Training can be delivered to employees via many vehicles. However, all training methods are not equally effective. Training, particularly in critical job skills, must be provided in the most effective manner possible to allow employees to gain and practice the skills necessary to do their jobs. Skills that involve communicating directly with the taxpayer and eliciting the information necessary to reach the right answer for that taxpayer are critical to any job series that involves taxpayer communication.

For example, TAS recently conducted an in-person training on these skills at the Congressional Affairs Program Conference for Local Taxpayer Advocates (LTAs), who were then able to take what they learned back to their office and train their case advocates and other employees in this critical skill.[35] Similarly, in preparation for case assignments to Private Collection Agencies (PCAs), in January 2017, TAS delivered in-person training to PCA managers which included a 45-minute video of the National Taxpayer Advocate explaining how the Taxpayer Bill of Rights applies to PCA employees and

32 The IRS believes it is more appropriate to focus on the change in total training hours, including virtual training, as compared with solely in-person training. We disagree. Virtual training is not as effective as in-person for many purposes. For example, in-person training allows groups of employees to discuss cases and consider alternative scenarios in ways that cannot be replicated through online training. Moreover, even focusing on total training, hours per employee have generally dropped significantly. With respect to Revenue Agents in TE/GE, for example, the IRS reports that the number of training hours per employee has declined from 80.39 hours per employee in FY 2013 to 43.48 hours per employee in FY 2017, a reduction of almost 46 percent. IRS response to TAS fact check (Dec. 15, 2017).

33 IRS response to TAS information request (Nov. 22, 2013 and Nov. 7, 2017).

34 *Id.*

35 *See also Case Advocacy*, *infra*. Currently TAS is developing TAS Employer Shared Responsibility Payment training that will kick off with train-the-trainer sessions in January 2018 and continue with training all TAS employees in January as part of Filing Season Readiness training.

activities.[36] We also delivered PCA training to all LTAs in March 2017, and created a dedicated mailbox for case advocates to send any questions they have about the program, committing to provide answers to their questions within 24 hours.

Having "train the trainer" courses in-person can be an effective way to teach critical job skills. This methodology permits the trainer to go back and provide the training to employees in their local area, thus limiting the number of employees who need to travel for training.

Further, the IRS should make use of training provided by other entities, such as the American Bar Association or the American Institute of Certified Public Accountants, state and local Bar and Certified Public Accountant (CPA) associations, and educational institutions. Employees could be encouraged to seek out opportunities for training from outside groups and be granted permission to attend on a rotating basis in their local commuting areas. TAS obtained an opinion from the IRS Office of Chief Counsel that TAS employees can accept waived admission fees to attend outside continuing professional education courses; the IRS should pursue the same.

Additionally, TAS makes use of outside experts in presenting training to TAS employees. Recently TAS filmed training related to the Annual Report to Congress Most Litigated Issues (MLI) section, focusing on issues that TAS employees may encounter in their case work. The National Taxpayer Advocate, her attorney-advisors, and practitioners from Low Income Taxpayer Clinics (LITCs) delivered these trainings. The perspective from practitioners can be invaluable in adding real-world experience to training and driving home how the work IRS employees do impacts taxpayers. LITCs in particular can provide information on how IRS practices are born out in the low income taxpayer community, a particularly vulnerable population. This training is available to all IRS employees through a video link. In fact, one Appeals manager reached out to TAS inquiring how his employees can access the MLI training and was provided the link.

The IRS's Failure to Provide Adequate Training to Employees Impacts Taxpayer Rights and Causes Downstream Consequences

Taxpayers have the *right to be informed* and *to quality service*.[37] If the IRS does not provide timely and comprehensive training to its employees, taxpayers cannot expect to receive quality service and may be misinformed.[38] Taxpayers need to be able to trust that they can contact the IRS and receive the right answer from any employee. Anything less erodes trust and confidence in an agency that already struggles in both areas. Failure to train employees comprehensively can also result in rework or further taxpayer contacts, causing additional costs to the IRS. It may also result in costs to taxpayers who may feel the need to turn to paid tax assistance in order to receive appropriate guidance. Or, a taxpayer may become frustrated and give up which could have dire consequences in the form of liens or levies for that taxpayer.

36 *See also Case Advocacy*, *infra*. Despite TAS's offer to deliver this training to all Private Collection Agencies (PCA) employees, the IRS refused to impose this training requirement.

37 See TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

38 For a discussion of the TBOR, see Most Serious Problem: *Taxpayer Rights: The IRS Does Not Effectively Evaluate and Measure Its Adherence to the Taxpayer's Right to a Fair and Just Tax System*, *infra*.

That $200 in interest paid to the taxpayers whose Earned Income Tax Credit (EITC) claims were originally denied is more than the IRS is spending, on average, to train an employee in Wage & Investment who handles EITC issues.

In some scenarios, because of a wrong answer from an IRS employee or an improper collection action, taxpayers may pursue litigation to arrive at the correct determination or to seek damages from the IRS.[39] Such litigation is time-consuming and costly to both parties, and strains judicial resources.

For example, a TAS study on Earned Income Tax Credit (EITC) cases, where the taxpayer petitioned the Tax Court for review of the IRS's determination to disallow all or part of the claimed EITC, found that the IRS paid on average $200 in interest to the taxpayers on the delayed refund in about one third of the sample cases.[40] That $200 in interest paid to the taxpayers whose EITC claims were originally denied is more than the IRS is spending, on average, to train an employee in W&I who handles EITC issues.[41] Further, prior to getting to the stage of potential litigation, taxpayers in the majority of these cases attempted to resolve the issue, calling the IRS five times on average (one taxpayer actually called 15 times).[42] The downstream cost of resolving or litigating the case is far beyond the cost of training to ensure that employees reach the correct answer early in the process.

CONCLUSION

Reductions in training and the lack of in-person training causes taxpayer burden and undermines taxpayer rights. Technological advances and innovative approaches to training used by TAS demonstrate that in-person training can be accomplished in a variety of ways. Face-to-face and interactive training should become a priority, using "train-the-trainer" methodology, video presentations combined with in-person question and answer sessions, and mailboxes for follow-up. The IRS should encourage its employees to attend in-person courses and trainings offered by third parties, such as Bar and CPA associations, colleges and universities in the local commuting areas. Meeting with other employees, other business operating divisions, and, especially, taxpayer representatives and tax experts in local communities will provide employees with different, diverse perspectives on their job duties, increase competence, and allow them to learn from each other to better understand taxpayer issues.

39 *See, e.g.*, IRC §§ 7432, 7433. For example, a taxpayer may bring a civil action for damages against the United States in a district court if an IRS employee negligently fails to release a lien or disregards any IRC provision or regulation associated with collection of taxes.

40 *See* National Taxpayer Advocate 2012 Annual Report to Congress 72-104 (Research Study: *Study of Tax Court Cases in Which the IRS Conceded the Taxpayer Was Entitled to Earned Income Tax Credit (EITC)*).

41 IRS response to TAS information request (Nov. 7, 2017). IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/ (last visited Nov. 17, 2017).

42 *See* National Taxpayer Advocate 2012 Annual Report to Congress 72-104 (Research Study: *Study of Tax Court Cases in Which the IRS Conceded the Taxpayer Was Entitled to Earned Income Tax Credit (EITC)*).

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Increase "train the trainer" in-person trainings to allow more effective delivery of training to field offices.
2. Increase training hours per employee, particularly in mission critical job series.
3. Encourage employees to identify outside training relevant to their jobs and allow the employees to attend such trainings.
4. Include outside experts in training to leverage knowledge gained from working with taxpayers who are impacted by IRS actions.

MSP #8 TAXPAYER RIGHTS: The IRS Does Not Effectively Evaluate and Measure Its Adherence to the Taxpayer's Right to a Fair and Just Tax System

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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

For many years, the National Taxpayer Advocate urged the IRS to adopt a Taxpayer Bill of Rights (TBOR) and Congress to codify the TBOR.[2] In 2014, the IRS officially adopted the TBOR, and in late 2015, Congress followed suit by adding the list of fundamental rights to the Internal Revenue Code (IRC or Code).[3] IRC § 7803(a)(3) now states: "In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including— ." This section then lists the ten fundamental rights proposed by the National Taxpayer Advocate. The statutory language of IRC § 7803(a)(3) shows Congress's intent not just to articulate and group taxpayer rights in categories, but to ensure the IRS is held accountable for putting those rights into practice.

The IRS has recently taken some positive steps to revise its policies, procedures, and materials to support the TBOR. For example, the IRS updated an introductory section in the examination part of its Internal Revenue Manual (IRM) to provide excellent explanations of various actions employees can take related to taxpayer rights.[4] Despite these improvements, the IRS has not yet adequately incorporated the TBOR into its measures or quality review criteria, thus making it difficult to evaluate the extent to which IRS employees are considering a taxpayer's *right to a fair and just tax system* in their day to day work. The IRS's description of the *right to a fair and just tax system* states:

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *See, e.g.*, National Taxpayer Advocate, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration: Recommendations to Raise Taxpayer and Employee Awareness of Taxpayer Rights* (2013), https://taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf.

3 *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

4 IRM 4.10.1.2, *Taxpayer Rights* (Aug. 24, 2017).

Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.[5]

The statutory language of IRC § 7803(a)(3) shows Congress's intent not just to articulate and group taxpayer rights in categories, but to ensure the IRS is held accountable for putting those rights into practice.

The IRS is not fully complying with the statutory mandate in IRC § 7803(a)(3) regarding the *right to a fair and just tax system* for the following reasons:

- Critical Job Elements (CJEs) do not evaluate employees on whether they consider a taxpayer's individual facts and circumstances;
- Quality attributes do not measure whether an office or group of employees' actions are appropriate in light of the taxpayer's facts and circumstances as part of the quality review process; and
- The IRS's guidelines for creating performance commitments for managers as well as its fiscal year (FY) 2014-2017 Strategic Plan do not require or encourage managers or employees to protect taxpayer rights.

ANALYSIS

Background

Why it Is Important for the IRS to Evaluate Employees, Measure Quality, and Establish Goals

The criteria used to evaluate employee performance and measure overall case quality and results are key drivers of employee behavior. If the IRS wants employees to act in accord with the TBOR, it must measure to what extent employees take appropriate actions on taxpayer cases. As one behavioral economist has noted, "Human beings adjust behavior based on the metrics they're held against. Anything you measure will impel a person to optimize his score on that metric. What you measure is what you'll get. Period."[6] In a study of 335 airline pilots across 40,000 flights, economists found two ways to effectively drive intended behavior (in this case, reducing carbon emissions): (1) inform the pilots that their performance was being monitored, and (2) give them personalized performance targets.[7] In that study, the economists tied most of the gains simply to the awareness of being monitored.

5 IRS, Publication 1, *Your Rights as a Taxpayer* (Sept. 2017), https://www.irs.gov/pub/irs-pdf/p1.pdf.

6 Dan Ariely, *You are What You Measure*, Harv. Bus. Rev. (June 2010), https://hbr.org/2010/06/column-you-are-what-you-measure.

7 Robert Metcalfe, Greer Gosnell, and John List, *Virgin Atlantic Tested 3 Ways to Change Employee Behavior*, Harv. Bus. Rev. (Aug. 1, 2016), https://hbr.org/2016/08/virgin-atlantic-tested-3-ways-to-change-employee-behavior.

Research shows that beyond just evaluating employee performance and measuring how that performance achieves quality, it is important for managers to provide positive feedback regarding what employees are doing well, or else risk that employees will stop performing the positive action if it is not acknowledged.[8] In the case of IRS employees, if managers do not evaluate employees and discuss with them how they have taken actions to support the taxpayer's *right to a fair and just tax system* by considering the taxpayer's facts and circumstances, employees may stop taking these actions.

Performance management, which is informed by both program evaluation and performance measurement, is part of the movement known as New Public Management (NPM), which has changed the way governmental agencies are managed.[9] NPM principles include: "stating clear program and policy objectives, measuring and reporting program and policy outcomes, and holding managers, executives, and politicians accountable for achieving expected results."[10] The five stages of performance management are relevant to the IRS and its implementation of the TBOR:

1. Formulating clear strategic objectives for organizations, including their programs and policies.
2. Translating these objectives into program and policy designs to achieve those goals.
3. Implementing the program and policy designs by creating or changing organizational structures and processes.
4. Monitoring performance, and measuring, evaluating, and reporting results, leading to consequences for the programs.
5. Returning to the strategic objectives to use findings from the earlier phases to update the objectives.[11]

The IRS's Strategic Plan, discussed below, provides a mechanism for the first stage of performance management. To understand how the IRS is achieving its strategic objectives, such as protecting taxpayer rights, it must monitor and evaluate employee performance, measure quality results, and apply these findings.

8 Timothy R. Hinkin, and Chester A. Schriesheim, *"If You don't Hear from Me You Know You are Doing Fine": The Effects of Management Nonresponse to Employee Performance*, 45 Cornell Hotel & Rest. Admin. Q., vol. 45, 362-72 (2004), http://scholarship.sha.cornell.edu/articles/213/.

9 James C. McDavid, Irene Huse, Laura R. L. Hawthorn, *Chapter 1: Key Concepts and Issues*, Program Evaluation and Performance Measurement: An Introduction to Practice, 5 (2d ed. 2013).

10 *Id.*

11 *Id.*

The criteria used to evaluate employee performance and measure overall case quality and results are key drivers of employee behavior.

How Laws, Internal Guidance, Standards, and Measures May Direct Employees to Consider a Taxpayer's Facts and Circumstances

A multitude of sources and resources impact an employee's ability or willingness to consider a taxpayer's facts and circumstances. These include:

1. **The IRC (or Code) –** The Code is comprised of tax laws that have passed Congress and been signed into law. It is legally binding on the IRS.
2. **Treasury Regulations –** These provide the official interpretation of the IRC by the Department of Treasury and are binding on the IRS.
3. **The Internal Revenue Manual (IRM) –** This is "the primary, official source of IRS 'instructions to staff' relating to the organization, administration, and operation of the Service."[12] Although employees are expected to follow IRM procedures, these procedures are not legally binding.
4. **Critical Job Elements (CJEs) –** CJEs set the standards that the IRS uses to evaluate employees. The IRS defines CJEs as "[a] work assignment or responsibility of such importance that unacceptable performance on the CJE would result in a determination that an employee's overall performance is unacceptable. Regulations require the IRS to establish critical elements and performance standards for employee performance plans and monitor employee progress."[13]
5. **Quality Attributes –** The IRS measures quality through two systems – the Embedded Quality Review System (EQRS) and the National Quality Review System (NQRS).[14] EQRS is used to evaluate employee performance on cases and rate case actions against quality attributes. NQRS provides independent case review information that is used to determine organizational performance. Many of the same quality attributes are used to review employee performance and assess organizational quality. The Large Business and International Division (LB&I) also has its own quality measurement system (LQMS).
6. **Commitments for Managers and Managerial Officials –** Managers and management officials are rated against critical performance expectations, which are comprised of the statutory Retention Standard for the Fair and Equitable Treatment of Taxpayers,[15] general responsibilities that are common to all managers and management officials,[16] and Commitments. This last component establishes a link between organizational performance and individual performance. Commitments are derived from the Strategic Business Plans, but are specific to each employee, each one providing a distinct action with identified and measurable results.

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12 IRM 1.11.6.1.4, *Definition of Terms and Acronyms* (July 28, 2017).

13 IRM Exhibit 6.430.1-1, *Glossary of Performance Management Terms* (June 14, 2011).

14 IRM 5.13.1, *Embedded Quality Administrative Guidelines* (Oct. 28, 2014).

15 The Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 requires all IRS employees to be evaluated on the fair and equitable treatment of taxpayers. Pub. L. No. 105-206, 112 STAT. 722 § 1204(b) (1998). *See* IRM 6.430.3.2.2.1, *Retention Standard for the Fair and Equitable Treatment of Taxpayers* (Oct. 28, 2011). Congress later amplified and expanded this by setting out the ten taxpayer rights in the Taxpayer Bill of Rights. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

16 *See* IRM 6.430.3.2.2.2, *Responsibilities* (Jan. 1, 2007).

7. **IRS Strategic Plan –** The IRS uses its strategic plan to outline its primary goals and associated objectives for the upcoming four fiscal years.[17]

There are situations where the Code, regulations, or IRM may direct the IRS or an employee to consider an individual taxpayer's facts and circumstances. However, in these examples, the IRS's CJEs, quality attributes, managerial commitments, and FY 2014–2017 Strategic Plan fail to set relevant goals, and evaluate and measure whether the IRS is protecting this part of the *right to a fair and just tax system*. To ensure employees are familiar with and act in accord with the *right to a fair and just tax system*, the IRS needs to set standards through its CJEs and evaluate employees with respect to these standards. In addition, the IRS needs to measure how often its employees comply with certain required job actions to meet a quality attribute. Although discussing every instance where an employee should be considering the facts and circumstances is beyond the scope of this analysis, below are three detailed examples of where the IRS is not ensuring its employees consider and take appropriate action: based on a taxpayer's facts and circumstances as it relates to a taxpayer's underlying liability, a taxpayer's ability to pay, and a taxpayer's ability to provide information timely.[18]

Underlying Liability: CJEs and quality measures do not evaluate employees and measure quality based on whether employees considered the taxpayer's facts and circumstances when making penalty determinations

One key area where employees must consider facts and circumstances is penalty determination. As shown in Figure 1.8.1 below, the Treasury Regulation and IRM require looking at the facts and circumstances on a case by case basis to determine whether the taxpayer qualifies for reasonable cause. The IRM instructs that a penalty determination cannot be made until the examiner has developed the facts and circumstances and documented how the law applies to these.

17 *See*, *e.g.*, IRS Pub. 3744, *Internal Revenue Service Strategic Plan (Fiscal Year (FY) 2014-2017).*

18 Because the most frequent opportunities for considering a taxpayer's facts and circumstances as they relate to the liability, ability to pay, and ability to provide information timely are in examination and collection, the discussion will primarily focus on some specific IRMs and job series for employees in these areas.

FIGURE 1.8.1, Law, Guidance, Standards, and Measures Related to Penalty Determination by Revenue Agents

Statute or Regulation	IRM	CJE	Quality Attribute
Treas. Reg. § 1.6664–4 Reasonable cause and good faith exception to section 6662 penalties "The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances."	**IRM 4.10.9.7.8 *Workpapers: Documenting Penalties***[19] "Only after all facts and circumstances surrounding an audit have been developed can a determination be made as to the application of appropriate penalties…The examiner must cite the appropriate regulations, rulings and court decisions that are specific to the case's facts and circumstances for assertion or non-assertion of penalties."	**Internal Revenue Agent Critical Element III, Customer Satisfaction – Application, 3A: Application of Tax Laws**[20] "Generally: obtains and evaluates the customers' position and addresses the merits during case development." **Critical Element V, Business Results – Efficiency, 5C: Gathers Information and Develops Facts**[21] "Generally: ♦ uses appropriate analytical resources and fact finding or innovative techniques to gather and develop facts that are complete, understand-able and logically presented; ♦ interprets and follows appli-cable procedures, guidelines and standards."	**707: Workpapers Support Conclusions**[22] "This attribute measures if the examiner used the activity record to document examination activities and time charges throughout the audit. It also measures if the examiner appropriately prepared workpapers (including scope, depth, and techniques used) to support the conclusions in the case." **408: Civil Penalty Determination**[23] "This attribute measures if the examiner properly considers, correctly computes and adequately documents the assertion or non-assertion of Civil penalties."

In contrast to the regulation and IRM, the CJE makes no mention of a taxpayer's specific situation. The CJE on applying the tax law only looks at whether the employee obtains and evaluates the taxpayer's position, without also considering how the taxpayer's facts and circumstances affect the liability. As an example, a taxpayer may take the position that he should be allowed certain business expense deductions because his tax preparer misunderstood the law. Although the IRS employee may evaluate the taxpayer's position and conclude he is not allowed the expenses, the employee should still consider the taxpayer's facts and circumstances. Such consideration could lead to a determination that the taxpayer had reasonable cause based on reliance on the return preparer and should not receive accuracy-related penalties.

The Business Results CJE focuses on developing complete facts, which is important, but it does not adequately measure the *right to a fair and just tax system* because of its sole focus on facts without regard to the personal circumstances of the taxpayer. An example of how this shortcoming harms taxpayers is an individual who failed to report income resulting from cancellation of indebtedness that was reported on a Form 1099-C, *Cancellation of Debt*. It may be a fact that the taxpayer received debt forgiveness but most taxpayers do not know the consequences of cancellation of debt, including that it is taxable unless exceptions apply. If the revenue agent were to consider the taxpayer's facts and circumstances, he or she would ask about whether the insolvency exception applied, directing the taxpayer to the insolvency worksheet in the IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*,

19 IRM 4.10.9.7.8, *Workpapers: Documenting Penalties* (Aug. 11, 2014).
20 IRS, Performance Plan for Internal Revenue Agent GS-0512 (July 2001).
21 *Id.*
22 IRS, Document 12354, *Field Compliance Embedded Quality, Field & Office Examination Job Aid* (Oct. 2012).
23 *Id.*

and possibly helping the taxpayer complete it. If the taxpayer did not qualify for the exception, the employee could consider the taxpayer's education and understanding of the consequences of debt forgiveness to determine whether the taxpayer may meet the reasonable cause exception to the penalty.

The quality attribute related to the workpapers focuses on the scope and depth of the case, but not whether the facts and circumstances of the taxpayer's specific situation were considered in determining the result. While the quality attribute for penalty determination requires documentation of the assertion or nonassertion of the penalty, there is nothing to ensure the employee thoughtfully considered the taxpayer's specific situation, as opposed to simply following prescribed procedures in computing and asserting the penalty.

Not included in the chart above, the CJEs for Revenue Agent Reviewer and Tax Law Specialist Reviewer do evaluate employees on whether the employee "conducts appropriate amount of research based on the facts and circumstances of each case."[24] However, this standard goes to whether the employee is taking the appropriate amount of time on the examination based on the facts and circumstances, not whether the employee is analyzing and applying the facts and circumstances to determine the liability. Another CJE for the Revenue Agent Reviewer requires that the employee "analyzes case file and other data to become familiar with issues" and "analyzes financial information to work toward effective case resolution."[25] This CJE could be strengthened by requiring the employee to analyze the case file and other data not to just become "familiar with issues" but also to understand the facts and circumstances of the taxpayer's situation.

Ability to Pay: CJEs and quality attributes do not ensure employees consider the facts and circumstances when determining the correct amount of basic living expenses

The consideration of facts and circumstances required by the *right to a fair and just tax system* also applies to determining a taxpayer's ability to pay. As shown in Figure 1.8.2, the IRC and Treasury regulations require considering the facts and circumstances when determining a taxpayer's basic living expenses, which are used to conclude how much a taxpayer can pay for an offer in compromise (OIC).

While the quality attribute for penalty determination requires documentation of the assertion or non-assertion of the penalty, there is nothing to ensure the employee thoughtfully considered the taxpayer's specific situation, as opposed to simply following prescribed procedures in computing and asserting the penalty.

24 IRS, Performance Plan for Revenue Agent Reviewer GS-0512 and Tax Law Specialist Reviewer GS-0987 (Dec. 2007).
25 *Id.*

FIGURE 1.8.2, Law, Guidance, Standards, and Measures Related to Determining Ability to Pay by Revenue Officer Advisors and Related Positions

Statute	Regulation	IRM	CJE	Quality Attribute
IRC § 7122(d)(2) Allowances for basic living expenses The IRS "shall develop and publish schedules of national and local allowances designed to provide that taxpayers entering into a compromise have an adequate means to provide for basic living expenses." The IRS's guidelines shall provide that IRS employees "shall determine, on the basis of the facts and circumstances of each taxpayer, whether the use of the schedules published under subparagraph (A) is appropriate and shall not use the schedules to the extent such use would result in the taxpayer not having adequate means to provide for basic living expenses."	**Treas. Reg. § 301.7122-1(c)(2)** "[t]he determination of the amount of such basic living expenses will be founded upon an evaluation of the individual facts and circumstances presented by the taxpayer's case."	**IRM 5.8.12.2, *Role of the Independent Administrative Reviewer***[26] "The IAR is responsible for reviewing the facts and circumstances of each case to determine if the proposed rejection is reasonable." **IRM 5.8.12.6.1, *The Review***[27] "If supporting documents indicate any circumstances that could impact either future earning potential or allowable expenses the documentation in the case file must support the decision to exclude or include assets, expenses, and/or income relating to the taxpayer's circumstances."	**Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer, Critical Element II, Customer Satisfaction – Knowledge, 2B: Case Analysis**[28] "analyzes case file and other data to become familiar with issues; analyzes financial information to work toward effective case resolution; determines ability to pay by verifying ownership, value and equity in assets." **Critical Element II, Customer Satisfaction – Knowledge, 2A: Taxpayer Rights**[29] "informs taxpayers of their rights; ensures that taxpayer's rights are observed and protected throughout the collection process; protects the confidentially of taxpayer return and case related information."	**432 – Verify/Analyze Ability to Pay**[30] "Use this field to identify if the employee properly evaluated the thoroughness and accuracy of the financial information secured and determined the taxpayer's ability to pay" **426 – Review Procedures**[31] "Use this field to identify if the employee followed appropriate Advisory review procedures." "Rate this attribute "Yes," if the employee made a determination that resulted in either the correct decision to sustain the rejected IA/OIC based on the circumstances, or a correct and sufficiently documented decision not to sustain the rejection and return the case for further development." **607 – Taxpayer Rights**[32] "Use this field to determine if the employee advised the TP/POA of all rights."

26 IRM 5.8.12.2, *Role of the Independent Administrative Reviewer* (Oct. 28, 2014).

27 IRM 5.8.12.6.1, *The Review* (Oct. 28, 2014). Although there are many IRMs related to ability to pay, here we focus on two that guide employees to consider a taxpayer's facts and circumstances.

28 IRS, Performance Plan for Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer GS-1169 (Mar. 2006). This CJE is the same for Revenue Officers. IRS Performance Plan for Revenue Officer, GS-1169 (July 2001). There are also additional positions that make ability to pay determinations such as Offer-in-Compromise Examiners and Revenue Officer Offer Examiners.

29 IRS, Document 12359, Fiel*d Compliance, Embedded Quality, Field Collection (FC)* (Sept. 2017).

30 IRS, Document 12739, *Embedded Quality Advisory Function Lien Job Aid* (Aug. 2016).

31 IRS, Performance Plan for Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer GS-1169 (Mar. 2006). This CJE is the same for Revenue Officers. IRS Performance Plan for Revenue Officer, GS-1169 (July 2001).

32 IRS, Document 12359, *Field Compliance, Embedded Quality, Field Collection (FC)* (Sept. 2017).

Congress provided a specific directive as to how the *right to a fair and just tax system* would be realized in the context of collection activity. IRC § 7122(d) directs that employees shall determine, based on the facts and circumstances of the taxpayer, whether it is appropriate to use established schedules for calculating living expenses, which are designed to ensure taxpayers have adequate means to provide for basic living expenses. … Yet, IRS measures focus on formulas and rules, instead of applying judgment and discretion to the individual facts and circumstances.

To its credit, the IRS procedures, outlined in the IRM, provide for an independent administrative review of all proposed OIC rejections. However, the CJEs for independent administrative reviewers and revenue officers say nothing about looking at a taxpayer's individual facts and circumstances, especially as it relates to determining allowable expenses. To meet the CJE criterion, an employee merely needs to verify ownership, value and equity in assets, without looking at individual facts, such as if the forfeiture of assets would create an economic hardship. Similarly, the quality attribute for ability to pay asks if the employee properly verified that the financial information provided by the taxpayer was thorough and accurate, but does not emphasize looking at individual facts and circumstances that may be unique to the taxpayer and which might alter the analysis.

In fact, as shown in Figure 1.8.2 above, Congress provided a specific directive as to how the right to a fair and just tax system would be realized in the context of collection activity. IRC § 7122(d) directs that employees shall determine, based on the facts and circumstances of the taxpayer, whether it is appropriate to use established schedules for calculating living expenses, which are designed to ensure taxpayers have adequate means to provide for basic living expenses. Congress believed "the ability to compromise tax liability and to make payments of tax liability by installment enhances taxpayer compliance" and "the IRS should be flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system."[33] Yet, IRS measures focus on formulas and rules, instead of applying judgment and discretion to the individual facts and circumstances.

The Rating Guide Explanation for the Review Procedures attribute does mention looking at the circumstances, but it only requires a "sufficiently documented decision" if the review results in the rejected offer being sent back for further development.[34] The decision to sustain a rejected offer should also be sufficiently documented to show how the taxpayer's circumstances were considered. For example, if the decision to reject the offer was based on a finding that the taxpayer could sell his primary vehicle to pay the tax debt, the consideration of whether the taxpayer had other sources of transportation necessary to continue working in his job should be documented.

33 S. Rep. No. 105–174 at 88 (1998).

34 IRS, Document 12739, *Embedded Quality Advisory Function Lien Job Aid* (Aug. 2016).

The catch-all attribute for taxpayer rights, while commendable and beneficial in raising awareness, is not helpful in determining whether an employee's actions were appropriate in light of a taxpayer's circumstances because it is so broad that one cannot ascertain which rights were complied with and which were not.

Ability to provide information timely: Quality attributes related to timeliness may discourage employees from considering a taxpayer's facts and circumstances when deciding whether to allow the taxpayer additional time to provide information in an examination

Although the Treasury Regulations do not expressly state that a taxpayer can receive additional time to provide information in an examination, the IRS has decided as a policy matter to allow additional time based on "reasonable circumstances."[35] The IRM provides examples of when this requirement might be met and advises using judgment based on the taxpayer's facts and circumstances. However, as shown in the table below, the CJEs and quality attributes seem to be incompatible with an employee considering a taxpayer's facts and circumstances and providing a taxpayer with additional time if the examination does not involve a complex issue. Figure 1.8.3, below, lists CJEs for revenue agents, even though the IRM advises that a manager or management official must grant the extension of time to provide information in response to a 30-day letter. We discuss managerial commitments below, but here, the CJEs for revenue agents are also relevant because the revenue agent is likely to be the frontline employee who must receive and consider the request for additional time and choose how to present it to a manager.

35 IRM 4.10.8.11.8, *Extension of Time to Respond* (Sept. 12, 2014).

FIGURE 1.8.3, Law, Guidance, Standards, and Measures Related to Extensions of Time to Respond in an Examination

Regulation	IRM	CJE	Quality Attribute
Statement of Procedural Rules 601.105(d)(1) "The 30-day letter is a form letter which states the determination proposed to be made…If the taxpayer does not respond to the letter within 30 days, a statutory notice of deficiency will be issued or other appropriate action taken…"	**IRM 4.10.8.11.8** ***Extension of Time to Respond***[36] "(1) In general, Statement of Procedural Rules 601.105(d)(1) does not provide for an extension of time to reply to a 30-day letter. However, as a matter of practice, extensions may be granted under reasonable circumstances. (2) Reasonable circumstances include but are not limited to the following: The taxpayer retains a representative and demonstrates a need for more time to prepare a meaningful protest. The taxpayer retains a new representative. Sickness or injury of the taxpayer or representative. Issues are complex and require extensive research." **IRM 4.19.13.9.6,** ***Taxpayer Requests Additional Time to Respond***[37] "If subsequent time extensions are requested [beyond the automatic 30 day extension], judgment should be used based on the facts and circumstances for the individual case." **IRM 4.46.5.7.2, *Key Points to Consider and Verify in Preparing an Unagreed Issue Report***[38] "The case manager, in collaboration with the issue manager(s), may approve the request [for an extension of time in which to file a protest] based on the facts and circumstances in each case."	**Internal Revenue Agent Critical Element V, Business Results - Efficiency, 5A: Completes Work Timely**[39] "Generally completes work assignments so that both the total time spent and the time span of the activities are commensurate with the nature and complexity of the work. Generally identifies issues that have significant impact and seldom spends time on items of little materiality." **LB&I Issue Practice Group Coordinator, Issue Practice Group Subject Matter Expert, Knowledge Network Specialist, Senior Revenue Agent, Critical Element V, Business Results - Efficiency, 5A, Planning and Scheduling**[40] "Generally: • plans, schedules, and executes program responsibilities within established time frames; • initiates timely actions without managerial follow-up; • coordinates activities and recommendations to ensure timely action."	**510: Time Span**[41] "This attribute measures if the time span of the case is appropriate for the actions taken. Case actions should be completed in the most efficient manner and not result in unnecessary delays during the examination process." **LQMS Technical Standard 2: Execution**[42] "Was the time applied commensurate with the complexity of the Issues?"

36 IRM 4.10.8.11.8, *Extension of Time to Respond* (Sept. 12, 2014). *See also* IRM 4.10.8.12.8, *Extension of Time to Respond (LB&I Examiners only)* (Aug. 11, 2006), which provides similar guidelines for Large Business and International (LB&I) examiners.

37 IRS, Performance Plan for Internal Revenue Agent GS-0512 (July 2001).

38 IRS, Document 12354, *Field Compliance Embedded Quality, Field & Office Examination Job Aid* (Oct. 2012).

39 IRM 4.19.13.9.6, *Taxpayer Requests Additional Time to Respond* (Jan. 1, 2016).

40 IRM 4.46.5.7.2, *Key Points to Consider and Verify in Preparing an Unagreed Issue Report* (Mar. 9, 2016).

41 IRS, Performance Plan for Issue Practice Group Coordinator, GS-0512, Issue Practice Group Subject Matter Expert, GS-0512, Knowledge Network Specialist, GS-0987, Senior Revenue Agent (Mar. 2016).

42 IRS, LB&I Quality Measurement System Technical Standards (Feb. 2016).

Both the Critical Job Elements and the quality attributes focus on efficiency, making sure the amount of time the case stays open is consistent with established timeframes and the complexity of the case. Yet, there may be situations where an examination is not complex, and the documentation requested is straightforward, but the taxpayers needs additional time due to unique facts and circumstances.

Both the CJEs and the quality attributes focus on efficiency, making sure the amount of time the case stays open is consistent with established timeframes and the complexity of the case. Yet, there may be situations where an examination is not complex, and the documentation requested is straightforward, but the taxpayers needs additional time due to unique facts and circumstances. For example, a taxpayer is suffering a medical condition, needs to request documents from abroad, or is unable to take off from a job to obtain the documents immediately.

The LB&I Division uses a checklist for reviewers conducting sample case reviews for its quality measurement system. One checklist item asks: "Were there any delays in the examination? Quality Reviewers consider reasons for delays in responses but rate this area based on the examiner's actions. Did the examiner take into account the taxpayer's not being able to provide information in a timely manner (*e.g.*, if the taxpayer had to get the requested information from a foreign country)?"[43] Other IRS operating divisions could use checklists with similar questions to ensure that where an employee did not appear to meet a timeliness measure, the employee's actions may still be appropriate based on the taxpayer's facts and circumstances.

A Discussion of a Taxpayer's *Right to a Fair and Just Tax System* Is Absent in a Number of CJEs

TAS conducted a review of the CJEs of 21 different positions that are part of four major categories of employees: revenue officers, revenue agents, appeals and settlement officers, and OIC specialists. We identified these positions as ones in which employees have regular contact with taxpayers and likely have the authority to use some discretion. This review showed that each of these 21 positions contained the Retention Standard for the Fair and Equitable Treatment of Taxpayers, required by statute.[44] In addition, 14 of the 21 positions had at least one CJE that mentioned taxpayer rights, and five of the 21 positions had two CJE's that mentioned taxpayers' rights. Five of the positions had a CJE specifically devoted to taxpayer rights, which required an employee to:

- Educate the taxpayer of their rights throughout the collection process;
- Ensure that taxpayer's rights are observed and protected throughout the collection process;
- Protect the confidentially of taxpayer return and case related information; and
- Accurately explain the collection process throughout the case progression.

43 TBOR and Quality Reviews of LB&I Cases, IRS response to TAS information request (July 13, 2016).

44 *See* footnote 15, *supra*.

These are desirable and important elements. However, the CJEs for the different positions varied greatly in their coverage of the taxpayer's *right to a fair and just tax system*, with some including multiple CJEs focusing on fully developing the relevant facts, and others without a single CJE mentioning the facts of the case or the taxpayer's circumstances. Thus, the IRS should conduct a review of all CJEs, identifying where it would be appropriate to specifically incorporate a discussion of the taxpayer's *right to a fair and just tax system*, as well as the other nine rights set out in IRC § 7803(a).

The IRS's guidelines for creating performance commitments for managers as well as its FY 2014-2017 strategic plan do not require or encourage managers or employees to protect taxpayer rights.

In the above example about allowing a taxpayer more time to provide information, the decision rests with a manager or management official, who is not subject to CJEs. Managers are evaluated based on whether they meet general responsibilities and specific commitments, which are unique to each management employee and tied to specific accomplishments. At first glance, it may appear difficult to use commitments to drive a behavior that should be ongoing and consistent — considering a taxpayer's specific facts and circumstances.[45] However, managers could identify specific accomplishments that would drive employees to make this consideration in their daily work. For example, a manager could commit to enhancing the technical knowledge of her direct reports by providing additional training, and state that the commitment will be satisfied if the training includes detailed examples on when a taxpayer's facts and circumstances might lead to a reasonable cause determination. A manager could also commit to reviewing cases where the IRS granted a request for additional time as well as where such requests were denied. This would help the manager determine appropriate timelines for providing additional information in all cases and consider whether employees may be prematurely coming to a determination and issuing a 30-day letter while a taxpayer is still working with examination. The current guidelines for developing managerial commitments are devoid of information about the TBOR or any of the specific rights.[46] The IRS should update this guidance, with examples, of how commitments can further the protection of taxpayer rights.

The current guidelines for developing managerial commitments are devoid of information about the Taxpayer Bill of Rights or any of the specific rights.

Commitments and other elements of the performance evaluation system are tied to the IRS's strategic goals. The IRS's current strategic plan for FY 2014-2017, contains no information about taxpayer rights outside of a discussion of TAS and the role of non-profit institutions in distributing information about taxpayer rights.[47] The strategic goals related to organizational excellence miss an opportunity for the IRS to commit to protecting taxpayer rights and reflect a disproportionate focus on enforcement.[48] At the time of this writing, the IRS had not yet released its Strategic Plan for FYs 2018-2022, but had drafted

45 IRM 6.430.3.2.4.1, *Guidelines for Developing Well Constructed Commitments or Objectives* (Oct. 28, 2011).

46 *Id.*; IRS, *Writing Performance Commitments, A Reference Guide for Managers and Management Officials* (Aug. 23, 2017).

47 IRS, Publication 3744, *Strategic Plan (FY 2014-2017)* (June 2014).

48 The associated goals are to "[d]eliver high quality and timely service to reduce taxpayer burden and encourage voluntary compliance" and to "[e]ffectively enforce the law to ensure compliance with tax responsibilities and combat fraud." IRS, Publication 3744, *Strategic Plan (FY 2014-2017)* (June 2014).

and revised a list of goals, objectives, and activities.[49] In this document, the IRS states its plans to post the TBOR upfront within the Strategic Plan, which will emphasize taxpayer rights as an important IRS priority. Beyond just posting the TBOR, the IRS needs to create goals and objectives related to taxpayer rights, such as committing to training all IRS employees each year on taxpayer rights. Integrating taxpayer rights throughout the strategic plan would have an effect on other IRS standards and measures, including CJEs, quality attributes, and commitments, which flow from the IRS's strategic goals.

CONCLUSION

The above discussion shows the IRS could better evaluate its employees and measure whether their actions are appropriate based on a taxpayer's facts and circumstances. There are likely other examples where the IRS's performance standards and measures either do not account for this part of the taxpayer's *right to a fair and just tax system* or may even be incompatible with it. Although TAS was not able to review individual commitments for managers, the guidance for creating these commitments offers no assurance that managers will take actions or set goals to protect taxpayer rights. Because the Strategic Plan provides a framework for all the IRS's evaluation and measurement systems, it is vital for the specific goals and objectives to provide a link to rights under the TBOR.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise its CJEs and quality attributes to align with statutory, regulatory, case law, and IRM instructions for employees to consider the specific facts and circumstances that affect taxpayers' underlying liabilities, ability to pay, and ability to provide timely information.
2. Update its guidance for developing commitments to provide examples and emphasize how commitments can further the protection of taxpayer rights.
3. Add information throughout its strategic plan to tie goals and objectives to taxpayer rights under the TBOR and add objectives: (1) to evaluate employees' performance with respect to and in accord with taxpayer rights, and (2) to train all employees on taxpayer rights.
4. Collaborate with TAS in developing and delivering a mandatory annual training on taxpayer rights.

49 IRS, *FY 2018–2022 Strategic Plan, Overview of Proposed Strategic Goals and Objectives* (Oct. 2017).

MSP #9

OUTREACH AND EDUCATION: The IRS Is Making Commendable Strides to Develop Digitized Taxpayer Services, But It Must Do More to Maintain and Improve Traditional Outreach and Education Initiatives to Meet the Needs of U.S. Taxpayers

RESPONSIBLE OFFICIALS

Terry Lemons, Chief, Communications and Liaison
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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*

DEFINITION OF PROBLEM

The IRS has held a longstanding position that taxpayer outreach and education is essential to voluntary compliance.[2] Yet, it continues to shift outreach and education responsibilities to third-party partners. In addition, the IRS is increasingly relying on digital channels to distribute outreach and education information.[3] While digital distribution channels and leveraging third-party partners may enable the IRS to reach large taxpayer populations in a cost-effective manner, it still leaves significant populations of taxpayers behind.[4] It also eliminates the two-way exchange, and in conjunction with the trend away from geographic presence in the taxpayer communities, results in a one-way, filtered, education strategy as well as a remote, impersonal IRS.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *See, e.g.*, Internal Revenue Manual (IRM) 1.2.19.1.8(2), *Policy Statement 11-93 (Formerly P-1-181)* (July 24, 1989).

3 *See, e.g.*, IRS Small Business Week Tax Tip 2017-01, *IRS Promotes Specialized Online Services during Small Business Week* (Apr. 28, 2017); Wage & Investment Research, *Facilitating Access to Convenient & Efficient IRS Service: W&I Web-First Conjoint Study* (May 11, 2016).

4 In its response to the TAS fact check, the IRS stated that it is "relying more on digital channels since many taxpayers, particularly younger ones, rely on these for their information." IRS response to TAS fact check (Nov. 20, 2017). While we agree that younger generations are more receptive to online channels, we encourage the IRS to give due consideration to the information needs of those taxpayers without access to digital channels. *See* Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*, *supra*; Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*; National Taxpayer Advocate 2016 Annual Report to Congress, vol. 2, 1-30 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*).

A successful outreach strategy is both cost-effective and substantively effective. The IRS appears to have designed its outreach strategy in reaction to cost concerns.[5] However, if it does not develop a research-based outreach strategy, the IRS may not be conducting its outreach initiatives in the most effective manner. To be effective, the outreach and education must (1) include content addressing the taxpayers' information needs, (2) clearly state the message in language the target audience can understand, and (3) use a distribution channel the target recipient can access. Accordingly, the IRS must conduct research as well as review the findings of TAS research to understand the information needs of the diverse taxpayer populations.[6]

In addition to formal research, an effective way to gain an understanding of the information needs of the various diverse local communities is to have a geographic presence (*i.e.*, at least one employee living in or touring through the state or geographic region) rather than generalize the information needs of the entire U.S. taxpayer population from afar. Unfortunately, the IRS outreach functions did not have local presence in about one-third of the states. Specifically, for fiscal year (FY) 2017, the IRS Office of Communications and Liaison (C&L) Stakeholder Liaison (SL) function had 105 employees assigned to various outreach activities in over 33 states and the District of Columbia.[7]

ANALYSIS OF PROBLEM

The IRS Centralized Outreach Activities for Individual Taxpayers and Small Businesses

In April 2017, the IRS transferred the SL function of Small Business/Self-Employed (SB/SE) to C&L. There are now several key outreach functions located in C&L:[8]

1. **National Public Liaison (NPL):** NPL promotes and strengthens relationships with external partners and solicits ideas on emerging issues, IRS initiatives, policies, procedures, and guidance.
2. **Stakeholder Liaison (SL):** Provides outreach and education through partnerships with tax professional organizations, industry associations, and government agencies. SL collaborates with these partners to maintain relationships and conduct meetings or events in-person, by phone or email, and through virtual web conferencing. SL also communicates by tweets and provides fact sheets and news releases to partners, who can distribute the material to their members, clients, and constituents.

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5 IRS response to TAS fact check (Nov. 20, 2017). The National Taxpayer Advocate previously raised concerns about the dwindling resources allocated to outreach and education since the IRS Restructuring and Reform Act of 1998 (RRA 98). *See, e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress (Most Serious Problem: *The IRS is Substantially Reducing Both the Amount and Scope of Its Direct Education and Outreach to Taxpayers and Does Not Measure the Effectiveness of its Remaining Outreach Activities, Thereby Risking Increased Noncompliance*).

6 *See* Literature Review: *Fostering Taxpayer Engagement Through Geographic Presence*, vol. 2, *infra*.

7 IRS response to TAS information request (Oct. 13, 2017). In response to TAS's information request for the number of outreach employees assigned to each state, territory, and the District of Columbia, the IRS responded that Communication & Liaison (C&L) had 105 employees assigned to outreach activities spread over 33 states and the District of Columbia. However, the IRS response to fact check stated that these numbers only account for Small Business/Self-Employed (SB/SE) Stakeholder Liaison (SL) employees. Therefore, we do not have details regarding any additional outreach employees. IRS response to TAS fact check (Nov. 20, 2017).

8 In response to the TAS information request, the IRS provided that C&L has two key outreach organizations: National Public Liaison (NPL) and Stakeholder Liaison (SL). IRS response to TAS information request (Oct. 13, 2017). However, in the response to a TAS fact check, C&L stated that outreach is performed by the following C&L organizations in addition to NPL and SL: (1) the Office of Communications (including Media Relations and Social Media) and (2) the Office of Legislative Affairs (including the branch dealing with local congressional offices). However, we did not receive details about the outreach activities performed by and resources allocated to these functions. IRS response to TAS fact check (Nov. 20, 2017).

3. **Tax, Outreach, Partnership, and Education:** C&L recently launched this new branch to focus on building relationships with organizations outside the traditional tax communities.

The following chart summarizes the in-person and virtual outreach events conducted by both NPL and SL in C&L.

FIGURE 1.9.1, FY 2017 Face-to-Face and Virtual Outreach Events Conducted by C&L NPL and SL[9]

C&L Outreach Activity	Number of Events	FY 2017 Direct Face-to-Face Participants	FY 2017 Digital Participants
NPL: Tax Forums	5	12,621	N/A
SL: Practitioner Virtual Events	215	N/A	48,133
SL: Practitioner Face-to-Face Events	673	58,106	N/A
SL: Industry Virtual Events	80	N/A	4,759
SL: Industry Face-to-Face Events	238	15,198	N/A
SL: Web Conferencing Outreach Events	31	N/A	33,469
Total	**1,242**	**85,925**	**86,361**

With the exception of Stakeholder Partnerships, Education and Communication (SPEC) in the Wage and Investment (W&I) Division, which is completely dedicated to the Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs, the IRS centralized most outreach functions for individuals and small businesses in C&L.[10] The centralized outreach function in C&L bears ultimate responsibility, whether conducted directly or through leveraged partnerships, for helping approximately 151 million individual taxpayers and 62 million small business taxpayers understand and comply with their tax filing and payment obligations.[11] Despite the diverse taxpayer population for which C&L is responsible, the organization allocates only 105 employees to conduct outreach and education. Furthermore, dedicated outreach and education staff are assigned in over 33 states and the District of Columbia, leaving approximately 16 states and the territories of Guam, Puerto Rico and the

9 IRS response to TAS information request (Oct. 13, 2017). By comparison, TAS Local Taxpayer Advocates conducted over 4,700 local outreach activities during fiscal year (FY) 2017, accounting for nearly 16,000 hours during the fiscal year, despite having numerous other duties as managers of the TAS local offices. Their efforts reached over 875,000 taxpayers and tax professionals through various outlets including local radio and television. TAS Office of Communications, Stakeholder Liaison, and Online Services, *National Completed Events Summary for 2017* (Oct. 27, 2017).

10 IRS response to TAS information request (Oct. 13, 2017). The following organizations maintain a separate outreach function: Tax Exempt/Government Entities Division (TE/GE), Large Business and International Division (LBI), Return Preparer Office (RPO), the Office of Appeals, Criminal Investigation Division (CI), and TAS. IRS response to TAS fact check (Nov. 20, 2017).

11 IRS, *2016 Data Book*, Table 2, https://www.irs.gov/pub/irs-soi/16databk.pdf; IRS response to TAS fact check (Nov. 20, 2017); IRS response to TAS fact check (Dec. 15, 2016).

U.S. Virgin Islands without any dedicated outreach staff.[12] C&L allocates $12.1 million of its budget to direct labor costs of employees in NPL and SL to conduct outreach and education activities.[13]

The IRS Outreach and Education Staff Needs Geographic Presence to Effectively Perform Its Government Function

Before 1998, the IRS was organized into 43 geographically defined districts and service centers.[14] In addition, the IRS encouraged its staff to perform face-to-face outreach by accepting invitations to speaking events and participating in conferences.[15] The previous IRS structure and outreach policy evidences that the organization realized the importance of geographic presence and face-to-face outreach.

Geographic presence among outreach and education staff is vital to understanding the local economy and culture. For example, the IRS may not understand the information needs of natural disaster victims in Puerto Rico or the U.S. Virgin Islands, unless it has employees, preferably C&L employees assigned to outreach activities, on the ground and in the community. These employees can hear firsthand the local issues and concerns of the community. In addition, by engaging with the community, they will gain familiarity with the local norms and understand the best channels to deliver messages. Community engagement places the IRS in the best position to communicate targeted messages on issues relevant to that particular population, as opposed to general messages that are too vague for anyone to see themselves reflected in the information presented.

Accordingly, the IRS should not shift a majority of its outreach and education responsibilities to third-party partners. Relying on partners to deliver the message benefits the IRS because it is a convenient and efficient way to reach a large number of taxpayers. In addition, communicating through third-party partners is crucial when there is a lack of trust in the IRS. For example, the IRS may have a difficult time getting undocumented workers to participate in outreach events and, for these taxpayers, the IRS could use third-party partners as intermediaries. However, in most cases, relying on partners is not as beneficial as actually going out and talking with taxpayers, preparers, and other representatives to really

Community engagement places the IRS in the best position to communicate targeted messages on issues relevant to that particular population, as opposed to general messages that are too vague for anyone to see themselves reflected in the information presented.

12 IRS response to TAS information request (Oct. 13, 2017). The geographic outreach data provided in the IRS response to TAS information request does not include in-person speeches given by IRS employees who are not dedicated outreach employees. IRS response to TAS fact check (Nov. 20, 2017).

13 In response to TAS's request for the IRS's overall outreach budget, the IRS responded that $12.1 million of C&L's budget was allocated to outreach activities. IRS response to TAS information request (Oct. 13, 2017). However, in its response to the TAS fact check, the IRS stated that the $12.1 million figure only applies to labor costs of employees in NPL and SL. IRS response to TAS fact check (Nov. 20, 2017).

14 S. Rep. No. 105-174, 9 (1998); Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 1998*, JCS-6-98 16-17 (1998); IRS Pub. 3349, *Modernizing America's Tax Agency* 1-10 (Apr. 2000), https://www.irs.gov/pub/irs-utl/27877d00.pdf.

15 IRM 1.2.19.1.8, *Policy Statement 1-181* (Jul. 24, 1989).

However, in most cases, relying on partners is not as beneficial as actually going out and talking with taxpayers, preparers, and other representatives to really understand where confusion lies, how to develop better publications and materials, and what national messages need to be modified or reinforced.

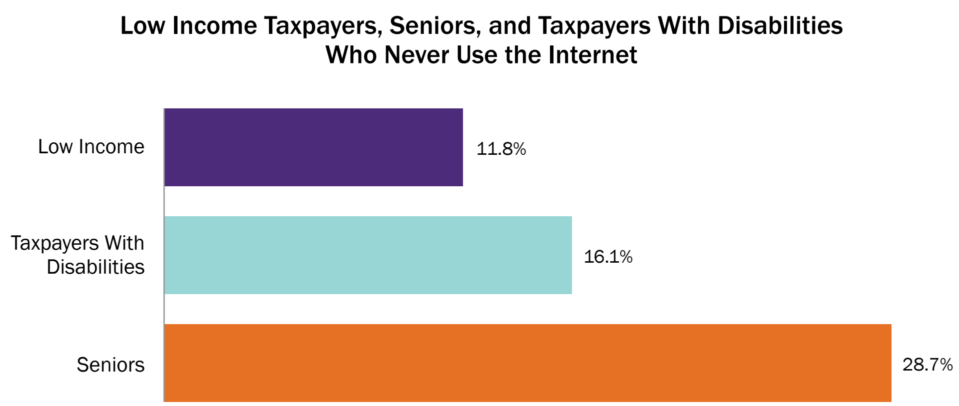
understand where confusion lies, how to develop better publications and materials, and what national messages need to be modified or reinforced.

Given That Tax Administration Relies on Voluntary Compliance, It Is Incumbent on the IRS to Conduct and Evaluate Research Into Taxpayer Information Needs

To give taxpayers what they need, when they need it, and in a manner they can access, the IRS must conduct and evaluate research into taxpayer information needs. In 2016 and 2017, TAS conducted a nationwide survey of U.S. taxpayers about their needs, preferences, and experiences with IRS taxpayer service conducted entirely by telephone (landline and cell phone).[16] Without evaluating the results from this type of research, the IRS is developing an outreach strategy that may miss the mark and negatively impact taxpayer compliance.

For example, the 2016 and 2017 TAS survey found that about 28 percent of taxpayers do not have broadband access, which translates to over 41 million taxpayers without this type of access, particularly an issue in the vulnerable populations including low income taxpayers, seniors and taxpayers with disabilities. The following chart illustrates the percentages of the respondents in the vulnerable populations who never use the internet:[17]

FIGURE 1.9.2, Percentages of Low Income Taxpayers, Seniors, and Taxpayers with Disabilities Who Never Use the Internet.



16 See Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*; National Taxpayer Advocate 2016 Annual Report to Congress, vol. 2, 1-30 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*).

17 See Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

To give taxpayers what they need, when they need it, and in a manner they can access, the IRS must conduct and evaluate research into taxpayer information needs.

In addition, the survey found seniors and taxpayers with disabilities are not as confident in their ability to find information they are seeking on the internet as other taxpayers. They are more likely to report they are not able to find information and less likely to state they always find the information they are seeking. Therefore, as the IRS increasingly uses digital outreach channels to distribute information, the IRS outreach strategy should also include alternate distribution channels to reach those taxpayers without broadband access as well as vulnerable taxpayer populations.[18]

Before Focusing on Digital Outreach and Education, Review Research on How People Process Information They Read Digitally

Before the IRS prioritizes digital outreach and education, it should review research on how people process information they read digitally. Research has shown that people tend to engage in a greater use of short cuts (such as searching for keywords) when reading digital content. Not surprisingly, readers of digital content tend to become distracted and multitask.[19]

Face-to-face outreach events tend to involve the distribution of pamphlets and brochures. In comparison to digital distribution of information, research has shown that people mentally process information easier (*e.g.*, less cognitive effort to process) if they read it on paper. There is a physicality in reading on paper — people tend to remember where on a page they read a specific item and they understand how the information they are currently reading fits into the whole picture, because they can see where the current page is in relation to the entire publication.[20] Research has also found that people recall information better if read on paper.[21]

IRS Efforts to Educate Taxpayers About the IRS Phone Scam Did Not Reach Far Enough

A practical example of how digital outreach may not reach certain populations can be seen with outreach initiatives warning taxpayers about the IRS phone and email scams. The IRS has conducted extensive outreach and education, mainly through digital channels and leveraged partnerships, detailing the evolving scams, how to avoid becoming a victim, and information on where to report scams.[22] Yet, these scams were raised as a serious problem at many, if not all, of the 12 National Taxpayer Advocate Public

18 See Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

19 Anne Niccoli, *Paper or Tablet? Reading Recall and Comprehension*, Educause Review. (Sept. 28, 2015).

20 Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper versus Screens*, Scientific American (Apr. 11, 2013); Roger Dooley, *Paper Beats Digital in Many Ways, According to Neuroscience*, Forbes (Sept. 16, 2015).

21 Roger Dooley, *Paper Beats Digital in Many Ways, According to Neuroscience*, Forbes (Sept. 16, 2015).

22 The IRS issued and posted news releases and alerts, delivered products in multiple languages via irs.gov, social media platforms, presentations at the IRS Nationwide Tax Forums, tax practitioner institutes, webinars, press events, Security Summit meetings and events, advisory board meetings, practitioner meetings, partner visits, industry meetings, state and local governments, congressional visits and congressional phone conferences that include sharing materials for external IRS partners to share with clients and taxpayers. All YouTube videos are close-captioned and the IRS has separate channels for multilingual and deaf taxpayers. IRS response to TAS fact check (Nov. 20, 2017). For two examples of digital products, see IRS, *Tax Scams/Consumer Alerts*, https://www.irs.gov/uac/tax-scams-consumer-alerts (visited May 23, 2017); IRS, *Scam Phone Calls Continue; IRS Identifies Five Easy Ways to Spot Suspicious Calls*, IR-2014-84 (Oct. 7, 2016).

Forums held around the country in 2016. Many audience members noted that the IRS's message is not reaching taxpayers in their communities — many of them English as a Second Language (ESL) and Limited English Proficiency (LEP) taxpayers.[23]

Therefore, despite the significant efforts by the IRS to distribute information on the topic, they still did not reach these ESL and LEP taxpayers. Without a local presence, the IRS does not necessarily consider language barriers or the most effective ways to communicate with certain taxpayer populations, such as working with community leaders and local trade and community organizations.

Outreach and Education Goes Beyond the Traditional Conveyance of Information and Should Be Part of Every Taxpayer Touch

To create an environment that encourages taxpayer trust and confidence, the IRS must change its culture from one that is enforcement-oriented to one that is service-oriented. In the related literature review in this report, there is discussion about the importance of the customer experience. Specifically, to build customer confidence, the organization must invest in the micro customer experience. This is the small, subtle, memorable, and affordable gesture that will resonate with customers for years.[24]

In addition to using traditional methods to convey information, such as IRS news releases and the IRS official website, the IRS must take advantage of each and every taxpayer touch to educate taxpayers. Every time an IRS employee has direct contact with a taxpayer regarding an enforcement action, the employee should take the time to ensure that the taxpayer understands how to come into compliance and avoid making similar mistakes in the future, if applicable. Further, when taxpayers take the initiative to visit Taxpayer Assistance Centers (TACs), employees have the perfect opportunity to listen to taxpayers in their own communities and provide targeted information to address their particular needs. In many cases, the TAC employee will be able to read the taxpayer's expressions and determine whether the taxpayer is truly understanding the information provided. Finally, because local TAC employees are well-positioned to identify community-specific information needs, the IRS should have procedures for TAC employees to elevate local information needs to C&L, as deemed appropriate.

Conducting outreach through the use of mobile vans would promote listening, humanizes both the IRS and the taxpayers, and builds taxpayer trust in the IRS.

Mobile van units can also serve as an outreach and education presence in the community. The IRS would establish relationships with community leaders in the process of scheduling stops. In addition, when employees engage with the taxpayers who visit the mobile van, they can address account issues, or answer follow-up questions, or even connect taxpayers to a remote expert on a given topic.[25] Taxpayers also feel more at ease while they are on their own turf rather than in a traditional government building. Conducting outreach through the use of mobile vans would promote listening, humanizes both the IRS

23 For transcripts of the National Taxpayer Advocate's Public Forums, see https://taxpayeradvocate.irs.gov/public-forums.

24 *See* Literature Review: *Fostering Taxpayer Engagement Through Geographic Presence*, vol. 2, *infra*.

25 HM Revenue & Customs, *A New Service for Those Needing the Most Help*, GOV.UK (Feb. 12, 2014), https://www.gov.uk/government/publications/issue-briefing-a-new-service-for-those-needing-the-most-help/a-new-service-for-those-needing-the-most-help.

and the taxpayers, and builds taxpayer trust in the IRS.[26] In addition, through these interactions, IRS employees would gain valuable information about the limitations of vulnerable populations, such as seniors, low income, and taxpayers with disabilities.[27]

Two-Way Communication Is Vital to Maintain Responsiveness

IRS digital outreach and education is currently a form of one-way messaging. In a vacuum, the IRS anticipates the information needs of taxpayers and drafts guidance to address these anticipated needs. However, there is no current method for taxpayers to comment on informal or "unpublished" guidance posted online (such as Tax Topics and Frequently Asked Questions or FAQs), ask more detailed questions, or present their own unique set of facts for a more tailored response.[28] In addition, the IRS does not have a sense of whether taxpayers are receiving or understanding the messages distributed through digital channels.

To maintain trust in the agency, the IRS must be responsive to taxpayer needs. This includes needs particular to certain regions and localities. As an example, the Federal Emergency Management Agency (FEMA) has developed effective two-way communication lines with the local communities. To accomplish its mission, FEMA must distribute important disaster-related information to people who need it and must incorporate critical updates from individuals who are experiencing the changing situation on-the-ground. Because time is a fundamental factor in emergency management, FEMA must fully comprehend the full scope of the disaster. Accordingly, FEMA fully uses two-way communication, generally in the form of social media, to maintain responsiveness.[29]

While the administration of a federally-declared disaster emergency response differs from tax administration, they both share the need to be responsive to the needs of local communities. The IRS must have a way to give and receive information that effectively tailors its outreach and education to address the particular facts and circumstances faced in that specific geographic area. The IRS has noted that it is evaluating new more efficient opportunities to expand two-way dialogue with taxpayers around the country.[30] We look forward to the implementation of new technology that would provide such capability, but we also caution the IRS that such technology should not replace actual geographic presence in the local communities.

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26 TAS is planning to purchase or lease one or more mobile units in its outreach and disaster efforts in fiscal year (FY) 2018.

27 An example of the use of mobile vans in local communities to provide outreach and education in addition to the provision of traditional governmental services is the MVA mobile bus. *See* Maryland Department of Transportation, Motor Vehicle Administration, *MVA Bus Schedule*, http://www.mva.maryland.gov/locations/bus.htm (last visited Sept. 5, 2017).

28 *See* National Taxpayer Advocate Blog: *IRS Frequently Asked Questions Can Be a Trap for the Unwary* (Feb. 26, 2017), https://taxpayeradvocate.irs.gov/news/irs-frequently-asked-questions-can-be-a-trap-for-the-unwary?category=TaxNews.

29 *Understanding the Power of Social Media as a Tool in the Aftermath of Disasters, hearing before the Senate Committee on Homeland Security and Governmental Affairs, Subcomm. on Disaster Recovery and Intergovernmental Affairs* (May 4, 2011) (written statement of Craig Fugate, Administrator, Federal Emergency Management Agency); FEMA, *Social Media Provides Online Information and Resources for Survivors* (Oct. 10, 2017), https://www.fema.gov/news-release/2017/10/10/social-media-provides-online-information-and-resources-survivors (last visited Nov. 3, 2017); Dina Fine Maron, *How Social Media is Changing Disaster Response, Scientific American* (June 7, 2013), https://www.scientificamerican.com/article/how-social-media-is-changing-disaster-response/ (last visited Nov. 3, 2017).

30 IRS response to TAS information request (Oct. 13, 2017).

An International Approach: Her Majesty's Revenue and Customs (HMRC)[31]

The IRS can learn from the experience of other taxing authorities in developing an effective outreach and education strategy that meets taxpayers' needs. In an effort to close the tax gap, Her Majesty's Revenue and Customs (HMRC) in the United Kingdom developed a research-based outreach strategy. In fact, the first of HMRC's eight key compliance activities states: "Identifying how to deal with customers in the most appropriate way. This ranges from educating them about their tax responsibilities to providing local help and support."[32]

To provide more targeted and tailored service to taxpayers, HMRC commissioned research into the estimated 1.5 million customers who need extra help to get their taxes right. These customers included individuals who experienced a specific event in their lives (such as a family member's death or approaching retirement), or those with low literacy levels, medical conditions, or disabilities. HMRC used the research results to design a service strategy that is accessible to more taxpayers. HMRC trained its employees to identify when a customer needs extra help. Some of these customers may need extra help from a specialist over the phone, with arranged call-backs, and possibly face-to-face meetings. Others may need face-to-face support, delivered by a team of mobile advisors at convenient locations rather than fixed locations with limited opening times. Such locations include government offices, community buildings, and a person's own home.[33] HMRC also established improved working relationships with community organizations. HMRC's initiative allowed the agency to refine its personalized services by offering a select group of taxpayers the support that suits them best.[34] It also allowed HMRC to close all of its brick-and-mortar Enquiry Centres, even as it retained the ability to meet face-to-face with taxpayers based on their specific needs.

The IRS services strategy appears to have the same end goal as HMRC — efficiently use outreach resources to "free up" resources to effectively provide personalized services to the population who actually need more help. However, the IRS has not conducted research to determine how to best support its diverse taxpayer base. Moreover, the IRS has significantly reduced the scope, coverage, and availability of face-to-face assistance over the last decade.[35] Therefore, without any relevant data on taxpayer information needs, the IRS has little basis to justify its substantial shift toward digital outreach and education and almost complete reliance on third-party intermediaries to deliver outreach and education.

31 HM Revenue & Customs, Issue Briefing, *Helping Those Who Need It Most* (March 2013), https://www.gov.uk/government/publications/helping-those-who-need-it-most; HM Revenue & Customs, Issue Briefing, *Our Approach to Tax Compliance* (Sept. 2012).

32 HM Revenue & Customs, Issue Briefing, *Our Approach to Tax Compliance* (Sept. 2012).

33 HM Revenue & Customs, *A New Service for Those Needing the Most Help*, GOV.UK (Feb. 12, 2014), https://www.gov.uk/government/publications/issue-briefing-a-new-service-for-those-needing-the-most-help/a-new-service-for-those-needing-the-most-help; Nick Huber, AccountingWEB, *HMRC to Close Walk-in Tax Enquiry Centres* (Feb. 12, 2014).

34 HM Revenue & Customs, Issue Briefing, *Helping Those Who Need It Most* (Mar. 2013); HM Revenue & Customs, *A New Service for Those Needing the Most Help* (Feb. 12, 2014), https://www.gov.uk/government/publications/issue-briefing-a-new-service-for-those-needing-the-most-help/a-new-service-for-those-needing-the-most-help (last visited Sept. 5, 2017).

35 See Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*, *infra*; National Taxpayer Advocate 2016 Annual Report to Congress 86-97 (Most Serious Problem: *Geographic Focus: The IRS Lacks an Adequate Local Presence in Communities, Thereby Limiting Its Ability to Meet the Needs of Specific Taxpayer Populations and Improve Voluntary Compliance*); National Taxpayer Advocate 2014 Annual Report to Congress 31-45 (Most Serious Problem: *IRS Local Presence: The Lack of a Cross-Functional Geographic Footprint Impedes the IRS's Ability to Improve Voluntary Compliance and Effectively Address Noncompliance*).

CONCLUSION

To protect the taxpayer's right to be informed, the IRS must develop a research-based outreach and education strategy. Not all taxpayers have the same information needs. The most effective way to understand the information needs of the various diverse local communities is to have geographic presence rather than generalize the information needs of the entire U.S. taxpayer population from afar. Both the IRS and taxpayers are harmed if they cannot engage in two-way conversations, ideally in the form of a face-to-face meeting, because both parties have so much to learn from each other.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Conduct research into the outreach and education needs of taxpayers, broken down by various demographics.
2. Evaluate and implement two-way digital communication models into the outreach and education strategy (instead of one-way messaging).
3. Incorporate into the IRS outreach and education strategy the findings of TAS research on taxpayers' varying abilities and attitudes toward IRS taxpayer service, as well as the needs and preferences of low income and Hispanic taxpayers, and the recommendations from the National Taxpayer Advocate's 2016 Public Forums.
4. Assign at least one employee to conduct outreach activities in each state, territory, and the District of Columbia (and who resides in that state, territory, or district) and provide each employee with sufficient resources to travel and engage in regular face-to-face communications with taxpayers throughout the state.
5. Establish a program in which the IRS provides various services, including traditional face-to-face outreach and education, through the use of mobile taxpayer assistance stations (vans) in rural and underserved communities.

MSP #10 TAXPAYER ASSISTANCE CENTERS (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance

RESPONSIBLE OFFICIAL

Kenneth Corbin, Commissioner, Wage and Investment

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*

DEFINITION OF PROBLEM

Taxpayer Assistance Centers (TACs), formerly called walk-in sites, became the primary local face of the IRS after the IRS reorganized around central campus locations and business divisions, severely reducing the IRS presence in local communities.[2] However, recent changes to TACs have chipped away at the services provided and the ability of taxpayers to receive prompt, in-person service, and negatively impacted the image of the IRS in local communities. Specifically, the National Taxpayer Advocate is concerned that:

- The IRS has closed 30 TACs since fiscal year (FY) 2011, a reduction of over seven percent.[3]
- In FY 2017, the first full year of the appointment system, the IRS served 3.2 million taxpayers at TACs compared to 4.4 million taxpayers in FY 2016.[4]
- The IRS has reduced TAC staffing from 2,254 employees in late February 2011 to 1,586 employees in late February 2017, a decline of about 30 percent.[5]
- 111 TACs, approximately 30 percent of all TACs, have either zero employees or one employee, resulting in a closed or virtually closed TAC.[6]

As the IRS moves towards online self-service it must consider taxpayers who cannot complete tasks online or prefer not to use the internet for interacting with the IRS. Reducing a service to the point that taxpayers can no longer easily access it, then declaring no one uses the service and eliminating it entirely

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue and Restructuring Act of 1998 (RRA 98), Pub. L. No. 105-206, § 1001(a), 112 Stat. 685 (1998) (codified at IRC § 7801). RRA 98 required the IRS to reorganize its structure around business units serving specific taxpayer populations as opposed to its previous geographically based structure.

3 IRS response to TAS information request (Dec. 23, 2014); IRS response to TAS information request (Nov. 3, 2017). IRS had 401 TAC locations in 2011 but that number is down to 371 in 2017.

4 IRS response to TAS information request (Sept. 13, 2017). IRS response to TAS information request (Nov. 3, 2017).

5 IRS response to TAS information request (Sept. 13, 2017; Nov. 3, 2017). Figures in the text are for Feb. 26, 2011 and Feb. 18, 2017. The number of employees declined at the end of the fiscal year (FY) primarily due to seasonal staffing with 1,898 employees in 2011 vs. 1,435 in 2017 on September 30th of each year.

6 IRS response to TAS information request (Nov. 3, 2017).

has proven successful for the IRS in the past and it appears the IRS is moving in the same direction with TACs. Further, the IRS should not discount the value of a presence in local communities — being able to interact with an employee in real life helps humanize the agency for taxpayers and provides the IRS with real time information about tax issues affecting local areas.[7] Nor can it ignore the consequences to taxpayer rights, particularly the *right to quality service* and the *right to be informed* that occur when taxpayers' access to taxpayer service methods is reduced or restricted.

ANALYSIS OF THE PROBLEM

The State of TACs in FY 2017

The IRS currently operates 371 TACs in the 50 states, the District of Columbia, and Puerto Rico.[8] The TACs provide the main source of in-person, face-to-face assistance from the IRS to taxpayers. Approximately 3.2 million taxpayers visited a TAC in FY 2017.[9] The IRS has been reducing the services offered in TACs for many years and recently switched to a mainly appointment based service model for TACs.[10] While the IRS has restricted the topics it addresses at TACs, only answers tax law questions (both on the phones and in TACs) during the filing season, and no longer offers return preparation at the TACs, taxpayers continue to seek out TAC services.[11]

Of the TACs, 24 have zero employees, so are closed for all intents and purposes, and 87 have one employee and are subject to closure if that employee is sick, on leave, or in training.[12] Five TACs were staffed only seasonally.[13] Six TACs were open fewer than 35 hours per week.[14] Seven TACs were staffed by circuit riders.[15] Overall, TAC staffing is down nearly 30 percent since FY 2011.[16]

TAC Service in Some States Is Nearly Non-Existent

While overall TAC availability has been drastically reduced in terms of services offered, employees on staff, and locations, the situation is particularly dire in certain states. In Montana, the IRS lists six TAC locations.[17] Of these six TACs, half have zero or one employee, one TAC with one employee is only staffed seasonally, and total TAC employees in Montana dropped from 11 in FY 2014 to eight in FY 2017.[18] Faring worse are the 3.1 million residents of Iowa,[19] with only five TACs, 60 percent of which

7 For a discussion of the geographic footprint of the IRS, see National Taxpayer Advocate 2016 Annual Report to Congress 86-97 (Most Serious Problem: *GEOGRAPHIC FOCUS: The IRS Lacks an Adequate Local Presence in Communities, Thereby Limiting Its Ability to Meet the Needs of Specific Taxpayer Populations and Improve Voluntary Compliance*).

8 IRS response to TAS information request (Nov. 3, 2017).

9 *Id.*

10 *See, e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress 302-18 (Most Serious Problem: *The IRS Lacks a Servicewide Strategy that Identifies Effective and Efficient Means of Delivering Face-to-Face Taxpayer Services*). IRS, *Contact Your Local Office*, https://www.irs.gov/help-resources/contact-your-local-irs-office (last visited Aug. 16, 2017).

11 See IRS, e-News for Tax Professionals – Issue Number 2013-49, Item 4, *Some IRS Assistance and Taxpayer Services Shift to Automated Resources* (Dec. 20, 2013), https://www.irs.gov/uac/Some-IRS-Assistance-and-Taxpayer-Services-Shift-to-Automated-Resources.

12 IRS response to TAS information request (Nov. 3, 2017).

13 *Id.*

14 *Id.*

15 IRS response to TAS fact check (Dec. 19, 2017).

16 From February 2011 to February 2017, Taxpayer Assistance Center (TAC) staffing fell from 2,254 to 1,586, a decrease of 30 percent. Similarly, from September 2011 to September 2017, staffing fell from 1,898 to 1,435 in TACs.

17 IRS response to TAS information request (Nov. 3, 2017).

18 *Id.*

19 Census Bureau, *Quick Facts Iowa*, https://www.census.gov/quickfacts/IA (last visited Sept. 21, 2017).

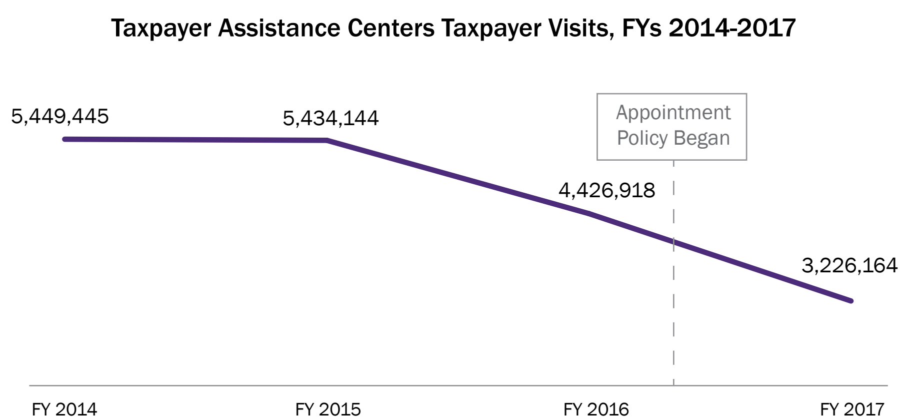
> **Reducing a service to the point that taxpayers can no longer easily access it, then declaring no one uses the service and eliminating it entirely has proven successful for the IRS in the past and it appears the IRS is moving in the same direction with Taxpayer Assistance Centers.**

are unstaffed or have one employee and only six total TAC employees in the state.[20] These taxpayers have approximately one TAC employee per 500,000 residents of the state. The situation in Vermont is equally grim — of Vermont's four TACs, only one is staffed with more than one employee, one is unstaffed, and one is serviced by a shared, circuit-riding employee.[21] For residents in these and other states, finding an IRS employee for face-to-face assistance is a monumental task.

The IRS Changed TACs From Walk-In Sites to Mostly By Appointment

By the end of calendar year 2016 the IRS moved from a walk-in system for TAC service to a mostly by appointment only system.[22] Prior to changing to a mostly appointment based system at TACs, 4.4 million taxpayers visited TACs in FY 2016.[23] In FY 2017, the first full year of the appointment system, only 3.2 million taxpayers visited TACs, a decrease of 27 percent.[24]

FIGURE 1.10.1, TAC Visits from FY 2014–2017[25]



20 IRS response to TAS information request (Nov. 3, 2017).

21 *Id.*

22 Memorandum from Debra Holland, Commissioner, W&I to All W&I Employees (Dec. 13, 2016) (on file with TAS). Additionally, it is important to note that the IRS did not have a global view system for selecting appointments for taxpayers. As a result, scheduling employees scrolled ahead weeks in advance to find an appointment for a taxpayer where the chance would be greater for availability rather than looking at the next few days individually to find the next available appointment for a taxpayer, delaying the taxpayer's ability to secure a TAC appointment. The Commissioner, W&I, informed the National Taxpayer Advocate that the IRS now intends to procure a global calendar system, hoping this issue would be resolved going forward. Conversation between the Commissioner, W&I and the National Taxpayer Advocate (Sept. 6, 2017).

23 IRS response to TAS information request (Sept. 13, 2017).

24 IRS response to TAS information request (Sept. 13, 2017, Nov. 3, 2017).

25 *Id.*

In addition to implementing an appointment system, the IRS has created a triage system whereby it attempts to resolve the taxpayer's concerns over the phone when the taxpayer calls to make a TAC appointment before the IRS employee will schedule an appointment for the taxpayer. In FY 2017, approximately 3.5 million taxpayers called for a TAC appointment and about half or nearly 1.7 million did not make an appointment.[26]

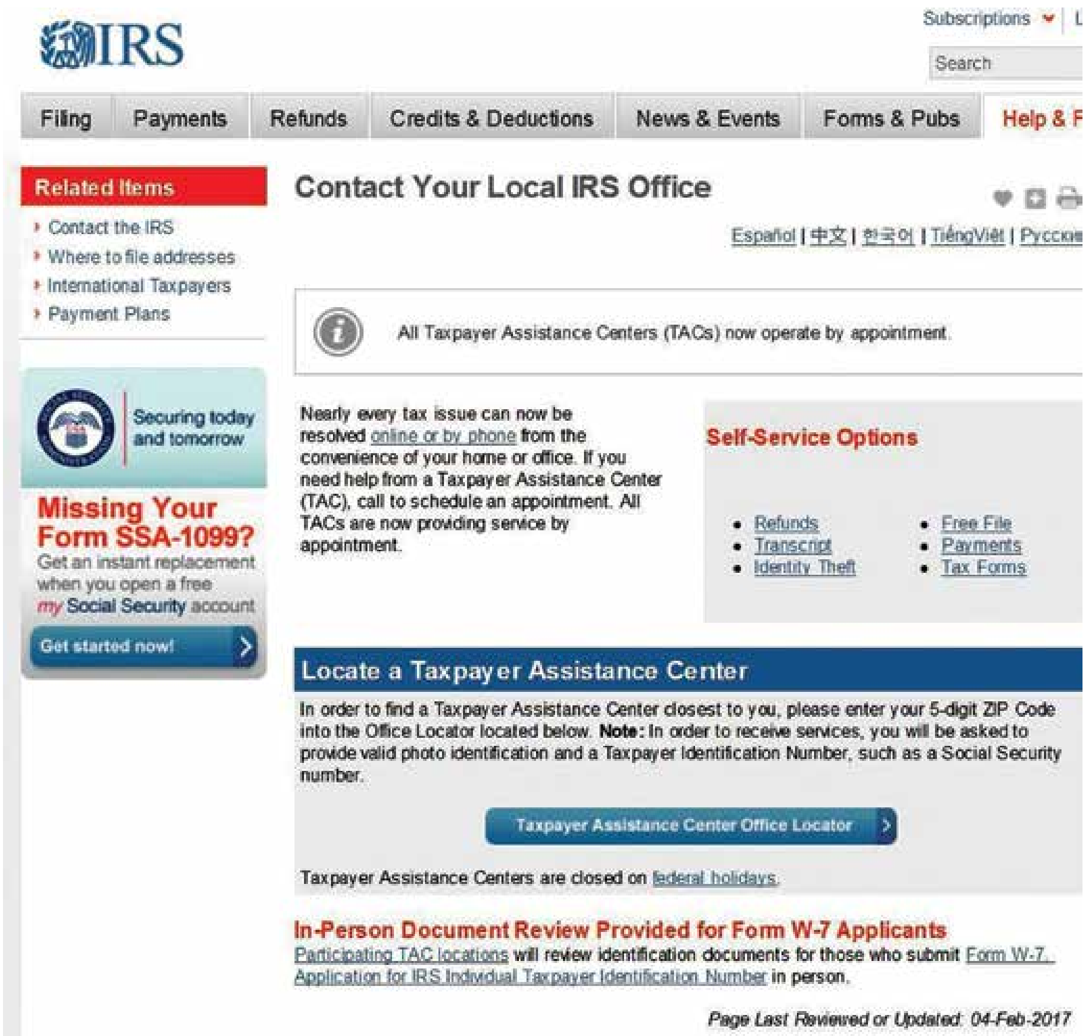
The National Taxpayer Advocate believes that conserving IRS in-person resources for those taxpayers who need face-to-face service is an important goal; however, she is concerned about where the nearly 350,000 taxpayers (the difference between taxpayers served at TACs in FY 2015 and taxpayers served in TACs in FY 2017 plus taxpayers triaged in FY 2017) are now turning for tax assistance.[27] While the National Taxpayer Advocate is pleased that the IRS indicates it now allows TAC managers to accept walk-ins at the manager's discretion, she urges the IRS to allow both appointments and walk-ins at TACs to provide options for taxpayers. Additionally, while the IRS indicates that taxpayers can still walk-in to complete certain tasks (making payments, picking up forms, etc.), and that managers can accept walk-ins for other services, the IRS website providing information about contacting your local office provides no such information.[28]

26 IRS response to TAS information request (Nov. 3, 2017).

27 IRS response to TAS information request (Sept. 13, 2017 and Nov. 3, 2017). TAS is concerned that the number of taxpayers "triaged" may not accurately reflect taxpayers who resolved their issues during the initial phone call. The numbers provided by the IRS simply report the total number of taxpayers who initially called seeking a TAC appointment and the number of taxpayers who did not schedule an appointment during that phone call.

28 IRS, *Contact Your Local Office*, https://www.irs.gov/help-resources/contact-your-local-irs-office (last visited Sept. 21, 2017).

FIGURE 1.10.2



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All Taxpayer Assistance Centers (TACs) now operate by appointment.

Nearly every tax issue can now be resolved online or by phone from the convenience of your home or office. If you need help from a Taxpayer Assistance Center (TAC), call to schedule an appointment. All TACs are now providing service by appointment.

Self-Service Options

- Refunds
- Transcript
- Identity Theft
- Free File
- Payments
- Tax Forms

Locate a Taxpayer Assistance Center

In order to find a Taxpayer Assistance Center closest to you, please enter your 5-digit ZIP Code into the Office Locator located below. **Note:** In order to receive services, you will be asked to provide valid photo identification and a Taxpayer Identification Number, such as a Social Security number.

Taxpayer Assistance Center Office Locator

Taxpayer Assistance Centers are closed on federal holidays.

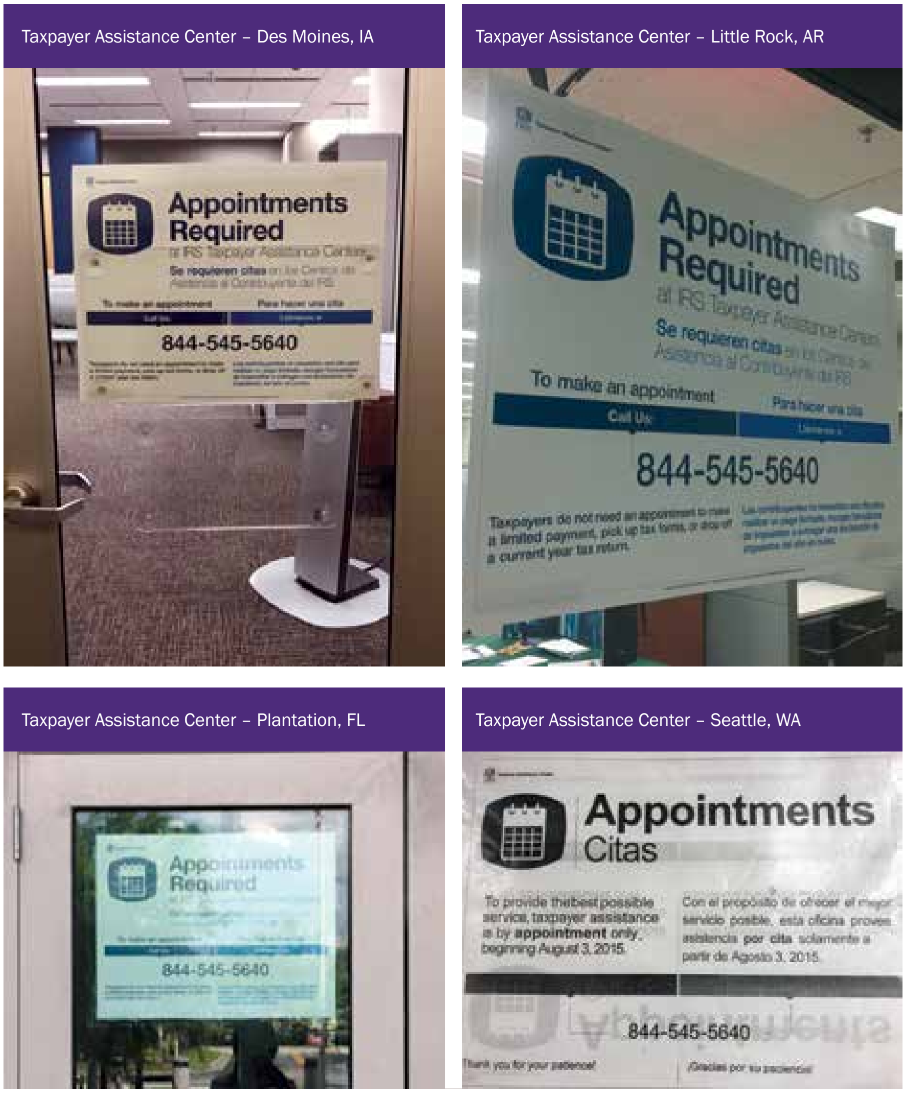
In-Person Document Review Provided for Form W-7 Applicants

Participating TAC locations will review identification documents for those who submit Form W-7, Application for IRS Individual Taxpayer Identification Number in person.

Page Last Reviewed or Updated: 04-Feb-2017

Further, taxpayers who visit TACs without an appointment are greeted with the signs pictured below.

FIGURE 1.10.3, Appointment Only Signs on TACs



Between the messaging on the IRS website and these signs adorning the doors of TACs, the IRS is telling taxpayers not to come in without first calling, and providing no indication that a taxpayer could even walk in if they so desired. The National Taxpayer Advocate is concerned about this messaging and what is actually happening to taxpayers who visit a TAC to complete a task, such as making a payment, which the IRS maintains taxpayers can do without an appointment.[29]

29 For further information regarding the National Taxpayer Advocate's concerns about what taxpayers are experiencing if they visit a TAC without an appointment, see https://taxpayeradvocate.irs.gov/news/nta-blog-taxpayer-assistance-center-service-continues-to-decline-impairing-taxpayers-ability-to-receive-in-person-assistance?category=TaxNews.

Taxpayers have the *right to quality service* and when the agency charged with administering the tax code says it can't help, the IRS is violating the rights of all taxpayers, and in particular those without the resources to seek outside help.

The IRS Is the Agency of "No," Harming Vulnerable Taxpayer Populations and Impacting Taxpayer Rights

The IRS arguably touches the lives of more people than any other United States government agency. It is hard to imagine anyone who lives in the United States, or is a United States citizen, or has ever done business in the United States, not having to interact with the IRS at some point in time. Yet, the IRS continues to reduce the services it provides, preferring to pursue a policy of "low cost" at the expense of service and protecting taxpayer rights. Want a tax return prepared? Do it yourself, pay someone else to do, or if you meet the income requirements you can go to a Volunteer Income Tax Assistance (VITA) site. But don't ask the IRS, it doesn't offer return preparation anymore.

This is particularly concerning in light of recent natural disasters. VITA sites, which only prepare returns for taxpayers within their income restrictions, do not prepare returns with casualty losses.[30] Taxpayers in disaster areas affected by the year's catastrophic hurricanes are being warned to beware of scammers — with so much on their plates, where should these taxpayers turn for tax assistance at this time when they cannot turn to the IRS? Instead, these taxpayers are left to sort through finding a reputable tax preparer or waiting until next filing season to claim their disaster losses. Instead of saying "no" in times of disaster, the IRS could deploy mobile vans and staff nearby TACs with onsite employees such as revenue agents or revenue officers to meet taxpayer demand and implement a policy of assisting taxpayers in disaster areas with filing amended returns. Further, the IRS could also use co-located employees at peak times of the year where taxpayer demand for TAC services outpaces the availability to assist additional taxpayers.

Adding insult to injury, the IRS no longer answers tax law questions outside of the tax filing season, which runs from January to mid-April.[31] So, any taxpayers currently facing hardship caused by the recent hurricanes cannot even call the IRS to get a tax law question answered. Taxpayers have the *right to quality service* and when the agency charged with administering the tax code says it can't help, the IRS is violating the rights of all taxpayers, and in particular those without the resources to seek outside help.

30 For a detailed discussion of VITAs, see Most Serious Problem: *VITA/TCE Programs: IRS Restrictions on Volunteer Income Tax Assistance (VITA) and Taxpayer Counseling for the Elderly (TCE) Programs Increase Taxpayer Burden and Adversely Impact Access to Free Tax Preparation for Low Income, Disabled, Rural, and Elderly Taxpayers*, *infra*. *See also* IRS, Pub. 3676-B. For example, in areas currently affected by hurricane damage, like Houston, there is only one VITA site open within 100 miles of Houston and its hours are limited to 10am-2pm. *See* https://irs.treasury.gov/freetaxprep/jsp/vita.jsp?zip=77005&lat=29.7183467&lng=-95.43061410000001&radius=100. *See also* IRS, Pub. 4012 (Rev. 10-2017).

31 IRM 21.3.4.2(1) (Oct. 1, 2017). *See also* IRM 21.3.4.3.4 (Oct. 27, 2016) (providing an exception at the manager's discretion).

Alternative Face-to-Face Service Methods Are Important, But Are Not a Substitute for a TAC

Partnership With Social Security Administration (SSA)

While the National Taxpayer Advocate is pleased that the IRS is pursuing partnerships with other government agencies, as she has recommended, the recommendation was not to replace current TAC locations with partner sites, but instead, to use partner sites to expand the reach of IRS face-to-face services to underserved communities.[32] The IRS is currently testing a pilot program with the SSA where the IRS will place TAC employees in four SSA locations.[33] Each of these TACs is a one employee TAC; therefore, during this pilot, those TACs will be effectively closed.[34] If the IRS is merely using this program to prove it can provide TAC services in a co-located space and release the space leased by the IRS for TACs in these areas, then this program will not result in a net positive number of taxpayers now having access to TACs who did not previously have such access.

Virtual Service Delivery (VSD)

The National Taxpayer Advocate recommended for many years that the IRS pursue VSD to reach taxpayers without ready access to IRS face-to-face services.[35] However, again, the National Taxpayer Advocate does not believe that VSD kiosks should replace TACs, rather kiosks should be used as a supplement to already existing TACs where demand outstrips employee availability and as a tool to reach rural and underserved communities. Additionally, the National Taxpayer Advocate is very concerned that the IRS's implementation of VSD has not kept pace with the available technology, resulting in outdated technology that does not allow taxpayers to complete the tasks they need to complete.[36] With the advent of mobile phone video technology, the IRS must keep pace with the ways that taxpayers can connect with the services they need in its mission to provide top quality taxpayer service.

Mobile Vans

The National Taxpayer Advocate has long urged the IRS to test a properly designed mobile van program.[37] While the IRS has previously indicated that it has piloted a van program, TAS and the National Taxpayer Advocate have not had the opportunity to review either the design or the results from this program, only the IRS assertion that it was unsuccessful.[38] In contrast, this summer, the IRS created posters for the main IRS building, one of which featured a tax van from the 1970s, depicted below.

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32 *See, e.g.*, National Taxpayer Advocate 2010 Annual Report to Congress 267-77 (Most Serious Problem: *The IRS Has Been Reluctant to Implement Alternative Service Methods that Would Improve Accessibility for Taxpayers Who Seek Face-to-Face Assistance*).

33 IRS response to TAS information request (Sept. 13, 2017).

34 The four "home" TACs of the employees in the pilot program are: North Platte, NE; Danville, VA; Presque Isle, ME; and New London, CT. IRS response to TAS information request (Sept. 13, 2017).

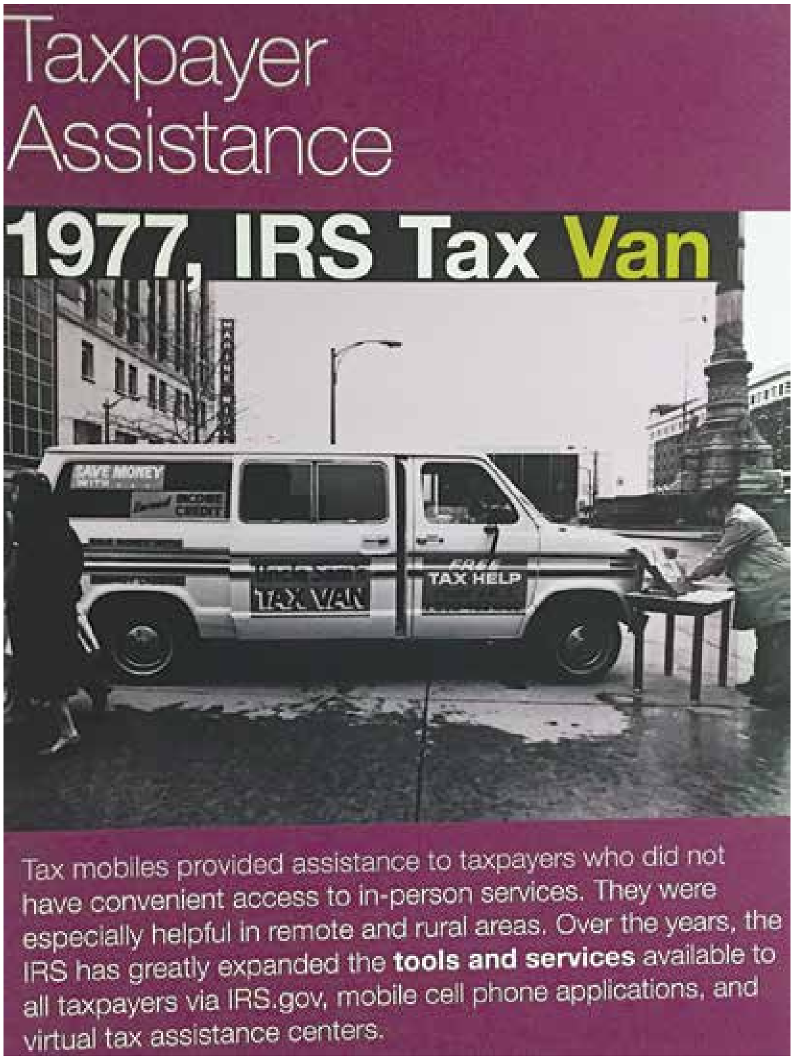
35 *See, e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 154-62 (Most Serious Problem: *Despite a Congressional Directive, the IRS Has Not Maximized the Appropriate Use of Videoconferencing and Similar Technologies to Enhance Taxpayer Services*); National Taxpayer Advocate 2012 Annual Report to Congress 462-68; National Taxpayer Advocate 2012 Annual Report to Congress 302-18.

36 See Most Serious Problem: *Appeals*: *The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*, *infra*; Most Serious Problem: *Online Accounts*: *The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*, *infra*.

37 *See, e.g.*, National Taxpayer Advocate 2010 Annual Report to Congress 267-77 (Most Serious Problem: *The IRS Has Been Reluctant to Implement Alternative Service Methods that Would Improve Accessibility for Taxpayers Who Seek Face-to-Face Assistance*); National Taxpayer Advocate 2008 Annual Report to Congress 95-113 (Most Serious Problem: *Taxpayer Service: Bringing Service to the Taxpayer*).

38 National Taxpayer Advocate 2010 Annual Report to Congress 267-77.

FIGURE 1.10.4



While the poster indicates taxpayers can now complete tasks online and thus implies a van is a relic of a different era, other programs serving similar populations as the IRS have found vans meet the needs of these populations.

Recently, an article appeared in the *Washington Post* regarding a Washington, D.C. area food bank that is bringing its food to where the populations it serves are most likely to gather.[39] The National Taxpayer Advocate strongly urges the IRS to implement a similar program and additionally use the vans to service presidentially declared disaster areas.[40]

39 Bui, Lynn, *Slowing the Revolving Door of Prison with Corn Bread, Cabbage and Chocolate*, Wash. Post (July 24, 2017).

40 TAS is currently exploring the potential to secure and operate its own mobile van with the ability to deploy TAS services to disaster areas.

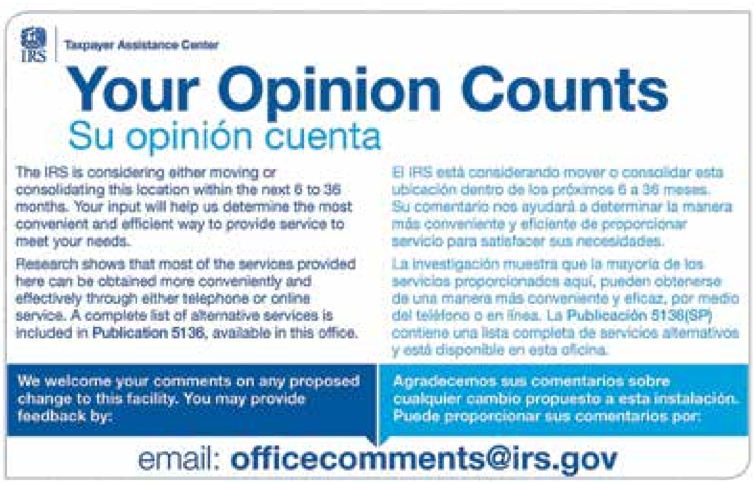
Taxpayers Prefer Familiar Services

TAS recently completed a survey of taxpayers focused on preferred service delivery methods. One point in particular stood out — taxpayers prefer to use the first service channel (phone, web, TAC) they attempted to use to complete a task and expressed a preference to not use a different method.[41] Further, specific taxpayer populations were more likely to use a TAC, namely the low income and the elderly.[42] Additionally, low income taxpayers reported the loss of some services available at the TACs would have a negative impact.[43] Vulnerable populations were more likely to report that they never go on the internet compared to other taxpayer populations.[44] As the IRS moves toward internet self-help and away from in-person assistance, findings from taxpayer needs and preferences studies must shape service decisions.

Before Closing a TAC, the IRS Must Consider the Community Needs

Recent language in the Senate Report accompanying the Senate version of the FY 2017 appropriations bill contains specific language addressing service at TACs.[45] In particular, the report directs the IRS to hold a public forum in the community where it is planning to close a TAC and to inform the Senate and House appropriations committees.[46] The National Taxpayer Advocate is concerned that the IRS may not be following this directive. The sign depicted below recently appeared on the door of the TAC in Texarkana, Texas:

FIGURE 1.10.5



41 TAS, *Observations from Services Priorities Data* (Oct. 4, 2017) (on file with TAS).

42 Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*, vol. 2, *infra*.

43 *Id.*

44 *Id.* Nearly 30 percent of seniors, almost 12 percent of low income, and about 16 percent of disabled respondents reported they never use the internet. This compares with only about three to five percent of their counterparts saying they do not use the internet.

45 S. Rep. No. 114-280, at 32-34 (2016).

46 *Id.*

While the sign invites the public to comment on the proposed changes to the TAC, it is unlikely the public will ever see the sign. The Texarkana TAC is located on the 5th floor of a federal building and the public must have an appointment to get in the building. However, the TAC has been unstaffed since FY 2016, so taxpayers cannot get an appointment and will never see the sign.[47] TAS is unaware of any IRS plans to hold a public forum for comment on the potential closure of the Texarkana TAC. Posting a sign on a door no one can access asking for comments seems an ideal way for the IRS to state that the public raised no objections to the closure of the TAC and simply close the TAC. Such a sign does not appear to meet the directive from the Senate.

CONCLUSION

The National Taxpayer Advocate strongly supports providing taxpayer service via many delivery channels. The IRS must meet taxpayers where they are and through the methods they prefer in order to provide service to the greatest number of taxpayers possible. The least expensive method is not necessarily the best, and reducing current services without providing other methods for taxpayers to access those services creates a self-fulfilling prophecy — reduce service to the point that taxpayers can no longer easily access it, then declare the service unused and unnecessary and cut it completely. Such a strategy worked as the IRS undermined its own return preparation services, and it appears to be moving in that direction with its face-to-face services. If a TAC has no employees, taxpayers can't use it, then the IRS declares no one is using the TAC and closes it. Reducing the IRS presence across the country at a time when the population is increasing,[48] scammers abound,[49] taxpayers are subject to recurrent information breaches that threaten their tax information,[50] and natural disasters present immediate tax issues,[51] does not protect taxpayer rights, particularly the *right to quality service*.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Institute a dual appointment and walk-in structure at TACs at the taxpayer's choice.
2. Request the funding for, and in consultation with TAS, develop a pilot mobile van program.
3. Answer tax law questions throughout the year, at both TACs and on the phones.
4. Reinstate return preparation for amended disaster-based casualty loss returns.
5. Staff TACs during peak times with co-located staff such as revenue officers or revenue agents to handle overflow and appointments.

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47 IRS response to TAS information request (Sept. 13, 2017).

48 Census Bureau, *US and World Population Clock*, https://www.census.gov/popclock/.

49 IRS, Tax *Scams/Consumer Alerts*, https://www.irs.gov/newsroom/tax-scams-consumer-alerts (last visited Sept. 26, 2017).

50 Alyssa Newcomb, *Massive Equifax Data Breach Could Affect Half of the U.S. Population*, NBC NEWS (Sept. 10, 2017, 6:01 PM), https://www.nbcnews.com/tech/security/massive-equifax-data-breach-could-impact-half-u-s-population-n799686.

51 *See, e.g.*, Meghan Keneally, *Breaking Down Hurricane Irma's Damage*, ABC NEWS (Sept. 11, 2017, 1:28 PM), http://abcnews.go.com/US/breaking-hurricane-irmas-damage/story?id=49765357.

MSP #11 VITA/TCE PROGRAMS: IRS Restrictions on Volunteer Income Tax Assistance (VITA) and Taxpayer Counseling for the Elderly (TCE) Programs Increase Taxpayer Burden and Adversely Impact Access to Free Tax Preparation for Low Income, Disabled, Rural, and Elderly Taxpayers

RESPONSIBLE OFFICIALS

Kenneth Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The Volunteer Income Tax Assistance (VITA) program provides free basic income tax return preparation with electronic filing to taxpayers who generally make $54,000 or less,[2] including low-wage workers, persons with disabilities, taxpayers living in rural communities, Native Americans, and taxpayers with limited English proficiency.[3] In addition to VITA, the Tax Counseling for the Elderly (TCE) program offers free tax help for taxpayers 60 years of age and older, specializing in questions about pensions and retirement-related issues.[4] IRS-certified volunteers in these programs are associated with IRS partners, which are often non-profit organizations that receive grants from the IRS.[5]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 The $54,000 figure is based on the Earned Income Tax Credit (EITC) threshold; family size is not a factor. *See* IRS response to TAS Information Request (Sept. 21, 2017). Each year, the IRS suggests an income threshold for which free tax preparation will be offered. For example, in Tax Year 2015, the income threshold was $53,000 while the EITC threshold for a family filing married filing jointly with three or more children, was $53,267. *See* IRS, *2015 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts-1-year (last visited Oct. 19, 2017).

3 Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) sites provide free tax preparation services for qualified individuals in conjunction with IRS assistance and direction. *See* IRS, *Free Tax Return Preparation for Qualifying Taxpayers*, https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers (last visited May 17, 2017).

4 Section 163 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2810 (1978) authorizes the IRS to enter into agreements with private or nongovernmental public non-profit agencies and organizations, exempt under IRC § 501, providing training and technical assistance to volunteers engaged in free tax help for the elderly.

5 *See* Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2810 (1978), § 163. In Fiscal Year (FY) 2017, the IRS partnered with 55 national partners. *See also* IRS response to TAS Information Request (Sept. 21, 2017).

Of about 143 million individual tax return filers in Processing Year (PY) 2017, 108 million or approximately 75 percent may be eligible to have their returns prepared at VITA and TCE sites.[6] During fiscal year (FY) 2017, VITA and TCE programs prepared over 3.5 million individual income tax returns.[7] This total does not reflect the number of taxpayers who sought assistance from VITA or TCE sites but were turned away because the issues they sought help with were deemed "out-of-scope."[8] Notably, in FY 2017, VITA and TCE sites were reported to have a 93 percent accuracy rate.[9]

The National Taxpayer Advocate has long emphasized that restrictions and limitations the IRS imposes on VITA and TCE sites, compounded with the elimination of tax preparation services at Taxpayer Assistance Centers (TACs), increase taxpayer burden and may adversely impact the ability of low income, disabled, rural, and elderly taxpayers to obtain free tax return preparation services and meet their reporting obligations.

More specifically, we have identified the following issues pertaining to the IRS administering VITA and TCE programs:

- VITA/TCE programs are subject to restrictions that impede their effectiveness;
- VITA and TCE income limits, which do not account for family size, adversely impact free tax preparation for otherwise eligible taxpayers;
- The IRS's lack of tracking volunteers certified in specific "in-scope" law issues results in VITA and TCE programs being unable to assist eligible taxpayers;
- Most VITA and TCE tax preparation sites are open only until mid-April each year, further confounding the problem of taxpayers going without the assistance they need; and
- The IRS unreasonably restricts grant funds to be used as compensation for screeners, quality reviewers, and Certified Acceptance Agents (CAAs).

ANALYSIS OF PROBLEM

Background

History of VITA and TCE Programs

The Tax Reform Act of 1969 resulted in the formation of the VITA Program.[10] IRS personnel recruited and trained volunteer tax preparers and then assigned them to community sites, such as libraries and community centers.[11] In 2000, the IRS created Stakeholder Partnerships, Education and Communication (SPEC), the outreach and education office of the IRS's Wage and Investment Division,

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6 TAS Research & Analysis, Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF), data drawn Nov. 6, 2017. The number of individual filers is based on primary taxpayers who filed IRS Forms 1040, 1040A, and 1040EZ in Processing Year (PY) 2017. This number excludes amended returns. Some taxpayers may have filed multiple taxable year returns in a given processing year.

7 Letter by Frank Nolden, Director, Stakeholder Partnerships, Education and Communication; IRS Publication 4012, *VITA/TCE Volunteer Resource Guide* (Oct. 2, 2017).

8 *See* IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart* (Dec. 2016). Topics the IRS prohibits VITA programs from addressing are referred to as "out-of-scope" topics.

9 *See* FY 2017 Stakeholder Partnerships, Education and Communication (SPEC) Quality Statistical Sample (QSS) Review Results (July 5, 2017).

10 Pub. L. No. 91-172, 83 Stat. 487 (1969) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

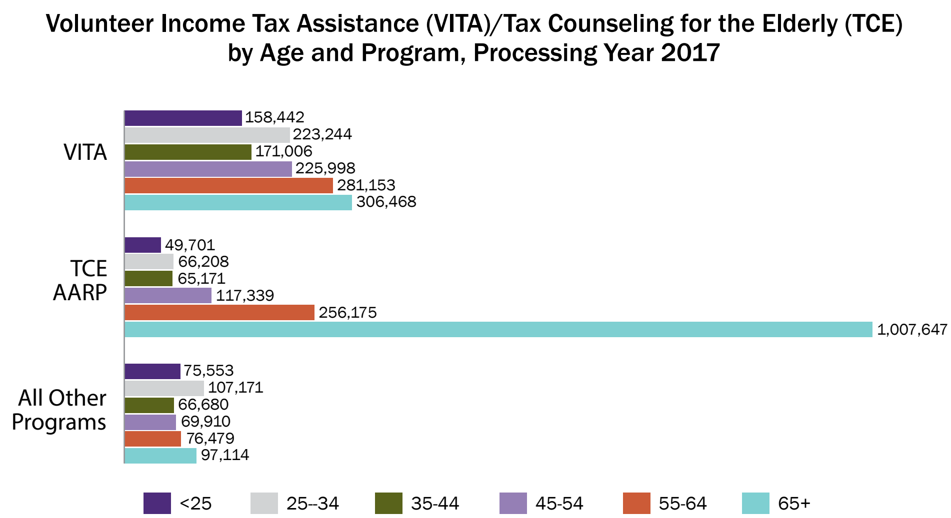
11 Steve Holt, *Ten Years of the EITC Movement: Making Work Pay Then and Now*, Metropolitan Policy Program at Brookings, 2 (Apr. 2011).

which manages the VITA and TCE programs.[12] Its creation led to the IRS's emphasis on developing and supporting community partnerships rather than providing direct service.[13]

Diversity of VITA Taxpayers and Partners

The population of the United States is large and diverse in its taxpayer service needs, requiring VITA to be adaptable to the vulnerable populations it serves. During the 2016 tax year, 90 percent of that year's nearly 3.5 million VITA taxpayers had annual incomes equal to or less than $50,000.[14] Nearly 42 percent of VITA and TCE filers were age 65 or older.[15] As depicted in the figure below, the vast majority of older taxpayers using the volunteer programs file their returns at TCE sites.

FIGURE 1.11.1, VITA/TCE Tax Returns by Age and Program: Processing Year 2017[16]



Additionally, more than 400,000 taxpayers filed their returns at sites located in rural areas of the country.[17] Whether low income, disabled, military, or elderly, taxpayer groups have different needs, all which VITA must be prepared to serve. During FY 2017, taxpayers visited 11,400 VITA and TCE sites,

12 *See* Internal Revenue Manual (IRM) 22.30.1.1, *Program Scope and Objectives* (Oct. 1, 2017). Stakeholder Partnerships, Education and Communication (SPEC) manages the VITA and TCE programs and handles the outreach and education functions of the IRS.

13 *Id.* By working with partners already established in local communities, SPEC has better access to lower income and underserved populations in those communities. The National Taxpayer Advocate has pointed out, however, that the IRS's disappearing geographic footprint has significant downfalls. *See, e.g.*, National Taxpayer Advocate 2016 Annual Report to Congress 86-97 (Most Serious Problem: *Geographic Focus*) (discussing how the lack of access to local IRS employees may result in taxpayers turning to both legitimate and illegitimate internet resources for tax information, where anonymity provides cover for behavior people might not normally consider).

14 IRS response to TAS Information Request, VITA-TCE Demographics attachment (Sept. 21, 2017).

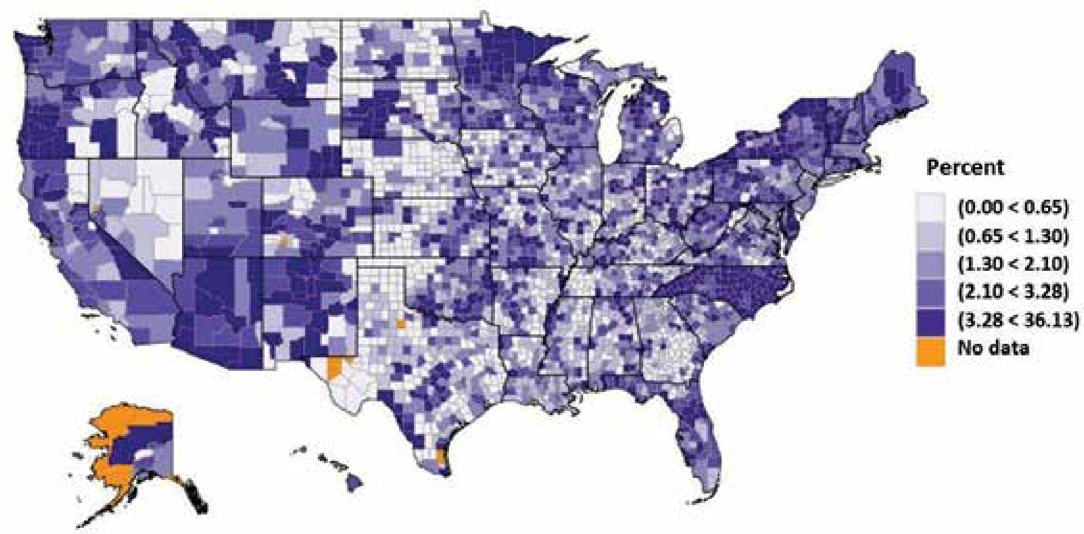
15 *Id.*

16 The "All Other" category is comprised of Facilitated Self-Assistance, Grant Programs, TCE (non-AARP), Co-located VITA programs, and Military VITA programs. TAS Research & Analysis, CDW, IRTF, data drawn Nov. 14, 2017.

17 IRS response to TAS Information Request, Percent of Target Population Filed Tax Returns with VITA/TCE Sites attachment (Sept. 21, 2017).

using the efforts of more than 87,000 volunteers.[18] The map below depicts where taxpayers, who visited VITA/TCE sites during tax season 2017, were located.

FIGURE 1.11.2, Percent of VITA and TCE Returns in U.S. Counties: Filing Season 2017[19]



The sheer diversity of the most vulnerable taxpayer populations signals the difficulty in creating guidelines that apply equally to all groups. Tax issues that are considered out-of-scope for one group may not make sense to consider out-of-scope for another. One solution is that some out-of-scope decisions can be made on a regional basis. For example, a VITA program in rural Iowa should be equipped to prepare a Schedule F for a farmer, even if a VITA program in New York City is not. To support taxpayers with more complex issues, the IRS can develop additional certification levels for volunteers. Additionally, current VITA regulations exclude most self-employed taxpayers and Schedule E filers. For example, nearly a quarter of the U.S. population supplement their income in the sharing economy.[20] Of those, 85 percent make less than $500 per month.[21] However, taxpayers in these categories very often include low income, limited English proficiency (LEP), and elderly taxpayers who are exactly the type of taxpayer VITA ought to serve and who are easy prey for unscrupulous, dishonest, or incompetent tax preparers.

18 FY 2017 Stakeholder Partnerships, Education and Communication (SPEC) Quality Statistical Sample (QSS) Review Results (July 5, 2017).

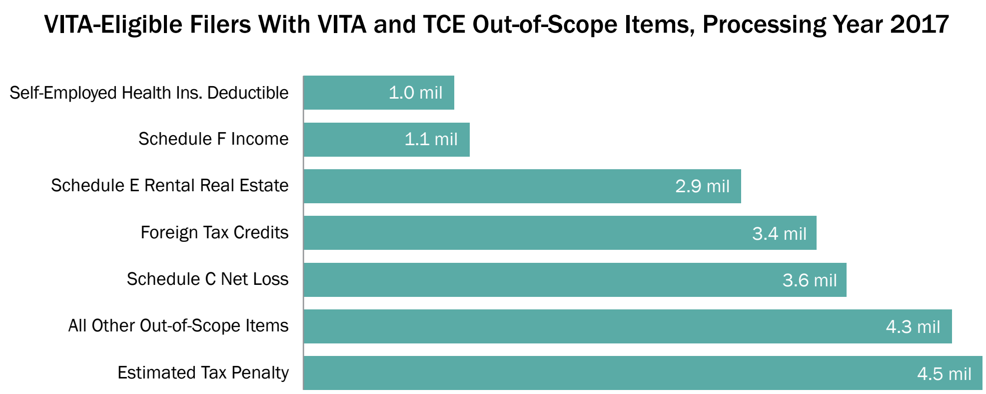
19 TAS Research & Analysis, CDW, IRTF, data drawn Nov. 6, 2017. The percentage was calculated by taking the number of tax returns prepared by VITA & TCE sites and dividing it by the total number of tax returns filed in PY 2017. 'No data' means that no tax returns appear in the CDW ENTITY database (as of Sept. 2017) for the indicated counties. A ratio of zero indicates that no one in the county used VITA/TCE services even though some positive number of tax returns were filed. Counties with a ratio of zero are included in the category of 0.00 to 0.65 percent.

20 Pew Research Center, *Gig Work, Online Selling and Home Sharing* (Nov. 17, 2016), www.pewinternet.org/2016/11/17/gig-work-online-selling-and-home-sharing/. The sharing economy (also known as the gig economy) can be described as "collaborative consumption" or a "peer-to-peer market" that links a willing provider to a consumer of goods or services (coordinated through a community-based online service). *See also* Most Serious Problem: *SHARING ECONOMY: Participants in the Sharing Economy Require Further Guidance from the IRS*, *infra*.

21 Washington Post, *Side Hustles Are the New Norm* (July 3, 2017).

Nearly 21 million taxpayers who otherwise would have been eligible (based on age and income criteria) in processing year 2017 to seek Volunteer Income Tax Assistance had out-of-scope items.

FIGURE 1.11.3, VITA-Eligible Filers with VITA and TCE Out-of-Scope Items: Processing Year 2017[22]



As depicted in Figure 1.11.3, nearly 21 million taxpayers who otherwise would have been eligible (based on age and income criteria) in PY 2017 to seek VITA or TCE assistance had out-of-scope items.[23] About 4.5 million taxpayers contended with issues related to an estimated tax penalty, the single largest out-of-scope item.

22 TAS Research & Analysis, CDW, IRTF, data drawn Nov. 6, 2017.

23 The figure of 20.8 million for 2017 reflects the number of taxpayers as of September 2017 and will increase as extension and other late filers are included.

VITA/TCE Programs Are Subject to Restrictions That Impede Their Effectiveness

Because VITA programs are staffed primarily by volunteers who are not tax professionals, the IRS has been concerned about allowing volunteers to prepare returns that involve legal complexity. To address this concern in part, the IRS has established a regime of testing for volunteers.[24] Volunteers must certify in tax law in one of four courses — Basic, Advanced, Military, or International.[25] There are also two optional specialty courses — Cancellation of Debt (COD) and Health Savings Accounts (HSAs) — and two supplemental training courses for Puerto Rico returns and foreign student returns.[26] A volunteer who tests and passes a particular certification level can prepare all tax returns that fall within the scope of that level.

The IRS, however, provides inconsistent information about what topics are out-of-scope for VITA and TCE volunteers. The IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart*, *Depiction of What is In-Scope Versus Out-of-Scope for Varying Taxpayers*,[27] Appendix 1, was developed to list in-scope tax law topics in a centralized location.[28] In fact, SPEC contends it does not maintain a list of out-of-scope issues.[29] Yet, Publication 5220 identifies several tax law topics determined to be out-of-scope for its volunteers, no matter what their certification level.[30] Publication 5220 is confusing and overly complex, and is difficult for volunteers, much less Customer Service Representatives (CSRs), to identify which issues assistance can be provided under the VITA and TCE programs.[31]

As illustrated in the table below, one VITA publication, IRS Publication 4491, *VITA/TCE Training Guide*, lists over 100 additional out-of-scope issues.[32] Yet another VITA publication, IRS Publication 4012, *VITA/TCE Volunteer Resource Guide*, incorporates a version of IRS Publication 5220 but leaves out the columns depicting which additional specialty tax law certifications are required, whether the Interactive Tax Law Assistance (ITA) is available, and whether a particular tax law topic can be referred to a VITA/TCE site.[33] IRS Publication 3676-B, *IRS Certified Volunteers Providing Free Tax Preparation*, lists additional issues with which VITA and TCE Volunteers will not assist, further confusing the matter of what is considered out-of-scope.[34] None of the IRS publications provide a comprehensive list of out-of-scope issues.

24 IRS, Volunteer Training Certification, https://www.irs.gov/individuals/volunteer-training-certification (Rev. Sept. 30, 2017).

25 The VITA certification test is contained in IRS Pub 6744, *VITA/TCE Volunteer Assistor's Test/Retest* (Rev. Oct. 2017). A minimum score of 80% is required to pass each certification test.

26 Only volunteers who have passed the Advanced exam may choose to test for Military and International certifications. The HSA exam requires that volunteers be certified at the Basic level or higher, while the COD exam requires an Advanced level certification. *See* IRS, *Volunteer Training Certification*, https://www.irs.gov/individuals/volunteer-training-certification (Rev. Sept. 30, 2017).

27 *See* IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart* (Dec. 2016).

28 IRS response to TAS Information Request (Sept. 21, 2017).

29 *Id*.

30 *But see* IRS Publication 4012, *VITA/TCE Volunteer Resource Guide* (2016 Returns). Ironically, SPEC allows volunteers to use the IRS provided software to prepare and electronically file their own tax return and the returns of family and friends since "[u]nlike VITA/TCE returns, these returns have no income or tax law limitations."

31 If a volunteer consults Publication 5220 for scope guidance in assisting a low income nonresident taxpayer, the volunteer will find that a volunteer would need to have both an Advanced and an International certification to assist the taxpayer. For instance, if the volunteer continues across the "Foreign Taxpayers" row on the chart, he or she will also find that no Interactive Tax Assistance (ITA) is available, nor can the return be referred to a particular site. A referral would only occur if the IRS knows which VITA site might have a volunteer certified at the appropriate level to assist with the issue.

32 IRS Publication 4491, *VITA/TCE Training Guide* (Rev. Oct. 2017).

33 IRS Publication 4012, *VITA/TCE Volunteer Resource Guide* (Rev. Oct. 2017).

34 Per IRS Publication 3676-B, *IRS Certified Volunteers Providing Free Tax Preparation* (Rev. Nov. 2016).

FIGURE 1.11.4, Out-of-Scope Issues Identified Per IRS VITA Publications[35]

Publication	Number of tax topics deemed out-of-scope	Number of tax topics in-scope but with limitations	Number of tax topics that can be referred only to AARP
Pub. 4491, VITA/TCE Training Guide (Rev. Oct. 2016)	111	—	—
Pub. 3676-B, IRS Certified Volunteers Providing Free Tax Preparation Flyer (Rev. Nov. 2016)	8	—	—
Pub. 5220, VITA/TCE Volunteer Site Scope & Referral Chart (Rev. Dec. 2016)	6	—	11
Pub 4012, VITA/TCE Volunteer Resource Guide 2016 Tax Returns (Rev. Dec. 2016)	10	7	—

Although many tax law topics justifiably are considered out-of-scope because of their complexity, there are others that SPEC should allow volunteers to assist with if they are certified at the appropriate level. For example, preparation of tax returns with Schedule C are in scope for VITA/TCE, but only under certain conditions.[36] A Schedule C is basically only in scope for VITA if a Schedule C-EZ would otherwise be allowed except that business expenses are between $5,000 and $25,000. Thus, VITA and TCE volunteers cannot assist most entrepreneurs who qualify to take an office-in-home deduction, including, for example, day-care providers. Nor can they assist Uber/Lyft drivers if they have over

Disaster victims, as a taxpayer population, have characteristics that justify Volunteer Income Tax Assistance (VITA) assistance. Yet, claiming any casualty loss is out of scope for VITA. For all of its efforts in assisting disaster-area taxpayers, the IRS still does not permit these taxpayers to seek tax preparation assistance at VITA and Tax Counseling for the Elderly sites.

35 IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart*, line 15a-b, SEP/SIMPLE IRAs is reportedly pending an update to show this item as an in-scope topic for VITA/TCE, which will cause the number of tax topics in IRS Publication 5220 that can be referred only to AARP to drop to ten. IRS response to TAS fact check (Dec. 13, 2017). IRS Publication 3676-B, *IRS Certified Volunteers Providing Free Tax Preparation Flyer* states that VITA will not prepare the following: (1) Schedule C with losses; (2) Complicated Schedule D (capital gains and losses); (3) Form SS-5 (request for Social Security Number); (4) Form 8606 (non-deductible IRA); (5) Form 8615 (minor's investment income); (6) Form SS-8 (determination of worker status for purposes of federal employment taxes and income tax withholding); and (7) Parts 4 & 5 of Form 8962 (Premium Tax Credits).

36 In February 2011, SPEC initiated a Schedule C pilot program to determine the effectiveness of allowing tax law issues or topics relating to small business owners into the VITA/TCE program. SPEC ultimately determined that pilot sites, although preparing Schedule C returns with about 99 percent accuracy, were not preparing many returns with the expanded parameters, such as business use of home and depreciation expenses and the Schedule C Pilot was discontinued. Although SPEC agreed to allow return preparation with business expenses up to $25,000, there is now stricter criteria for VITA-prepared Schedule C returns than existed under the Schedule C pilot. Criteria includes: depreciation is not allowed; no Section 179 expensing in lieu of depreciation; no business use of home; cash only accounting method; no businesses with inventory; no businesses with employees; only standard mileage (actual not allowed); and no business losses.

$25,000 in business expenses.[37] Similarly, VITA cannot assist someone who rents out his or her home in Airbnb[38] or HomeAway [39] for more than 14 days because of the requirement to depreciate."[40]

Additionally, VITA may not assist taxpayers affected by hurricanes and other natural disasters. To claim a casualty loss on a prior year return, taxpayers must file amended returns or claim their loss on their current year tax returns. The IRS suggests that volunteer preparers have two years of previous experience and be trained and certified at the advanced level before preparing prior year or amended returns.[41] Disaster victims, as a taxpayer population, have characteristics that justify VITA assistance.[42] Yet, claiming any casualty loss is out of scope for VITA. For all of its efforts in assisting disaster-area taxpayers, the IRS still does not permit these taxpayers to seek tax preparation assistance at VITA and TCE sites.[43]

Another group of vulnerable taxpayers are those whose debts are canceled or forgiven. Despite being the very population who might be eligible for such relief and least likely to pay for professional representation, cancellation of debt due to bankruptcy or insolvency[44] is considered out-of-scope for VITA programs, even though IRS publications include clear worksheets that could be automated for assistance in preparation.[45]

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37 An Uber driver's tax return is in scope only if all of the following are true: the deduction for car expenses is claimed using the standard mileage rate — not the actual expense method (to qualify, the standard mileage rate must have been used for the first year the car was used for business); the total of all business expenses is less than $25,000; the driver does not pay helpers — whether as subcontractors or employees; and there is a profit from the business. *See* IRS Publication 4491, *VITA/TCE Training Guide* (2017 Returns).

38 Airbnb is an online marketplace enabling people to lease or rent short-term lodging including vacation rentals, apartment rentals, homestays, hostel beds, or hotel rooms. *See* https://www.airbnb.com/about/about-us (last visited Nov. 13, 2017).

39 HomeAway, Inc. is an online marketplace, offering vacation rentals throughout the world, often for less than the cost of traditional hotel accommodations. *See* https://www.homeaway.com/info/media-center/presskit (last visited Dec. 4, 2017).

40 If a taxpayer rents his or her dwelling unit to others that he or she also uses as a personal residence, limitations may apply to the rental expenses that can be deducted. Taxpayers are considered to use their dwelling unit as a residence if they use it for personal purposes during the tax year for more than the greater of 14 days, or ten percent of the total days they rent it to others at a fair rental price. *See* IRC § 280a(d).

41 IRS, Fact Sheet for SPEC Partners, Preparing Prior Year and Amended Returns at VITA/TCE sites (Aug. 2016), https://www.irs.gov/pub/irs-utl/fact-sheet-prior-year-and-amended-returns.pdf (last visited May 15, 2017).

42 People who are of low socio-economic status (SES) are more likely to live in housing that is vulnerable to disasters. They also may live in areas where risks from disasters are higher. Because people of low SES have fewer assets, they have less to lose, and when they experience financial loss in disasters, the loss has a greater financial impact on them than it will on people of higher SES, as the loss is proportionally greater. They also may have their savings concentrated in fewer possessions, and so they may be more vulnerable to economic losses in disasters than people of higher SES who have their savings distributed more widely and saved in financial institutions. *See* Disaster Technical Assistance Center Supplemental Research Bulletin, *Greater Impact: How Disasters Affect People of Low Socioeconomic Status*, https://www.samhsa.gov/sites/default/files/programs_campaigns/dtac/srb-low-ses.pdf (July 2017).

43 During August and September 2017, Hurricanes Harvey, Irma, and Maria caused unprecedented and catastrophic damage in Puerto Rico, U.S. Virgin Islands, Florida, Georgia, and Texas. The IRS immediately responded, providing extensive relief that postpones various tax deadlines, and other special assistance for disaster-area taxpayers. *See* IRS, IRS Offers Help to Hurricane Victims: A Recap of Key Tax Relief Provisions Available Following Harvey, Irma and Maria, https://www.irs.gov/newsroom/irs-offers-help-to-hurricane-victims-a-recap-of-key-tax-relief-provisions-available-following-harvey-irma-and-maria (Sept. 26, 2017).

44 Cancellation of indebtedness can involve auto loans, credit card debt, medical care, professional services, installment purchases of furniture or other personal property, mortgages, and home equity loans. *See* IRS Publication 4491, *VITA/TCE Training Guide* (Rev. Oct. 2017); IRS Publication 5182, *VITA/TCE Specialty Course – Cancellation of Debt (COD)– Principal Residence* (Rev. Dec. 2014). The insolvency must have occurred immediately before the debt was canceled. *See* IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments* (Feb. 1, 2017); IRS Publication 4491, VITA/TCE Training Guide (Rev. Oct. 2017).

45 *See* IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments* (Feb. 1, 2017). Worksheets include an insolvency worksheet, used to help calculate the extent the taxpayer was insolvent immediately before the cancellation of debt, and a worksheet for foreclosures and repossessions, used to figure the amount of gain or loss from the foreclosure or repossession.

Additionally, although SPEC's rural strategy focuses on assisting those taxpayers in underserved, rural areas, VITA programs cannot assist farmers in tax preparation. Returns with Schedule F, *Profit or Loss From Farming*, are considered out-of-scope for VITA and TCE programs.[46] About 2.06 million farms are currently in operation.[47] By arbitrarily restricting low income farmers from VITA and TCE Programs, the IRS is further burdening a vulnerable taxpayer population that should have access to free tax preparation.

Each of the examples discussed above show that an out-of-scope classification has serious impact on the very taxpayer population that Congress intended to be served by VITA and TCE Programs. The IRS believes that expanding the scope may burden volunteers to learn complex tax law topics and topics that come up infrequently.[48] The consequence, however, is that many taxpayers who would otherwise qualify for VITA services and truly need person-to-person assistance may have to seek assistance from unregulated and unqualified preparers or attempt to use self-service, risking error.

One potential solution is to require a higher certification level for issues impacting specific taxpayer populations, but not declaring them out of scope. Tax professionals with the skill set and knowledge to help taxpayers, such as tax attorneys, certified public accountants and enrolled agents, who are also VITA volunteers, should be able to prepare out-of-scope returns to address topics where these is a need but no access to service.

VITA and TCE Income Limits, Which Do Not Account for Family Size, Impede Access to Free Tax Preparation for Otherwise Eligible Taxpayers

The IRS acknowledges that the definition of in-scope refers to permissible tax law topics in a tax return and does not refer to income levels.[49] Since the value of low to moderate income can vary depending on the cost of living for a geographic location, the IRS instead urges partners to exercise sound judgment in establishing income limitations for return preparation.[50]

Current limitations exclude many taxpayers who are low income under Low Income Taxpayer Clinic (LITC) guidelines, yet are excluded from VITA income guidelines.[51] In order to qualify for assistance from an LITC, generally a taxpayer's income must be below 250 percent of the current year's federal poverty guidelines, based on family size and with income adjustments for Hawaii and Alaska, as indicated in Figure 1.11.5 below.[52] A system similar to the LITC financial guidelines, which account for

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46 Farmers must file a Form Schedule F, *Profit or Loss From Farming*, to report their farming income and claim their expense deductions. A farm includes livestock, dairy, poultry, fish, fruit, and truck farms. It also includes plantations, ranches, ranges, and orchards and groves. *See* IRS Publication 225, *Farmer's Tax Guide* (Oct. 19, 2017).

47 United States Department of Agriculture, *Farming and Farm Income*, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/ (Oct. 11, 2017).

48 IRS response to TAS Information Request (Sept. 21, 2017).

49 *Id*.

50 Interestingly, in September 2017, the Treasury Inspector General for Tax Administration (TIGTA) found that VITA and TCE grantees continue to prepare tax returns for taxpayers with income amounts that exceed the suggested income threshold set for the Volunteer Program. TIGTA reported it is concerned that when taxpayers with incomes exceeding the Volunteer Program's income threshold have their tax returns prepared, it limits the resources available to assist those taxpayers for which Congress appropriated the VITA grant funds. *See* TIGTA, *Improvements Are Needed to Ensure That the Volunteer Income Tax Assistance Grant Program Extends Tax Return Preparation to Underserved Populations*, Ref. No. 2017-40-088 (Sept. 20, 2017).

51 *See* IRS Publication 3319, *Low Income Taxpayer Clinic 2018 Grant Application Package and Guidelines* (Rev. Apr. 2017). Per IRC § 7526(b)(1)(B)(i), at least 90 percent of taxpayers represented by an LITC must have incomes that do not exceed 250 percent of the federal poverty level.

52 IRS, *Information for Taxpayers Seeking LITC Services*, https://www.irs.gov/advocate/low-income-taxpayer-clinics/low-income-taxpayer-clinic-income-eligibility-guidelines (Rev. Aug. 4, 2017).

family size and income, as well as include flexibility for extenuating circumstances, would expand the reach of VITA services to the low income community.

FIGURE 1.11.5, 250 percent of Federal Poverty Guidelines[53]

Size of Family Unit	48 Contiguous States, D.C., and Puerto Rico	Alaska	Hawaii
1	$30,150	$37,650	$34,650
2	$40,600	$50,725	$46,675
3	$51,050	$63,800	$58,700
4	$61,500	$76,875	$70,725
5	$71,950	$89,950	$82,750
6	$82,400	$103,025	$94,775
7	$92,850	$116,100	$106,800
8	$103,300	$129,175	$118,825
For each additional person, add	$10,450	$13,075	$12,025

The IRS's Lack of Tracking Sites With Volunteers Certified in Specific "In-Scope" Law Issues Results in VITA and TCE Programs Being Unable to Assist Large Segments of Eligible Taxpayers

Publication 5220 also includes several "in-scope" tax law topics[54] but specifies that taxpayers with those issues may not be referred to VITA sites because the IRS has not identified volunteers with the appropriate certifications to assist those taxpayers. Moreover, because the Publication 5220 chart is found only online, taxpayers with limited internet access[55] may not know for which topics they can seek assistance.

As noted in Publication 5220, Appendix 1, there is a column entitled, "Can a Taxpayer's Tax Return with this Tax Law be Referred to a VITA/TCE site?" If there is a "No" in that column, the corresponding tax law topics cannot be referred to any VITA/TCE site, therefore rendering them *de facto* out-of-scope. This is because the IRS is not tracking which sites have volunteers who are certified to assist with these issues. Including this information in the IRS tracking system is crucial in managing the VITA Program.

Tracking volunteer certification levels and where those volunteers provide services should be simple. After all, the SPEC Coordinator or Partner already must validate the volunteer's credentials and verify

53 This table is based on the Federal Poverty Guidelines published at 81 Fed. Reg. 8831-32 (Jan. 31, 2017).

54 These topics include: Foreign taxpayers or those with foreign income; Schedule E, Supplemental Income and Loss (rental real estate); Cancellation of debt income (mortgage or credit cards); Health savings account deduction; and Foreign tax credit. IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart* (Dec. 2016).

55 Over 33 million taxpayers do not have broadband access at home, significantly limiting their online activities. Of this number, 28.5 percent are low income, 40 percent are senior, and 31.9 percent are disabled taxpayers. National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 1-30 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*). *See also* National Taxpayer Advocate 2016 Annual Report to Congress 21 (Special Focus: *IRS FUTURE STATE: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*).

that the volunteer certified by passing the appropriate test. The IRS captures data on volunteers but is not tracking it in a way that would enable the IRS to administer the program more effectively and to better meet the needs of its target populations.[56] The Treasury Inspector General for Tax Administration (TIGTA) also has indicated its concern about the IRS's lack of a centralized list of volunteers who have achieved advanced certification.[57] Although its information management system is fully capable of tracking this information, the IRS argues that SPEC does not include this capability for several reasons, which include adhering to privacy guidelines intended to limit the digital storage and access to Personally Identifiable Information (PII) and averting the task of inputting and maintaining records for volunteers, their certifications, and the specific sites where they may be volunteering on a given day.[58]

Identifying and tracking the certification level of volunteers at VITA sites, however, would not violate privacy guidelines (and if the guidelines do consider such tracking a violation, then the IRS should review its policies to align with the specific situations presented). Such tracking would assist customer service representatives in directing taxpayers to volunteers who can help. *Notably, SPECTRM[59] does allow for comments to be stored to indicate special limitations or capabilities for particular sites, but these comments are not searchable for specific tax law issues*.[60] The IRS appears to have designed the VITA and TCE programs to minimize what it is responsible for, preferring instead to stay at the level of limited utility.

Most VITA and TCE Tax Preparation Sites Are Open Only Until April 15th Each Year, Further Confounding the Problem of Taxpayers Going Without the Necessary Assistance They Need

Not all taxpayers file their tax returns by the April tax deadline. The IRC recognizes that there are legitimate reasons why a taxpayer may not do so.[61] Taxpayers may request a six-month automatic extension to file which moves the return filing deadline to October 15th.[62] The ability to request an extension to file suggests that the taxpayer should have access to assistance to meet their statutory requirement at least until October 15th. Instead, the IRS appears to abandon these taxpayers after April 15th. The VITA Hotline is staffed only from mid-January to mid-April each year.[63] Thus, in order to obtain a list of VITA sites open year-round, taxpayers must access the VITA Locator on irs.gov and then plug in their zip code and the number of miles they are willing to travel, or call the IRS

56 *See* IRS response to TAS Information Request (Sept. 21, 2017).

57 In its September 2017 audit report, TIGTA stated that the IRS does not have reasonable assurance that the complex tax returns prepared by volunteers from 2014-2016 were prepared by volunteers with the appropriate training and certification. *See* TIGTA, *Improvements Are Needed to Ensure That the Volunteer Income Tax Assistance Grant Program Extends Tax Return Preparation to Underserved Populations*, Ref. No. 2017-40-088 (Sept. 20, 2017).

58 IRS response to TAS Information Request (Sept. 21, 2017).

59 SPEC's information management system, Stakeholder Partnerships, Education & Communications Total Relationship Management (SPECTRM), is the database system developed for use by SPEC to manage and coordinate the VITA and TCE programs. *See* IRS response to TAS Information Request (Sept. 21, 2017).

60 IRS response to TAS Information Request (Sept. 21, 2017).

61 For example, taxpayers impacted by presidentially declared disasters may need assistance in filing amended returns declaring casualty losses after April 15th.

62 *See* IRS Form 4868, *Application for Automatic Extension of Time to File U.S. Individual Income Tax Return* (2016). Although the IRS does not track how many Forms 4868 are prepared at VITA and TCE sites, we know many taxpayers within VITA income eligibility file returns with extensions. For example, in TY 2016, 36,243 taxpayers with income of $54,000 or less and who used a VITA or TCE site, filed returns with extensions. TAS Research & Analysis, CDW, IRTF, data drawn Nov. 7, 2017.

63 The Hotline phone number is listed in IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart* (Dec. 2016) as (800) 829-8482. For eight months of the year, a recording directs callers to search online for answers to their questions via the Interactive Tax Assistant.

The IRS appears to have designed the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs to minimize what it is responsible for, preferring instead to stay at the level of limited utility.

Assistor telephone line so that Assistors can search the VITA locator for the taxpayer. Without year-round person-to-person assistance, VITA-eligible taxpayers with limited digital access or functional or computer literacy will face challenges.

The IRS Unreasonably Restricts Grant Funds to Be Used As Compensation for Quality Reviewers, Qualified Tax Experts (QTEs), and Certified Acceptance Agents (CAAs)

Since FY 2008, the IRS has also provided financial assistance to some VITA programs through matching grants.[64] The IRS, however, does not allow VITA or TCE to use grant funds as compensation for tax assistors or preparers, screeners, or quality reviewers.[65] The IRS also restricts funding of CAAs who assist non-citizens in obtaining Individual Taxpayer Identification Numbers (ITINs) needed to file U.S. tax returns. The IRS maintains that grant funds may not be used to compensate the services of volunteers so that volunteers will remain under the veil of the Volunteer Protection Act.[66] It also maintains that paying for a portion of a volunteer's activity also adds complexity to managing volunteers.[67]

Identifying and tracking the certification level of volunteers at VITA sites, however, would not violate the IRS's argument regarding extra burdens and liability imposed on the sites is misleading because VITA and TCE sites are already responsible for managing day-to-day activities. Similar to the Low Income Tax Clinic (LITC) Program, where a paid Qualified Tax Expert (QTE) is required to be on staff to assist the pro bono attorneys and assist with cases, the IRS could allow paid quality reviewers/experts to assist VITA volunteers. Moreover, the quality reviewer/expert could be specialized based on the location of the VITA site.[68] To support those higher more complex issues, IRS can develop additional certification levels, such as a home office module, a disaster loss module, or a Schedule C or F module. Spending funds on paid quality reviewers and QTEs will address TIGTA's concerns,[69] create stability and continuity of the programs, and enable sites to develop their own training materials for complex issues (such as disaster losses or home office deductions).

64 As part of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Congress enacted IRC § 7526 to authorize funding for the Low Income Tax Clinic (LITC) grant program. Subject to the availability of appropriated funds, the IRS may award grants of up to $100,000 per year to qualifying organizations for the development, expansion, or continuation of an LITC. In Grant Year 2016, VITA grantees helped prepare more than 1.5 million tax returns. *See* TIGTA, *Improvements Are Needed to Ensure That the Volunteer Income Tax Assistance Grant Program Extends Tax Return Preparation to Underserved Populations*, Ref. No. 2017-40-088 (Sept. 20, 2017). *See also* IRS Publication 3319, *Low Income Taxpayer Clinic 2018 Grant Application Package and Guidelines* (Rev. Apr. 2017).

65 IRM 22.30.1.8.3.1.2(1), *Compensation for the Grant Program* (Oct. 1, 2011).

66 IRS response to TAS Information Request (Sept. 21, 2017).

67 *See* Report Card to National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VITA/TCE FUNDING: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*), https://www.irs.gov/pub/tas/2014ARC_ReportCard.pdf (last visited Dec. 4, 2017).

68 For instance, VITA sites in rural areas may want QTEs in preparing returns with Schedule F, Profit or Loss from Farming.

69 *See* TIGTA, *Improvements Are Needed to Ensure That the Volunteer Income Tax Assistance Grant Program Extends Tax Return Preparation to Underserved Populations*, Ref. No. 2017-40-088 (Sept. 20, 2017).

CONCLUSION

One of the VITA and TCE program's goals is making voluntary compliance easier by improving issue resolution across all interactions with taxpayers.[70] The restrictions and limitations the IRS imposes on VITA and TCE sites prevent the IRS from achieving this goal, increase taxpayer burden, and may adversely and significantly impact the ability of vulnerable taxpayers to obtain free tax return preparation services and meet their reporting obligations. Moreover, published restrictions confuse taxpayers and cause many otherwise eligible individuals to turn to paid tax filing services or to prepare their own returns. These shortcomings burden taxpayers because those who cannot obtain free filing assistance may pay more in taxes than they are legally required to pay, or seek preparation services from unqualified or unscrupulous preparers, undermining voluntary compliance and eroding the *taxpayer's rights to be informed*, *to quality service*, and *to pay no more than the correct amount of tax*.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Allow VITA and TCE Partners, at their discretion, to prepare returns with issues that are currently out-of-scope, including:
   - Home office deduction (*e.g.*, day care providers);
   - Standard mileage vs actual costs (*e.g.*, Uber/Lyft drivers);
   - Casualty losses (*e.g.*, disaster relief);
   - Cancellation of debt due to bankruptcy or insolvency; and
   - Farm income.
2. Implement financial guidelines for the VITA/TCE Program which account for both family size and income, similar to that used by LITC Programs.
3. Create a tracking system for volunteers and their certifications so that taxpayers can be referred to a specific VITA or TCE site handling a specific tax law issue.
4. Ensure that more volunteer tax sites are open until October 15 each year.
5. Allow grant funds to be used for quality review and QTEs, CAAs, and year-round services at select sites.

70 IRS Publication 1084, *VITA/TCE Volunteer Site Coordinator Handbook* (Rev. Oct. 2017).

MSP #12 EARNED INCOME TAX CREDIT (EITC): The IRS Continues to Make Progress to Improve Its Administration of the EITC, But It Has Not Adequately Incorporated Research Findings That Show Positive Impacts of Taxpayer Education on Compliance

RESPONSIBLE OFFICIAL

Kenneth Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Retain Representation*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The Earned Income Tax Credit (EITC) is a tax credit targeted at low income workers (primarily workers with children).[2] It has become one of the government's largest means-tested anti-poverty programs.[3] For Tax Year (TY) 2015 returns filed during 2016, over 27 million taxpayers received about $67 billion in EITC.[4] For the same time period, the average amount of EITC was more than $2,455.[5] However, as the Department of Treasury recently reported, the EITC rules of eligibility are "complex and lead to high overclaim error rates."[6] In addition to complex rules, the population eligible to claim the EITC is constantly churning, with approximately one-third of the eligible population changing every year.[7]

1 *See* Taxpayer Bill of Rights (TBOR), https://www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Pub. L. No. 94-12, § 204, 89 Stat. 26 (1975). The preference to provide Earned Income Tax Credit (EITC) benefits to families with children is seen in the stark difference between the amount of benefits available to childless workers and to workers with children. The most a married couple with no children could receive in EITC benefits for tax year (TY) 2016 was $506. A married couple with three children was eligible for a maximum of $6,269 in EITC benefits in TY 2016. IRS, Publication 596, *Earned Income Credit (EIC)* 31-33 (Dec. 21, 2016).

3 Congressional Budget Office, *Federal Means-Tested Programs and Tax Credits – Infographic* (Feb. 11, 2013), https://www.cbo.gov/publication/43935.

4 IRS, *About EITC*, https://www.eitc.irs.gov/eitc-central/about-eitc/about-eitc.

5 *Id.*

6 Department of Treasury, *Agency Financial Report Fiscal Year 2016* 160 (Nov. 2016).

7 IRS, *EITC Fast Facts*, https://www.eitc.irs.gov/Partner-Toolkit/basicmaterials/ff. For a detailed explanation for how EITC eligibility and benefits calculation works, see National Taxpayer Advocate 2015 Annual Report to Congress 240-42.

As a result of the complex rules and the ever-changing population of eligible taxpayers, the EITC is associated with a high improper payment rate.[8] To its credit, the IRS has reached out to a broad array of experts via its two EITC Summits, resulting in many suggestions about how to improve EITC administration, education, and compliance. The IRS and TAS also work jointly on the EITC Audit Improvement team, which has worked to expand the list of acceptable documentation to substantiate an EITC claim and to allow the use of third-party affidavits during EITC audits. Nevertheless, while the IRS does conduct EITC taxpayer education initiatives, its primary tool to combat the improper payment rate thus far has been the audit process.[9]

Over the years, the National Taxpayer Advocate has encouraged a multi-pronged approach to reducing the number of improper claims for EITC while encouraging eligible claims. For example, the National Taxpayer Advocate has recommended enhancing taxpayer communication and education, using an examination process tailored to the needs of low income taxpayers, and strengthening the program overseeing EITC return preparers.[10] The National Taxpayer Advocate has the following concerns with how the IRS administers the EITC:

- The IRS has not adequately studied the impact of taxpayer education on EITC compliance;
- TAS research shows providing a dedicated helpline for EITC taxpayers during the tax season improves EITC compliance; and
- Progress is being made with the IRS joint EITC Audit Improvement team, but more can be done to help low income taxpayers, particularly in the area of acceptance of alternative documentation.

ANALYSIS OF PROBLEM

Background

Research has shown that the EITC can offer both short-term and long-term support to eligible taxpayers. One study of EITC claims between 1989 and 2006 found that sixty-one percent of taxpayers claimed the EITC for only a period of one or two years.[11] The study also found that 20 percent of taxpayers

8 An improper payment is defined as "any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements" and ''any payment to an ineligible recipient." Improper Payments Elimination and Recovery Act of 2010, Pub. L. No. 111–204, § 2(e) (2010), amending Improper Payments Information Act of 2002, Pub. L. No. 107-300 (2002) by striking § 2(f) and adding (f)(2). The IRS estimates that for fiscal year (FY) 2016, between 22.2 percent ($15.5 billion) and 25.9 percent ($18.1 billion) of the total EITC program payments of $69.8 billion were improper. Department of Treasury, *Agency Financial Report Fiscal Year 2016* 49 (Nov. 2016).

9 National Taxpayer Advocate 2015 Annual Report to Congress 248-60.

10 For recent recommendations, see National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 61-69 (*TAS Continues to Pursue Improvements to the IRS's Administration of the Earned Income Tax Credit (EITC), Particularly With Recent Changes to the Law*); National Taxpayer Advocate 2016 Annual Report to Congress 138-50 (*Earned Income Tax Credit (EITC): The Future State's Reliance on Online Tools Will Harm EITC Taxpayers*); National Taxpayer Advocate 2015 Annual Report to Congress 240-47 (*Earned Income Tax Credit (EITC): The IRS Does Not Do Enough Taxpayer Education in the Pre-filing Environment to Improve EITC Compliance and Should Establish a Telephone Helpline Dedicated to Answering Pre-filing Questions From Low Income Taxpayers About Their EITC Eligibility*); National Taxpayer Advocate 2015 Annual Report to Congress 248-60 (*Earned Income Tax Credit (EITC): The IRS Is Not Adequately Using the EITC Examination Process As an Educational Tool and Is Not Auditing Returns With the Greatest Indirect Potential for Improving EITC Compliance*); National Taxpayer Advocate 2015 Annual Report to Congress 261-83 (*Earned Income Tax Credit (EITC): The IRS's EITC Return Preparer Strategy Does Not Adequately Address the Role of Preparers in EITC Noncompliance*).

11 Tim Dowd and John B. Horowitz, *Income Mobility and the Earned Income Tax Credit: Short-Term Safety Net or Long-Term Income Support*, Public Finance Review 29 (2011).

The Earned Income Tax Credit (EITC) is a "temporary safety net during periods of either anticipated or unanticipated income or family structure shocks" but also a long-term assistance for taxpayers "with children who are entrenched in the lowest-income brackets."

claimed the EITC for five or more years.[12] Thus, the EITC is a "temporary safety net during periods of either anticipated or unanticipated income or family structure shocks" but also a long-term assistance for taxpayers "with children who are entrenched in the lowest-income brackets."[13]

The EITC may be most beneficial during times of change in the taxpayer's family structure or economic wellbeing. One study reviewed EITC claim rates according to the qualifying child's age and found that in the year a child is born, there is a 43 percent chance of the EITC being claimed and then this number decreases over time.[14] Additionally, when a taxpayer's financial situation deteriorates because of an unanticipated job loss or long-term illness, he or she may suddenly find him or herself eligible for the EITC. Indeed, tax credits such as the EITC played an important role in the financial safety net for taxpayers during the recent Great Recession.[15]

The EITC is critical in helping financially vulnerable families. While Social Security benefits provide support to the elderly and those with disabilities, tax credits including the EITC and the Child Tax Credit reduce the number of children in poverty by 6.7 percent.[16] The positive effects for children who live in families receiving the EITC are long-term: these children do better in school, mothers and infants have improved health, and the children have higher college attendance rates.[17]

12 Tim Dowd and John B. Horowitz, *Income Mobility and the Earned Income Tax Credit: Short-Term Safety Net or Long-Term Income Support*, Public Finance Review 3 (2011).

13 *Id.*

14 *Id.* The authors of this study surmise that "some of the decline likely represents the normal anticipated shock that having a newborn has on family labor income in the year of birth, thereby reducing income in the year of birth and increasing eligibility."

15 For the period of time including the Great Recession, between 2007 and 2010, poverty rates only rose by 0.5 percent despite the largest rise in unemployment since the Great Depression. Credit for this is due to the expansion of Supplemental Nutrition Assistance Program (SNAP) and tax credits. The Council of Economic Advisers, *The War on Poverty 50 Years Later: A Progress Report* 22 (Jan. 2014).

16 The Council of Economic Advisers, *The War on Poverty 50 Years Later: A Progress Report* 27 (Jan. 2014).

17 Center on Budget and Policy Priorities, *EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children's Development, Research Finds* (Oct. 1, 2015). One study built on the connection between those living in poor economic conditions and increased stress manifesting itself in higher blood pressure, higher cholesterol, and other physical effects. The study found that the expansion of EITC in the Omnibus Reconciliation Act of 1993 led to a decrease in the number of "reported bad mental health days for mothers with a high school degree or lower and two or more children compared to a similar woman with only one child" and "increased the probability of reporting excellent or very good health status." William N. Evans and Craig L. Garthwaite, *Giving Mom a Break: the Impact of Higher EITC Payments on Mental Health*, American Economic Journal: Economic Policy 286 (May 2014). Another study looked at the increased EITC available with the Omnibus Reconciliation Act of 1993 and found that larger EITC benefits led to positive impacts in children's educational achievements both now and into the future. Michelle Maxfield, *The Effects of the Earned Income Tax Credit on Child Achievement and Long-Term Educational Attainment*, Michigan State University Job Market Paper 31 (Nov. 14, 2013).

The IRS Made Great Strides By Following Up With Its Second Earned Income Tax Credit (EITC) Summit This Year

The IRS hosted its first EITC Summit (Summit) June 29–30, 2016. The objective of the Summit was to "obtain perspectives from an array of stakeholders on improving compliance while fostering participation."[18] The Summit opened a constructive dialog between the IRS and people from various sectors, such as the tax profession industry, state and federal agencies, consumer advocates, research institutes, volunteer site coordinators, and Low Income Tax Clinics (LITCs). Overall, the Summit addressed the following issues:

- Reducing overclaims;
- Improving participation; and
- Improving administration.

As a result of the Summit, the IRS received many useful suggestions to pursue going forward. For instance, to increase participation, the participants suggested a strong outreach program that would focus on how changes to the traditional family structure can impact EITC eligibility and how such taxpayers can substantiate their EITC claims. Additionally, outreach and education was a major component of the group's suggestions for improving EITC participation. Specifically, participants suggested the IRS create partnerships with non-tax parties, including child service workers, pediatricians, veterans' organizations, and divorce attorneys.[19] To improve administration of the EITC, participants suggested ways to ease taxpayer burden during an audit. For example, the IRS could look at prior year returns to see if income levels and qualifying children were the same (or similar). Second, if a qualifying child is not claimed by anyone else in that tax year, the IRS could require the taxpayer to send only "minimal documentation" to substantiate the residency test.[20]

The IRS held another EITC Summit in September 2017 and identified some outreach "concepts."[21] For 2018, the IRS intends to include messaging geared to childless workers.[22] The IRS will also devote resources to veterans and rural taxpayers.[23] While vague, this response shows that the IRS is at least aware of the need for greater outreach and education.

The Earned Income Tax Credit (EITC) Summit opened a constructive dialog between the IRS and people from various sectors, such as the tax profession industry, state and federal agencies, consumer advocates, research institutes, volunteer site coordinators, and Low Income Tax Clinics.

18 IRS, *Earned Income Tax Credit Summit, Identifying New Approaches for Administration of the EITC* 3.
19 *Id*. at 10.
20 *Id*. at 15.
21 IRS response to TAS information request (Nov. 14, 2017).
22 *Id.*
23 *Id.*

Vulnerable groups, including low income taxpayers, are less likely to have broadband access at home, feel less skilled doing internet research, and feel less secure sharing personal financial information over the internet.

The IRS Has Not Adequately Studied the Impact of Taxpayer Education on EITC Compliance

The National Taxpayer Advocate consistently advocates that low income taxpayers need services specifically tailored to their unique needs.[24] Most recently, TAS studied how taxpayers' service preferences, usage patterns, and usage effectiveness vary by demographic group within the taxpayer population.[25] This study found that vulnerable populations (including low income taxpayers) are less equipped to rely on the internet for services. In particular, vulnerable groups, including low income taxpayers, are less likely to have broadband access at home, feel less skilled doing internet research, and feel less secure sharing personal financial information over the internet.[26] This type of research should be driving the IRS's approach to EITC compliance. However, the IRS is taking the opposite approach, by relying on automation and self-help modules to educate low income taxpayers.[27]

The National Taxpayer Advocate's position that greater education is connected to improved compliance is supported by research. The current approach used by the IRS may be considered a "neoclassical economic approach," meaning a taxpayer is driven by "profit-maximizing motives" when he or she considers tax compliance.[28] For instance, what are the odds the taxpayer will be audited? How much will the fine be if the taxpayer is audited?

However, research shows that instead, tax administration generally (and EITC administration in particular) could benefit from adopting a "slippery slope" framework. Under this theory, voluntary tax compliance is achieved by "taking actions to increase power and build trust," not just by using an iron fist.[29] As explained in one study, "A synergistic climate is characterized by high mutual trust between taxpayers and authorities. Taxpayers are willing to comply, and tax administration provides customer-oriented services."[30]

The IRS is already taking some action to move from a system reliant on audits to one that provides customer-oriented services for EITC taxpayers. As noted above, it has engaged in a conversation with a diverse group of people who work with the EITC and it has attempted to fine-tune its EITC outreach and

24 National Taxpayer Advocate 2004 Annual Report to Congress vol. 2, 1-87 (*Earned Income Tax Credit (EITC) Audit Reconsideration Study*); National Taxpayer Advocate 2007 Annual Report to Congress 222-41 (*EITC Examinations and the Impact of Taxpayer Representation*); National Taxpayer Advocate 2015 Annual Report to Congress 240-47 (*Earned Income Tax Credit (EITC): The IRS Does Not Do Enough Taxpayer Education in the Pre-filing Environment to Improve EITC Compliance and Should Establish a Telephone Helpline Dedicated to Answering Pre-filing Questions From Low Income Taxpayers About Their EITC Eligibility*).

25 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 3-30 (*Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*).

26 *Id.* at 4.

27 National Taxpayer Advocate 2016 Annual Report to Congress 138-50.

28 Erich Kirchler, Christoph Kogler, and Stephan Muehlbacher, *Cooperative Tax Compliance: From Deterrence to Deference, Current Directions in Psychological Science* 87-88 (Apr. 2014).

29 *Id.* at 88.

30 *Id.* at 89.

education program. The National Taxpayer Advocate encourages the IRS to expand its customer service by offering a dedicated toll-free helpline for EITC questions, discussed below.[31]

TAS Research Shows Pre-Filing Season Letters Can Improve EITC Compliance

In 2016, the National Taxpayer Advocate sent 6,564 letters to taxpayers who appeared to have erroneously claimed the EITC on their 2014 returns, whose 2014 returns were not audited, but who appeared to be as noncompliant as those who were audited.[32] The TAS letter explained the requirements for claiming EITC in plain language, identified the specific requirement the recipient did not appear to meet, and suggested sources of additional information and assistance, including TAS. TAS then conducted a study to compare the level of compliance shown on taxpayers' 2015 returns among three groups:

- Taxpayers the IRS identified as appearing to have erred in claiming EITC on their 2014 return but whose 2014 returns were not audited, and were sent the TAS letter;
- Taxpayers whose 2014 returns were not audited and had similar characteristics as the returns of taxpayers who received the TAS letter, but who were not sent the TAS letter; and
- Taxpayers whose 2014 returns had similar characteristics as those who received the TAS letter but were not sent the TAS letter and whose 2014 returns were audited.[33]

Key findings of this study include:

- The TAS letter averted noncompliance on 2015 returns where the 2014 return appeared erroneous because the relationship test was not met. Taxpayers who were sent the TAS letter were less likely to repeat the same error on their 2015 returns than unaudited taxpayers who did not receive TAS letters. In fact, sending the TAS letter to all taxpayers whose 2014 returns appeared to be erroneous because the relationship test was not met would have averted about $47 million of erroneous EITC claims.
- Audited taxpayers whose 2014 return appeared to contain a duplicate claim for EITC were less likely to claim the EITC on their 2015 returns than taxpayers in either of the other two groups.[34]

TAS continued this study in 2017.[35] This year's results show that when it comes to the relationship test, the sample group broke the same rule 72 percent of the time compared to 77 percent of taxpayers in the

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31 National Taxpayer Advocate 2016 Annual Report to Congress 138-50.

32 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 33-52 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter From the National Taxpayer Advocate*). *See also* National Taxpayer Advocate, *Earned Income Tax Credit (EITC): TAS Study Finds that Sending an Informative, Tailored Letter to Taxpayers Who Appear to Have Erroneously Claimed EITC Can Avert Future Noncompliance* (Oct. 11, 2017), https://taxpayeradvocate.irs.gov/news/nta-blog-eitc-TPLetters-avert-noncompliance?category=TaxNews; National Taxpayer Advocate 2017 Annual Report to Congress, vol. 2, (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*), *infra*.

33 The IRS selects returns that claim EITC for audit using the Dependent Database (DDb). It is a tool that combines data from IRS and third-party sources such as the Social Security Administration. When a return is filed, the IRS compares the return against these data and scored for a probability of noncompliance. Dept. of Treasury, *Report to Congress on Strengthening Earned Income Tax Credit Compliance Through Data Driven Analysis* 14 (July 5, 2016).

34 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 33-52.

35 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, *Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*, *infra*.

control group, a statistically significant reduction of five percentage points that, if projected to the entire 2015 population, would result in a savings of over $53 million in erroneous EITC claims.[36]

TAS Research Shows Providing a Dedicated Helpline for EITC Taxpayers During The Tax Season Improves EITC Compliance

In the 2017 study, TAS added an additional sample of 1,197 taxpayers who were offered in the letter the availability of a dedicated "Extra Help" telephone line staffed by TAS employees trained to answer taxpayer questions about the letter and the EITC eligibility rules.[37] Taxpayers who received the TAS letter with the available Extra Help telephone line broke the same rule related to residency 67 percent of the time; this is seven percentage points less than the 74 percent of the taxpayers in the control group who broke the same rule, and is statistically significant at the 95 percent confidence level. If projected to the entire 2015 population who only broke a Dependent Database (DDb) rule indicating the child may not have resided with the taxpayer, sending the TAS letter with the available Extra Help telephone line would result in a savings of over $44 million in erroneous EITC claims.[38] Taxpayers who received the TAS residency letter without the Extra Help line number, broke the same residency rules 74 percent of the time, which was not statistically different from the control group.[39]

Offering the Help line could be particularly helpful since the IRS could talk to the taxpayer directly and identify areas of confusion. Based on the data referenced above, just offering the Help line may help reduce repeat EITC errors. The IRS could then apply this knowledge and improve EITC outreach, education, and procedures for all EITC taxpayers. Based on a review of calls received on the Help line, TAS has been able to identify two areas that received repeat questions: the rules of claiming a dependent versus the EITC, and the rules that are involved when parents have shared custody of a qualifying child.

This approach is similar to that of the United Kingdom's tax authority, Her Majesty's Revenue and Customs (HMRC), which provides a hotline for general tax credit questions and a hotline dedicated

This year's results show that when it comes to the relationship test, the sample group broke the same rule 72 percent of the time compared to 77 percent of taxpayers in the control group, a statistically significant reduction of five percentage points that, if projected to the entire 2015 population, would result in a savings of over $53 million in erroneous Earned Income Tax Credit (EITC) claims.

36 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, *Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*.

37 *Id.* Only 967 of those letters were deliverable and the study is based on that group. TAS received 35 calls to the Extra Help telephone line during this study.

38 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, *Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC, infra*.

39 *Id.*

Taxpayers who received the TAS letter with the available Extra Help telephone line broke the same rule related to residency 67 percent of the time; this is seven percentage points less than the 74 percent of the taxpayers in the control group who broke the same rule, and is statistically significant at the 95 percent confidence level.

solely to child benefit credits.[40] This approach helps meet HMRC's strategy to promote compliance and prevent noncompliance "as early as possible."[41]

Progress is Being Made with the IRS Joint EITC Audit Improvement Team But More Can Be Done to Help Low Income Taxpayers, Particularly in the Area of Acceptance of Alternative Documentation

Improvements to Internal Revenue Manual (IRM) 4.19.14-1 will allow acceptance of documents likely to be used by low income taxpayers

TAS is an active participant on a collaborative IRS team dedicated to identifying ways to improve the audit process for taxpayers claiming the EITC. One area of improvement includes the identification of acceptable documents for substantiating EITC claims, which are particular to the circumstances of low income taxpayers. This is something for which the National Taxpayer Advocate has consistently advocated.[42] Previous internal guidance provided a list of acceptable documentation to substantiate an EITC claim; however, the list was very narrow and did not reflect the types of documentation and methods of proof that would most likely be available or best-suited for taxpayers claiming the EITC. Through the work of the EITC Audit Improvement Team, the IRS added IRM 4.19.14-1 in July 2016. This IRM section will foster acceptance of substantiating documentation outside of the traditional EITC documentation, which typically includes letters from schools and doctor offices. In addition to listing various "new" documents for Examination employees to consider, such as paternity test results, eviction notices, and statements from homeless shelters, the internal guidance informs Examination employees that this list is not all-inclusive. The National Taxpayer Advocate applauds the IRS for expanding acceptable documentation and she will continue to advocate for a wide range of additional documents to be added to IRM 4.19.14-1.

The EITC Audit Improvement Team has also identified employee training as a concern with the revisions to IRM 4.19.14-1. While the intent behind enhancing the list of documents in the IRM was to foster a mindset that would be open to considering alternatives for substantiating an EITC claim, it appears the additional documents, while helpful, have not created an environment where employees feel they can consider a multitude of documents. The EITC Audit Improvement Team will also work to tackle this obstacle.

40 Her Majesty's Revenue and Customs (HMRC), *Child Tax Credit and Working Tax Credit: Why Overpayments Happen* 10 (Apr. 2017).

41 HMRC, *Our Strategy* 4 (June 2017).

42 National Taxpayer Advocate 2015 Annual Report to Congress 253-54; National Taxpayer Advocate 2011 Annual Report to Congress 305; National Taxpayer Advocate 2007 Annual Report to Congress 222, 225; National Taxpayer Advocate 2004 Annual Report to Congress vol. 2, 20.

The IRS will introduce the use of third-party affidavits in EITC audits

The National Taxpayer Advocate believes that a third-party affidavit should be incorporated into the EITC audit process as a tool for any taxpayer to use for substantiating his or her claim, and will help reduce the improper payment rate. TAS advanced this objective during its participation on the EITC Audit Improvement team and recently the IRS announced that it will allow the use of third-party affidavits as proof of residency for a limited population of taxpayers, beginning in TY 2018.[43] The use of affidavits will be limited to those taxpayers who "appear to meet the relationship requirement for claiming EITC based on information available to the IRS from the U.S. Department of Health and Human Services' Federal Case Registry and information from the Social Security Administration."[44] The IRS will add the affidavit to the initial audit mailing for the limited population, but those taxpayers will be allowed to use the affidavit at all stages of the audit.[45] While the option to use affidavits will be known to taxpayers and representatives who receive this audit notice, it does not appear that the IRS will be broadly advertising this tool.

The National Taxpayer Advocate applauds the IRS's decision to adopt the limited use of third-party affidavits and looks forward to seeing how this decision will improve the audit process for taxpayers. However, TAS will continue to work to expand the use of affidavits to all EITC taxpayers because affidavits are a tool proven to help taxpayers. In 2005, the IRS studied the use of affidavits as part of its EITC Qualifying Child Residency Certification Study.[46] The study found that affidavits had the highest rate of acceptance at 82 percent, compared to an overall acceptance rate of 64 percent for all document types.[47] The study concluded that this outcome was reasonable because affidavits had dedicated lines for all of the information, explaining "as long as the affidavit was filled out completely, it would contain all the required information to be accepted."[48] If the affidavit became available to all EITC taxpayers, it would help educate claimants about EITC eligibility rules and further the public perception that the IRS is trying to help taxpayers correctly claim the EITC. It will also honor the taxpayers' *right to a fair and just tax system*.[49]

Templates are available on irs.gov to make traditional documentation easier to obtain

Some taxpayers cannot use traditional documentation to substantiate their case. For instance, if a taxpayer is relying on school records, which are maintained by school year, the information may not be enough for IRS purposes, which is needed by calendar year. In other instances, a doctor's office may have adequate records but might not prepare the letter on letterhead in a way that meets IRS standards. In order to make it easier for taxpayers to use traditional documentation, the EITC Audit Improvement Team developed templates for several traditional sources of substantiation: school records, medical records, and childcare provider records. These templates provide language for the taxpayer to provide directly to the school, doctor's office, or childcare provider. These templates will eliminate guesswork for offices helping taxpayers and will provide an easy tool for taxpayers to use. However, one downside is that

43 IRS response to TAS information request (Nov. 14, 2017).
44 *Id.*
45 *Id.*
46 IRS, *IRS Earned Income Tax Credit (EITC) Initiative Final Report to Congress* 7 (Oct. 2005).
47 *Id.* at 33.
48 *Id.*
49 IRC §7803(a)(3)(J).

Based on a review of calls received on the Help line, TAS has been able to identify two areas that received repeat questions: the rules of claiming a dependent versus the Earned Income Tax Credit (EITC), and the rules that are involved when parents have shared custody of a qualifying child.

the templates are not easily accessible on irs.gov.[50] These templates are also available on the TAS website as part of the TAS Tax Toolkit, EITC educational material.[51]

CONCLUSION

The EITC is a powerful tool to improve the financial status of low income families. TAS's most recent research shows that an educational letter sent in the pre-filing season had a positive impact on EITC compliance and taxpayer education. A dedicated Help line may provide targeted assistance to the particular taxpayers who need it and give the IRS a better sense of what taxpayers find particularly confusing. Given the complexity of the EITC and the numerous ways in which eligibility can be affected, education will be the key to improving EITC compliance. The EITC Summits hosted by the IRS will go a long way in improving EITC claims. However, the IRS should be utilizing research, such as that conducted by TAS, to improve its efforts as well.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Send out pre-filing season letters to taxpayers who break certain return filters. These letters should be written in plain language and be tailored to the taxpayer's particular needs.
2. Provide a dedicated toll-free Help line for EITC taxpayers during the filing season.
3. Expand the list of acceptable documentation under IRM 4.19.14-1 and train employees on the importance of this list.
4. Continue to expand the use of third-party affidavits, thereby making them available to all EITC taxpayers.

50 The template for school records is found at: https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/school-template. The template for medical records is found at: https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/healthcare-template. The template for childcare providers is available at: https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/childcare-template.

51 TAS, *Claiming the Earned Income Tax Credit (EITC)*, https://taxpayeradvocate.irs.gov/get-help/claiming-the-eitc.

MSP #13 MILITARY ASSISTANCE: The IRS's Customer Service and Information Provided to Military Taxpayers Falls Short of Meeting Their Needs and Preferences

RESPONSIBLE OFFICIAL

Kenneth Corbin, Commissioner, Wage and Investment Division.

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

There are about 1.3 million active duty service members, and over 800,000 Reserves and National Guard personnel in the United States.[2] Those in uniform have undergone repeated deployments to war zones and many have endured extreme, and often invisible, psychological pain.[3] Whether stationed domestically or overseas, or serving on active duty or reserve duty, service members encounter questions about how to apply statutory extensions when returning from combat deployments, how the capital gain exclusion applies to them when selling their homes, whether to include nontaxable combat pay in earned income for purposes of the Earned Income Tax Credit (EITC), and whether they can make early Individual Retirement Account (IRA) withdrawals without incurring penalties. Their tax challenges are compounded if they must face the IRS alone in resolving post-filing tax disputes.

The demanding situations of military personnel, in addition to the unique issues they face, call for dedicated taxpayer service and information that meets the needs and preferences of these taxpayers. Yet, the IRS does not have employees assigned solely to assist service members. The IRS's service to this taxpayer population instead is generally limited to posting information on the web, and providing tax software and training to military partners who prepare tax returns at military installations around the

1 *See* Taxpayer Bill of Rights (TBOR), http://www.TaxpayerAdvocate.IRS.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 Conference Report, Pub. L. No. 114-840, § 401. The NDAA is an annual bill that sets policies and budgets for the U.S. Department of Defense (DoD). DoD, *About the Department of Defense (DoD)*, https://www.defense.gov/About/ (last visited Dec. 18, 2017).

3 Some veterans may suffer from mental disorders, such as Post-Traumatic Stress Disorder (PTSD). *See National Institute of Mental Health, Post-Traumatic Stress Disorder*, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (Feb. 2016). *See also* National Taxpayer Advocate 2009 Annual Report to Congress 351-56 (Legislative Recommendation: *Exclude Settlement Payments for Mental Anguish, Emotional Distress, and Pain and Suffering from Gross Income*).

world.[4] However, much of the IRS's information about military tax issues is inadequate,[5] obsolete,[6] or just plain wrong.[7]

The National Taxpayer Advocate has identified the following issues pertaining to the IRS customer service for military taxpayers:

- IRS online information and publications for the military is insufficient and outdated;
- Complex military tax issues warrant a special unit of Stakeholder Partnership, Education and Communication (SPEC) staffed with veterans whose responsibilities are to develop and conduct outreach, education, and assistance to current military taxpayers and the organizations that provide tax assistance to these taxpayers;
- SPEC lacks funding that would enable them to travel to overseas military locations to provide face-to-face training to military Volunteer Income Tax Assistance (VITA) volunteers; and
- A dedicated toll-free telephone line for service members and their families, both in and out of tax season, is essential for this population.

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4 *See*, *e.g.*, Internal Revenue Manual (IRM) 22.30.1.8.7.1.5.2, *Military* (Sept. 26, 2016). For example, military Volunteer Income Tax Assistance (VITA) volunteers Army-wide prepared over 108,000 tax returns on average from calendar years (CY) 2013 to 2016. During fiscal year 2017, they prepared 87,806 federal tax returns, including approximately 13,000 that were prepared at overseas locations. Army's Client Information System (CIS), Sep. 9, 2017; CIS, Dec. 9, 2017; CIS, Dec. 11, 2017. The numbers of military tax returns are all input into the Army's CIS by the Officers in Charge of the individual tax centers world-wide and maintained by the U.S. Army Legal Assistance Policy Division in Washington, D.C.

5 For example, service members may invest as much as $54,000 in an Individual Retirement Account (IRA) when serving in a combat zone; however, this information is missing from the IRS website. *See* IRS, *Tax Information for Members of the Military*, https://www.irs.gov/individuals/military (last visited Dec. 18, 2017). Additionally, nowhere on irs.gov can a veteran find information on the Combat-Injured Veteran Tax Fairness Act of 2016. This legislation provides veterans additional time to claim a refund if they had taxes improperly withheld from their severance pay.

6 For example, the *Miscellaneous Provisions — Combat Zone Service* link on irs.gov indicates it was last reviewed in August 2017; however, only the IRA contribution for 2006 is provided: "[t]he IRA contribution limit for 2006 is $4,000 for those under age 50 and $5,000 for those 50 and over." *See* IRS, *Miscellaneous Provisions — Combat Zone Service*, https://www.irs.gov/newsroom/miscellaneous-provisions-combat-zone-service (last visited Dec. 19, 2017).

7 For example, irs.gov reports the death gratuity paid to survivors of deceased service members is $12,000 for deaths occurring after Sep. 10, 2001. The death gratuity program actually provides for a tax-free payment of $100,000 to eligible survivors of members of the Armed Forces who die while on active duty or while serving in certain reserve statuses. *See* IRS, *Highlights: Military Family Tax Relief Act*, https://www.irs.gov/newsroom/highlights-military-family-tax-relief-act (last visited Dec. 19, 2017). The death gratuity has been at the $100,000 level since 2006. *See* NDAA for Fiscal Year 2006, Pub. L. No. 109-163, § 664 (2006).

ANALYSIS OF PROBLEM

Background

The Number of Military Taxpayers Is Now Increasing

Over the past 50 years, the size of the military has shrunk to about 1,338,000 active duty service members,[8] an 85 percent decrease from the 8,744,000 service members during the Vietnam War.[9] As those numbers have fallen, the connections between military personnel and the civilian population appear to be growing more distant, prompting also a perception that the public does not understand the problems service members face.[10]

Although the size of the military has been cut significantly in recent years, that number is now increasing.[11] Active-duty end strengths[12] were required to increase by 24,000 service members by September 30, 2017.[13] The Army succeeded in meeting its 2017 recruiting and retention goals across the active Army and National Guard,[14] as did the Air Force.[15] In FY 2018, the size of the military will increase by an additional, nearly 20,000 troops.[16]

8 *See* Defense Manpower Data Center, *DoD Personnel, Workforce Reports & Publications, Military Personnel Current Strength*, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Dec. 19, 2017).

9 *See* Department of Veterans Affairs, America's Wars Fact Sheet, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (Apr. 2017).

10 Pew Research Center Social and Demographics Trends, *The Military-Civilian Gap: Fewer Family Connections*, http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections (Nov. 23, 2011).

11 *See* Defense Manpower Data Center, *DoD Personnel, Workforce Reports & Publications, Military Personnel Current Strength*, https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Dec. 19, 2017). From FY 2011 to FY 2016, U.S. military personnel decreased nine percent from 1,424,317 to 1,301,308. Congress began decreasing the size of the military in anticipation of the withdrawal of U.S. forces from Iraq in 2011, the drawdown of U.S. forces in Afghanistan which began in 2012, and budgetary constraints. End-strengths for the Air Force and Navy have been generally declining since 2001. *See* Congressional Research Service (CRS), *FY2016 National Defense Authorization Act: Selected Military Personnel Issues* (Dec. 15, 2015). However, the military has now been mandated to increase in size. *See* National Defense Authorization Act for Fiscal Year 2018 Conference Report to Accompany H.R. 2810, § 401, at 193-194.

12 The term "end-strength" refers to the authorized strength of a specified branch of the military at the end of a given fiscal year, while the term authorized strength means "the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces." 10 United States Code (U.S.C.) § 101(b)(11).

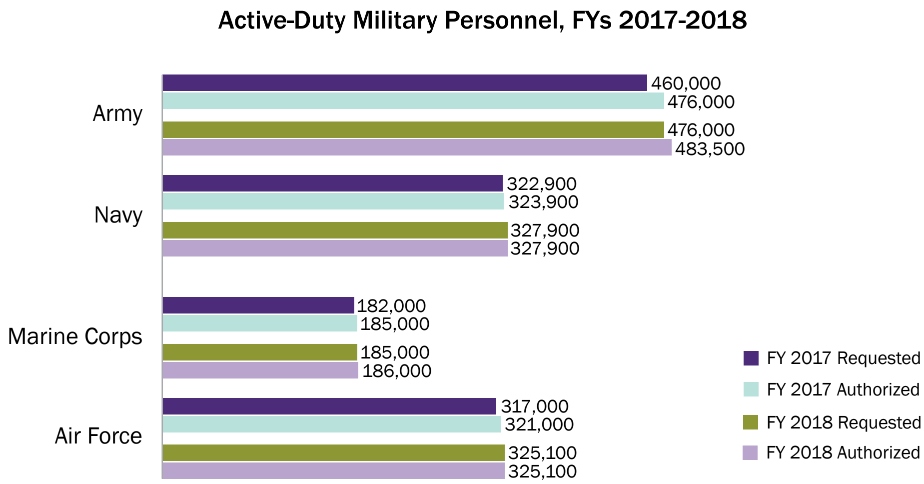
13 *See* National Defense Authorization Act for Fiscal Year 2018 Conference Report to Accompany S. 1519, § 401, at 125.

14 *See* Defense News, *Personnel chief: The Army is preparing to grow the force by 17,000 soldiers in 2018*, https://www.defensenews.com/news/your-army/2017/10/08/personnel-chief-the-army-is-preparing-to-grow-the-force-by-17000-soldiers-in-2018/ (Oct. 8, 2017).

15 *See* Air Force Times, *Air Force Hits Recruiting Goals With 33,000 New Airmen*, https://www.airforcetimes.com/news/your-air-force/2017/10/15/air-force-hits-recruiting-goals-with-33000-new-airmen/ (Oct. 15, 2017).

16 *See* National Defense Authorization Act for Fiscal Year 2018 Pub. L. No. 115-91, § 401. Authorized end strengths for active duty military personnel by September 30, 2018 is 483,500 for the Army, 327,900 for the Navy, 186,000 for the Marine Corps, and 325,100 for the Air Force. The Army will grow by at least 7,500, the Navy by nearly 4,000, the Marine Corps by 1,000, and the Air Force by about 4,100. Reserve forces will grow by about 3,400.

FIGURE 1.13.1[17]



Reserves and National Guard personnel numbers are set to increase as well by the end of FY 2018.[18]

Tax Issues Unique to the Military Are Complex

Tax issues pertaining to the military add a layer of complexity to a tax system that has grown more complex by the year.[19] These issues, discussed more thoroughly below, include extensions of tax filing deadlines, especially for those serving overseas; combat zone income exclusions; tax abatement for service members who die in combat zones or qualified hazardous duty areas; IRA contributions from tax-free combat pay; tax return signature authority without a power of attorney; unique capital gains exclusions for service members who sell their homes; deductions for relocation expenses, travel expenses for reservists, and military uniforms; waivers for early withdrawals from IRAs; rules pertaining to the choice of service members to include their nontaxable combat pay as earned income for purposes of EITC; and refund claims under the Combat-Veterans Tax Fairness Act of 2016.

17 The annual federal budget process begins with a detailed proposal from the President that is developed through an interactive process between agencies and the President's Office of Management and Budget (OMB). The President's budget request is simply a proposal by the administration of its fiscal goals and policy preferences. *See Center on Budget and Policy Priorities, Policy Basics: Introduction to the Federal Budget Process*, https://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process (Aug. 23, 2017). This request has no binding authority on Congress. *See also* National Defense Authorization Act for Fiscal Year 2018 Report to Accompany S. 1519, § 401.

18 *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 411; *see also* National Defense Authorization Act for Fiscal Year 2018 Conference Report to Accompany H.R. 2810, § 411, at 193-194.

19 For a detailed discussion on the efforts by the National Taxpayer Advocate in urging Congress to simplify the tax code, see National Taxpayer Advocate 2016 Annual Report to Congress 305-324 (Legislative Recommendation: *Tax Reform: Simplify the Internal Revenue Code Now*).

EXTENSION OF TAX RETURN FILING DEADLINES. Service members who serve in a combat zone[20] or qualified hazardous duty area[21] are allowed additional time to take care of tax matters.[22] This extension applies to the deadline for filing an annual tax return, paying any tax due, and filing a claim for a refund.[23] Additionally, service personnel are not charged interest or penalties attributable to the delayed deadline.[24] The deadline is extended for at least 180 days after the latter of the last day the taxpayer is in a combat zone or qualified hazardous duty area, or the last day of any continuous qualified hospitalization for wounds, disease, or injury sustained while serving in the combat zone.[25] In addition to the 180 days, the deadline is extended by the number of days that were left for the service member to file when he or she entered a combat zone.[26] For example, if a service member enters a combat zone on April 5, ten days before the tax filing deadline of April 15, the service member had ten days remaining to file a tax return. These ten days are then added to his or her 180-day extension, affording the service member 190 days after leaving the combat zone to file his or her tax return.

Additionally, whether in or outside of a combat zone or qualified hazardous duty area, if a service member's ability to pay an income tax liability is materially affected by his or her military service, payment of tax is deferred up to 180 days after termination of service, without any accrual of interest or penalties for that period.[27] This rule is broader than the extension under Internal Revenue Code (IRC) § 7508, in that it applies to all service members, whether deployed in a combat zone or not. The statute of limitations against the collection of tax deferred under this section is suspended for the period of military service of the service member and for an additional period of 270 days thereafter.[28] To receive this deferment, the service member must make a written request that is supported by evidence that his ability to pay is materially affected by his military service.

EXTENSION TO FILE FOR SERVICE MEMBERS OVERSEAS. Service members stationed abroad at the time of the filing due date automatically get two more months, until June 15, to file their returns.[29] If service members still need the additional four months, until October 15, to file, overseas service members must submit Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return*, by June 15.

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20 *See* IRC § 112(c)(2). The term "combat zone" means any area which the President of the United States by Executive Order designates, for purposes of this section or corresponding provisions of prior income tax laws, as an area in which Armed Forces of the United States are or have engaged in combat.

21 A Qualified Hazardous Duty Area (QHDA) is treated in the same manner as if it were a combat zone. *See* DoD Financial Management Regulation, DoD 7000.14-R ¶ 440203 (July 2016). "NOTE: In order to have [combat zone tax exclusion] treatment of wages for services performed in a QHDA, a member must be entitled to hostile fire or imminent danger pay while performing service in the QHDA." *Id.*

22 *See* IRC § 7508(a).

23 The extension also applies to filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court; allowance of a credit or refund of any tax; bringing suit upon any such claim for credit or refund; assessment of any tax; giving or making any notice or demand for the payment of any tax; collection, by levy or otherwise; bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and any other act required or permitted under the internal revenue laws specified by the Secretary. *See* IRC § 7508(a).

24 IRC § 7508(a); *See also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

25 *Id.*

26 *Id.*

27 50 U.S.C. § 4000 (a)-(b). While there is no definition in the Servicemembers Civil Relief Act (SCRA) of the term "materially affected," courts generally require that military duties prevent the member from appearing in court at the designated time and place or assisting in the preparation or presentation of a case, or substantially impair the member's ability to pay financial obligations. Thus, a court will determine whether a service member's ability to pay an income tax liability is materially affected by his military service on a case-by-case basis.

28 50 U.S.C. § 4000 (a), (c).

29 *See* Treas. Reg. § 1.6081-5(a)(6). Extensions are granted only to file forms, not to make payments.

COMBAT ZONE INCOME EXCLUSION. While a service member is serving in a combat zone as an enlisted member or as a warrant officer for any part of a month, all of his or her income for that month is exempt from federal taxes.[30] For officers, the monthly exclusion is capped at the highest rate of enlisted pay, plus any hostile fire or imminent danger pay received.[31] In some cases, service outside a combat zone can be considered service in a combat zone if the Department of Defense (DoD) designates it in direct support of military operations in the combat zone, or if the service qualifies for duty subject to hostile fire or imminent danger pay.[32] Geographic areas that are considered tax-qualified combat zones are listed on the IRS website. *However, this list is out-of-date.*[33]

TAX ABATEMENT IN CASE OF DEATH. A service member who dies in a combat zone or qualified hazardous duty area, or as a result of wounds, disease, or injury incurred while serving in the combat zone is exempt from income tax for the taxable year in which death occurs and any prior taxable year ending on or after the first day served in a combat zone or qualified hazardous duty area.[34] Because an amended return is a claim for refund, it is subject to the statutory period of limitations that applies to refunds.[35] However, service members who are deployed outside of the United States, away from their permanent duty stations, and are serving in support of a qualified hazardous duty area[36] are allowed an extension of time allowed for performing most acts required by the IRC.[37] Such an extension can hold a previous tax year open longer than three years.[38] Moreover, the service member's tax liability is forgiven for all income, not just military compensation.[39]

IRA CONTRIBUTIONS FROM COMBAT PAY. While combat pay is generally nontaxable, it is included in income for purposes of calculating the limits on contributions and deductions for an IRA.[40] The earnings on contributions will also be tax-free when withdrawn, assuming the service member

30 IRC § 112; Treas. Reg. § 1.112-1; *see also*, IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

31 *Id. See also* DoD Financial Management Regulation, DoD 7000.14-R ¶ 440203 (July 2016).

32 *See* DoD Financial Management Regulation, DoD 7000.14-R ¶ 440203 (July 2016).

33 The DoD has certified Tajikistan, Kyrgyzstan, and Uzbekistan as "in direct support" of a military operation in a combat zone through May 31, 2014 only. The IRS website, https://www.irs.gov/newsroom/combat-zones, lists them as still receiving combat zone benefits. Additionally, Syria was designated by the Secretary of Defense as an "in direct support" area beginning Jan. 1, 2004. The IRS website does not list Syria at all. Lebanon's certification as an "in direct support" area is through February 11, 2020. The IRS website does not indicate that its certification is for a limited time. *See* DoD Financial Management Regulation, DoD 7000.14-R ¶ 440223 (July 2016).

34 IRC § 692(a)(2); *see also* Treas. Reg. § 1.692-1; Rev. Proc. 2004-26, 2004-19 I.R.B. 890. The word, "a" in the phrase, "in a combat zone" is significant. In short, a service member who has had multiple deployments to combat zones over the years and then dies in a combat zone, may have multiple years of taxes forgiven, depending on the amount of time the service member has spent outside of combat zones between deployments.

35 Under IRC § 6511(a), a taxpayer must file a claim for credit or refund of an overpayment within: 1) three years from the time the return was filed, or 2) two years from the time the tax was paid, whichever is later. If no return was ever filed by the taxpayer then the claim must be filed within two years of payment of the tax.

36 *See* DoD Financial Management Regulation, DoD 7000.14-R (July 2016).

37 IRC § 7508(a)(1)(E) provides service members serving in a combat zone an automatic extension to file a claim for refund for the period that the service member is in the combat zone, and for the next 180 days thereafter.

38 IRC § 7508(a); IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

39 This may be important for a reservist service member or a service member with large investment income.

40 Heroes Earned Retirement Opportunities Act, Pub. L. No. 109-227, § 2 (2006).

qualifies.[41] Combat pay service also entitles service members to invest as much as $54,000 in an IRA when serving in a combat zone.[42] This is important information missing from the IRS website.[43]

RETURN SIGNATURE AUTHORITY. Generally, joint returns must be signed by both spouses. However, if a service member is deployed to a combat zone, a power of attorney is not needed to sign the return on the deployed spouse's behalf.[44] The other spouse must attach to the return a signed statement explaining the combat zone status.[45] If a service member deployed to a combat zone is deemed missing in action, a joint return can be filed under the same rules for up to two years after the termination of the combat zone designation of the deployment location.[46] The joint return will be considered valid even if it is later determined that the missing spouse died before the year covered by the return.[47]

CAPITAL GAINS EXCLUSION FOR SALE OF PRIMARY RESIDENCE. Taxpayers, whether civilian or military, can generally avoid paying capital gains taxes on the sale of their home if they owned it and used it as their qualifying principal residence for two out of the five years preceding the sale, permitting homeowners to exclude up to $250,000 in gains for individuals or $500,000 for married couples.[48] Service members, however, can suspend the five-year test period for up to ten years when they are assigned to a duty station that is at least 50 miles from the house for a period of 90 days or more.[49]

RELOCATION EXPENSES. Service members are permitted to deduct the reasonable unreimbursed expenses of relocating themselves and their families, without having to meet the distance and time tests.[50]

TRAVEL EXPENSES FOR RESERVISTS. If service members are called more than 100 miles away from home to perform Reserve duties, they can generally deduct any unreimbursed travel expenses.[51]

41 If a taxpayer is age 59½ or over, he may withdraw any amount from his Roth IRA as long as the account has been open for at least 5 years. If a taxpayer is under age 59½, he may withdraw the exact amount of his Roth IRA contributions with no penalties, although there are several exceptions that enable Roth IRA plan participants to withdraw funds from Roth IRAs that otherwise would be subjected to ordinary income taxes and the ten percent early withdrawal penalty. IRC § 408A(d)(2)(A)(i).

42 Deployed military members can exceed the $18,500 annual Elective Deferral Limit. *See* IRC § 415(b)(2)(H); IRC § 415(c); *See also* IRM 4.72.7.3, *Annual Additions* (May 22, 2017); IRS Notice 2016-62, 2016-2 C.B. 725; and Thrift Savings Plan, *Contribution Limits*, https://www.tsp.gov/PlanParticipation/EligibilityAndContributions/contributionLimits.html (last visited Dec. 19, 2017). The annual addition limit for 2018 is set to increase to $55,000. *See* IRS Notice 2017-64.

43 *See* IRS, https://www.irs.gov/individuals/military (last visited Dec. 19, 2017).

44 *See* Treas. Reg. §1.6012-1(a)(5).

45 *Id*. *See also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016); Associate Chief Counsel (Procedure & Administration) Desk Guide, Chapter 1, *Filing Requirements*, https://www.irs.gov/pub/irs-utl/PADeskbook.pdf (last visited Dec. 6, 2017).

46 *See* IRC § 6013(f).

47 *Id*. *See also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

48 *See* IRC § 121(b)(2)(A); *see also* 2003 Military Family Tax Relief Act, Pub. L. No. 108–121, § 101 (2003).

49 *See* IRC § 121(d)(9). This period of suspension cannot last longer than 10 years and can be on only one property at a time. *See also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

50 *See* IRC § 217; *see also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016). The Distance Test mandates that a taxpayer's new principal workplace must be at least 50 miles farther from his or her old home than his old workplace was. For example, if a taxpayer's old workplace was three miles from his or her old home, the taxpayer's new workplace must be at least 53 miles from that home. The Time Test mandates that a taxpayer must work full time in the general area of his new workplace for at least 39 weeks during the 12 months right after he or she moves.

51 *See* 2003 Military Family Tax Relief Act, Pub. L. No. 108–121, § 109 (2003); *see also* IRS Pub. 529, *Miscellaneous Deductions* (Dec. 2016). This deduction is an above-the-line deduction and is allowed whether or not the taxpayer elects to itemize.

UNIFORM EXPENSES. If service members are prohibited from wearing certain uniforms when off duty, they can generally deduct the cost to buy and maintain those uniforms if those expenses are in excess of two percent of their Adjusted Gross Income (AGI).[52]

IRA EARLY WITHDRAWALS. Because a call to active duty sometimes creates financial hardship for reservists whose military income is much lower than their civilian pay, early withdrawal penalties may be waived. If a service member takes money from his IRA, 401(k) or certain other retirement plans, the IRS may waive the ten percent penalty tax normally applied for withdrawals before age 59½.[53]

EARNED INCOME. A service member's nontaxable pay, such as combat pay, the Basic Allowance for Housing (BAH),[54] and the Basic Allowance for Subsistence (BAS),[55] is not included in the earned income for EITC purposes.[56] However, the military service member and spouse can each choose to have their nontaxable combat pay included in earned income for purposes of the EITC.[57] This scenario is usually seen during tax years in which the service member has a lengthy deployment in a combat zone, where his or her income is nontaxable. Including it as earned income may decrease the amount of tax the service member owes and may mean a larger refund, assuming he is still eligible for the EITC.

SEVERANCE PAY FOR WOUNDED VETERANS. The Combat-Injured Veterans Tax Fairness Act of 2016[58] gives veterans who retired from the military for medical reasons additional time to claim a refund if they had taxes improperly withheld from their severance pay. The DoD will identify veterans impacted by the law and send notices to them. These veterans will have the opportunity to file

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52 *See* IRC § 132(a)(3) and IRC § 162. An employee can exclude from gross income any fringe benefit which qualifies as a working condition fringe under IRC § 132(a)(3). A "working condition fringe" includes any property or services provided by an employer to an employee to the extent that, if the employee paid for such property or services, such payment would be allowed as a deduction under IRC § 162 as an ordinary trade or business expense. *See also* IRS Pub. 529, *Miscellaneous Deductions* (Dec. 2016). Generally, military taxpayers cannot deduct the cost of uniforms if they are on full-time active duty in the armed forces. However, a reservist can deduct the unreimbursed cost of his uniform if military regulations restrict him from wearing it except while on duty as a reservist. If local military rules do not allow a service member to wear his uniform when he is off duty, he can deduct the amount by which the cost of buying and keeping up these uniforms is more than the uniform allowance he receives.

53 *See* IRC § 72(t)(2)(G). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 401-408 (Legislative Recommendation: *Hardship Withdrawals: Provide a Uniform Definition of a Hardship Withdrawal from Tax-Advantaged Retirement Arrangements*) (describing the complexities involved in tax-advantaged retirement plans and arrangements). There are several different definitions of "hardship," depending on the taxpayer's type of retirement plan or arrangement. The National Taxpayer Advocate has long-advocated for uniform rules regarding the definition of "hardship" and the tax consequences of hardship withdrawals from tax-advantaged plans. *Id*.

54 The Basic Allowance for Housing (BAH) is a U.S. based allowance prescribed by geographic duty location, pay grade, and dependency status. It provides uniformed service members equitable housing compensation based on housing costs in local civilian housing markets within the United States when government quarters are not provided. *See* Defense Travel Management Office, *Basic Allowance for Housing (BAH)*, http://www.defensetravel.dod.mil/site/bah.cfm (last visited Dec. 19, 2017).

55 Basic Allowance for Subsistence (BAS) is a monthly allowance meant to offset costs for a service member's meals. All enlisted members get full BAS, but pay for their meals, including those provided by the government. BAS is linked to the price of food. Each year it is adjusted to account for the increase in food prices, as measured by the USDA food cost index. This is why the increase to BAS will not necessarily be the same percentage as that applied to the increase in the pay table, as annual pay raises are linked to the increase of private sector wages. *See* Military Pay and Benefits, *Basic Allowance for Subsistence (BAS)*, http://militarypay.defense.gov/Pay/Allowances/BAS.aspx (last visited Dec. 19, 2017).

56 *See* IRC § 32. The Earned Income Tax Credit (EITC) is an anti-poverty program consisting of a refundable tax credit available to certain low income working taxpayers and their families.

57 The Working Families Tax Relief Act of 2004 gave taxpayers the option to include combat pay in EITC earned income. The Heroes Earnings Assistance and Relief Tax Act of 2008 made this change permanent. *See* Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 104; Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 102.

58 Combat-Injured Veterans Tax Fairness Act of 2016, Pub. L. No. 114-292, 130 Stat. 1500 (2016).

amended returns dating back to 1991 to recover amounts that were withheld.[59] The IRS's website has no information about this significant provision, even on the Disabled Veterans link, in spite of the IRS's review of the web page as recently as November 27, 2017.[60]

IRS Service to the Military Taxpayers Largely Relies on the irs.gov web pages and the VITA Program

The IRS does not have SPEC employees assigned solely to assist service members.[61] Similarly, very few military tax experts outside the IRS are available to assist the tens of thousands of active and reserve military taxpayers with preparing returns and other tax issues.[62] Additionally, there are no dedicated telephone lines for service members to call the IRS with questions. Instead, the IRS disseminates important tax information to service members via its website, using a broad brush.[63]

The IRS primarily relies on VITA volunteers to help with tax return preparation at military installations worldwide.[64] During FY 2017, military VITA volunteers Army-wide prepared 87,806 federal tax returns, and averaged over 108,000 tax returns from calendar years (CY) 2013 to 2016.[65] Of the returns prepared at Army installations during CY 2017, over 13,000 were prepared at overseas locations.[66]

The challenging situations of military personnel, in addition to the unique issues they face, call for a proactive approach to assisting this taxpayer population, as well as IRS employees who understand their needs.

IRS Online Information and Publications for the Military Are Insufficient and Outdated

The irs.gov website appears to have a relatively comprehensive page for military service members, grouping its information in categories: current military personnel, those serving in a combat zone, former military personnel, and disabled veterans.[67] The page includes numerous links within each category to the Armed Forces Tax Guide;[68] particular legislation affecting service members, such as

59 Combat-Injured Veterans Tax Fairness Act of 2016, Pub. L. No. 114-292, 130 Stat. 1500 (2016).

60 *See* IRS, *Special Tax Considerations for Veterans*, https://www.irs.gov/individuals/military/special-tax-considerations-for-veterans (last visited Dec. 18, 2017).

61 The primary intermediary for IRS outreach to military personnel and their families is the Armed Forces Tax Council, which has a representative from each of the five military branches — Army, Air Force, Navy, Marines, and Coast Guard. *See* Internal Revenue Manual (IRM) 22.30.1.3.1.1, *Volunteer Income Tax Assistance (VITA)* (Jan. 10, 2013).

62 Currently, two active duty Army Judge Advocates world-wide possess Army-funded Tax LL.M.s (Master of Laws). The Army Judge Advocate General's Corps generally selects one Judge Advocate every two - four years to obtain a Tax LL.M. at Army expense. Attorneys from other service branches (Marines, Air Force, and Navy) may attend a week-long military income tax course each year prior to the tax season to prepare them to administer their military VITA programs. Email communication to TAS from Chief, Career Management Branch, Personnel, Plans & Training Office, Office of the Judge Advocate General, United States Army (Sept. 28, 2017) (on file with TAS).

63 *See* IRS, *Tax Information for Members of the Military*, https://www.irs.gov/individuals/military (last visited Dec. 19, 2017).

64 Commanders temporarily assign service members to prepare returns during tax season and provide space and equipment for tax centers. The IRS supports these efforts by providing tax software and training service members to address military specific tax issues.

65 *See* Army's CIS, Dec. 9, 2017. The numbers of military tax returns are all input into the Army's CIS by the Officers in Charge of the individual tax centers world-wide and maintained by the U.S. Army Legal Assistance Policy Division in Washington, D.C.

66 *See* Army's CIS, Dec. 9, 2017.

67 *See*, *Tax Information for Members of the Military*, https://www.irs.gov/individuals/military (last visited Dec. 19, 2017).

68 IRS Publication 3, *Armed Forces Tax Guide* (2016).

tax provisions provided in the Military Family Tax Relief Act of 2003;[69] filing topics with additional links to publications, form instructions, and other specific guidance; information about the military tax exclusion;[70] special tax considerations for disabled veterans; information for retirees, such as veterans education benefits,[71] taxable versus nontaxable income;[72] and Frequently Asked Questions (FAQs) about the Uniformed Services and Reemployment Rights Act (USERRA) and the "Veterans and Sailors Civil Relief Act of 1940 (SSCRA)."[73]

Notably, however, the reference to the SSCRA on the irs.gov website is significantly out of date, and the reference to the "Veterans and Sailors Civil Relief Act" is wrong.[74] The Act does not contain the word *Veterans*.[75] The Servicemembers Civil Relief Act (SCRA), was enacted over 14 years ago, on December 19, 2003, in response to the increased use of Reserve and National Guard military units in the Global War on Terrorism, and as a modernization and restatement of the protections contained in the SSCRA.[76] Additionally, this well-established legislation concerns individuals currently in the military, called to active duty from the Reserves or National Guard, or deployed service members, as opposed to veterans who have previously served.[77] Not only does the legislation not pertain to veterans, but its title does not and never did have the word "Veterans" in it.

The IRS's website further reports, "The death gratuity paid to survivors of deceased Armed Forces members rises to $12,000 and is not taxable (was $6,000, with $3,000 tax-free) … for deaths occurring after 9/10/2001."[78] The $12,000 figure is grossly out-of-date. The death gratuity program actually provides for a tax-free payment of *$100,000* to eligible survivors of members of the Armed Forces who

69 Among the provisions of the Military Family Tax Relief Act of 2003 are tax provisions related to the following: death benefits; sale of principal residence; deduction for overnight travel expenses of National Guard and Reserve members; Department of Defense Homeowners Assistance Program; combat zone extensions expanded to contingency operations; dependent care assistance programs; and Military Academy attendees. *See* 2003 Military Family Tax Relief Act, Pub. L. No. 108–121 (2003).

70 A service member serving in a combat zone may exclude the following income: basic pay, reenlistment bonuses, school loan repayments associated with the months in a combat zone, Imminent Danger/Hostile Fire Pay, discharge benefits (*i.e.*, selling accrued leave earned while in a combat zone), and awards and other financial incentives. *See* DoD Financial Management Regulation, DOD 7000.14-R (July 2016).

71 *See* U.S. Department of Education, *Information for Military Families and Veterans*, https://www.ed.gov/veterans-and-military-families/information, for information about educational benefits for service members. Payments for education, training, or subsistence under any law administered by the Department of Veterans Affairs (VA) are tax free. *See also* IRS Publication 970, *Tax Benefits for Education* (2016).

72 *See* IRS Publication 525, *Taxable and Nontaxable Income* (2016).

73 Recognizing the special burdens that members of the military may encounter trying to meet their financial obligations while on active duty, Congress passed the Soldiers' and Sailors' Civil Relief Act (SSCRA) in 1940. The SCRA was signed into law in 2003, replacing the SSCRA, and is codified at 50 U.S.C. App. 501 *et seq*.

74 *See* IRS, *Retirement Plans FAQs*, https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-userra-and-sscra (last visited Dec. 19, 2017).

75 *C.f.*, Pub.L. 111-275, the Veterans' Benefits Act of 2010, which makes certain improvements to the SCRA.

76 *See* H. Rep. 108-81, at 32 (Apr. 30, 2003). *See also* S. Rept. 108-197, at 9 (Nov. 17, 2003) (stating that the military had activated approximately 300,000 Reserves since September 2001, and that a DOD survey indicated that the self-employed Reservists reported an average $6,500 in lost income when mobilized or deployed).

77 The SCRA provides a wide range of protections to enable service members to devote their full attention to duty. A few examples of obligations they may be protected against are outstanding credit card debt; mortgage payments; pending trials; taxes; and terminations of leases.

78 *See* IRS, *Highlights: Military Family Tax Relief Act*, https://www.irs.gov/newsroom/highlights-military-family-tax-relief-act (last visited Dec. 19, 2017).

Very few military tax experts outside the IRS are available to assist the tens of thousands of active and reserve military taxpayers with preparing returns and other tax issues. Additionally, there are no dedicated telephone lines for service members to call the IRS with questions. Instead, the IRS disseminates important tax information to service members via its website, using a broad brush.

die while on active duty or while serving in certain reserve statuses.[79] The "Miscellaneous Provisions — Combat Zone Service" link on irs.gov was last updated in 2007.[80] The military information contained on irs.gov requires a thorough review and update on a regular basis.

The irs.gov website contains a portal with video and audio presentations on topics of interest to small businesses, individuals and tax professionals, but does not have any presentations on military tax issues. By including specific videos on the various military-specific tax issues, the IRS would be providing another avenue to reach service members around the world.

IRS Publication 3, *Armed Forces Tax Guide*,[81] covers the special tax situations of active members of the U.S. Armed Forces, although it does not cover military pensions or veterans' benefits, nor does it provide the basic tax rules that apply to all military taxpayers. The IRS could do more by providing easy-to-read information papers explaining the many complex issues facing service members.

SPEC Lacks Funding That Would Enable Them to Travel to Overseas Military Locations to Provide Face-to-Face Training for Military VITA Volunteers

Most large military installations around the world offer service members and their families free income tax filing assistance through the VITA program, managed by SPEC — the outreach and education office of the IRS's Wage and Investment Division.[82] As stated above, service members have limited options for obtaining assistance with tax filing and rely primarily on military VITA sites where they can speak with a tax preparer knowledgeable about complicated military-specific tax issues in person.[83]

79 Public Law 109-163 permanently increased the death gratuity from $12,420 to $100,000 for all active duty deaths resulting from wounds, injuries, or illnesses that are incurred in the line of duty, not just those occurring in combat-related situations, and was retroactive to September 10, 2001. *See* NDAA for Fiscal Year 2006, Pub. L. No. 109-163, § 664 (2006). The entire $100,000 is tax free. *See* IRC § 134(b)(3)(C). For deaths occurring between October 7, 2001 and January 6, 2006, the law allows the DoD to make retroactive payments of the difference between the original death gratuity survivors received and the new $100,000 amount. NDAA for FY 2006, Pub. L. No. 109-163, § 664 (2006). An additional death benefit may be possible depending on the circumstances and date of death. *See* 10 U.S.C. § 1478(d).

80 See IRS, *Miscellaneous Provisions — Combat Zone Service*, https://www.irs.gov/newsroom/miscellaneous-provisions-combat-zone-service (last visited Dec. 19, 2017). Shamefully, the most recent information on the page regarding IRA contribution limits is for 2006. The military web page indicates it was reviewed or updated as recently as August 17, 2017, albeit displaying wrong and outdated information.

81 IRS Publication, *Armed Forces' Tax Guide* (2016).

82 *See* IRM 22.30.1.1, *What is Stakeholder Partnerships, Education and Communication* (Oct. 1, 2013). *See also*, IRS, *Free Tax Help Available for the Military*, https://www.irs.gov/newsroom/free-tax-help-available-for-the-military (Mar. 23, 2017).

83 Other tax filing options include Military OneSource, a DoD-funded program providing free online tax preparation and tax consultations for military families. Service members from all branches are eligible except for active duty Coast Guard personnel. Service members can file up to three state returns for each federal return and the link to the software is available six months past the April tax deadline — two advantages that Military OneSource has over the VITA program.

In the past, SPEC personnel with knowledge of military tax issues trained volunteers stationed at military bases abroad by using the Link and Learn course for the military certification. However, more and more the IRS is turning to the virtual classroom to train these volunteers.[84] Desperate for in-person training, some overseas installations must procure the expertise of a tax-trained attorney[85] who happens to be stationed in the country or a U.S.-based attorney[86] who travels to the other country to teach tax law. Given that there are only a handful of U.S. military lawyers who are tax law trained,[87] it is simply not feasible to rely on the model of having uniformed lawyers, who happen to be stationed at an overseas installation, provide VITA training.[88]

Overseas military VITA sites need dedicated IRS employees who are trained on the complex issues that service members face year after year. In addition, the IRS should strongly consider hiring veterans who are specifically charged with outreach, education, and training for military taxpayers and the organizations that support them. By providing the necessary training and focusing efforts on outreach, the IRS will be providing essential services to this taxpaying population and honor important taxpayer *rights to be informed*, *to quality service*, *to pay no more than the correct amount of tax*, and *to fair and just tax system*.

Complex Military Tax Issues Warrant a Dedicated IRS Toll-Free Telephone Line for Service Members and Their Families, Both In and Out of Tax Season

Military OneSource is a DoD-funded program that provides service members and their families free or reduced cost tax filing.[89] In FY 2016, service members and their families filed more than 200,000 federal and state tax returns through Military OneSource.[90] Additionally, Military OneSource tax consultants conducted over 17,000 telephonic tax counseling sessions.[91] One of the most helpful aspects of the program is specialized phone support available to all service members. Consultants are available

84 For the first time in many years, SPEC will not be traveling to South Korea to deliver VITA training for the 2018 tax filing season, citing personal safety concerns for their employees. *See* email communication to TAS from SPEC Director (Sept. 7, 2017) (on file with TAS); email communication to TAS from SPEC Senior Tax Analyst (Sept. 29, 2017) (on file with TAS). Instead, the IRS will offer webcaster VITA training to personnel in South Korea. *See* email communication to TAS from Tax Counsel, Under Secretary of Defense (USD), Personnel and Readiness (P&R), Legal Policy, Pentagon (Dec. 15, 2017) (on file with TAS). Notably, there are approximately 20,000 service members and 23,800 U.S. civilians living, at the invitation of the U.S. Government, in South Korea. The DoD, at least currently, is actively assigning and moving these employees and families to South Korea and has deemed it safe to do so. Email communication to TAS from Director, Armed Forces Tax Council, Office of the Secretary of Defense, Department of Defense (Sept. 8, 2017) (on file with TAS).

85 Generally, these are uniformed attorneys, although civilian DoD attorneys working abroad may step in to teach tax law.

86 The U.S. attorneys may be either civilian or military attorneys.

87 Email communication to TAS from Chief, Personnel, Plans & Training Office, Office of the Judge Advocate General, United States Army (Sept. 26, 2017) (on file with TAS).

88 Budget constraints have also made it difficult for the IRS to provide in-person training for military VITA volunteers domestically. As such, SPEC has teamed up with the American Bar Association (ABA) Section of Taxation and law firms in recent years to instruct tax law to military VITA personnel, who prepare returns for other military personnel and their dependents. Although this model appears to work for many installations, the ABA struggles to continually recruit lawyers for these pro bono opportunities. *See* American Bar Association's description of the Adopt-a-Base Program at https://www.americanbar.org/groups/taxation/tax_pro_bono/assist_service_members.html. *See also* C. Well Hall, III, *Uncle Sam: We Need a Few Good Tax Lawyers — Military VITA Training Opportunities Through the "Adopt-A-Base" Program*, ABA Section of Taxation NewsQuarterly, 10-12 (Spring 2015).

89 Military OneSource provides a variety of service resources to active-duty service members, to include free federal and state tax preparation through H&R Block software. There are no income nor age restrictions for service members and their families. *See* IRM 22.30.1.3.1.1.10, *Facilitated Self Assistance Software Programs* (Sept. 26, 2016).

90 Email communication to TAS from Branch Chief, Administration and Communication, Office of the Assistant Secretary of Defense, the office that administers the Military OneSource program (Sept. 11, 2017) (on file with TAS).

91 *Id.*

Even if service members stationed abroad were some of the lucky 40 percent who got through to the IRS, they cannot be confident the IRS employees on the other end of the line understand their issue.

January through October. However, these consultants are neither tax attorneys nor tax preparers and can answer only basic procedural questions.

Each year, the IRS receives more than 100 million telephone calls on its toll-free lines, roughly five million taxpayer visits in its taxpayer assistance centers (TACs), and some ten million pieces of correspondence from taxpayers responding to proposed adjustment notices.[92] The IRS received about 8.6 million calls on its "Installment Agreement/Balance Due" line, which taxpayers generally call if they cannot pay their tax liabilities in full and are seeking to arrange a payment plan.[93] The IRS answered 42 percent of these calls during FY 2017 (down from 44 percent in FY 2016), and wait times increased from 22 minutes in FY 2016 to 33 minutes in FY 2017.[94]

Service members face uncommon tax law questions about complex tax issues, including questions associated with return filing, audits, math error adjustments, penalty assessments, and collection issues. Even if service members stationed abroad were some of the lucky 40 percent who got through to the IRS, they cannot be confident the IRS employees on the other end of the line understand their issue. Additionally, military taxpayers stationed abroad generally cannot call U.S. toll-free telephone lines.[95] Moreover, because service members have until June 15 each year to file their tax returns, and IRS employees are prohibited from answering any tax law questions outside the domestic filing season (January 1–April 15), there are two months that service members have nowhere to turn *during the overseas filing season*.[96] This does not even take into account the additional six months outside the filing season, during which they have few tax resources available to them.

CONCLUSION

Military tax law is a very complicated area of tax law, and members of the military and their families face unusual difficulties in meeting their tax obligations. To better address the complexity of these issues, the IRS should provide accurate, up-to-date information for military taxpayers. Ample funds should be provided to SPEC for the specific purpose of training military tax preparers at overseas locations, as well as hiring veterans who are specifically charged with outreach, education, and training for military taxpayers. There needs to be a dedicated service line for the military, staffed with people familiar with the various provisions, exclusions, and exceptions, who can route the service member taxpayer to the place he or she can go to resolve issues quickly. Additionally, there should be a specific individual in the IRS who is charged with updating the information geared towards service members on irs.gov, to keep it current with developments in this important area of the law. The IRS should strive to be a part of the military community and display a desire to work with and educate service members. By

92 National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 6-28.

93 IRS, JOC, Snapshot Reports: Product Line Detail Snapshot (week ending Sept. 30, 2017).

94 *Id.*

95 National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 6, 27.

96 Service members stationed abroad for the entire tax year are automatically granted two more months, until June 15, to file their returns. *See* Treas. Reg. § 1.6081-5(a)(6); *see also* IRS Pub. 3, *Armed Forces' Tax Guide* (Dec. 2016).

doing so, the IRS will assist a significant number of taxpayers with noteworthy and oftentimes complex tax issues, thereby building trust and improving compliance among this population.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Assign a dedicated IRS employee to routinely update the military information on irs.gov website.
2. Create a special unit of SPEC staffed with veterans whose responsibilities are to develop and conduct outreach, education, and assistance to current military taxpayers, including National Guard and Reservists, and to those organizations that provide tax assistance to these taxpayers.
3. Allocate ample funding for SPEC to provide face-to-face training for military VITA volunteers in overseas locations.
4. Provide a year-round dedicated toll-free telephone line for service members and their families to answer tax law and filing questions, and to resolve their tax account and compliance issues.

MSP #14 SHARING ECONOMY: Participants in the Sharing Economy Lack Adequate Guidance From the IRS

RESPONSIBLE OFFICIAL

Mary Beth Murphy, Commissioner, Small Business/Self-Employed Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The "sharing" economy (also known as the gig economy) can be described as "collaborative consumption" or a "peer-to-peer market" that links a willing provider to a consumer of goods or services (coordinated through a community-based online service). Typically, there are three parties involved in a sharing economy transaction. Here, we will refer to them as *service providers* (the freelancers who provide the goods or services), *service recipients* (the consumers of such good or services), and *service coordinators* (the third-party platforms that facilitate the transactions).

A 2016 survey of members of the National Association of the Self-Employed (NASE) revealed that:

- 34 percent of those who reported earning income in the sharing economy did not know they needed to file quarterly estimated tax payments;
- 36 percent did not understand what records they would need to maintain as a small business for tax purposes;
- 43 percent did not set aside money to meet their tax obligations or know how much they owed; and
- 69 percent did not receive any tax information from the sharing economy platform they used to earn their income.[2]

These results demonstrate both the need for guidance from the IRS and the opportunity to create a culture of tax compliance among participants in the sharing economy from the outset. Establishing the tax compliance norms for this emerging sharing economy industry in its infancy will assist the IRS as this segment of taxpayers grows.

1 *See* Taxpayer Bill of Rights (TBOR), http://www.TaxpayerAdvocate.irs.gov/Taxpayer-Rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC §7803(a)(3)).

2 Written statement of Caroline Bruckner, Managing Director, Kogod Tax Policy Center (May 17, 2016). In this survey, 22 percent of respondents reported earning income in the sharing economy. The statistics reported above are percentages of those who reported earning income in the sharing economy. *See* Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* (May 2016).

ANALYSIS OF THE PROBLEM

Proponents of the sharing economy believe it promotes marketplace efficiency by enabling individuals to generate revenue from assets while the assets are not being used personally. For example, a vacation home owner may rent out her home while she is not using it. Peer-to-peer services not only include short-term home rentals (Airbnb) and shared car services (Uber and Lyft), but also:

- Sharing a back seat with strangers (Hitch);
- Short-term car rentals (Relayrides);
- Selling handmade or vintage items (Etsy);
- Providing household errands (TaskRabbit); and
- Providing cleaning and greeting services to Airbnb properties (Happy Host).

Service providers in the sharing economy may not fit the mold of the traditional employee who works "9-to-5" for a singular boss and receives a Form W-2, *Wage and Tax Statement*, from an employer. Rather, they may view themselves as contingent workers or freelancers, serving hundreds of service recipients but with no set schedule. The sharing economy often includes an additional party in transactions — the service coordinator — which may or may not provide a Form 1099-MISC, *Miscellaneous Income*, to the service provider.

Scope of the Sharing Economy

According to a 2016 Pew Research Center survey, nearly a quarter of the U.S. population earned money from the sharing economy.[3] About eight percent of Americans earned money using digital platforms to perform a job or task; 18 percent earned money selling something online, and one percent rented out properties on a home-sharing site.[4] Revenue from the sharing economy is projected to increase from $15 billion internationally in 2013 to $335 billion by 2025.[5]

Although it may be growing at a healthy rate, the sharing economy may not be lucrative for all or most service providers in the sector. On the contrary, data show that the vast majority of gig workers — 85 percent — make less than $500 per month.[6] When taxpayers take on multiple gigs to help make ends meet, it makes tax compliance even more difficult; they receive information returns from multiple sources, so it may be difficult to track and allocate expenses.

Establishing the tax compliance norms for this emerging sharing economy industry in its infancy will assist the IRS as this segment of taxpayers grows.

3 Pew Research Center, Gig Work, Online Selling and Home Sharing (Nov. 17, 2016), www.pewinternet.org/2016/11/17/gig-work-online-selling-and-home-sharing/.

4 *Id.*

5 Pricewaterhouse Coopers, *The Sharing Economy* 14 (2015), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf.

6 Washington Post, *Side Hustles Are the New Norm* (July 3, 2017).

There are many reasons why the sharing economy has grown as much as it has.

- **Cost.** It is often less costly for service recipients to use services offered by providers who identify as independent contractors than to use services offered by traditional businesses with employees. Employers are required to pay employment taxes for employees, and many offer costly benefits to full-time employees (such as retirement plans, paid leave, and health insurance). By classifying service providers as independent contractors, service coordinators in the sharing economy can avoid these expenses and pass the savings along to service recipients.
- **Technology.** With mobile networks and smartphone apps, a sharing economy can tap pools of latent labor supply, allowing service providers to deliver in real-time. Service providers in the sharing economy can select engagements based upon how each job fits their own priorities and skills.
- **Lifestyle.** Service providers in a sharing economy enjoy greater flexibility, control, and variety than their full-time employed counterparts. For example, an Uber driver has the ability to work only when it makes sense for his schedule, whereas a full-time taxi driver may have to adhere to rigid schedules set by the employer.

Participants in the Sharing Economy May Not Fully Understand Their Tax Obligations

Understandably, many of the new service providers in a sharing economy may not fully comprehend their tax filing obligations or have any experience with the requisite tax record-keeping. These new entrants to the sharing economy will need to spend significant time learning about their tax compliance obligations and to devote many hours to recordkeeping. For example, the IRS estimates that it takes taxpayers nearly 40 hours to learn about depreciation methods, keep records, and report the depreciation to the IRS.[7] Yet, according to a recent survey conducted by NASE, 69 percent of entrepreneurs who participate in the sharing economy received absolutely no tax guidance from the companies with which they work.[8]

When looking at noncompliance, it is important to distinguish between the various types of noncompliance the IRS encounters. Not all noncompliant taxpayers are willfully noncompliant; many of them are tripped up by "unknowing" or "lazy" noncompliance.[9] That is, some taxpayers are simply unaware of their tax compliance obligations. The NASE survey results underscore the importance of educating sharing-economy entrepreneurs and merchants that they are operating a self-employed, small business and need to understand certain basic tax obligations (*i.e.*, making required quarterly estimated payments throughout the year to avoid penalties).

Much of the compliance burden can be alleviated if tax is collected by third parties and reported to the IRS and to the service providers. This works well for workers in an employee/employer relationship — the employer withholds income and employment taxes throughout the year and provides a Form W-2 to

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7 *See* 2016 Instructions to Form 4562, *Depreciation and Amortization*. The IRS makes the following estimates for completing this form:
Recordkeeping .... 30 hr., 22 min.
Learning about the law or the form .... 4 hr., 16 min.
Preparing and sending the form to the IRS .... 4 hr., 58 min.

8 National Association of the Self-Employed (NASE), http://www.nase.org/about-us/Nase_News/2016/04/29/nase-releases-new-survey-data-on-sharing-economy. The survey was sent in March 2016 to more than 40,000 small businesses and received over 500 responses, mainly from the self-employed, about their participation in the sharing economy.

9 Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. Kan. L. Rev. 1145 (2003).

the employer and the IRS after the close of the year. In fact, IRS tax gap data shows that 99 percent of wages subject to withholding and third-party information reporting is reported by taxpayers to the IRS.[10]

For workers who fall outside the parameters of a traditional employee/employer relationship, the process may get more complicated. A driver of a shared car service may receive a Form 1099-MISC in January, reporting the gross amount received in fares for the prior year, but the issuer of the Form 1099-MISC typically has not done any withholding. The service provider may not have been aware of the consequences of being classified as a non-employee and may not have set aside money for self-employment tax or made quarterly estimated payments. Other service providers in a sharing economy may not receive any information reporting from the service coordinators.[11] A 2016 survey found that only 32 percent of sharing economy service providers receive information reporting via Form 1099-K, *Payment Card and Third Party Network Transactions*, or Form 1099-MISC from their service coordinators — perhaps because coordinators are wary of being classified as employers.[12]

Service Providers in the Sharing Economy Have Turned to Online Forums for Tax Advice

The IRS has not issued industry-specific guidance outlining the common tax issues faced by participants of the sharing economy. Because of this vacuum, many service providers have turned to the internet to ask tax-related questions.

For example, many Uber drivers engage in an online forum where they can share information about or solicit advice on a wide range of topics.[13] There is even a sub-forum dedicated to tax compliance, focused on "1099 income, deductions, and the IRS."[14] Similarly, Airbnb hosts have created an online forum where hosts can share advice with other hosts, and there is a sub-forum dedicated to "Regulations/Tax Issues."[15]

There are certain advantages that these online forums enjoy over traditional sources of tax content. First, internet discussion forums can provide a real-time picture of the tax and related issues that concern ridesharing drivers. There is instantaneous reaction to an online post from other forum members who may have had similar experiences. Second, the anonymous nature of these forums may cause forum participants to be more candid and forthright than they might be in face-to-face discussions. Third, the back-and-forth nature of the discussion can flesh out and identify related issues, more so than a static IRS publication could.

However, there are some major risks for service providers in the sharing economy in relaying on information or advice gleaned from online forums. The information or advice may be incorrect, yet accepted by the group as correct. This can easily occur when the facts of one taxpayer's circumstances

10 IRS, *Tax Gap Estimates for Tax Years 2008-2010* (Apr. 2016).

11 The IRS requires payors to issue Form 1099-K, *Payment Card and Third Party Network Transactions*, only when the total number of transactions exceed 200 and the aggregate value exceeds $20,000 in a calendar year. *See* IRC § 6050W(e). Senator John Thune recently introduced legislation that would lower the threshold to $1,000 for payors to report payments on Form 1099-K, while raising the threshold for reporting payments to service providers on Form 1099-MISC to $1,000 (up from $600). *See* New Economy Work to Guarantee Independence and Growth Act of 2017, S. 1549, 115th Cong. (2017).

12 *See* Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* 10 (May 2016). The National Taxpayer Advocate has proposed legislative recommendations to allow voluntary withholding on payments made to independent contractors. *See* Legislative Recommendation: *Amend Internal Revenue Code Section 3402(p) to Allow Voluntary Withholding for Independent Contractors*, *infra*; National Taxpayer Advocate 2007 Annual Report to Congress 493-94; National Taxpayer Advocate 2005 Annual Report to Congress 69.

13 *See* www.uberpeople.net (last visited Nov. 28, 2017).

14 *See* http://uberpeople.net/forums/Taxes/ (last visited Nov. 28, 2017).

15 *See* http://airhostsforum.com/c/regulations-tax-issues (last visited Nov. 28, 2017).

> **If we operate under the premise that most taxpayers want to comply with the law, the IRS needs to expand its presence within the sharing economy to enable that compliance.**

differ in a slight, but significant, way from the situation discussed in an online forum. Furthermore, anti-government/anti-IRS sentiment may skew the forum discussion, to the point where high-risk tax-avoidance techniques may be accepted as norms.

Rather than ignore the existence of these online forums and the benefits they provide, the IRS should take an active role in such discussions. Certainly, the IRS could not provide specific tax advice through online forums and discussion groups, but it could answer general questions, link to the IRS website for relevant information, and provide the phone number for IRS assistors when appropriate. If the IRS wants to be really bold and proactive, it could designate a representative to respond to questions on a Reddit forum for Airbnb or Uber users. A benefit of these exchanges is that the IRS will learn about specific challenges and issues facing this segment of the economy and thereby do a better job of tailoring its guidance for both taxpayers and IRS employees. It is clear there is a segment of the sharing economy that seeks guidance on how to comply with their tax obligations. By proactively engaging in the discussion, the IRS can positively shape the norm for participants in the sharing economy.

The IRS Should Expand Its Education and Outreach to Sharing Economy Participants

If we operate under the premise that most taxpayers want to comply with the law, the IRS needs to expand its presence within the sharing economy to enable that compliance. Providers of services want to be educated about what is expected of them. There are many ways the IRS can provide improved taxpayer service to this growing sector.

The IRS could get more creative in repackaging existing content and tailoring it for participants in a sharing economy. For example, the IRS currently releases Publication 527, *Residential Rental Property*,[16] and Publication 463, *Travel, Entertainment, Gift, and Car Expenses*,[17] each year. While these publications contain helpful information, an Airbnb host would have to sift through the 24-page Publication 527, and an Uber driver would have to navigate through the 50-page Publication 463, and they still might not understand how these rules apply to themselves as service providers in a sharing economy.

This new publication for sharing economy participants need not be long and all-encompassing, but it should at a minimum provide a checklist of issues that first-time, self-employed persons participating in the sharing economy should be aware of. For example, this new publication should include information about the need to make estimated payments of income and employment taxes. It should also explain that self-employed persons pay both the employee and employer shares of employment taxes. The new publication should mention that self-employed persons generally need to file a Schedule C and generally may deduct expenses (*e.g.*, actual vehicle expenses for Uber drivers, or a standard vehicle expense based on mileage), provided they keep contemporaneous and accurate records. This new sharing economy publication should cross reference other IRS publications that provide more detail on these and a

16 *See* https://www.irs.gov/pub/irs-pdf/p527.pdf.

17 *See* https://www.irs.gov/pub/irs-pdf/p463.pdf.

few other issues that are relevant to service providers in a sharing economy. To be evenhanded, the publication should also briefly explain the factors underlying worker classification and cross-reference other IRS materials on that topic.

In addition, the IRS should consider developing a one-page brochure that touches on some very basic points relevant to service providers in a shared economy. For example, this brochure can point out the significant difference in tax treatment when a home is rented out for 14 days or less per year versus a home that is rented by an Airbnb host for more than 14 days.[18] This brochure could contain a link to the new publication on the sharing economy. The IRS should require third-party service coordinators to provide this brochure to service providers at the same time they receive the Form W-9, *Request for Taxpayer Identification Number and Certification*, along with the taxpayer identification number from the service provider.

The IRS recently created a dedicated web page containing tax tips for participants in a sharing economy.[19] The IRS could develop a series of webinars on topics of interest to participants in the sharing economy, and host them on the sharing economy web page. The IRS should develop a Frequently Asked Questions (FAQs) section that is updated periodically. The IRS should also designate liaisons to monitor online forums to identify emerging issues for the sharing economy and address them via FAQs while the IRS develops more formal guidance. (FAQs should not be a substitute for formal guidance.)

If the IRS wanted to be even more helpful, it could create and host an online "wizard" — a tool that could be extremely helpful to participants in the sharing economy. TAS is exploring doing just that, but we would welcome IRS involvement. Such an online wizard could walk taxpayers who are newly self-employed through the various steps one needs to take (*e.g.*, obtain an employer identification number, make estimated payments, keep books and records). It could contain a downloadable mileage log app for taxpayers to use, with pre-populated mileage rates for a given year. The IRS could develop a user-friendly calendar function that permits taxpayers to add the estimated tax payment due dates to their smartphone calendars. In past Reports to Congress, we have suggested that the IRS work with the Electronic Federal Tax Payment System to make it more user friendly (*e.g.*, allow taxpayers to schedule estimated tax payments with greater frequency).[20] There are many ways the IRS can embrace technology to deliver services that taxpayers need.

Taxpayers who attempt to reach the IRS with tax law questions should be able to speak to someone about their substantive tax issue. Driving taxpayers to online content may be the desired goal of the IRS's "Future State" plan, but there are times when a taxpayer needs to speak to a live assistor. Congress needs to provide the resources for the IRS to properly staff its phone lines to achieve an acceptable level of service, and it needs to hold the IRS accountable for answering tax law questions via the phone all

18 For someone using a dwelling unit for both rental and personal purposes, the tax treatment of the rental expenses depends on how many days the dwelling unit was rented out during the year. If the property is rented less than 15 days during the year, income from the rental shall not be included in the gross income of the taxpayer (and rental expenses may not be deducted). *See* IRC § 280A(g); IRS, Publication 527, *Residential Rental Property* 3.

19 *See* www.irs.gov/sharing (last visited Nov. 28, 2017).

20 National Taxpayer Advocate 2007 Annual Report to Congress 43-44.

year round. There should be no reason for such questions to be deemed "out of scope."[21] We are asking taxpayers to voluntarily comply with their tax obligations, and the IRS should be there to pick up the phone and answer questions.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Develop and publicize new guidance for sharing economy participants that includes a publication and a checklist of issues of which first-time, self-employed persons participating in the sharing economy should be aware.
2. Create a one-page brochure touching on some basic points relevant to service providers in a sharing economy and containing a link to the resources available for sharing economy participants.
3. Require third-party service coordinators to provide the one-page brochure on the service economy to service providers at the same time they receive the Form W-9, *Request for Taxpayer Identification Number and Certification*, from the service provider.
4. Partner with TAS to develop an online wizard for taxpayers in the sharing economy, which may include interactive online tools such as a mileage log app or an estimated tax payment calculator.
5. Designate liaisons to participate in online forums to identify emerging issues for sharing economy participants.

21 Internal Revenue Manual (IRM) 21.1.1, *Accounts Management and Compliance Services Operations, Accounts Management and Compliance Services Overview* (Oct. 1, 2017), provides instructions regarding the kinds of questions IRS customer service representatives may answer. IRM 21.1.1.3.1 (Jan. 15, 2016) provides that "the areas discussed below are beyond the level of service (out of scope) that CAS, Accounts Management will provide:

- Tax form and schedule preparation
- Tax planning
- Legal opinions
- Highly complex tax issues (limited service)."

Exhibit 21.1.1-1 (Oct. 1, 2017) contains a list of out-of-scope topics and forms. Out-of-scope items include entity classification, e-commerce, depreciation and amortization (including Section 179 deductions), and questions about tax software.

MSP #15

INTERNATIONAL: The IRS's Approach to Credit and Refund Claims of Nonresident Aliens Wastes Resources and Burdens Compliant Taxpayers

RESPONSIBLE OFFICIAL

Douglas W. O'Donnell, Commissioner, Large Business and International Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*
- *The Right to Pay No More Than the Correct Amount of Tax*

DEFINITION OF PROBLEM

Under Internal Revenue Code (IRC) §§ 1441-1443 and 1461-1465 (Chapter 3), the IRS imposes withholding on payments made to nonresident aliens and foreign corporations and allows credits and refunds of the amounts to which these taxpayers are entitled.[2] For many years, the operation of this regime closely paralleled the approach taken by the IRS with respect to domestic withholding under IRC § 31 in that there were no restrictions limiting credits or refunds to the amount of withheld tax actually paid over to the IRS.[3] Based on generalized concerns regarding the potential for fraud and systematic noncompliance, however, in 2015, the IRS altered its administrative policy regarding Chapter 3 refunds.[4] It no longer allows credits and refunds when taxpayers can prove withholding has occurred, as is the practice in the domestic employment tax context. Instead, the IRS now grants credits and refunds only when the information on Forms 1040NR, *U.S. Nonresident Alien Income Tax Return,* substantially matches the information on Forms 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, issued directly to the IRS by withholding agents.[5] (Hereafter, nonresident aliens seeking

1 *See* Taxpayer Bill of Rights (TBOR), http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *See* Treas. Reg. §§ 1.1441-2; 1.1464-1. Those payors charged with the responsibility of undertaking this withholding are referred to as "withholding agents." Treas. Reg. § 1.1441-7(a). Often, the administrative tasks of withholding and reporting are outsourced to third parties, but ultimate legal responsibility for these duties remains with the individual or company on whose behalf they were undertaken. IRC § 1461.

3 For a discussion of prior IRS practice in the processing of Chapter 3 refund claims, see Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2010-40-121, *Improvements Are Needed to Verify Refunds to Nonresident Aliens Before the Refunds are Sent Out of the United States* 6 (Sept. 2010).

4 National Taxpayer Advocate 2015 Annual Report to Congress 346-47. Refunds under Chapter 4 (IRC §§ 1471-1474) follow the procedures for such refunds set forth with respect to Chapter 3. *See* IRC § 1474(b)(1).

5 IRM 21.8.1.11.14.3, *FATCA – 1042-S Matching Program – General Information – Identifying Related Letters, Transaction Codes, Reason Codes, 1042-S Data Fields* (Oct. 1, 2017); IRM 21.8.1.11.14.5(4), *FATCA Matching Program Form 1042-S Credit Denials – Accounts Management Telephone/Written Inquiries – Letter 5904C* (Oct. 1, 2017). Note that many of the procedures and some of the concerns discussed in this Most Serious Problem apply equally to foreign corporations filing Forms 1120-F, *U.S. Income Tax Return of a Foreign Corporation*, but these foreign corporations are not the focus of this analysis, as they also present distinct analytical and administrative issues from those arising in the case of individual nonresident aliens.

these credits and refunds associated with Forms 1042-S will be referred to, for simplicity, as "1042-S filers.")

Without an analytic foundation, the IRS took the drastic step of freezing refund claims of 1042-S filers for up to one year or longer while attempting to match the documentation provided by taxpayers with the documentation provided by withholding agents.[6] The IRS did this even though most 1042-S filers (nearly 80 percent) claim relatively small dollar amounts of withholding (an average of approximately $1,100).[7] Further, as a group, 1042-S filers appear to be substantially more compliant than a comparable portion of the U.S. taxpayer population.[8] The IRS ultimately released these frozen refunds, which impacted over 100,000 taxpayers, after the systemic matching program yielded so many "false positives" that it proved untenable.[9] The IRS is now redesigning this program.[10] Nevertheless, only the tools and the processes are being revised, while the program's philosophy remains unchanged and its underlying assumptions unchallenged. The IRS continues to treat 1042-S filers as "tax cheats" anytime a mismatch arises, even if that mismatch is beyond the taxpayer's control or is based on some other good-faith error.

As a result, the National Taxpayer Advocate is concerned that:

- The IRS's current approach to 1042-S filers does not appear to be based on analysis of quantitative evidence;
- The IRS is wasting resources and needlessly burdening taxpayers by its undifferentiated approach to 1042-S filers;
- The IRS has demonstrated a reluctance to enforce compliance among Form 1042-S withholding agents, even though it generally has the ability to do so; and
- The IRS position of forcing nonresident taxpayers to shoulder the burden of their withholding agents' reporting and compliance may be subject to litigation hazards under *Portillo* and other naked assessment cases.

The IRS continues to treat 1042-S filers as "tax cheats" anytime a mismatch arises, even if that mismatch is beyond the taxpayer's control or is based on some other good-faith error.

6 National Taxpayer Advocate 2016 Annual Report to Congress 220-29; National Taxpayer Advocate 2015 Annual Report to Congress 346-52.

7 TAS Research, Compliance Data Warehouse (CDW), data drawn Oct. 12, 2017. These numbers represent an annual average derived from the 2013, 2014, and 2015 tax years.

8 *Id.*

9 National Taxpayer Advocate 2016 Annual Report to Congress 221; IRS, *IRS Takes Steps to Help Students; Outlines Interim Process for Obtaining Refunds of Withholding Tax Reported on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding* (June 6, 2016), https://www.irs.gov/uac/irs-takes-steps-to-help-students-and-others-outlines-interim-process-for-obtaining-refunds-of-withholding-tax-reported-on-form-1042s-foreign-persons-us-source-income-subject-to-withholding.

10 The systemic matching program previously employed by the IRS relied on a semi-automated tool, supplemented by manual review of taxpayer returns and forms where necessary. The systemic matching program was suspended because the semi-automated tool generated a significant false-positive rate, resulting in an overwhelming need for manual review. *Id.* TAS's understanding is that this manual review is continuing on a more limited basis, but that, as part of its redesigned program, the IRS hopes to reintroduce a mechanism for automated matching.

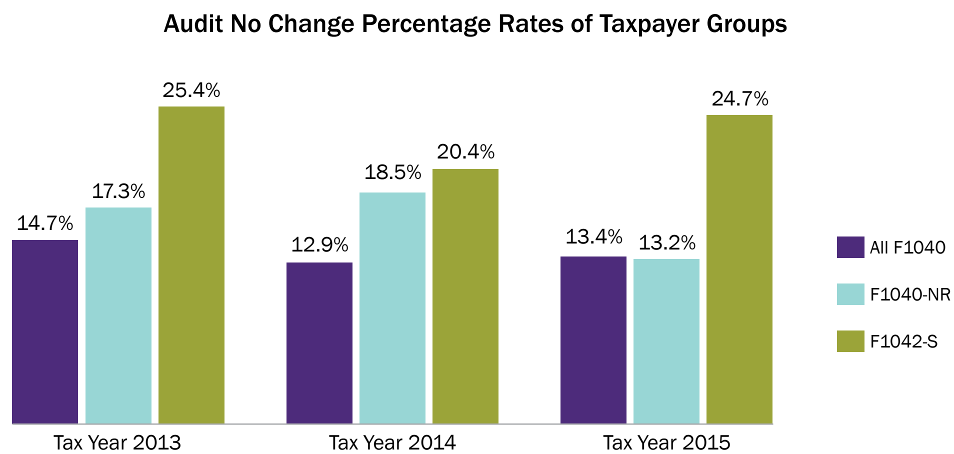
ANALYSIS OF PROBLEM

The IRS's Current Approach to 1042-S Filers Does Not Appear to Be Based on Analysis of Quantitative Evidence

The IRS is faced with legitimate challenges regarding information reporting and collection of taxes with respect to nonresident aliens and offshore accounts.[11] Nevertheless, the IRS has not, to TAS's knowledge, yet developed comprehensive statistical data establishing the existence and nature of widespread fraud or noncompliance on the part of 1042-S filers.[12] This lack of information has caused the IRS to adopt a broad-brush approach, which generates tax administration prone to inequities, inefficiencies, and inaccurate assumptions.

In contrast to the blanket fears of the IRS, TAS analysis indicates that the vast majority of taxpayers who file income tax returns associated with a Form 1042-S actually appear to be substantially more compliant than a comparable portion of the overall U.S. taxpayer population. In part, TAS bases this determination on an examination of data relating to reporting compliance. For example, for tax years (TY) 2013, 2014, and 2015, the "no change" rate for cases involving audits of 1042-S filers exceeded the audit "no change" rate for all Form 1040-NR filers as well as for all Form 1040 filers.[13] This comparison can be seen in Figure 1.15.1.

FIGURE 1.15.1[14]



11 TIGTA, Ref. No. 2010-40-121, *Improvements Are Needed to Verify Refunds to Non-resident Aliens Before the Refunds Are Sent out of the United States* 6 (Sept. 2010).

12 Large Business & International (LB&I) response to TAS information request (July 5, 2017); LB&I response to TAS information request (Sept. 6, 2016). In its responses, LB&I refers to a TIGTA report from September 2013, which ultimately was determined to be TIGTA Ref. No. 2013-40-083, *Income and Withholding Verification Processes Are Resulting in the Issuance of Potentially Fraudulent Tax Refunds* (Aug. 7, 2013). This report, however, does not address Form 1042-S filers.

13 TAS Research, CDW, data drawn Nov. 1, 2017. The selection criteria used to identify returns for audits sometimes varies across these filing groups. LB&I response to TAS fact check request (Nov. 16, 2017).

14 TAS Research, CDW, data drawn Oct. 16, 2017.

Further, 1042-S filers have a lower percentage of high-scoring Discriminant Index Function (DIF) returns in comparison to filers overall.[15] Since high-scoring DIF returns generally indicate compliance issues, while low-scoring DIF returns signify a more compliant group of taxpayers, this measure likewise furnishes evidence that 1042-S filers as a group are not a high-risk population.

This conclusion is further supported by the circumstance that the increased scrutiny generated by the Form 1042-S systemic matching program does not appear to have resulted in a drop in the number of claims by 1042-S filers. If a significant portion of 1042-S filers had been engaging in fraud or systematic noncompliance, it would follow that the enhanced IRS vigilance in this area would result in a reduced volume of Form 1042-S claims. By contrast, the number of 1042-S filers making credit claims has remained remarkably consistent between processing year (PY) 2013 and PY 2016, the last year for which complete data is available.[16] Indeed, the aggregate dollar value of these claims has increased every year.[17] Figure 1.15.2 elaborates on this claim activity.

FIGURE 1.15.2, Form 1042-S Claim Activity[18]

Processing Year	Number of Returns	Aggregate Credits
2013	73,054	$ 336,803,000
2014	73,038	$ 384,249,000
2015	73,734	$ 420,906,000
2016	72,702	$ 546,167,000

The IRS Is Wasting Resources and Needlessly Burdening Taxpayers by Its Undifferentiated Approach to 1042-S Filers

As demonstrated above, the majority of 1042-S filers present little risk of noncompliance or revenue loss. As a result, applying a "one-size-fits-all" model of tax administration in this context will continue to disadvantage nonresident taxpayers, poorly allocate scarce funding, and undermine related IRS enforcement efforts.

Instead, the IRS should focus on high-risk taxpayer categories that would benefit from increased scrutiny and enforcement activity.[19] For example, 86 percent of the 1042-S filers in one Total Positive Income (TPI) class show DIF scores that are suggestive of potential noncompliance.[20] On the other hand, only one percent of those in a different TPI class, which encompasses over 80 percent of all 1042-S filers,

15 TAS Research, CDW, data drawn Nov. 1, 2017. These Discriminant Index Function (DIF) scores are for tax year (TY) 2015, which is the last year for which relatively complete data is available. High-scoring DIF returns are generally defined as those falling within the top five percentile.

16 TAS Research, CDW, data drawn Nov. 20, 2017. The term "processing year" denotes all filings made during a given calendar year, regardless of the tax years to which they relate. For instance, processing year 2017 runs from January 1, 2016 through December 31, 2016.

17 TAS Research, CDW, data drawn Nov. 20, 2017.

18 *Id.*

19 This focus could, in part, be pursued by applying an improved version of the Return Integrity and Compliance Services Integrity and Verification Operation, as used in the domestic context. *See* IRM 25.25.1.1 (Feb. 19, 2015). *See also* National Taxpayer Advocate 2016 Annual Report to Congress 223; National Taxpayer Advocate 2016 Annual Report to Congress 151-60.

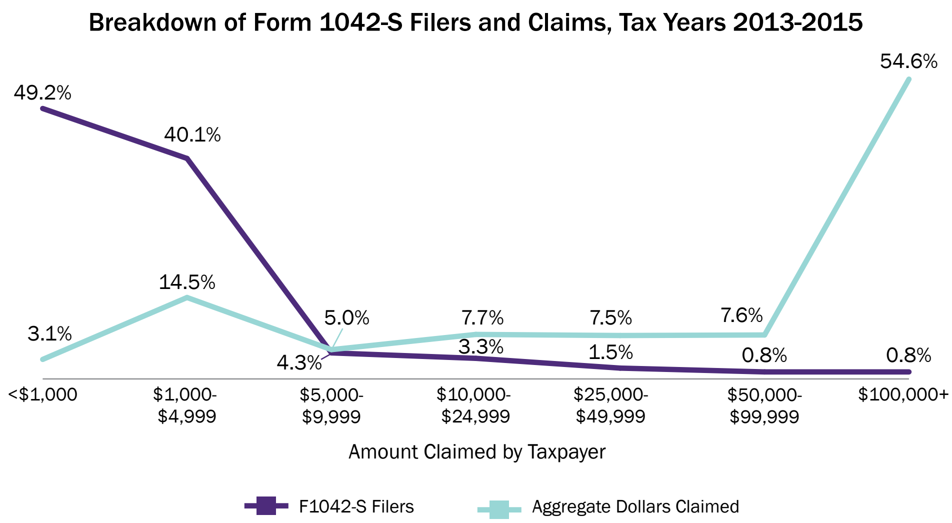
20 Total Positive Income (TPI) class 80. TAS Research, CDW, data drawn Nov. 1, 2017. These DIF scores are for TY 2015, which is the last year for which relatively complete data is available.

possess a DIF score indicative of noncompliance.[21] While DIF scores are not always conclusive measures of compliance, at a minimum, they provide useful data that the IRS could employ to more efficiently and effectively narrow its oversight efforts.

Also, most 1042-S filers (nearly 80 percent) claim relatively small dollar amounts of withholding (an average of approximately $1,100).[22] These individual filings can never be completely ignored, as, in the aggregate, they represent a statistically significant portion of the Form 1042-S credits and refunds sought on an annual basis (approximately 11 percent of total dollars).[23] Nevertheless, absent the development of an accurate, timely, and seamless review mechanism, occasional, random examinations of these returns would seem most cost-effective and proportionate, and consistent with sound tax administration practices.

Conversely, a small group of 1042-S filers (less than five percent) claim nearly 74 percent of the credits measured in terms of dollars.[24] The minimal size of this group and the high revenue risk it represents justify more focussed scrutiny. Figure 1.15.3 depicts these relationships.

FIGURE 1.15.3[25]



21 TPI class 72. TAS Research, CDW, data drawn Nov. 1, 2017. These DIF scores are for TY 2015, which is the last year for which relatively complete data is available.

22 TAS Research, CDW, data drawn Nov. 1, 2017. These numbers represent an annual average derived from the 2013, 2014, and 2015 tax years.

23 *Id.*

24 *Id.*

25 *Id.*

Moreover, a variety of income sources, ranging from compensation for dependent services to gambling winnings to scholarship and fellowship grants to dividend payments, are associated with significant Form 1042-S credit claims.[26] An analysis aimed at determining the intersection between compliance behavior and revenue risk associated with these income sources could provide some additional insight for fashioning a more tailored oversight regime that is less onerous for taxpayers and more resource-efficient for the government.

The IRS Has Demonstrated a Reluctance to Enforce Compliance Against Form 1042-S Withholding Agents, Even Though It Generally Has the Ability to Do So

The IRS is primarily concerned that 1042-S filers might attempt to obtain refunds of amounts not remitted to the IRS by withholding agents. This concern has some validity, as approximately $700 million of taxes for which withholding agents were liable went uncollected by the IRS from both domestic and foreign withholding agents in TY 2015.[27] Figure 1.15.4 details this information.

FIGURE 1.15.4, Withholding and Remittance Data in Millions of Dollars for Tax Year 2015[28]

Withholding Agent	Domestic	Foreign	Total
Number	39,963	7,082	47,045
Amount Liability	$15,859.6	$8,330.6	$24,190.3
Amount Remitted	$15,324.7	$8,161.4	$23,486.1
Amount Unremitted	$534.9	$169.2	$704.1
Remittance Percentage	97%	98%	97%

While the need to protect against fraud and systematic noncompliance is understandable, the IRS has so far allocated a disproportionate share of this burden to taxpayers and away from both itself and withholding agents, a step that has only exacerbated the problems caused by the undifferentiated approach adopted by the IRS with respect to 1042-S filers. Current IRS practice is to review certain credit and refund claims of 1042-S filers.[29] Because the IRS's legal position is that it has no obligation to honor Form 1042-S credits or refund claims unless the taxpayer has an accurate Form 1042-S from the withholding agent and the withholding agent has remitted the withholding to the IRS, a mismatch of various data fields will cause the issuance of a preliminary disallowance letter.[30] That letter instructs the taxpayer to contact the withholding agent, figure out the reason for the mismatch, and resolve the issue.[31] If the taxpayer is unable to carry out this instruction, or the withholding agent is unwilling to

26 TAS Research, CDW, data drawn Oct. 12, 2017.

27 LB&I response to TAS fact check request (Nov. 16, 2017).

28 *Id.*

29 IRM 21.8.1.11.14.3 (Oct. 1, 2017).

30 *Id.*; Notice 2015-10, 2015-20 I.R.B. 965. The scope of the fields emphasized by the IRS has varied over time, but currently the IRS looks to the following specific fields: name, taxpayer identification number, federal tax withheld, and escrow. LB&I response to TAS fact check request (Nov. 16, 2017).

31 *Id.*

Moreover, a variety of income sources, ranging from compensation for dependent services to gambling winnings to scholarship and fellowship grants to dividend payments, are associated with significant Form 1042-S credit claims. An analysis aimed at determining the intersection between compliance behavior and revenue risk associated with these income sources could provide some additional insight for fashioning a more tailored oversight regime that is less onerous for taxpayers and more resource-efficient for the government.

cooperate, the taxpayer is left with little practical recourse other than to seek redress in the courts, either against the withholding agent or the IRS itself.[32]

This is a step that many taxpayers lack the resources to undertake, as it involves litigating against withholding agents, many of which are large global companies, or against the IRS. Moreover, as the withholding claimed by nearly 80 percent of 1042-S filers averages only about $1,100 per taxpayer, the cost of litigation for most of these taxpayers would vastly exceed the amounts they are attempting to recover.[33] The IRS has, in effect, shifted the burden of withholding agent noncompliance to these taxpayers, who are comparatively ill-equipped to pursue any remedies in the event that simple reporting inconsistencies cannot be resolved.

By contrast to most taxpayers, the IRS has powerful tools allowing it to directly pursue, and collect from, withholding agents who fail to remit funds.[34] In addition, the IRS can assess assorted failure to pay and failure to file penalties against these withholding agents.[35] Nevertheless, the IRS has shown some reluctance to seek recovery from, and impose sanctions against, noncompliant withholding agents. For example, IRS actions to recover unpaid deposits from withholding agents have dropped from 4,302 for TY 2014 to only 1,139 for TY 2015.[36]

Likewise, the IRS has in its arsenal a number of penalties that can be applied against withholding agents. These penalties, by all appearances, could be employed more vigorously to encourage compliance. Figure 1.15.5 presents IRS penalty activity with respect to withholding agents.

32 Taxpayers in such situations generally will be entitled to appeal rights. *See* IRM 21.8.1.11.14.5(4), *FATCA Matching Program Form 1042-S Credit Denials – Accounts Management Telephone/Written Inquiries - Letter 5904C* (Oct. 1, 2017); IRM 21.5.3.4.6.1, *Disallowance and Partial Disallowance Procedures* (Mar. 2, 2017). Nevertheless, given the IRS's current policies precluding credits and refunds in the absence of specified documentation, discussed above, the likelihood of successfully resolving such matters at Appeals remains open to question.

33 TAS Research, CDW, data drawn Oct. 12, 2017. These numbers represent an annual average derived from the 2013, 2014, and 2015 tax years.

34 Treas. Reg. § 1.1461-1(a)(1).

35 Treas. Reg. § 1.1461-1(a)(2); Treas. Reg. § 1.1461-1(h).

36 LB&I response to TAS information request (Oct. 31, 2017). These numbers are based on systemic assessments of the Failure to Pay penalty. LB&I response to TAS fact check request (Nov. 16, 2017). This decrease may be attributable to a variety of factors, including increased compliance by withholding agents, resource constraints on the part of LB&I, or a shift in enforcement emphasis to individual taxpayers.

FIGURE 1.15.5, Penalties Imposed Against Withholding Agents[37]

Penalties	2013	2014	2015
IRC § 6656, Failure to make deposit	3,913	3,784	957
IRC § 6672, Failure to collect and pay over, or attempt to evade and defeat tax	0	0	0
IRC § 6651, Failure to file return or pay tax	1,485	1,504	414
IRC § 6662, Accuracy-related penalty	0	1	0
IRC § 6663, Fraud penalty	0	0	0
IRC § 6721, Failure to file correct information returns	0	0	0
IRC § 6722, Failure to furnish correct payee statements	0	0	0
IRC § 6723, Failure to comply with other information reporting requirements	0	0	0

Enforcing compliance on the part of withholding agents will not eliminate all possibility of fraud or noncompliance by individual 1042-S filers. Nevertheless, most large-scale attempts at fraud or noncompliance likely would involve collusion between withholding agents and taxpayers. Since 85 percent of withholding agents are domestic, however, the IRS has direct recourse in the event of fraud or systematic noncompliance in which these withholding agents participate.[38] As a result, the IRS already possesses the ability to guard against and eliminate the majority of the fraud and noncompliance about which it is concerned. The IRS should act assertively on its own behalf and on behalf of taxpayers who are disadvantaged by withholding agent noncompliance. Further, it should consider more efficient ways of discouraging noncompliance by, and collecting unremitted funds from, foreign withholding agents, including exploring cooperative agreements with foreign jurisdictions.

The IRS Position of Forcing Nonresident Taxpayers to Shoulder the Burden of Their Withholding Agents' Reporting and Compliance May Be Subject to Litigation Hazards Under *Portillo* and Other Naked Assessment Cases

Beyond causing unnecessary taxpayer burden, the Form 1042-S approach could create litigation risks for the IRS. In *Portillo v. Commissioner*, the Fifth Circuit Court of Appeals held that by failing to substantiate a Form 1099, the accuracy of which was challenged by the taxpayer, the IRS made a "naked assessment," acted arbitrarily, and failed its burden of proof.[39] Courts generally have limited the naked assessment analysis of *Portillo* and similar decisions to unreported income cases arising in the domestic context.[40] Nevertheless, the IRS faces the risk that, in a case involving the creation of a deficiency attributable to a Form 1042-S mismatch, a court could extend *Portillo* and rule that IRS reliance on a withholding agent's Form 1042-S while rejecting a taxpayer's sworn Form 1040NR is arbitrary,

37 LB&I response to TAS information request Oct. 31, 2017). LB&I penalty actions and enforcement with respect to withholding agents may be on the increase for the 2016 tax year, although it is still to early to analyze the extent of and reasons for this apparent increase.

38 LB&I response to TAS fact check request (Nov. 16, 2017). Treas. Reg. § 1.1461-1T(c). *See also* IRC §§ 6601, 6651(a)(2), and 6656. This recourse is sometimes more attenuated in the case of foreign withholding agents and is subject to accessibility constraints, permissions from foreign governments, and provisions of applicable treaties. LB&I response to TAS information request (June 19, 2017).

39 *Portillo v Comm'r*, 932 F.2d 1128 (5th Cir., 1991). The burden of proof in tax cases generally rests with the taxpayer. In a deficiency proceeding, however, when a taxpayer establishes that an assessment is "arbitrary and erroneous," the burden shifts to the IRS to prove the correct amount of any taxes owed. *Id*. at 1133.

40 *See U.S. v. Janis*, 428 U.S. 433 (1976); *Jackson v. Comm'r*, 73 T.C. 394 (1979). *See also Parker v. Comm'r*, 117 F.3d 785 (5th Cir. 1997): *Pittman v. Comm'r*, 100 F.3d 1308 (7th Cir.,1996); *Tinsman v Comm'r*, T.C. Memo. 2000-55.

particularly where the program's false-positive rate is high. Such a finding could result in immediate dismissal of the IRS's case.

Further, even in a refund case, a taxpayer could come before a court and, using any available evidence, demonstrate that the withholding for which the refund is claimed actually occurred. Such a showing would open to judicial scrutiny the IRS's policy of relying solely on withholding agents' Forms 1042-S without any other validation, an approach treated as arbitrary by *Portillo* in the Form 1099 context. Additionally, it would enable a taxpayer to challenge the IRS's current legal view that the IRS has no obligation to provide refunds unless it actually receives full remittances from withholding agents.[41]

CONCLUSION

The IRS's current approach to 1042-S filers does not appear to be firmly grounded in comprehensive statistical analysis. Rather than using available data to focus compliance and enforcement efforts on high-risk taxpayers, the IRS has adopted an undifferentiated approach to 1042-S filers that wastes resources and needlessly burdens compliant taxpayers. Additionally, the IRS has demonstrated a reluctance to enforce compliance among Form 1042-S withholding agents, even though it generally has the ability to do so.

Instead, the IRS requires taxpayers to do its compliance work with respect to withholding agents, as well as to shoulder the risk that such compliance may not occur. Under current IRS policy, if a withholding agent reports incorrectly or fails to remit, even blameless taxpayers forfeit their credits and refunds while the IRS loses nothing. This allocation of risk and responsibility is not only unfair but inefficient. The IRS has strong tools at its disposal and should energetically use them to obtain increased compliance from withholding agents. This approach, combined with a more precise strategy for addressing potential noncompliance by 1042-S filers, would better protect taxpayer rights and more effectively utilize scarce IRS resources.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Compile and internally publish data relating to the results of manual review of frozen Form 1042-S credits and use this data to better understand and identify the sources and income stratifications generating increased risks of noncompliance.
2. Implement a policy that relies on data as the basis for developing effective programs and systems for validating the credit and refund claims of those relatively few Chapter 3 and Chapter 4 filers for whom such scrutiny is statistically justified.
3. Energetically enforce the withholding, reporting, and remittance obligations of withholding agents, rather than attempting to shift this obligation to nonresident taxpayers in ways that create hazards of litigation.
4. Consider more effective ways of discouraging noncompliance by, and collecting unremitted funds from, foreign withholding agents, including exploring cooperative agreements with foreign jurisdictions.

41 Notice 2015-10, 2015-20 I.R.B. 965.

MSP #16 INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS (ITINs): The IRS's Failure to Understand and Effectively Communicate With the ITIN Population Imposes Unnecessary Burden and Hinders Compliance

RESPONSIBLE OFFICIALS

Ken Corbin, Commissioner, Wage & Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Individual Taxpayer Identification Numbers (ITINs) allow individuals with a tax filing obligation who are ineligible for Social Security numbers (SSNs) to file required returns and pay taxes.[2] IRS administrative policies have made it difficult for taxpayers to apply for and receive ITINs; yet, the IRS has not made necessary changes such as allowing ITIN applications from all applicants year-round and providing adequate alternatives to submitting original documents. These problems have been discussed extensively in past Annual Reports to Congress.[3] The multitude of ITIN problems has many drivers, but two in particular stand out. The IRS fails to adequately:

1. Analyze the characteristics of and understand the ITIN population, including where applicants live, how they file their taxes, what language they speak, and what kind of community resources are available to them; and
2. Communicate with ITIN taxpayers by providing sufficient notices in the taxpayer's language and by conducting outreach through multiple channels to target groups of underserved taxpayers.

These two shortcomings result in a host of negative repercussions, including:

- A substantial decrease in ITIN applications, paired with only 176,000 renewal applications at the close of the filing season and over 152,000 returns with a math error for an expired ITIN, reflects that taxpayers may be unaware of the need to apply for ITINs or are choosing not to.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified as IRC § 7803(a)(3)).

2 IRC § 6109; Treas. Reg. § 1.6109-1. Taxpayers who require ITINs include international business persons, foreign students, foreign workers, and any other individual who does not have a Social Security number (SSN). All U.S. citizens and U.S. residents for tax purposes are required to file and pay U.S. taxes on their worldwide income and need a Taxpayer Identification Number (TIN) to do so. *See, e.g.*, IRC § 61. Individuals considered nonresident aliens under the IRC are required to file and pay tax on income derived from sources within the United States. *See* IRC §§ 1, 2, 871, 7701(b).

3 *See e.g.*, National Taxpayer Advocate 2016 Annual Report to Congress 239-52; National Taxpayer Advocate 2012 Annual Report to Congress 154-179.

- Taxpayers may be unaware of the requirement to have ITINs issued by the tax return due date to claim certain credits, as evidenced by the over 50,000 returns with math errors for failure to have an ITIN issued timely.
- Taxpayers may not receive their original documents or other ITIN correspondence from the IRS, including over five thousand passports that the IRS sent to embassies in 2016 because it could not find a better address to return them to taxpayers.

ANALYSIS OF PROBLEM

The IRS Does Not Analyze the Characteristics of the ITIN Population and Fails to Understand Their Needs

The Protecting Americans from Tax Hikes (PATH) Act of 2015 made many changes to the ITIN program, laying out rules for how to apply, when an ITIN must be issued to receive certain credits, and when an ITIN expires.[4] The PATH Act required the IRS to conduct a study on the effectiveness of the ITIN application process.[5] The IRS Research, Applied Analytics, and Statistics office delivered a draft report to internal stakeholders in early 2017. We understand the report addresses many of the issues included in this discussion. However, despite repeated requests, the IRS declined to share the draft report with TAS or even provide high-level information about its scope until December 21, 2017, immediately before the Annual Report to Congress went to press.[6] Accordingly, we have not had sufficient time to evaluate the scope and extent of the IRS's research of the ITIN population that is included in this report. In light of our publication deadline and because the draft report has not been cleared for public release, we do not discuss it here. To the extent that the IRS has addressed the concerns described in this Report, it can identify those efforts in its response to our recommendations. TAS is statutorily required to assist taxpayers in resolving problems with the IRS,[7] and works over a thousand cases related to ITINs each year.[8] TAS also oversees the Low Income Taxpayer Clinics (LITCs), which are statutorily required to conduct outreach and education to taxpayers for whom English is a second language.[9] Excluding TAS from the study team indicates the IRS is not committed to understanding the ITIN population and meeting its needs.

During the last five years, following a 2012 overhaul of ITIN application procedures,[10] the IRS has compiled ITIN data specific to Form W-7, *Application for Individual Taxpayer Identification Number* only one time.[11] This data compilation meets some of the requirements of the PATH Act study, but leaves out key information such as the number of dependents, average refund, withholding, gross income, and

4 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 203(d) (2015) (hereinafter PATH Act).

5 PATH Act § 203(d).

6 IRS response to TAS information request (Oct. 12, 2017).

7 IRC § 7803(c)(2).

8 TAS Inventory Report, Year to Date (YTD) Receipts to Sept. 23, 2017 by Primary Case Issue Code (PCIC) and Special Case Code (Sept. 25, 2017).

9 IRC § 7526(b)(1)(A)(ii)(II).

10 *See* National Taxpayer Advocate 2013 Annual Report to Congress 214-227 for a discussion of the application changes.

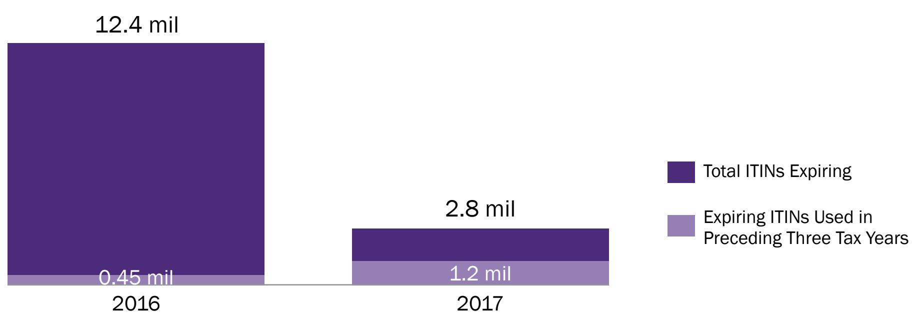
11 IRS response to TAS information request (Oct. 12, 2017). The IRS Research, Applied Analytics, and Statistics office delivered a draft report of the ITIN study required by the PATH Act to internal stakeholders in early 2017. We understand the report addresses many of the issues included in this discussion. However, despite repeated requests, the IRS declined to share the draft report with TAS or even provide high-level information about its scope until December 21, 2017, immediately before the Annual Report to Congress went to press. Accordingly, we have not had sufficient time to evaluate the scope and extent of the IRS's research of the ITIN population that is included in this report. In light of our publication deadline and because the draft report has not been cleared for public release, we do not discuss it here. To the extent that the IRS has addressed the concerns described in this Report, it can identify those efforts in its response to our recommendations.

reason for applying for an ITIN.[12] In addition, it only analyzes a single tax year — 2014 — even though there may be large differences between the activities of taxpayers during the first tax year they needed an ITIN versus a later year. For example, most ITIN taxpayers file a paper return for their first year because the ITIN application must be generally attached to a paper tax return during the filing season, but these taxpayers may prefer to file electronically in subsequent years.

The IRS also analyzed zip code data for taxpayers with expiring ITINs to identify locations for Certified Acceptance Agent (CAA) recruitment based on proximity to existing CAAs and Taxpayer Assistance Centers (TACs) offering ITIN services.[13] This is important because as shown in Figure 1.16.1, even though a smaller number of ITINs will expire at the end of 2017 versus 2016 (2.8 million versus 12.4 million), a greater number of the ITINs expiring at the end of 2017 have been used on a return recently (1.2 million versus 450,000 expiring at the end of 2016), indicating a likely need for them to be renewed.[14]

FIGURE 1.16.1[15]

ITINs Expiring in 2016-2017 Used on a Return in Preceding Three Tax Years



Between December 2015 and August 2017, the IRS increased the number of CAAs by almost ten percent,[16] but the IRS could do more to recruit CAAs in the most needed areas by compiling and using comprehensive data about ITIN taxpayers, including applicants, current filers, and past filers.[17] TAS

12 The compilation compares mail applications versus applications submitted through a Taxpayer Assistance Center (TAC), Acceptance Agent (AA), or Certifying Acceptance Agent (CAA), and applications submitted before and after the 2012 application changes. These comparisons were requirements of the PATH Act study. PATH Act § 203(d). The compilation also looks at refundable credits and other characteristics that could potentially identify "noncompliant activities."

13 IRS response to TAS information request (Oct. 12, 2017). CAAs and certain TACs can certify an ITIN applicant's original documents so the applicant can send in copies instead of original documents to the IRS. IRS, *Instructions for Form W-7* (Nov. 2017).

14 *Id.* ITINs are considered used on a return recently if they have been used on a return for at least one of the last three tax years.

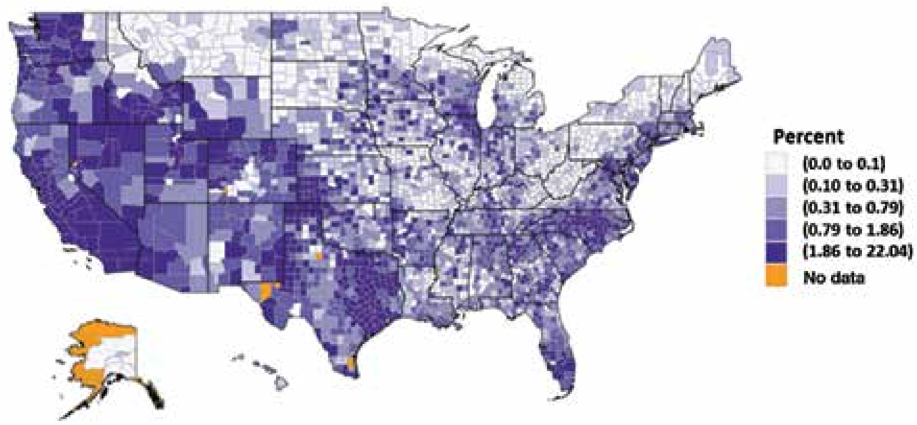
15 *Id.*

16 As of October 2017, there are 3,676 CAAs. *Id.*

17 The IRS Research, Applied Analytics, and Statistics office delivered a draft report of the ITIN study required by the PATH Act to internal stakeholders in early 2017. We understand the report addresses many of the issues included in this discussion. However, despite repeated requests, the IRS declined to share the draft report with TAS or even provide high-level information about its scope until December 21, 2017, immediately before the Annual Report to Congress went to press. Accordingly, we have not had sufficient time to evaluate the scope and extent of the IRS's research of the ITIN population that is included in this report. In light of our publication deadline and because the draft report has not been cleared for public release, we do not discuss it here. To the extent that the IRS has addressed the concerns described in this Report, it can identify those efforts in its response to our recommendations.

conducted some preliminary research into the ITIN population. The below map shows the percent of ITIN returns in each county.

FIGURE 1.16.2, Percent of Tax Returns in U.S. Counties That Include One or More ITINs, Filed in Calendar Year 2017[18]



Source: Compliance Data Warehouse data retrieved Oct. 19, 2017

Our analysis showed a large number of ITINs in western U.S. counties with a high agricultural output or high proportion of Hispanic individuals. ITIN taxpayers may be underserved in counties with a relatively high number of ITIN returns, few Volunteer Income Tax Assistance (VITA) sites, and high agricultural output.[19] For example, Grant county in east-central Washington, a rural county with a 40 percent Hispanic population[20] and high agricultural output[21] had only two VITA sites. In this county, there were approximately 5,000 ITIN returns, comprising about 13 percent of all returns. Despite the lack of VITA sites, only 63 percent of ITIN returns were prepared by a paid preparer, which is lower than the average for ITIN returns. As depicted on Figure 1.16.3, in the adjacent Douglas county, Washington, there were no VITA sites and only 43 percent of ITIN returns were prepared by a paid preparer.

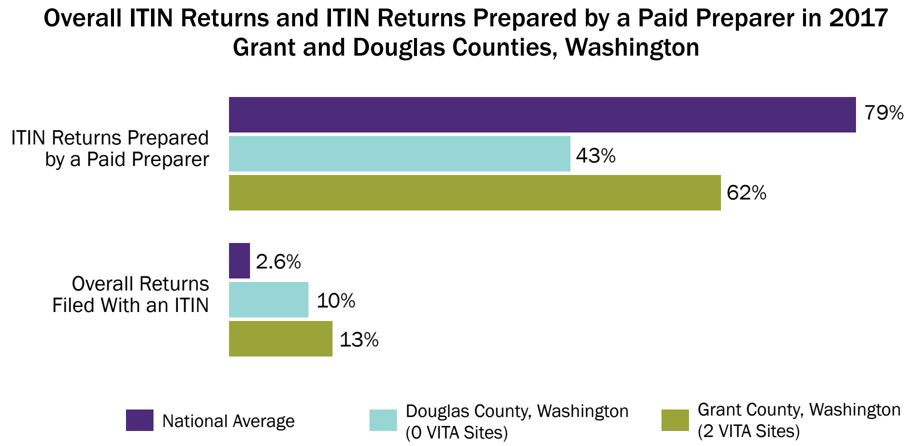
18 TAS Research, Compliance Data Warehouse (CDW) (data drawn Oct. 19, 2017).

19 For a detailed discussion of how the IRS could improve access to the Volunteer Income Tax Assistance (VITA) program, see Most Serious Problem: *VITA/TCE Programs: IRS Restrictions on Volunteer Income Tax Assistance (VITA) and Taxpayer Counseling for the Elderly (TCE) Programs Increase Taxpayer Burden and Adversely Impact Access to Free Tax Preparation for Low Income, Disabled, Rural, and Elderly Taxpayers*, *supra*.

20 United States Census Bureau, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, (data drawn Nov. 08, 2017).

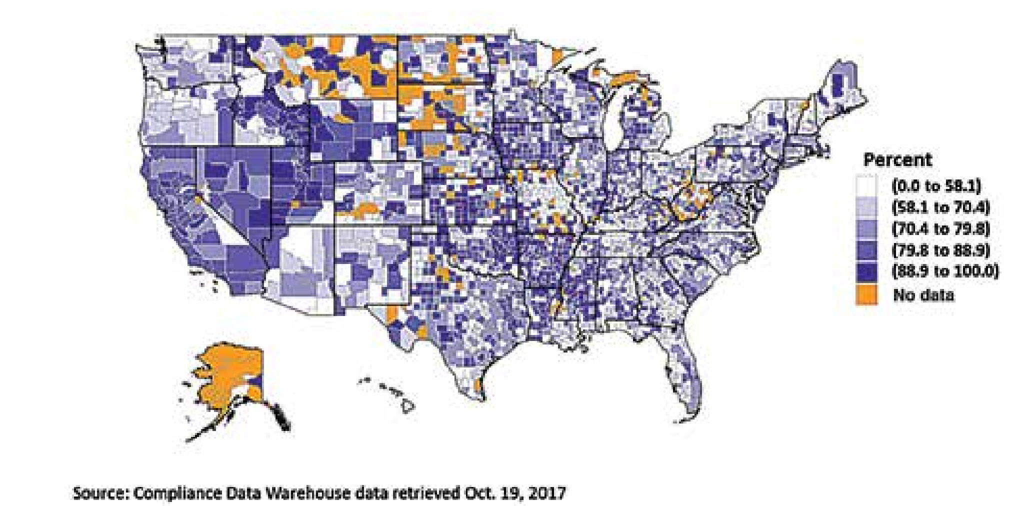
21 Elizabeth Sieverkropp, *2011 Grant County, Washington Irrigated Agriculture: Economic Impact Analysis* (May 1, 2013), http://www.sieverkroppconsulting.com/wp-content/uploads/2013/04/2011-Irrigated-Agriculture-Report.pdf.

FIGURE 1.16.3, Comparison of percent of ITIN returns and ITIN returns prepared by a paid preparer in Grant County, Washington and Douglas County, Washington[22]



TAS's research also showed several metropolitan areas such as Los Angeles and Houston with a large Hispanic population, a high ratio of ITIN returns to VITA sites, and a high percentage of ITIN taxpayers using a paid preparer. Using paid preparers may be beneficial to ITIN taxpayers who do not understand the tax system and have limited English proficiency, but it also may signal a lack of access to free tax preparation for low income taxpayers.

FIGURE 1.16.4, Percent of ITIN Returns Prepared by a Paid Preparer in U.S. Counties, Filed in Calendar Year 2017[23]



22 TAS Research, CDW (data drawn Oct. 19, 2017).
23 *Id.*

The Government Accountability Office calculated the overclaim error rate for ITIN taxpayers claiming the Child Tax Credit (CTC) and Additional Child Tax Credit (ACTC) in 2009-2011 to be 32 percent, versus 10 percent for all claimants.[24] Given the high overclaim rates for ITIN returns claiming refundable credits, and the high percentage of ITIN returns prepared by a paid preparer, it makes sense that the IRS should use this data to identify communities in which to conduct more preparer and taxpayer outreach.[25]

Another area the IRS appears to overlook is language preference or ability. The majority of ITIN taxpayers come from Spanish speaking countries,[26] and over half of Hispanic taxpayers speak exclusively Spanish at home.[27] However, the IRS data compilation on ITIN filers does not include any statistics about language. Furthermore, our analysis showed similar change of address rates for ITIN returns and the individual taxpayer population as a whole.[28] This does not support the IRS's reasoning that it is infeasible to provide notice to all taxpayers with expiring ITINs due to "the transient nature of the ITIN population and our reduced ability to contact them at a last known address."[29]

TAS estimated there were approximately 8,700 expired ITINs at the beginning of 2017 that were not renewed or used on a Form 1040 but were used on a third-party information return, suggesting they may need to be renewed in future years.[30] The IRS could use the addresses of these taxpayers listed on the information returns to directly notify them about the need to renew their ITINs prior to filing an individual return.[31] Although not an exhaustive list, these are examples of helpful data points that could be analyzed in a comprehensive study of ITIN taxpayers.

The IRS could communicate more effectively with the ITIN population and conduct better outreach

Applying Data to Conduct More Targeted Outreach

In advance of the mass ITIN deactivations at the end of 2016 and 2017, the IRS launched public outreach campaigns, initially meeting with key stakeholders such as the Congressional Hispanic Caucus,

24 Government Accountability Office, *Refundable Tax Credits: Comprehensive Compliance Strategy and Expanded Use of Data Could Strengthen IRS's Efforts to Address Noncompliance* 16-475, 51 (May 2016).

25 The IRS Research, Applied Analytics, and Statistics office delivered a draft report of the ITIN study required by the PATH Act to internal stakeholders in early 2017. We understand the report addresses many of the issues included in this discussion. However, despite repeated requests, the IRS declined to share the draft report with TAS or even provide high-level information about its scope until December 21, 2017, immediately before the Annual Report to Congress went to press. Accordingly, we have not had sufficient time to evaluate the scope and extent of the IRS's research of the ITIN population that is included in this report. In light of our publication deadline and because the draft report has not been cleared for public release, we do not discuss it here. To the extent that the IRS has addressed the concerns described in this Report, it can identify those efforts in its response to our recommendations.

26 In 2014, 50 percent of ITIN applicants came from Mexico and another seven percent came from Guatemala. National Taxpayer Advocate 2015 Annual Report to Congress 199.

27 Forrester Research, Inc., *The Taxpayer Advocate Service: Hispanic Underserved Analysis*, Q4 2014, 13 (Dec. 2014).

28 TAS Research, CDW (data drawn Nov. 13, 2017). Further research may be necessary to learn whether ITIN taxpayers really are more transient than the general taxpayer population, but are failing to change their addresses with the IRS.

29 IRS response to TAS Information request (Nov. 29, 2016).

30 TAS Research, CDW (data drawn Nov. 2, 2017). ITINs need to be renewed in order to be used on a Form 1040 or other individual return filed by the ITIN holder, but do not need to be renewed if they are only used on information returns filed by third parties.

31 This notification could take the form of an informative bilingual mailer, so there would be no IRC § 6103 disclosure.

La Raza organization, and national English and Spanish media outlets.[32] Between 2016 and Fall 2017, the IRS conducted approximately 250 ITIN outreach events, about 60 percent of which were delivered to practitioners.[33] However, only five outreach events involved community based organizations or nonprofit stakeholders.[34] The IRS conducted only one event for military partners and a single foreign language television broadcast.[35] Despite the prevalence of English as a Second Language (ESL) speakers within the ITIN population, only 10 of the approximately 250 events were delivered to an ESL audience. To its credit, the IRS did prepare helpful materials for stakeholders to share with their communities.[36]

The IRS could create a more targeted outreach strategy and focus on specific areas or populations. For example, Sonoma County in California had over 14,000 ITIN returns filed in 2017, representing about seven percent of all returns in that county, with 88 percent prepared by a paid preparer.[37] Of the approximately 250 ITIN outreach events in the last two years, none were in Sonoma county.[38] Although the IRS provided outreach in the counties with the most ITIN returns, applying data regarding paid preparers and language preferences could help the IRS better reach the population.[39] For example, it could conduct outreach in counties where ITIN returns constitute ten percent or more of the individual tax return population.

Communicating ITIN Program Changes

The IRS made some significant changes to the ITIN program with little publicity. During early 2017, the IRS increased the number of TACs that certify ITINs from 186 to 310 (out of 371 total TACs), but TAS is unaware of any related press releases with this information, leaving taxpayers and practitioners having to frequently visit the IRS's web page that lists the certifying TACs to monitor any changes.[40] The IRS reversed its policy of prohibiting CAAs from assisting taxpayers abroad, but did not include

32 The PATH Act requires ITINs to expire after three years of non-use or on a staggered schedule based on the year they were issued. At the end of 2016, the IRS deactivated approximately 12.4 million ITINs. IRS response to TAS Information request (Nov. 29, 2016). At the end of 2017, the IRS estimates it will expire approximately 2.75 million ITINs. IRS response to TAS information request (Oct. 12, 2017).

33 IRS response to TAS information request (Oct. 12, 2017). Although these events include three web conferences held by the IRS's Stakeholder Partnerships, Education and Communication (SPEC) office, there may be additional events held by SPEC partners that focused on ITINs. The IRS does not track specific events that partners conduct. This count also excludes three outreach items described by the IRS as "various methods" and six items described as "emailed accounts" because TAS could not confirm these were actual events. IRS response to TAS fact check (Dec. 22, 2017).

34 This count of events excludes three outreach items described by the IRS as "various methods" and five described as "emailed accounts" because we were not able to confirm these were actual events. IRS response to TAS fact check (Dec. 22, 2017).

35 IRS response to TAS fact check (Dec. 22, 2017).

36 IRS, Pub. 5261 (June 2017).

37 TAS Research, CDW (data drawn Oct. 19, 2017).

38 This statement refers to the last two calendar years through September 29, 2017. IRS response to TAS information request (Oct. 12, 2017).

39 A review of the top ten counties with the most ITIN returns filed in 2017 shows the IRS conducted at least one outreach event in each of these counties during calendar year 2016 or 2017. IRS response to TAS information request (Oct. 12, 2017).

40 IRS, *Taxpayer Assistance Center (TAC) Locations Where In-Person Document Review is Provided*, https://www.irs.gov/help/tac-locations-where-in-person-document-verification-is-provided (Aug. 11, 2017 and Feb. 1, 2017). Although the IRS did issue a news release, *IRS Now Accepting Renewal Applications for ITINs Set to Expire by End of 2017*, IR-2017-109, (June 21, 2017), this news release only linked to the web page that lists the certifying TACs for each state, and did not inform taxpayers that the IRS had dramatically increased the number of certifying TACs. For a discussion of how TACs are not providing adequate in-person service, *see* Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*, *supra*.

this information on its web page, *New ITIN Acceptance Agent Program Changes*, despite the confusion caused by the PATH Act.[41]

The IRS continues to be vague about the new PATH Act requirement that an ITIN be issued by the tax return due date (including extensions) in order to claim certain refundable credits.[42] The Form W-7 instructions were not updated until nine months after the passage of the PATH Act to state "Failure to timely file the tax return with a complete Form W-7 and required documentation may result in the denial of refundable credits, such as the Child Tax Credit and the American Opportunity Tax Credit."[43] However, this language is buried on page three and does not indicate that these credits will be permanently denied — even if the taxpayer later receives an ITIN.

Reaching ITIN Taxpayers Through Notices

The IRS failed to reach many ITIN taxpayers when it only sent expiration notices to a limited number of them and in a language they could not understand. In 2016, the IRS only directly notified 450,000 of 12.4 million taxpayers whose ITINs would expire. In 2017, the IRS sent out 874,657 ITIN deactivation notices, but only two were issued in Spanish, despite the prevalence of Spanish speaking taxpayers within the ITIN population.[44] TAS received a complaint on its Systemic Advocacy Management System (SAMS) about the CP 11 Math Error Notice for an expired ITIN not being issued in Spanish.[45] Although the IRS has a Spanish version of the CP 11 notice, it appears it is only issued to taxpayers who file a Form 1040PR, an annual tax return from a Puerto Rico resident.[46] Notices regarding ITIN applications are generated in Spanish if the taxpayer files an ITIN application in Spanish, but if the taxpayer files the English version, the language preference cannot be changed on the ITIN system.[47]

In 2017, the IRS sent out 874,657 Individual Taxpayer Identification Number (ITIN) deactivation notices, but only two were issued in Spanish, despite the prevalence of Spanish speaking taxpayers within the ITIN population.

41 Applicants abroad can apply by mail or in-person to an IRS employee according to the PATH Act § 203(a). IRS, *New ITIN Acceptance Agent Program Changes*, https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes (June 20, 2017) and (Aug. 29, 2017). The IRS did issue an online news article about this change. IRS, e-News for Tax Professionals, 2017-16 (April 21, 2017). In addition, the web page *Obtaining an ITIN from Abroad* currently states that applicants abroad can use a CAA, although TAS was unable to determine when this information was added. IRS, *Obtaining an ITIN from Abroad* https://www.irs.gov/individuals/international-taxpayers/obtaining-an-itin-from-abroad (Dec. 12, 2017). Even though the IRS reversed the foreign CAA policy in April, a discussion on the American Bar Association Low Income Taxpayer Clinic List Serve reveals some practitioners were still not aware of the change as recently as November 2017. *See* November 2, 2017 post (on file with TAS).

42 PATH Act §§ 205, 206 (codified at IRC §§ 24(e), 25A(i)(6)).

43 IRS, *Instructions for Form W-7* (Sept. 2016).

44 *See* notes 26 and 27, *supra*. IRS, Servicewide Notice Information Program (SNIP) (Nov. 8, 2017).

45 Systemic Advocacy Management System (SAMS) record 36352 (Aug. 14, 2017).

46 IRS, CP 711 - *Spanish Math Error, Balance Due of $5 or More*. The IRS Servicewide Electronic Research Program, Document 6209, which lists all notices and notice codes describes the CP 711 as "Balance Due on Form 1040PR Math Error." (June 15, 2017). The IRS has an indicator for limited English proficiency on its system used to manage taxpayer account data known as the Integrated Data Retrieval System (IDRS), but TAS understands that the indicator does not actually generate Spanish notices and only the filing of forms that are specific to taxpayers in certain U.S. territories will generate Spanish notices. Email from Office of Taxpayer Correspondence to TAS (Nov. 6, 2017).

47 IRM 3.21.263.4.9, *ITIN Notices and Forms* (Oct. 1, 2016).

Notwithstanding the language issues, the IRS took positive steps in updating its ITIN suspense, rejection, and assignment notices in early 2017.[48] However, the math error notice for disallowances related to expired ITINs remains problematic because it does not explain why credits or exemptions are disallowed until the third page.[49] Although the second page of the notice does explain that a taxpayer should renew the expired ITIN if that was the reason for the disallowance, taxpayers may not read this last bullet, under the heading "If you disagree with the amount due" because they may agree that the ITIN was expired. Furthermore, the notice gives no deadline for renewing the ITIN, even though it must be renewed within the statutory limitations period for claiming a refund.[50] This notice would be more salient if the IRS were to clearly state on the first page that the credits or exemptions were disallowed due to an expired ITIN and the taxpayer can receive those credits or exemptions if he or she renews the ITIN within the applicable time period explained in the notice.

Finally, the IRS does not leverage partnerships with other federal agencies and state and local governments to share information for immigrant taxpayers. The IRS reported providing materials to organizations such as the Department of State, but it is unclear whether the IRS provided materials to the Department of Homeland Security, U.S. Citizenship and Immigration Services, or any state and local agencies to inform immigrants, temporary workers, or visitors of their tax filing obligations. Working with these agencies is vital because the majority of ITIN applicants reside in the United States.[51]

The Failure to Study, Understand, and Communicate with the ITIN Population Increases Taxpayer Burden and May Undermine Compliance and Taxpayer Rights

A substantial decrease in ITIN applications, paired with only 176,000 renewal applications at the close of the filing season and over 152,000 returns with a math error for an expired ITIN, reflects that taxpayers may be unaware of the need to apply for an ITIN or are choosing not to.

Without considering the characteristics of ITIN filers, the IRS maintains policies and procedures that result in taxpayers choosing not to apply for ITINs or being unaware of the need to apply. Additionally, some taxpayers may be unaware of confidentiality protections and fear the IRS will share information with other agencies for immigration purposes.[52] ITIN applications have decreased substantially in recent years, as depicted in Figure 1.16.5 below.

48 See CP 565 - *ITIN Assignment Notice*, CP 566 - *ITIN Suspense Notice*, CP 567 - *ITIN Rejection Notice*. IRS response to TAS information request (Oct. 12, 2017).

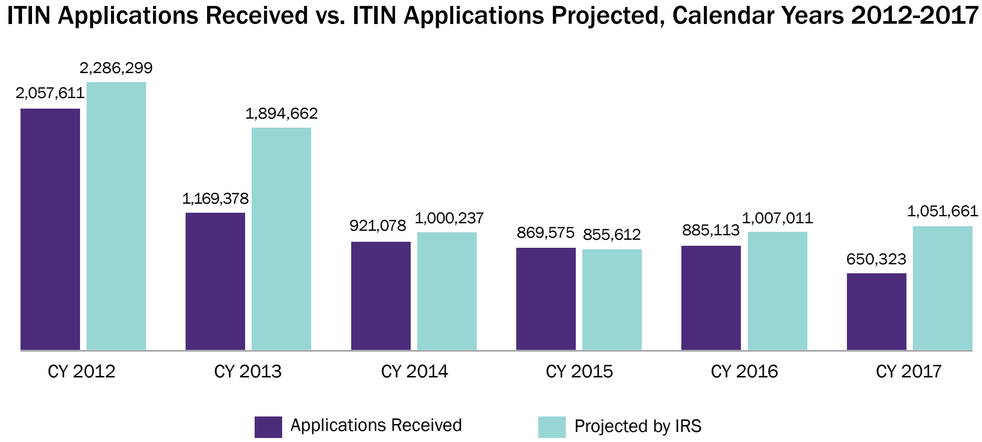
49 IRS, CP 11 - *Math Error, Balance Due of $5 or More*. For a discussion of salience and the behavioral research related to tax compliance, see National Taxpayer Advocate 2016 Annual Report to Congress 50-63. *See* IRS response to TAS fact check (Dec. 22, 2017) ("Math error notices have a standardized format that drives the location of the taxpayer notice code (TPNC) paragraphs to explain the specific disallowances. This is standard for all math error notices, regardless whether they are issued to an ITIN or an SSN.").

50 Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a).

51 National Taxpayer Advocate 2015 Annual Report to Congress 199.

52 IRC § 6103 provides the general rule that returns and return information shall be kept confidential.

FIGURE 1.16.5, Number of Returns Including One or More ITINs for Calendar Years 2012–2017[53]



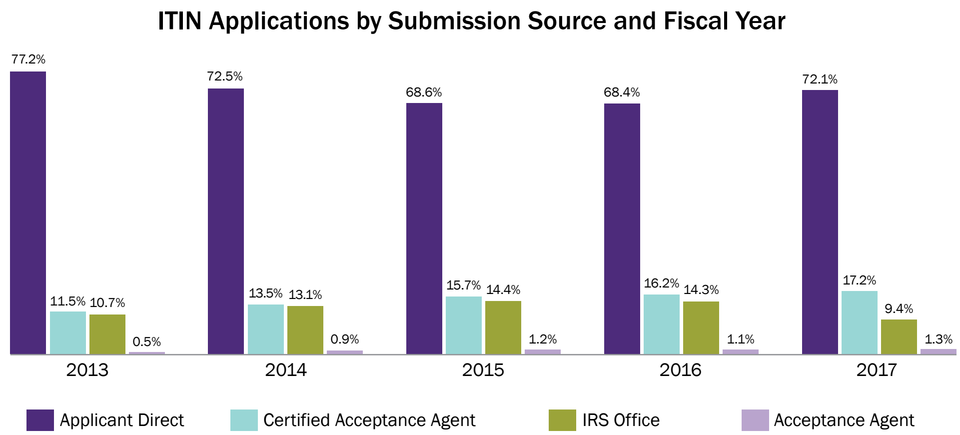
ITIN applications in 2017 were almost 40 percent lower than what the IRS projected.[54] Among other reasons, taxpayers may be failing to apply for ITINs because of the burdensome application procedures. Despite the IRS adding more TACs that can certify documents and permitting CAAs to certify some documents for dependents, the majority of ITIN applicants, approximately 72 percent, continue to mail in original documents or certified copies.[55] As shown in Figure 1.16.6 below, the percentage of applicants who apply by mail actually increased in 2017, indicating either that the IRS's expanded options did not help taxpayers or taxpayers were not aware of them.

53 IRS, ITIN Production Reports (Dec. 29, 2012; Dec. 14, 2013; Dec. 31, 2014; Dec. 30, 2015; Dec. 24, 2016; Nov. 25, 2017).

54 Immigration trends may play a role in the decrease of ITIN applications but are unlikely to account for the entire decrease from 2012 to 2016 because the number of unauthorized immigrants in the United States remained fairly steady during this time period. Because the population of unauthorized immigrants may include a sizable number of new immigrants who are taking the place of those who have left, there may actually be a greater need for new ITINs than would appear so based on just the number of unauthorized immigrants. Pew Research Center, *5 facts about illegal immigration in the U.S. Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/ (Apr. 27, 2017) (noting a decrease of about 800,000 unauthorized immigrants from Mexico between 2009 and 2015 and 2016, and rise in unauthorized immigration from other countries that has mostly offset the decrease in unauthorized immigrants from Mexico).

55 TAS Research, CDW (data drawn Oct 26, 2017).

FIGURE 1.16.6, Number and Submission Source of ITIN Applications from Fiscal Years 2013–2017[56]



Although the IRS estimated that approximately 450,000 taxpayers would apply to renew ITINs that expired at the beginning of 2017, the IRS had received only about 176,000 renewals at the close of the 2017 filing season.[57] ITIN renewals increased significantly after the IRS issued letters to approximately 1.2 million taxpayers (about 875,000 households) in August 2017.[58] However, between the beginning of August and mid-October, the IRS received less than 100,000 renewal applications, representing less than ten percent of the ITINs that would be expiring at the end of the year and which had been used recently (suggesting they may need to be renewed).[59] This trend is shown in Figure 1.16.7 below.

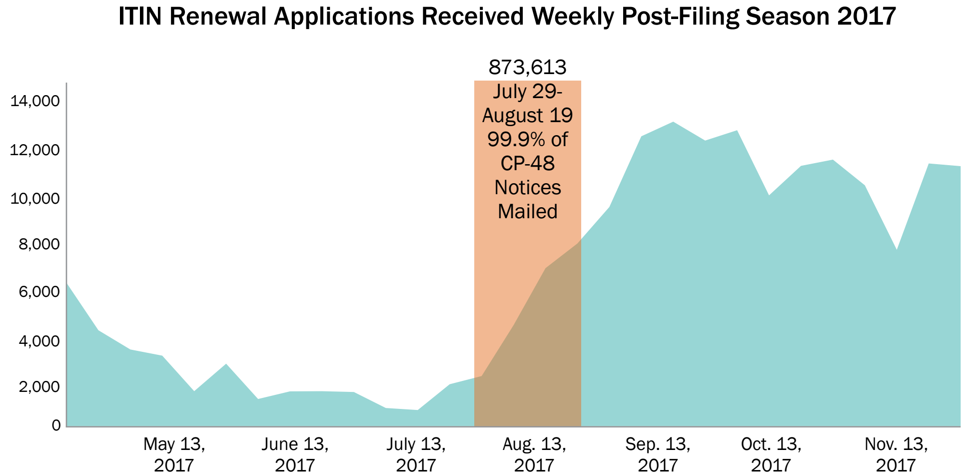
56 TAS Research, CDW (data drawn Oct 26, 2017).

57 IRS response to TAS information request (Nov. 29, 2016). IRS, Submission Processing (SP), Program Management/Process Assurance (PMPA) Branch, *Filing Season Statistics Report for Week Ending April 22, 2017*, 10. The 176,000 renewal applications received by the end of the filing season is based on the traditional filing season, which ended the week of April 17. Taxpayers living abroad receive an automatic two-month extension to file, and all taxpayers may request an extension until October 15. IRS, Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return* (Nov. 2017). However, because the majority of ITIN holders reside in the United States, and because we were not able to determine whether renewals received during the fall were for already expired ITINs or ones that would expire as part of the next batch at the end of the year, we only looked at the traditional filing season. National Taxpayer Advocate 2015 Annual Report to Congress 199.

58 IRS response to TAS information request (Oct. 12, 2017).

59 IRS, Submission Processing (SP), Program Management/Process Assurance (PMPA) Branch, *Filing Season Statistics Reports for Week Ending August 15, 2017 through Week Ending October 14, 2017.* IRS response to TAS information request (Oct. 12, 2017).

FIGURE 1.16.7, Number of ITIN Renewal Applications Received Weekly Post-Filing Season 2017[60]



In calendar year 2017, there have been over 152,000 tax returns with at least one math error for an expired ITIN.[61] Of these tax returns filed with expired ITINs, the IRS mailed an expiration notice to approximately one fifth of them, reflecting that the notices either did not reach taxpayers or were not effective. Furthermore, the math error notices themselves may have been ineffective because of the 152,000 tax returns that received a math error for an expired ITIN, taxpayers subsequently renewed the expired ITINs for only 33,056 (22 percent) of these returns.[62]

Taxpayers may be unaware of the requirement to have ITINs issued by the tax return due date to claim certain credits, as evidenced by the more than 50,000 returns with math errors for failure to have an ITIN issued timely.

As explained above, the IRS does not adequately notify taxpayers about the requirement to have an ITIN issued by the tax return due date. As of November 14, 2017, there were approximately 51,000 tax returns with at least one math error for failure to have an ITIN issued by the tax return due date in order to claim the CTC or American Opportunity Tax Credit.[63] Because the tax return due date for the purposes of having an ITIN issued includes extensions, these taxpayers may have been able to request an extension and obtain an ITIN by the extended due date, had they been aware of the requirement and this option. Unlike math errors for expired ITINs, where a taxpayer can remedy the problem by renewing an ITIN, taxpayers who did not have an ITIN issued by the tax return due date or extended due date have no options once the date has passed.

60 IRS response to TAS fact check (Dec. 22, 2017).

61 TAS Research, CDW (data drawn Nov. 14, 2017).

62 To determine these numbers, TAS assumed a successful renewal occurred if the renewed ITIN was issued in the same or later month when the math error notice was generated. TAS Research, CDW (data drawn Nov. 14, 2017).

63 *Id.*

Unlike math errors for expired Individual Taxpayer Identification Numbers (ITINs), where a taxpayer can remedy the problem by renewing an ITIN, taxpayers who did not have an ITIN issued by the tax return due date or extended due date have no options once the date has passed.

Taxpayers may not receive their original documents or other ITIN correspondence from the IRS, including over five thousand passports that the IRS sent to embassies in 2016 because it could not find a better address to return them to taxpayers.

The IRS's lack of understanding of ITIN taxpayers, combined with its failure to effectively promote alternatives to sending in original documents such as passports and national I.D. cards, leads to delays in returning these documents to taxpayers, or worse, the permanent loss of these documents. The IRS Submission Processing and Lean Six Sigma Organization collaborated on a pilot to improve quality, fraud detection, and the handling of original identification documents. While this pilot was reported to reduce the risk of misplacing documents, it is difficult to gauge improvement because the IRS does not track the number of missing document requests.[64]

From June 1, 2017 to September 15, 2017, the IRS was able to find a better address and return to taxpayers approximately 2,300 original documents that had been sent to the address listed on the ITIN application but were returned to the IRS as undelivered.[65] Nonetheless, the IRS returned about 5,400 passports to embassies in 2016 because it was not able to find a better address for the taxpayer.[66] For non-passport original documents, the IRS actually *destroys* these documents within six months if a better address is not found.[67] The IRS cited a study as the basis for its decision to retain documents for six months instead of the prior policy of a year, but provided TAS with no data in response to our request for information about the study.[68] Better communication with ITIN taxpayers could emphasize the importance of changing their addresses on file with the IRS, avoiding common address errors, or providing a pre-paid express envelope to receive their documents back.[69] To prevent the problems of lost documents to begin with, the IRS should adopt a more proactive approach by encouraging applicants to use alternatives to mailing original documents.

64 IRS response to TAS information request (Oct. 12, 2017).

65 *Id.*

66 In these cases, the taxpayer may have moved before the Form W-7 was processed. IRS response to TAS information request (Oct. 12, 2017); IRS response to TAS fact check (Dec. 22, 2017).

67 *Id.*

68 *Id.*

69 *See* IRS, *Instructions for Form W-7* (Sept. 2016).

The IRS returned about 5,400 passports to embassies in 2016 because it was not able to find a better address for the taxpayer. For non-passport original documents, the IRS actually *destroys* these documents within six months if a better address is not found.

CONCLUSION

In response to the PATH Act as well as a general need to improve the ITIN process, the IRS frequently makes changes to the ITIN program. However, without first understanding the ITIN population — who they are, where they live, what language they speak, what their needs are — the IRS will continue to overlook necessary changes and make others that create obstacles for taxpayers obtaining ITINs, filing their returns, and receiving tax benefits to which they may be entitled. Furthermore, without using its understanding of the ITIN population when developing its communication strategy, the IRS risks any positive changes not being effective because taxpayers do not understand or are not aware of them.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. In collaboration with TAS, conduct a comprehensive study of ITIN taxpayers that includes data such as geographical location, distance to a CAA, TAC, or VITA site, country of origin, language usage, paid preparer usage, and filing characteristics over multiple years.
2. Create a comprehensive outreach plan that includes materials to distribute to preparers; local community organizations; non-profit organizations; and local, state, and federal government agencies, with a particular focus on communities where there are high concentrations of ITIN filers.
3. Use data regarding the geographic location of ITIN taxpayers to create a list of underserved communities in need of greater CAA, TAC, and VITA sites and apply resources to recruit and add more CAAs, VITA sites, and certifying TACs in these locations.
4. Use data regarding ITIN taxpayers who incorrectly claimed refundable credits via a paid preparer to provide targeted outreach to segments of the preparer community.
5. Update its systems to provide that when a limited English proficiency indicator is placed on a taxpayer's account, all IRS notices will be issued in the taxpayer's preferred language when available.
6. Update Form W-7 instructions and CAA outreach materials to emphasize the importance of informing the IRS about a change of address.
7. Update Form W-7 instructions to explain on the first page the requirement to apply for an ITIN by the tax return due date in order to receive certain refundable credits.
8. Develop a system for tracking missing document requests and the actions the IRS has taken to address the missing document.

MSP #17 APPEALS: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases

RESPONSIBLE OFFICIALS

Donna C. Hansberry, Chief, Appeals

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

In October 2016, the IRS Office of Appeals (Appeals) formally changed its position regarding the availability of in-person Appeals conferences. Under this policy, the default rule became telephone conferences with in-person conferences only being available in cases meeting certain criteria and where the Appeals Team Manager approved.[2] Although Appeals offered reassurance that "the changes are not intended to shift the paradigm away from in-person conferences as a resolution tool," many taxpayers and their representatives viewed the IRS's new approach as "a major change in long-standing policy that protects taxpayer rights."[3] This perspective is understandable, given that the number of in-person Appeals conferences has dropped by 61 percent between fiscal year (FY) 2013 and FY 2017, while Appeals case receipts have fallen by only 16 percent during this same period.[4]

The shrinking availability of in-person Appeals conferences is problematic because a face-to-face meeting is sometimes essential to properly explaining and settling a controversy.[5] For example, as one tax practitioner has explained, "An experienced advocate will generally adjust his or her presentation based on how it is being received. A look of doubt by the IRS Appeals Officer would generally cause the taxpayer's representative to explain things in a different manner."[6] In particular, cases that involve substantial factual or legal complexity, or that pose significant hazards of litigation to the government, are difficult to adequately communicate remotely.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue Manual (IRM) 8.6.1.4.1. *Conference Practice* (Oct. 1, 2016).

3 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016); Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16.

4 Appeals response to TAS information request (Oct. 25, 2017).

5 Lisa Zarlenga, Robert Kovacev, Cameron Arterton and Caitlin Tharp, *Changes to IRS Appeals May Cause Problems for Taxpayers*, Law360 (Oct. 26, 2016), https://www.law360.com/articles/856147/changes-to-irs-appeals-may-create-problems-for-taxpayers.

6 Kevin Johnson, *Face-to-Face Conferences with IRS Appeals Should Be a Taxpayer Right*, Forbes (Mar. 5, 2017). *See also* National Taxpayer Advocate 2016 Annual Report to Congress 64-71.

As observed by the American Bar Association Section of Taxation, "In order for taxpayers to be amenable to the administrative Appeals process, they must feel that their legal arguments and perspective on an issue have been heard — and for that, there is no substitute for a face-to-face conference."[7] If access to an in-person conference is denied to taxpayers and their representatives when they believe this interaction to be crucial for resolving their case, the result is likely to be disillusionment, less long-term compliance, and a willingness on the part of taxpayers to more quickly seek recourse in the federal courts.[8]

In response to objections from a range of stakeholders, Appeals issued guidance to employees "informing them that Appeals will return to allowing taxpayers to have in-person Appeals conferences in field cases."[9] The National Taxpayer Advocate commends Appeals for its responsiveness to stakeholder concerns and its quick modification of its position. Nevertheless, the ultimate benefit of this new guidance remains uncertain as, rather than formally committing to honor good-faith requests for in-person conferences, Appeals pledges only to use its "best efforts" in this regard.[10] Further, a return to the pre-October 2016 status quo leaves a variety of underlying issues unaddressed. For example, the existing policy continues the prohibition against in-person conferences for Campus Appeals, which raises serious equity and due process concerns, as many Campus cases involve lower-income and unrepresented taxpayers. One of the hallmarks of top-quality customer service is choice, and the choice regarding an in-person conference should be made available to taxpayers regardless of whether their case is assigned to a Campus or Field office.

As a result, the National Taxpayer Advocate remains concerned that:

- The limitations on in-person conferences continue, particularly with respect to Campus cases, even though existing trends indicate these steps to be unnecessary;
- The availability of conference options that often represent unsatisfactory alternatives sometimes obscures the importance of in-person Appeals conferences;[11] and
- The existing restrictions on in-person conferences could harm both taxpayers and the government in the long run.

One of the hallmarks of top-quality customer service is choice, and the choice regarding an in-person conference should be made available to taxpayers regardless of whether their case is assigned to a Campus or Field office.

7 *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

8 Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16; Erich Kirchler, The Economic Psychology of Tax Behavior (2007).

9 Stephanie Cumings, *IRS Appeals Moving Back to In-Person Conferences*, 2017 TNT 179-4 (Sept. 18, 2017); IRS, Interim Guidance Memorandum (IGM) AP-08-1017-0017, *Appeals Conference Procedures*, (Oct. 13, 2017).

10 IRS, IGM AP-08-1017-0017, *Appeals Conference Procedures*, (Oct. 13, 2017).

11 These alternatives include teleconferences, virtual service delivery (VSD), the newly implemented case assistor program, and the WebEx program, which is currently being piloted.

ANALYSIS OF PROBLEM

The Limitations on In-Person Conferences Continue, Particularly With Respect to Campus Cases, Even Though Existing Trends Indicate These Steps to Be Unnecessary

With the October 2016 revisions to the Internal Revenue Manual (IRM), Appeals attempted to alter the playing field regarding in-person Appeals conferences. As Appeals explained, "By putting in place business rules around when Appeals provides in-person conferences, the changes shift the decision from the taxpayer to Appeals."[12] Simply returning to the pre-existing policy regarding Field cases, however, will not necessarily make in-person Appeals conferences significantly more available to good-faith taxpayers than has recently been the case.

For example, Appeals does not offer in-person conferences for Campus Appeals, which can be especially burdensome for low income taxpayers, whose testimony and credibility may be particularly important in the case of missing records or the lack of representation.[13] Further, Appeals will no longer allow taxpayers to seek transfer of a case from the Campus to the Field, one mechanism that previously enabled taxpayers to obtain an in-person conference.[14] Thus, in its effort to reduce the number of in-person conferences, Appeals continues to substantially limit taxpayers' choices and options, not just with respect to these conferences, but also regarding transfers to the Field, which sometimes are based on the reasonable desire of taxpayers to obtain an Appeals Officer with more topical experience or better regional understanding.[15]

These steps, however, appear to be largely unnecessary, given the long-term trends prevailing with respect to in-person conferences. In-person Appeals conferences have dropped by 61 percent between FY 2013 and FY 2017, and requests to transfer cases out of Campuses in order to obtain an in-person Appeals conference have fallen by 58 percent during this same period. These trends are illustrated in Figure 1.17.1.[16]

FIGURE 1.17.1, In-Person Conference Trends

	FY 2013	FY 2017	Percentage change
Total Appeals receipts	123,113	103,574	-16%
Total in-person conferences	14,986	5,832	-61%
Case transfers due to in-person request	5,853	2,461	-58%
Case transfers due to in-person request resulting in in-person conference	2,626	983	-63%

12 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016).

13 This testimony provides the evidentiary basis for application of the *Cohan* rule, developed in the case of *Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930), which allows the decisionmaker to estimate allowable deductions.

14 *Id*.

15 National Taxpayer Advocate 2016 Annual Report to Congress 204-08.

16 Appeals response to TAS information request (Oct. 25, 2017).

Since taxpayers have already been requesting fewer in-person conferences, the motivation for Appeals' new policy restricting taxpayers' right to an in-person conference is unclear. Appeals has in part justified its approach by explaining that taxpayers prefer telephone conferences and that "the overwhelming majority of [Appeals'] cases — more than 87 percent — are effectively handled by phone."[17] If this is so, however, then along with existing data trends, it would argue even more powerfully in favor of allowing taxpayers the maximum range of conference options and reducing the number of in-person conferences by increasing the desirability of alternatives.

Other taxing authorities have concluded that better results are achieved when taxpayers are not forced to pursue pre-selected channels of tax administration or case resolution.[18] Given this reality and the existing data indicating that Appeals is in no danger of being overwhelmed by in-person conferences, Appeals has the opportunity to substantially improve taxpayer service. For example, Appeals could, using attrition from the Campuses, increase staffing in local field offices with Hearing Officers of various grades and designations such that the office could cover cases ranging from the Earned Income Tax Credit (EITC) to itemized deductions to Schedule C controversies. This step would not only expand Appeals' geographic footprint and facilitate the accessibility of in-person Appeals to taxpayers, but would allow Appeals to implement the call for an Appeals Officer and Settlement Officer permanently located in every state, the District of Columbia, and Puerto Rico currently proposed in the Grassley-Thune bill, a policy which the National Taxpayer Advocate has long recommended.[19]

The Availability of Conference Options That Often Represent Unsatisfactory Alternatives Sometimes Obscures the Importance of In-Person Appeals Conferences

Appeals seeks to allay concerns regarding potential limitations on the availability of in-person conferences by reassuring taxpayers that they will still have a range of conference options, including virtual service delivery (VSD), telephone conferences, and the case assistor program.[20] Nevertheless, these alternatives often do not live up to their billing and fail to meet the needs of taxpayers and their representatives.

For example, the IRM paints a rosy picture of VSD, a "teleconferencing technology that permits parties to conduct virtual face-to-face conferences from remote locations." It "is installed in a number of IRS locations known as VSD 'support' sites, including all six Appeals Campus locations… VSD technology is also installed in a number of 'customer-facing' sites, where taxpayers and representatives can go to conduct VSD conferences."[21]

Nevertheless, the reality surrounding Appeals' use of VSD does not measure up to its portrayal. Currently, there are only ten customer-facing VSD locations available to taxpayers and their representatives around the country.[22] Further, there was just one Appeals conference held using VSD throughout all of FY 2017.[23] Outside commentators have noted the limited nature of VSD, as has Kirsten Wielobob, the former Chief of Appeals, who has said, "My personal feeling is that until we can

17 Letter from Kirsten Wielobob, Chief, Appeals, to Tax Analysts (June 23, 2016), 2016 TNT 123-13.

18 National Taxpayer Advocate 2016 Annual Report to Congress 70.

19 Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Congress. National Taxpayer Advocate 2014 Annual Report to Congress 46-54; National Taxpayer Advocate 2014 Annual Report to Congress 311-14.

20 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016).

21 IRM 8.6.1.4.5(1), *Virtual Service Delivery* (Oct. 1, 2016).

22 Appeals response to TAS information request (Oct. 25, 2017).

23 *Id.*

use Skype or something like that that's more commonly available to everyone, we're probably not going to get widespread adoption."[24]

Appeals recently announced a new WebEx pilot program in which taxpayers and Appeals Officers would communicate using WebEx meeting software on their own computers.[25] Taxpayers would also have the ability to use their smart devices for such conferences.[26] WebEx is a promising development and has a number of potential benefits for both taxpayers and Appeals. Nevertheless, the WebEx pilot is still in its formative stages and should be treated by Appeals as an additional means of expanding conference options for taxpayers, not as a further mechanism for limiting taxpayers' right to an in-person conference.

Further, Appeals has evidenced a strong desire to shift taxpayers from in-person conferences to telephone interactions, establishing the latter as the default method in the October 2016 guidance. Although Appeals has now abandoned the "default" language, the extent to which it will continue to push the telephone option on potentially unwilling taxpayers remains an open question. Appeals has expressed the view that 87 percent of its cases "are effectively handled by phone."[27] Many of the potential explanations for this large percentage, however, do not support Appeals' implication that telephone contact can effectively replace the availability of in-person conferences. For example, the Texas Society of Certified Public Accountants has observed that "[e]fficient resolution could very easily include prompt denial of the relief the taxpayer was seeking."[28] In particular, telephone conferences can sometimes present additional obstacles to the ability of low income or unsophisticated self-represented taxpayers to fully understand and adequately present their case.

Additionally, the 87 percent number cited by Appeals may be somewhat misleading given that many cases appropriate for resolution over the phone, by their very nature, include less complex factual and legal controversies than cases involving in-person appeals.[29] Likewise, some taxpayers who may be eligible for an in-person conference may feel compelled to accept a telephone conference simply to obtain timely resolution of their case. For FY 2017, average cycle time was 189 days for cases with telephone conferences, as compared with an average cycle time of 372 days for cases involving an in-person Appeals conference.[30]

As a third alternative, Appeals has developed a new procedure primarily for Campus cases, which are disqualified from eligibility for in-person Appeals conferences.[31] This procedure, known as the case assistor program, teams the assigned Appeals Officer with a local Appeals Officer. The taxpayer travels to the local Appeals office and together with the local Appeals Officer telephones the assigned Appeals Officer to consider the case. Thereafter, the two Appeals Officers discuss proceedings, and the assigned Appeals Officer reaches a decision.

24 Amy S. Elliot, *IRS Appeals to End Case Reassignment Strategy*, 2016 TNT 172-5 (Sep. 16, 2016).

25 Matthew R. Madara, *IRS Addressing Concerns Over Appeals Conference Pilot Program*, 2017 TNT 114-3 (June 15, 2017).

26 Appeals response to TAS fact check request (Nov. 13, 2017).

27 Letter from Kirsten Wielobob, Chief, Appeals, to Tax Analysts (June 23, 2016), 2016 TNT 123-13.

28 Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16.

29 *Id.*

30 Appeals response to TAS information request (Oct. 25, 2017). In this context, the term "cycle time" is defined as the period between when a non-docketed case is received by Appeals and closed by Appeals.

31 IRM 8.6.1.4.1.1, *In-Person Conferences: Case Assistance* (Oct. 1, 2016).

The IRS has described this mechanism somewhat confusingly as "in-person conferences: case assistance."[32] This program, however, combines the effort of travel to the Appeals office with the limitations inherent in a telephone conference, discussed above. Moreover, using two Appeals Officers for every case assistor conference will not only create an odd dynamic among the participants, but also seems to be an inefficient use of Appeals' dwindling personnel. The attractiveness of this option to taxpayers and their representatives remains an open question, as only 15 cases were closed using the case assistor program during FY 2017.[33]

One of the hallmarks of top-quality customer service is choice. The case assistor program, along with telephone conferences and VSD, have their place and can be beneficial in certain situations. They should not, however, be forced on taxpayers as a replacement for in-person Appeals conferences. As stated by one witness in hearings held before the Oversight Subcommittee of the House Committee on Ways and Means, "We believe that taxpayers, if willing to incur the time and cost, should have a fundamental right to meet Appeals face to face."[34]

The Existing Restrictions on In-Person Conferences Could Harm Both Taxpayers and the Government in the Long Run

Several taxpayer representative groups came forward to express disagreement with the October 2016 restrictions on in-person conferences. Many of these objections continue to be applicable, however, as they speak to the importance of in-person conferences as a means of resolving cases, particularly those involving factual or legal complexity, credibility of witnesses, or hazards of litigation settlements. "Our tax system has grown exponentially more complicated since RRA '98 [the IRS Restructuring and Reform Act of 1998], making the historical policy of allowing an in-person conference all the more important in facilitating clear communications between taxpayers and Appeals, allowing resolution of factual misunderstandings, and facilitating prompt resolution of tax disputes."[35]

Restricting the ability of good-faith taxpayers to obtain an in-person conference reduces Appeals' effectiveness and runs counter to Appeals' mission of achieving fair and equitable negotiated settlements. It increases the risk that the parties will fail to adequately understand one another's positions and decreases the likelihood that a fair and equitable settlement will be reached. Further, increasing the availability of in-person conferences in Field cases while continuing the prohibition against such conferences for Campus cases, many of which involve lower income taxpayers, raises serious equity and due process concerns.

As explained by another witness in the hearing held by the Oversight Subcommittee of the House Ways and Means Committee,

> For many taxpayers, the first opportunity to meet someone and talk about their case is at Appeals… In these cases, Appeals is the first opportunity they have to present their case

32 IRM 8.6.1.4.1.1, *In-Person Conferences: Case Assistance* (Oct. 1, 2016).

33 Appeals response to TAS information request (Oct. 25, 2017).

34 *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Kathy Petronchak, Director, alliantgroup LP) 5.

35 Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16. *See also* Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16; *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

> and have a discussion about their particular situation. By limiting face-to-face conferences, taxpayers lose the sense that their tax positions and perspectives are considered impartially.[36]

Many taxpayer representatives have expressed concern that unnecessary restrictions on in-person access could lead to expanded litigation, which would be costly for taxpayers, wasteful for the government, and burdensome for all concerned. "…[W]e suspect that if practitioners perceive that Appeals loses its attractiveness as the next step after a revenue agent's report, recourse to a Tax Court filing with the use of Appeals as a part of that procedure may become more the norm."[37]

A mechanism for resolving disputes that taxpayers view as equitable gives taxpayers a greater stake in the outcomes of their cases and encourages long-term fealty to the tax system.[38] The quality of the contact between taxpayers and the taxing authority correlates closely with long-term trust in that authority and acceptance of its determinations.[39] A program such as Appeals that purports to be impartial for everyone and committed to making "a high quality decision in each case" runs a substantial risk of fostering disillusionment by limiting taxpayers' options for true in-person contact with the organization when taxpayers believe such contact to be essential to the resolution of their cases.[40]

CONCLUSION

Appeals' 2016 policies that established a default telephone conference rule, removed taxpayers' right to choose an in-person conference, and restricted the circumstances under which an Appeals Officer could elect to hold such a conference were puzzling and troubling. After an outcry from stakeholders, Appeals announced that it would return to making in-person Appeals available in Field cases, a step which the National Taxpayer Advocate applauds. Nevertheless, the scope and parameters of this availability remain to be seen, and a number of important restrictions on in-person conferences are still in place, such as in the context of Campus Appeals.

The number of in-person Appeals conferences has dropped by 61 percent between FY 2013 and FY 2017, while Appeals' case receipts have fallen by only 16 percent during this same period. Given this trend, the sheer passage of time and some much-needed improvements to in-person alternatives likely would achieve Appeals' goals in a taxpayer-friendly manner.

36 *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Chastity K. Wilson, Am. Inst. Cert. Pub. Accts.).

37 Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16. *See also* Letter from California Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Mar. 8, 2017); Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16.

38 *See generally* Tonya M. Scherer, *Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation*, 2 J. of Disp. Resol. 215 (1997); National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 138-71; National Taxpayer Advocate 2016 Annual Report to Congress 214.

39 See generally Melinda Jone and Andrew J. Maples, *Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures*, 27 Austl. Tax F. 525, 528, 531 (2012).

40 IRM 8.1.1.1(2)(c), *Accomplishing the Appeals Mission* (Oct. 1, 2016).

The number of in-person Appeals conferences has dropped by 61 percent between FY 2013 and FY 2017, while Appeals' case receipts have fallen by only 16 percent during this same period.[41] Given this trend, the sheer passage of time and some much-needed improvements to in-person alternatives likely would achieve Appeals' goals in a taxpayer-friendly manner.

Nevertheless, taxpayers and their representatives still are left with significant concerns regarding their ability to effectively present and resolve their cases. The alternatives to in-person conferences touted by Appeals (VSD, telephone conferences, and the case assistor program) do not measure up to Appeals' optimistic descriptions. Further, in-person conferences are particularly important for some types of cases, such as those involving factual or legal complexity, or those implicating a hazards of litigation settlement. Restrictions, be they procedural or practical, on the ability of good-faith taxpayers to obtain in-person conferences may well lead to increased litigation, which is costly and inefficient for both parties. Additionally, such limitations run counter to the mission of Appeals and could diminish long-term tax compliance, an unintended consequence that would harm the government and taxpayers.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Honor all good-faith requests for an in-person Appeals conference.
2. Continue improving VSD (or its successor) and telephone conferences so that taxpayers have access to a range of quality options for interacting with Appeals.
3. Through the use of attrition and other strategies, staff local Appeals offices so as to have a permanent Appeals office in every state, the District of Columbia, and Puerto Rico that provides effective in-person coverage for the full range of Appeals cases.

41 Appeals response to TAS information request (Oct. 25, 2017).

MSP #18 APPEALS: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions

RESPONSIBLE OFFICIALS

Donna C. Hansberry, Chief, Appeals

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Effective October 2016, Appeals implemented a number of changes to its conference procedures. Among other things, Appeals revised the Internal Revenue Manual (IRM) to allow Hearing Officers to invite Counsel and/or Compliance to participate in Appeals conferences.[2] The ability to invite these additional participants exists regardless of whether taxpayers agree or object to their inclusion.

Appeals' option to involve Counsel and Compliance in such conferences has historically existed and occasionally has been used in selected cases by Hearing Officers.[3] Appeals, however, views the IRM changes as part of a new and concerted trend toward expanded participation in Appeals proceedings by IRS personnel.[4] As one example, effective May 1, 2017, Appeals began a pilot initiative designed to make the inclusion of representatives from the Large Business and International (LB&I) examination audit team a matter of "routine."[5] Donna Hansberry, Chief of Appeals, has stated that "the purpose of having both parties in the room is to aid case resolution."[6] Appeals further explains, "The goals for this initiative are to improve conference efficiency, reach case resolution sooner, and offer earlier certainty for issues in future years."[7]

Nevertheless, this change in conference procedures could have far-reaching negative consequences for Appeals' effectiveness in resolving cases with taxpayers. This potential downside is why a number of tax practitioner groups have expressed opposition to such a policy: "There should be a clean break between

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue Manual (IRM) 8.6.1.4.4, *Participation in Conferences by IRS Employees* (Oct. 1, 2016).

3 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, Appeals Quarterly Newsletter Vol. 3, Issue 1 1-2 (Feb. 2017).

4 *Id.*

5 *Appeals Team Cases: All Parties Conferences*, https://www.irs.gov/pub/irs-utl/atclfaqs.pdf (last visited Apr. 17, 2017).

6 *IRS Appeals Conference Procedure Change Follows Prior Guidance*, 2017 TNT 53-4 (Mar. 20, 2017).

7 *Id.*

Compliance and Appeals."[8] Appeals runs the risk that Hearing Officers could be perceived as part of a contingent representing the IRS in a "quasi-judicial" regime that fosters distrust and litigation, rather than negotiation and case resolution.

Specifically, the National Taxpayer Advocate is concerned that Appeals' emphasis on expanding participation of Counsel and Compliance in Appeals conferences will:

- Fundamentally change the nature of Appeals conferences in which this approach is adopted;
- Jeopardize Appeals' independence, both real and perceived; and
- Generate additional costs for the government and taxpayers in the form of fewer case resolutions, additional litigation, and reduced long-term compliance.

ANALYSIS

Background

Most cases brought by taxpayers to Appeals come directly from Compliance after taxpayers and Compliance reach an impasse.[9] In these cases, the Hearing Officer receives the administrative file, which includes the taxpayer's protest, the revenue agent's report, and a transmittal memorandum prepared by Compliance.[10] Upon receipt, Appeals reviews the administrative file to ensure completeness and to determine whether the case has been sufficiently prepared for potential disposition. If it has not, the case is to be returned to Compliance for further development under the terms of the Appeals Judicial Approach and Culture (AJAC) Project adopted in 2014.[11]

Assuming that the case is ready for Appeals' consideration, the Hearing Officer can invite Compliance and the taxpayer to a pre-conference meeting. The purpose of such a meeting is to discuss the issues of the case, the taxpayer's protest, and the rebuttal prepared by Compliance.[12] Pre-conferences generally are used in more complex cases.[13]

Once a pre-conference is held or bypassed, the Appeals conference itself is scheduled. The conference is conducted informally and, in practice, is often conducted in stages.[14] Taxpayers present their case, enter into dialogue with the Hearing Officer, and eventually commence settlement negotiations.[15] Although Appeals strives to resolve cases after a single conference, additional conferences can be conducted where necessary.[16]

As the final administrative stop for most taxpayers within the IRS, Appeals' role is to negotiate settlements with taxpayers in light of existing hazards of litigation to the government.[17] This function, in which

8 *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

9 Appeals response to TAS information request (June 9, 2017), Tab 3. This category of cases is known as nondocketed Appeals. The other category, docketed Appeals, consists of cases that bypass Appeals on their way to the U.S. Tax Court and then are remanded to Appeals for further consideration.

10 Michael I. Saltzman & Leslie Book, IRS Practice and Procedure 9.06 (2016).

11 *Id.*

12 IRM 8.7.11.8.1, *Purpose of Pre-Conference Meeting* (Mar. 16, 2015).

13 IRM 8.7.4.5, *Pre-Conferences in Estate and Gift Tax Cases* (Aug. 18, 2014).

14 IRM 8.6.1.4(5), *Conference Techniques used by Appeals Technical Employees (ATEs)* (Oct. 1, 2016).

15 Michael I. Saltzman & Leslie Book, IRS Practice and Procedure 9.06 (2016).

16 *Id.*

17 IRM 8.6.2.6.4.2, *Resolved Based on Hazards of Litigation* (Oct. 18, 2007).

By definition, if taxpayers had been able to reach agreement with Counsel and Compliance, the case would not have been elevated to Appeals in the first place.

Appeals serves as the ultimate decision-maker, is different from mediation and similar types of alternative dispute resolution (ADR) in which an independent third party seeks to facilitate an agreement between adversaries with opposing positions.[18] For example, in IRS mediation, which is voluntary, Compliance has a seat at the table, and Appeals attempts to facilitate a resolution that becomes binding only if Compliance and the taxpayer agree.[19]

By contrast, prior to Appeals' 2016 guidance changes, Counsel and Compliance generally did not attend Appeals conferences, although the IRS always had the right to include them.[20] Counsel and Compliance typically were granted their say via the case file and the pre-conference, if held. Thereafter, the Appeals conference itself generally was devoted to presentation of the taxpayer's case and settlement negotiations between the taxpayer and the Hearing Officer.

The manner in which Appeals will implement its new emphasis on including Counsel and Compliance in conferences is still somewhat vague. TAS has been assured that neither Counsel nor Compliance will be present during settlement negotiations between Hearing Officers and taxpayers.[21] Nevertheless, in her comments before the U.S. House Ways and Means Committee, Subcommittee on Oversight, one practitioner testified as follows:

> In a recent settlement conference with my client, the Appeals personnel openly asked Compliance what they thought was a fair settlement before reaching a final decision. After the conference, the taxpayer asked how it was possible for Appeals to maintain independence when they were seeking the opinion of the Compliance team.[22]

Participation of Additional IRS Personnel Will Fundamentally Change the Nature of Appeals Conferences

The expansion of Appeals conferences to routinely involve Counsel and Compliance alters the relationship between the taxpayer and the Hearing Officer and makes interactions less negotiation-based.

By definition, if taxpayers had been able to reach agreement with Counsel and Compliance, the case would not have been elevated to Appeals in the first place. The inclusion of these now-contentious parties in an Appeals proceeding likely will create a dynamic in which the opposing sides present their arguments and then await the ruling of the Hearing Officer. While this model may well move closer to the

18 For an in-depth discussion of alternative dispute resolution (ADR) within the IRS, see National Taxpayer Advocate 2016 Annual Report to Congress 211-19.

19 IRM 8.26.3.1, *Objective and Authority for Fast Track Mediation* (Dec. 5, 2014); IRM 8.26.3.2, *Collaborative Dispute Resolution Process* (Dec. 5, 2014).

20 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, Appeals Quarterly Newsletter Vol. 3, Issue 1 1-2 (Feb. 2017).

21 Appeals response to TAS fact check request (Nov. 13, 2017).

22 *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Chastity K. Wilson, Am. Inst. Cert. Pub. Accts.).

"quasi-judicial" role for Hearing Officers envisioned by AJAC, it is neither an effective means of reaching a settlement in a particular case, nor of pursuing administrative dispute resolution on a broader scale.

Appeals should be sitting across the table from taxpayers with a complete file, based on which administrative case resolution can be sought. Anything that Compliance would have to say at that point would be redundant or, if new, would contradict the principles of AJAC. If Appeals is receiving incomplete case files, the solution is to insist on better case development from Compliance, not to expand its participation in Appeals conferences so that it can present verbally what should already have been provided in writing. Rather than confronting and resolving this issue directly, Appeals' new approach simply creates more problems.

For example, this change, which allows Counsel and Compliance to reiterate their positions, converts Appeals to a more adversarial forum, and will limit negotiation between taxpayers and Hearing Officers. "Adding IRS employees to the Appeals conference turns the Appeals conference into more of a trial setting as opposed to the historic conduct of most Appeals conferences."[23]

As discussed above, the National Taxpayer Advocate has been assured by the Chief of Appeals that Counsel and Compliance will not be a party to the settlement discussions, which theoretically would occur later in the conference.[24] Even if that is the case, the entire Appeals conference can be accurately characterized as a settlement negotiation in which taxpayers and their representatives are attempting to establish a rapport with their Hearing Officer from which resolution of their case can be mutually explored.

When Counsel and Compliance are given a second opportunity and essentially allowed to present an oral argument setting forth their case, of which the Hearing Officer should already be aware, this in turn drives taxpayers and their representatives to present their own oral arguments. Aspects of the case in which the parties could reach agreement should previously have been addressed in the examination or even uncovered at an Appeals pre-conference. Including Counsel and Compliance in the Appeals conference itself deters, and runs the risk of poisoning the environment for, the meaningful dialogue between taxpayers, representatives, and the Hearing Officer, based on which resolution can occur.

Including Counsel and Compliance in the Appeals conference itself deters, and runs the risk of poisoning the environment for, the meaningful dialogue between taxpayers, representatives, and the Hearing Officer, based on which resolution can occur.

23 Marie Sapirie, *IRS Appeals Chief Clarifies Policy Changes in Open Letter*, 2016 TNT 215-5 (Nov. 14, 2016).

24 National Taxpayer Advocate Blog, *Appeals Should Facilitate Mutual Respect and Trust by Allowing Taxpayers a Choice in the Expanded Participation of Counsel and Compliance in Appeals Conferences* (June 21, 2017), https://taxpayeradvocate.irs.gov/news/appeals-should-facilitate-mutual-respect-and-trust-by-allowing-taxpayers-a-choice-in-the-expanded-participation-of-counsel-and-compliance-in-appeals-conferences?category=Tax%20News.

Expanding Conferences Will Jeopardize Appeals' Independence, Both Real and Perceived

Appeals recognizes that the achievement of its mission statement depends on resolving tax controversies on a basis that is fair and impartial to both the government and the taxpayer and in a manner that will enhance public confidence in the integrity and efficiency of the IRS.[25] Nevertheless, this initiative fundamentally imperils Appeals' ability to fulfill its mission and equitably settle cases.

Inviting Counsel and Compliance to attend conferences will make it difficult for Appeals to serve as an unbiased participant in the case resolution process. Compliance will be in a position to put pressure on Hearing Officers to adopt and sustain the prior asserted outcome and will have the opportunity to directly counter the arguments of taxpayers. As a practical matter, Compliance presumably will be granted a much broader latitude for extending arguments in person beyond the parameters existing within the four corners of the case file.

Where the views of Counsel are concerned, Revenue Procedure 2012-18 provides Appeals with the discretion to override Counsel. In reality, however, Hearing Officers may well be reluctant to do so when Counsel actually has a seat at the table.[26] A Hearing Officer may lack the personal confidence or the institutional support necessary to stand firm in exercising independent judgment in the face of opposition from Compliance regarding the factual strengths and weaknesses or the assessment of Counsel regarding hazards of litigation.[27] By inviting these parties to conferences as a routine matter, Appeals is undermining its own independent mechanisms for case resolution.

As has the National Taxpayer Advocate, the American Bar Association Section of Taxation has expressed concerns that "Appeals' independence is impaired by permitting, encouraging, or mandating that all three parties (Appeals employees, the taxpayer, and Compliance/Counsel personnel) attend all conferences with Appeals. Moreover, such a significant change in conference procedures could interfere with the ability of Appeals to conduct its traditional role of settling the case based on hazards of litigation."[28]

Including all three parties in the Appeals conference may appear sensible, and tax practitioners sometimes find this approach to be helpful in resolving cases.[29] Mandating this inclusion, however, fundamentally disregards the very purpose of the Appeals conference, which is neither to give Compliance another bite at the apple nor to transform Appeals into a mediation forum. Instead, the credibility of Appeals hinges on its ability to undertake direct and independent settlement negotiations with taxpayers and their representatives.

Even if Appeals is able to generate case resolutions that are unbiased, the necessary perception of independence will inevitably be compromised by Appeals' new approach. Additional IRS participants cannot help but alter taxpayers' perception of the proceedings and the fairness of the outcomes. Taxpayers will not feel they are going before an independent and objective party to seek a resolution to their cases; instead, taxpayers will feel they are simply continuing their disagreements with the IRS as an institution,

25 IRM 8.1.1.1(1), *Accomplishing the Appeals Mission* (Feb. 10, 2012).

26 Rev. Proc. 2012-18, § 2.02(3)(b), 2012-10 I.R.B. 455.

27 The National Taxpayer Advocate has previously suggested steps that would enhance Appeals' independence, such as locating at least one Appeals Officer and Settlement Officer in every state, the District of Columbia, and Puerto Rico, and maintaining separate office space and communication facilities from other IRS personnel. National Taxpayer Advocate 2009 Annual Report to Congress 348. This independence could be further strengthened if, as also recommended by TAS, Appeals were provided with an independent Counsel to help Appeals evaluate positions adopted by IRS Counsel. National Taxpayer Advocate 2002 Annual Report to Congress 198.

28 *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10, May 10, 2017.

29 TAS conference call with National Association of Enrolled Agents (NAEA) (Aug. 24, 2017).

> **Taxpayers will not feel they are going before an independent and objective party to seek a resolution to their cases; instead, taxpayers will feel they are simply continuing their disagreements with the IRS as an institution, this time with an extra party or two added to the conversation — perhaps as overseers.**

this time with an extra party or two added to the conversation — perhaps as overseers. Such an appearance is a far cry from the independent arbiter envisioned by the IRS Restructuring and Reform Act of 1998.[30] "With this legislation, we require the agency to establish an independent Office of Appeals — one that may not be influenced by tax collection employees or auditors."[31]

Other federal agencies likewise place a premium on the independence of their appeals process. Most of these agencies establish appeal to an Administrative Law Judge, or the equivalent, as the final stage in their administrative case resolution structure. Although negotiation is less of a central element in these disputes than in the context of IRS controversies, it is significant that, as far as TAS can determine, the agencies conducting large numbers of case appeals culminate their processes with proceedings in which claimants and their representatives can independently present their case to a final decision-maker without the presence of anyone from the agency who was involved in previous aspects of the case.[32]

Adding Counsel and Compliance to Appeals Conferences Will Generate Additional Costs for the Government and Taxpayers in the Form of Fewer Case Resolutions, Additional Litigation, and Reduced Long-Term Compliance

As the American Bar Association has observed, "Taxpayers who choose traditional Appeals have chosen not to mediate, based at least in part on an assessment that the inclusion of Compliance could be counterproductive."[33] To the extent that Appeals' independence, either in reality or appearance, is diminished by mandating the presence of adversarial IRS personnel, taxpayers will be less likely to value and respect the outcome of Appeals proceedings. On the other hand, when people feel that a dispute resolution mechanism represents a fair and just process, they are highly likely to accept it. For example, one ADR survey found that over 90 percent of parties involved in arbitration voluntarily comply with the outcome.[34]

By contrast, taxpayers who believe that Appeals has not made an objective, good-faith effort to resolve their cases will be much more likely to turn to the courts to obtain the independent review they are denied within the IRS. The National Taxpayer Advocate continues to note with concern that the proportion of docketed Appeals cases (which, by definition, require judicial involvement) in comparison to non-docketed Appeals cases has remained at over 40 percent between fiscal year (FY) 2013 and

30 The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, Title III, Subtitle E, § 3465 (b) (July 22, 1998).

31 144 Cong. Rec. S7622 (1998) (statement of Sen. Roth).

32 *See*, *e.g.*, Board of Veterans Appeals, *How Do I Appeal?*, VA Pamphlet 01-15-02B 10-11 (May 2015), https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf; Social Security Administration, *About Appeals*, Pub. No. 05-10041 (Jan. 2017).

33 *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

34 ABA, Sec. of Disp. Resol., *Benefits of Arbitration for Commercial Disputes*, http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Apr. 18, 2017).

FY 2017.[35] This undesirable level of litigation activity, which may well be attributable to a growing alienation between taxpayers and Appeals, likely is perpetuated by a series of Appeals initiatives, including the AJAC project, the limitations placed on in-person conferences, and now the push to involve Counsel and Compliance in conferences regardless of taxpayers' views.[36]

This troubling trend could be exacerbated by the possibility that, given the potential presence of Counsel, taxpayers and their representatives may decide to forego Appeals altogether out of concerns that Counsel will simply use the conference as a means of gathering insight regarding taxpayers' litigation strategies. Fewer resolutions in Appeals means more of a resource burden for taxpayers and the government on account of litigation, which forces taxpayers to incur extra expense, subjects them to tremendous personal stress, and wastes ever-dwindling government funds.

Appeals, administered with a careful eye toward taxpayer attitudes, can help generate the types of interactions and perceptions that will perpetuate the compliant behavior necessary to the success of the voluntary tax system.[37] Conversely, the implementation of procedures that allow for the addition of participants to conferences against taxpayers' wishes will likely foster disenfranchisement, litigation, and long-term noncompliance.

In many cases, the involvement of Counsel and Compliance in conferences may well generate the outcomes desired by Appeals. These beneficial results, however, will only occur where the participation of Counsel and Compliance is agreed to by taxpayers and their representatives, not where it is unilaterally mandated by Appeals. In order to facilitate short-term case resolutions and long-term tax compliance, Appeals should foster mutual respect and trust by allowing taxpayers a choice in the expanded participation of Counsel and Compliance in Appeals conferences.

CONCLUSION

Effective October 2016, Appeals implemented a number of changes to its conference procedures, including guidance in its IRM explicitly allowing Hearing Officers to invite Counsel and Compliance to participate in Appeals conferences. This step, however, may well have far-reaching negative consequences for Appeals' effectiveness in resolving cases with taxpayers. Among other things, Appeals' emphasis on expanding participation of Counsel and Compliance in conferences will fundamentally change the nature of conferences in which this approach is adopted and will jeopardize both the real and perceived independence of Appeals.

By allowing Hearing Officers the discretion to invite Counsel and Compliance personnel to join Appeals conferences, Appeals is altering the power dynamic between Hearing Officers and taxpayers. As a result, taxpayers are less likely to feel that their case has been fully heard, that they have been treated fairly, and

35 National Taxpayer Advocate 2016 Annual Report to Congress 205. Examination-based cases represent the best data set for observing trends in this context, as Collection-based cases overwhelmingly give rise to non-docketed appeals (approximately 99.9 percent). Appeals response to TAS information request (Oct. 25, 2017). A docketed case arises when a taxpayer files a valid petition for review in the U.S. Tax Court and the case is referred back to Appeals for possible settlement. A prerequisite for this reassignment is that a taxpayer has not previously had an opportunity to present the case to Appeals. *See* IRM 8.4.1.4(1), *Appeals Authority Over Docketed Cases* (Oct. 26, 2016).

36 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem: *The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*), *supra*; National Taxpayer Advocate 2016 Annual Report to Congress 203-10; National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

37 Melinda Jone and Andrew J. Maples, *Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures*, 27 Austl. Tax F. 525, 528 (2012); National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 138-71.

that the outcome of the proceeding should be respected. Instead, more litigation and less long-term tax compliance likely will be the unintended consequences of such an initiative. The IRS has acknowledged many of these issues, but has not yet committed to make any meaningful changes in the policy it has adopted.[38]

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Preserve its actual and perceived independence by adopting IRM procedures that separate Counsel and Compliance from Appeals conferences unless their inclusion is mutually agreeable to the taxpayer and Hearing Officer involved.
2. Continue to involve Counsel and Compliance in pre-conference hearings and if, after the Appeals conference itself is complete, additional information from Counsel and Compliance proves necessary, explain the need to taxpayers and convene a post-conference call or meeting in conformity with *ex parte* rules.
3. Track and analyze data relating to cycle times, outcomes, and subsequent litigation activity regarding conferences in which Counsel and Compliance participate so as to provide quantitative insight into the impact of such participation on Appeals proceedings.
4. Seek and carefully consider comments from tax practitioners and other stakeholders regarding when, and to what extent, the participation of additional IRS personnel in Appeals proceedings would contribute to case resolution.

38 Matthew R. Madara, *IRS Addressing Concerns Over Appeals Conference Pilot Program*, 2017 TNT 114-3 (June 15, 2017).

MSP #19 IDENTITY THEFT: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures

RESPONSIBLE OFFICIAL

Kenneth Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to Finality*

DEFINITION OF PROBLEM

Tax-related identity theft is an invasive crime that has significant impact on its victims and the IRS. Since 2004, the National Taxpayer Advocate has highlighted the need for the IRS to establish or improve procedures to assist victims of identity theft.[2] The IRS has gradually adopted many of our recommendations over the years. For example, one such change involved centralizing its identity theft victim assistance units, something for which TAS has long advocated.[3]

The IRS has made significant strides in revamping its identity theft victim assistance procedures. However, problems remain as cyber criminals continually evolve their schemes. In our review of the IRS response to identity theft, we found that:

- although identity theft case receipts are on the decline, there remains a significant inventory of unresolved identity theft cases;
- the IRS has adopted a centralized approach to identity theft victim assistance, including assignment of a sole contact person for certain victims;
- automated identity theft filters are still over-inclusive; and
- the IRS must be nimble as it counteracts emerging identity theft schemes, such as employer identity theft.

1 *See* Taxpayer Bill of Rights (TBOR), http://www.TaxpayerAdvocate.irs.gov/Taxpayer-Rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *See* National Taxpayer Advocate 2015 Annual Report to Congress 180-87; National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, 44-90; National Taxpayer Advocate 2013 Annual Report to Congress 75-83; National Taxpayer Advocate 2012 Annual Report to Congress 42-67; National Taxpayer Advocate 2011 Annual Report to Congress 48-73; National Taxpayer Advocate 2009 Annual Report to Congress 307-17; National Taxpayer Advocate 2008 Annual Report to Congress 79-94; National Taxpayer Advocate 2007 Annual Report to Congress 96-115; National Taxpayer Advocate 2005 Annual Report to Congress 180-91; National Taxpayer Advocate 2004 Annual Report to Congress 133-36.

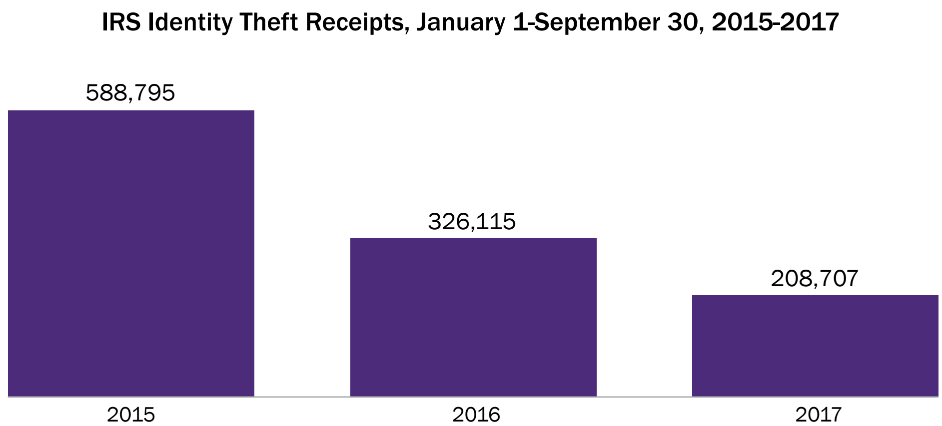
3 *See* National Taxpayer Advocate 2007 Annual Report to Congress 115.

ANALYSIS OF PROBLEM

Although Identity Theft Case Receipts Are on the Decline, There Remains a Significant Inventory of Unresolved Identity Theft Cases

While still pervasive and having significant impact to victims, tax-related identity theft has been on the decline in recent years. There has been a downward trend in identity theft case receipts IRS-wide from 2015.

FIGURE 1.19.1[4]



Through September 30, 2017, there has been a 36 percent drop in identity theft case receipts compared to the prior year, and a 65 percent drop compared to 2015.[5]

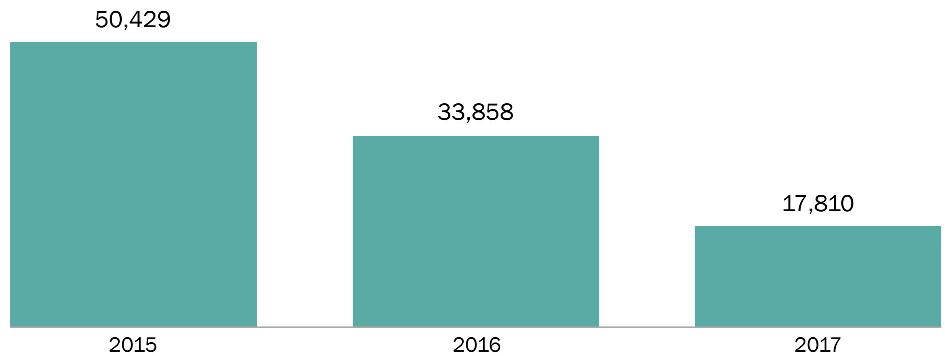
Within TAS, we have experienced a similar decline in our identity theft case receipts over the past year, which is a reversal of the upward trend in previous years.

4 IRS, *Global Identity Theft Report* (Sept. 2017). Identity Theft Victim Assistance (IDTVA) accounts for the majority of the cases, but the inventory also includes a small amount from Small Business/Self-Employed (SB/SE) (Field Exam), Large Business and International (LB&I), and Appeals.

5 Note that the 2015 and 2016 data in the table does not include inventories for Business Master File and Compliance Designated Identity Theft Adjustment, which are included in 2017 inventory.

FIGURE 1.19.2[6]

TAS Identity Theft Receipts, January 1-September 30, 2015-2017



It is not clear what the primary driver of the reversal is that caused the downward trend of identity theft case receipts. However, we believe that improvements to the IRS's identity theft filters and earlier access to information return data, has led to the decline in identity theft case receipts.

We also believe that part of the decline may be attributable to the way the IRS calculates identity theft case receipts. When the IRS revised the layout this year of the Global Identity Theft Report that is distributed monthly to its executives, it does not include all identity theft cases worked outside of the Identity Theft Victim Assistance (IDTVA) unit in Victim Assistance Servicewide Inventory. For example, identity theft cases may be worked by the Return Integrity & Compliance Services (RICS) and Submission Processing (SP) functions, but are not included in the roll-up of victim assistance identity theft case receipts reported in the Global Report.[7]

To get a sense of the volume of open identity theft cases, TAS Research conducted a query of unique taxpayers with unreversed open identity theft claim markers input during calendar years 2014–2016 and through April 1, 2017.[8] TAS Research looked for identity theft cases that have been open for more than the 180-day normal processing time that have not had an identity theft closing marker. There are more than 178,000 such taxpayers, substantially more than the inventory of 36,333 identity theft cases reported by the IRS in the IRS Global Identity Theft Report for the corresponding period.[9]

6 Data obtained from Taxpayer Advocate Management Information System (TAMIS) (Jan. 1, 2015, Jan. 1, 2016, Jan. 1, 2017; Oct. 1, 2015, Oct. 1, 2016, and Oct. 1, 2017).

7 IRM 25.23.2.21(1), *IMF Identity Theft Worked by Functions Outside Accounts Management IDTVA* (Oct. 13, 2016): "*The re-engineering effort brought accounts management and certain compliance functions under the Accounts Management Identity Theft Victim Assistance Organization. There are pockets of employees outside the new organization who will be working ID theft related issues identified using systemic applications and other applications and methods.*"; IRS, *Global Identity Theft Report* (Sept. 2017) (With Identity Theft Victim Assistance (IDTVA) making up the majority of the cases, the inventory also includes a small amount from SB/SE (Field Exam), LB&I, and Appeals).

8 IRS, Compliance Data Warehouse (CDW), Individual Master File (IMF), Transaction History table. Taxpayers are only counted once per year, but may be included more than once if their identity theft case spans multiple years. IRS did not provide information to confirm or disprove the figures during the TAS fact check process.

9 IRS, *Global Identity Theft Report* (Sept. 2017). This does not necessarily mean that the taxpayer's primary identity theft issue has not been resolved, but it does means that the IRS has not taken all actions to protect the taxpayer from further harm — for example, a closing marker is required for a taxpayer to be eligible to receive an Identity Protection Personal Identification Number (IP PIN).

The analysis completed by TAS Research yielded cases with unresolved identity theft markers servicewide, regardless of which IRS function controlled the case. In contrast, the IRS Global Identity Theft Report omitted identity theft case receipts worked by some functions, such as RICS or SP. By opting to include only a portion of its identity theft case receipts, the IRS does not provide a complete perspective and may undermine its case for sufficient funding to prevent identify theft and assist victims. While the IRS has improved its fraud detection measures and streamlined its processing of identity theft cases in certain situations, the overall problem is more pervasive that the IRS "Global" report suggests. When funding decisions are made, it would do a disservice to taxpayers if Congress were to rely on incomplete data as evidence that identity theft is no longer a serious problem for tax administration.

The IRS Has Adopted a Centralized Approach to Identity Theft Victim Assistance, Including Assignment of a Sole Contact Person for Victims

In addition to improved identity theft filters, the IRS recently overhauled its approach to identity theft victim assistance. In July 2015, the IRS established the IDTVA unit, centralizing victim assistance functions under one umbrella within the Wage and Investment (W&I) division.[10] In this centralized model, there is a core group of employees who receive specialized training in working identity theft cases.

Recently — for cases that do not require interaction with other IRS functions (such as RICS and SP) — IDTVA changed its procedures to designate a single employee as the sole contact person for an identity theft victim, from beginning to end.[11] The IDTVA assistor will provide the taxpayer with his or her name, direct phone extension, and tour of duty.[12] While we applaud the decision to provide a sole contact person — something the National Taxpayer Advocate has recommended since 2012[13] — we urge the IRS to extend this privilege to identity theft victims facing multiple issues and dealing with multiple IRS functions; these are the taxpayers most likely to have their cases fall between the cracks.

Shortly after standup in 2015, IDTVA convened a team (comprised of members from across various IRS organizations, including TAS) to overhaul the identity theft victim assistance procedures. This Identity Theft Re-engineering Team made many recommendations that allow the IRS to provide better service

For cases that do not require interaction with other IRS functions, Identity Theft Victim Assistance changed its procedures to designate a single employee as the sole contact person for an identity theft victim, from beginning to end — something the National Taxpayer Advocate has recommended since 2012.

10 While the IRS centralized most functions under IDTVA, some functions (such as Return Integrity & Compliance Services and Submission Processing) continue to work identity theft cases outside of IDTVA.

11 IRM Exhibit 25.23.4-6, *IDTVA Routing Matrix* (Oct. 1, 2017) ("With IDT, in most cases, there should be one single point of contact for a taxpayer.").

12 IRM 25.23.4.18, *Telephone Contact Procedures for IDTVA Paper Employees Only* (Oct. 27, 2017) ("Upon receiving those calls, the employee should try to answer the taxpayer's questions.... Provide the taxpayer the toll-free number, employee's name extension and Tour of Duty (TOD) when available based on the TP's time zone.").

13 *See* National Taxpayer Advocate 2012 Annual Report to Congress 67.

to victims of identity theft. For example, the team strengthened the global account review procedures to ensure all actions are taken prior to closing an identity theft case. The re-engineering team also expanded the role and scope of the Identity Protection Specialized Unit (IPSU), enabling certain types of identity theft cases to be addressed by IPSU employees. The Taxpayer Protection Program (TPP) End-to-End (E2E) Improvement Team improved the taxpayer's experience by making several process improvements, which includes updating TPP letters to encourage taxpayer response, creating an internal TPP website to shorten average handle time, and improve taxpayer authentication.

One preventive measure the IRS continues to use is the Identity Protection Personal Identification Number (IP PIN). This IP PIN is a unique number assigned to victims of identity theft to use in conjunction with their tax identification number (TIN, usually a Social Security number) when filing tax returns in future years, after their account issues have been fully resolved and their identity and address have been verified. Once the IRS assigns an IP PIN to a taxpayer, it will not accept an e-filed tax return without this IP PIN and paper return processing will be delayed by a manual review to verify the taxpayer's identity. The IRS issued 3.5 million IP PINs for use in the 2017 filing season.[14] Since the IRS began using IP PINs in 2011, it has been a very effective safeguard that prevents fraud from recurring.

Automated Identity Theft Filters Are Still Over-Inclusive

As tax-related identity theft refund fraud schemes become more sophisticated, the IRS continues to evolve its various filters, rules, and data mining models to combat these schemes. For example, the TPP is a process where the IRS uses a series of filters to stop certain tax returns it suspects are filed by an identity thief. TPP filters can be adjusted during the filing season if the data suggests that either the filters are too sensitive or not sensitive enough.[15] The IRS will not issue a refund for a return flagged by the TPP until the taxpayer can verify his or her identity by calling the TPP toll-free phone line and answering certain "high risk authentication" questions.[16]

As of September 30, 1.9 million suspicious tax returns were selected by the TPP identity theft filters in calendar year (CY) 2017.[17] In past years, we have had concerns regarding the high false detection rate.[18] High false detection rates can lead to significant downstream consequences for both the IRS and taxpayers. When legitimate taxpayers are ensnared in an over-reaching IRS fraud detection mechanism, they may experience protracted refund delays as they navigate the authentication processes to prove they are the true tax return filers.

In CY 2016, the false detection rate for TPP identity theft filters was 53 percent, which means that of all returns flagged as potentially fraudulent, more than half turned out to be legitimate.[19] In CY 2017 through September 30, the false detection rate for identity theft filters overall increased to 62 percent.[20]

14 IRM 25.23.2.20, *Identity Protection Personal Identification Number (IP PIN)* (Sept. 15, 2017); IRS, *Global ID Theft Report* (Aug. 2017).

15 IRS response to TAS information request (Nov. 6, 2017).

16 For taxpayers failing oral authentication with a phone assistor or for taxpayers deemed at high risk for identity impersonation (*i.e.*, data breach victims), the only option is to visit a Taxpayer Assistance Center (TAC). IRM 25.25.6.3.2, *Referring the Caller to the Taxpayer Assistance Center (TAC) - Taxpayer Protection Program (TPP) Toll Free Assistors* (July 14, 2017).

17 IRS response to TAS information request (Nov. 6, 2017).

18 National Taxpayer Advocate 2016 Annual Report to Congress 151-60 (Most Serious Problem: *The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*).

19 IRS Wage & Investment Division, *Business Performance Review* 9 (Feb. 9, 2017).

20 *Id.*

In calendar year 2017 through September 30, the false detection rate for identity theft filters overall increased to 62 percent. The IRS asserts that the identity theft filter false detection rate was a result of several large-scale data breach incidents from external organizations, which made it easier for identity thieves to access sensitive taxpayer information and more difficult for the IRS to create filters that can differentiate between legitimate and illegitimate tax returns.

RICS, the function that is in charge of the TPP, asserts that the identity theft filter false detection rate was a result of several large scale data breach incidents from external organizations (see discussion below), which made it easier for identity thieves to access sensitive taxpayer information and more difficult for the IRS to create filters that can differentiate between legitimate and illegitimate tax returns.

The IRS Must Be Nimble As It Counteracts Emerging Identity Theft Schemes, Such As Employer Identity Theft

As the IRS gets more adept at detecting identity theft, fraudsters get more sophisticated in their schemes. The IRS needs the ability to quickly identify and react to new schemes. It cannot afford to let months or even weeks go by without plugging a vulnerability in their filters.

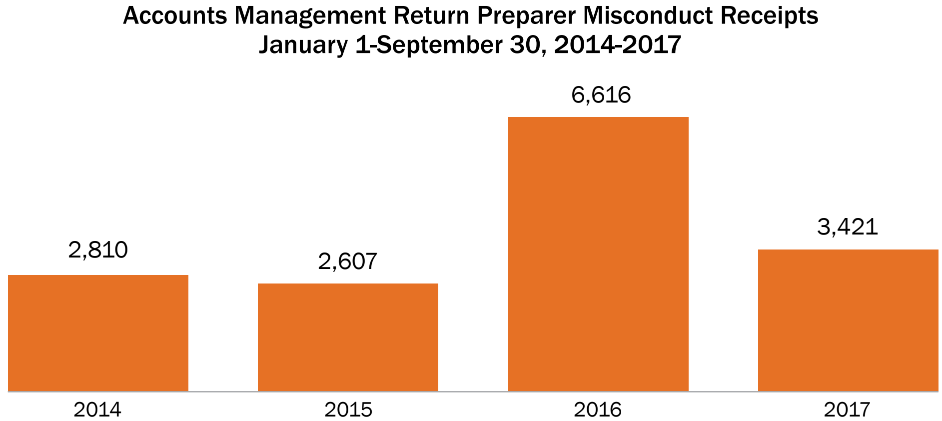
One emerging identity theft scheme involves the reporting of false data that is filed on stolen employer identification numbers (EINs) or tax returns. Criminals have long used stolen EINs to perpetrate tax fraud by creating falsified Forms W-2, *Wage and Tax Statement* or Forms 1099, *Miscellaneous Income*, but in the past couple of years there has been an increase in the filing of fraudulent business tax returns.[21] The IRS is aware of these types of schemes and has created a team to respond to employer identity theft issues.

Return preparer misconduct (RPM) is another type of refund fraud scheme that, like employer identity theft, is likely to bypass traditional identity theft filters because the perpetrator has access to the legitimate filer's tax return information. The IRS began tracking return preparer misconduct cases in 2014.[22] While the raw number of RPM cases may be relatively low, this type of fraud is particularly traumatic because taxpayers are being victimized by people they entrusted with their very personal information.

21 See IRS, FS-2017-10, *Information on Identity Theft for Business, Partnerships and Estate and Trusts* (July 25, 2017).

22 IRM 25.23.2.19.1.2, *TC 971 AC 504 - Miscellaneous Field Code SPCL1, SPCL2, RPM1, RPM2, RPM3, RPM4, and EAFAIL* (Sept. 15, 2017).

FIGURE 1.19.3[23]



Large Scale Data Breaches May Cause a Reversal in the Downward Trend of Identity Theft Case Receipts

The IRS must also develop procedures to assist victims of new schemes in a timely manner. Recent schemes have targeted businesses and other large organizations to gain access to personal information of their employees or customers. For example, the sensitive personal information of over 145 million American consumers was exposed in a data breach at Equifax, one of the nation's three major credit reporting agencies.[24] The IRS must assess how best to assist victims of these large-scale data breaches. With so many taxpayers made vulnerable by having their personal identifying information available to hackers, we can expect that tax-related identity theft will ramp up. Taxpayer personal information may include their full name, Social Security number, address, and even information from their last filed return or Form W-2, *Wage and Tax Statement*.

Given the risk that an identity thief could have full access to an individual's personal information, the IRS may need to reconsider how secure allowing online or phone authentication will be. The IRS will need to consider alternative methods of validating a taxpayer's identity.

In the past, we recommended that the IRS expand the use of IP PINs to allow taxpayers in every state the ability to receive an IP PIN to protect their accounts.[25] There was concern about the cost of administering the IP PIN program (new IP PINs must be generated each year, and phone lines must be staffed to assist the percentage of taxpayers who will invariably misplace the IP PIN) and the IRS did not adopt our recommendation.[26] We recognize that there is a cost to providing an IP PIN, but we also know that there is a considerable cost to **not** protecting taxpayer accounts from fraud.

23 IRS response to TAS information request (Nov. 6, 2017).

24 *See* Equifax, http://www.prnewswire.com/news-releases/equifax-announces-cybersecurity-firm-has-concluded-forensic-investigation-of-cybersecurity-incident-300529345.html.

25 *See* National Taxpayer Advocate 2015 Annual Report to Congress 187.

26 *See* National Taxpayer Advocate 2016 Objectives Report vol. 2, 105 (*IRS Responses and National Taxpayer Advocate's Comments Regarding Most Serious Problems Identified in the 2015 Annual Report to Congress*).

If the IRS finds it too cost-prohibitive to expand the IP PIN program under its current budget constraints, it should explore other ways to fund the cost. When a company is at fault for allowing a large-scale data breach, it often offers to pay for credit monitoring service for impacted individuals. The IRS should enter into similar agreements with these companies and have them pay for the cost of the IRS issuing IP PINs to impacted individuals.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Include identity theft case receipts received IRS-wide — including RICS and SP receipts — in its Global Identity Theft Report.
2. Expand its procedures so that all identity theft victims – including those with multiple tax issues and needing to interact with IRS functions outside of the Identity Theft Victim Assistance function — are assigned a sole contact person to assist them until all identity theft-related issues are resolved.
3. Set a limit of 35 percent for the false detection rate for its Taxpayer Protection Program identity theft filters for 2018 and 20 percent for 2019 and thereafter.
4. Expand the IP PIN program by offering it to all taxpayers to proactively protect their tax accounts against tax related identity theft.
5. Develop procedures to address large scale data breaches while minimizing the burden on victims.

MSP #20 FRAUD DETECTION: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected by These Systems, Resulting in Refund Delays

RESPONSIBLE OFFICIALS

Kenneth Corbin, Commissioner, Wage & Investment Division
John D. (Don) Fort, Chief, Criminal Investigation

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The IRS uses a series of complex screening processes to detect and prevent tax refund fraud.[2] When a return is flagged by the IRS's fraud detection system that scrutinizes returns for characteristics of refund fraud, the refund is held until the information on the return can be verified.[3] Although the IRS fraud detection system identifies illegitimate returns and prevents improper refunds from being issued, it also remains highly inaccurate, which results in unnecessary refund delays and negatively impacts taxpayers' voluntary compliance.

The National Taxpayer Advocate recognizes the need to detect and prevent refunds resulting from fraud or identity theft from being issued. However, TAS remains concerned about taxpayers whose legitimate refunds have been unreasonably delayed by the IRS. The IRS Return Review Program (RRP), the system used to detect fraud, selected 90,410 returns between January 1, 2017 and September 30, 2017, a decrease of about 25 percent from 120,884 returns selected during the same time period in 2016.[4] This may be explained in part by the availability of third-party reporting information (Forms W-2 and Forms 1099-MISC-Nonemployee Compensation) before or on January 31; thus, providing the IRS more time to match the wage and tax information reported on the taxpayer's return against the information

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 The IRS Return Integrity & Compliance Services (RICS) uses the Return Review Program (RRP) to identify returns when it suspects that the return is fraudulent.

3 The IRS has distinct screening processes for identity theft and refund fraud. For purposes of this report, we will refer to refund fraud including certain instances that have elements of identity theft but are processed in the refund fraud units. *See* Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra* MSP 19.

4 IRS response to TAS's information request (Oct. 19, 2017).

Despite the decline in the number of returns selected, the false positive rate went up from 54 percent for January 1, 2016 through September 30, 2016, to 66 percent for the same time period for 2017.

submitted by third parties.[5] Despite the decline in the number of returns selected, the false positive rate (FPR) went up from 54 percent for January 1, 2016 through September 30, 2016, to 66 percent for the same time period for 2017.[6]

Over the past 14 years, the National Taxpayer Advocate has consistently advocated for taxpayers whose legitimate refunds have been unreasonably delayed by the IRS, and recommended improvements to reduce taxpayer burden while preventing refund fraud.[7] Despite some improvements to the IRS's fraud detection system, the following issues remain:

- Many legitimate returns are improperly selected as possibly fraudulent because fraud detection filters are too broad, lack exactness, and are not adjusted during filing season despite the functionality to do so. The IRS has worked with other agencies to establish best practices for preventing and detecting fraud, but could benefit from broadening the types of partners it collaborates with.
- Improperly selected returns caused tens of thousands of refunds to be delayed for up to 11 weeks. TAS Research and Analysis analyzed tax year 2016 cases from the 2017 filing season, the latest data available. The analysis shows the IRS's pre-refund Income Wage Verification (IWV) Program selected approximately 65,700 tax returns where taxpayers ultimately received their refunds, but the refunds of more than 37 percent, or approximately 24,400 taxpayers, were delayed 11 weeks or beyond.[8]
- Since 2014, about 24,000 refunds were held where refund fraud was suspected and a notice of disallowance was sent to the taxpayer.[9] These refunds were held for months — and in some

5 IRS response to TAS information request (Oct. 19, 2017). Section 201 of the Protecting Americans From Tax Hikes (PATH) Act of 2015 amended IRC § 6071 to require that certain information returns be filed by January 31, generally the same date as the due date for employee and payee statements, and are no longer eligible for the extended filing date for electronically filed returns under IRC § 6071(b). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 201 (2015).

6 A false positive occurs when a system selects a legitimate return and delays the refund past the prescribed review period. IRS response to TAS information request (Oct. 19, 2017). The IRS commonly refers to this as a "false detection rate" (FDR); however, throughout this Most Serious Problem, we will be using the term "false positive rate" (FPR). IRS response to TAS fact check (Dec. 26, 2017).

7 *See, e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress, 45-55, 180-87; National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, 44-90; National Taxpayer Advocate 2013 Annual Report to Congress 75-83; National Taxpayer Advocate 2012 Annual Report to Congress 42-67, 95-110; National Taxpayer Advocate 2011 Annual Report to Congress 48-73; National Taxpayer Advocate 2009 Annual Report to Congress 307-17; National Taxpayer Advocate 2008 Annual Report to Congress 79-94; National Taxpayer Advocate 2007 Annual Report to Congress 96-115; National Taxpayer Advocate 2005 Annual Report to Congress 25-54, 180-91; National Taxpayer Advocate 2004 Annual Report to Congress 133-36; and National Taxpayer Advocate 2003 Annual Report to Congress 175-81.

8 TAS Research and Analysis, IRS Compliance Data Warehouse (CDW), Individual Master File (IMF) Transaction History Table and Individual Returns Transaction File Table for tax module 2016. *See also* footnote 30, *infra*.

9 TAS Research and Analysis, IRS CDW, IMF Transaction History Table, Individual Returns Transaction File Table and Notice Delivery System Notice Table for Calendar Years (CYs) 2014-2017. *See also* footnote 31, *infra*.

cases, even years — before the notice of disallowance was issued to the taxpayer.[10] On average, the notice of disallowance was sent to the taxpayer about 31 weeks after the refund was held by the IWV Program.[11] Further, since 2014, about 5,800 refunds have been held and no notice of disallowance has ever been issued to the taxpayer.[12]

- Legitimate taxpayers who get entangled in the IRS refund fraud filters are subjected to poor customer service. For example, when the taxpayer reaches an IRS employee to inquire about his or her refund, he or she will find the customer service representative (CSR) does not have access to the case history which is stored on the IRS's Electronic Fraud Detection System (EFDS), and therefore cannot give specific responses to taxpayer inquiries.[13]

ANALYSIS OF PROBLEM

Background

In an effort to combat refund fraud, the IRS uses pre-refund IWV to freeze a taxpayer's refund when it detects potentially false income or withholding. The Return Integrity & Compliance Services (RICS) Integrity & Verification Operation (IVO) — a part of the Wage and Investment (W&I) Division — uses data mining models and manual reviews to identify potentially false returns, usually through income documents reported by third parties.[14] The system that is primarily used for detecting possible refund fraud is the RRP.[15]

The IRS's EFDS was previously used to detect possible refund fraud. However, for over a decade the IRS has been attempting to retire this system because of its limitations and it is now largely used as a case management system.[16] The retirement of EFDS for detecting possible refund fraud and the implementation of RRP has allowed the IRS to modernize its fraud detection program by enhancing its ability to create custom inquiries and modify models, which should improve stability if all the capabilities of the RRP system are properly used.

The IRS has taken other steps to improve its fraud detection and prevention, including:

- establishing the Security Summit to collaborate with other government agencies and the private sector to identify the best techniques to detect, prevent, and anticipate identity theft fraud activity; and
- comparing third-party documentation prior to releasing a refund, ensuring the information matches what is reported on the return.

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10 The IRS uses different types of notices, some of which are required by statute, to tell taxpayers their claims are disallowed. If the IRS disallows any portion of a claim for refund or credit of an overpayment, IRC § 6532(a) requires it to mail to the taxpayer, by certified or registered mail, a notice of claim disallowance in order to commence the two-year statute of limitations on filing suit to challenge the disallowance in a United States District Court or the Court of Federal Claims. For more information on notices of disallowance, see National Taxpayer Advocate 2014 Annual Report to Congress, 172-84 (Most Serious Problem: *Notices: Refund Disallowance Notices Do Not Provide Adequate Explanations*).

11 TAS Research and Analysis, IRS CDW, IMF Transaction History Table, Individual Returns Transaction File Table and Notice Delivery System Notice Table for CYs 2014-2017. *See also* footnote 31, *infra*.

12 *Id.*

13 Internal Revenue Manual (IRM) 21.5.6.4.35.3 (Oct. 1, 2015).

14 IRM 25.25.1.1(1), *Revenue Protection, Return Integrity and Verification Revenue Protection Programs, Overview* (Feb.19, 2015); IRM 25.25.2.1(1), *Program Scope and Objectives* (Mar. 29, 2017).

15 IRM 25.25.2.1(1) (Mar. 29, 2017).

16 Wage and Investment (W&I), *Business Performance Review (BPR)* 21 (May 11, 2017). Currently, the IRS's RRP program is the system used for detecting possible fraudulent returns.

TAS's inventory of IVO cases indicates that taxpayers come to TAS more often for pre-refund wage verification than for any other issue except identity theft. For Fiscal Year (FY) 2017, TAS closed 20,238 IVO cases and of those, 77 percent received full or partial relief.[17]

Despite Improvements to Its Fraud Detection System, the IRS's Processes for Revising Filters Do Not Sufficiently Minimize Harm to Legitimate Taxpayers

The IRS has accepted high FPRs of 50 percent or more, rather than leveraging the full capacity of its fraud detection system. In October 2016, the case selection functionality of EFDS was replaced by the RRP, which is a real-time application, and has the flexibility to allow the IRS to adjust filters virtually in real-time. Changes to the filters that do not require new code to be written can typically be implemented within 48 hours from the time the change was approved. Changes that require new code to be written typically take up to three weeks.[18] Notably, the IRS did not make any fraud filter changes between January 1, 2017 and September 30, 2017.[19]

In contrast, fraud detection systems used by tax administration agencies in several states are nimble and are regularly adjusted. For example, the Iowa Department of Revenue (DOR) has developed a fraud detection system with filters and models that are adjusted spontaneously, even in the midst of the filing season.[20] The Maryland DOR introduced a new set of algorithms that proved successful in identifying 65 to 70 percent of fraudulent returns last year — a significant increase from the 55 percent success rate in 2015.[21] The success was largely due to shifting from an algorithm that proved too far-reaching and overwhelmed fraud analysts to a more narrow and refined model that could better zero in on instances of fraud.[22]

> **The IRS has accepted high false positive rates of 50 percent or more, rather than leveraging the full capacity of its fraud detection system.**

The IRS Has Worked With Other Agencies to Establish Best Practices for Preventing and Detecting Refund Fraud, But Should Expand the Types of Agencies It Consults With

In recognition of escalating challenges related to identity (ID) theft refund fraud, the Commissioner of Internal Revenue convened a Security Summit meeting in Washington, D.C. on March 19, 2015. IRS officials and state tax administrators came together with the chief executive officers of the leading tax preparation firms, software developers, and payroll and tax financial product processors, to discuss common challenges and ways to leverage collective resources and efforts.

17 Data obtained from Taxpayer Advocate Management System (TAMIS) (Oct. 1, 2017).

18 IRS response to TAS information request (May 23, 2017).

19 IRS response to TAS information request (Oct. 19, 2017). The IRS does have an annual meeting prior to the upcoming filing season in which it reviews prior year filters and discusses possible modifications to the filters for the upcoming filing season.

20 Meeting between TAS, Joshua R. Beck, Senior Advisor to the Executive Director of Systemic Advocacy, and Iowa Department of Revenue, Courtney M. Kay-Decker, Director (Aug. 29, 2017).

21 Juliet Van Wagenen, *How States are Using Tech to Stop Tax Fraud*, Statetech Magazine (March 24, 2017), https://statetechmagazine.com/article/2017/03/how-states-are-using-tech-spot-tax-fraud.

22 *Id.*

Although the Security Summit is primarily focused on ID theft, it is concerned with reducing refund fraud generally. The National Taxpayer Advocate, along with the Electronic Tax Administration Advisory Committee (ETAAC), recommended that the Security Summit broaden the types of partners to include entities from:

- the financial sector;
- the banking sector;
- the commercial sector; and
- the consumer and privacy advocate sectors.[23]

Expanding the Security Summit to include these partners will ensure it is aware of the most advanced tactics being used to detect and prevent ID theft and fraud in all sectors. Further, the Security Summit should consider amending its charter to reflect its interest in reducing all refund fraud and not just ID theft related refund fraud.

The IRS's Fraud Detection System Still Has a High False Positive Rate (FPR) and a Number of Legitimate Refunds Are Delayed for an Excessive Period of Time

The National Taxpayer Advocate is pleased that the IRS is now conducting monthly tracking of FPRs, and has decided to reverse its earlier position and set aspirational FPR goals for both its ID theft and refund fraud filters.[24] The IRS has set an FPR goal for its ID theft filters of 50 percent, but has not yet set any goals for its refund fraud filters, stating that it is waiting for a full year of data from its RRP

When and if the IRS does set goals for its non-ID theft filters, it should consider a more ambitious goal than the 50 percent false positive rate set for its identity theft filters.

23 *See* National Taxpayer Advocate 2016 Annual Report to Congress 151-60 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*); Electronic Tax Administration Advisory Committee (ETAAC) 2017 Annual Report to Congress (June 2017), https://www.irs.gov/pub/irs-pdf/p3415.pdf. *See also* National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress, vol. 2, 82. Security Summit's efforts were institutionalized through the auspices of the ETAAC in 2016 when an amendment to ETAAC's charter expanded its scope to include identity theft. On an ongoing basis, ETAAC engages with the Security Summit through the attendance and participation of its members in work group activities. Additionally, ETAAC members proactively engage with Security Summit work group co-leads to keep abreast of Security Summit initiatives and Identity Theft Tax Refund Fraud (IDTTRF) developments.

24 The National Taxpayer Advocate recommended establishing target false positive rates for each process and filter. National Taxpayer Advocate 2015 Annual Report to Congress 45-55. The IRS did not initially adopt this recommendation: "The establishment of precise target false detection rates per Fraud Model ("Non-Identity Theft Model") would be challenging to implement because specific FDR are typically not available until several months into the filing season." National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress, vol. 2, 18, 20 (*IRS Responses and National Taxpayer Advocate's Comments Regarding Most Serious Problems Identified in the 2015 Annual Report to Congress*). However, the IRS reversed course in 2017: "The FDR goal for the 2017 processing year is 49% for the identity theft (IDT) filters. Due to a change from moving non-IDT filters from the Electronic Fraud Detection System (EFDS) to the Return Review Program (RRP), we are base lining the FDR for non-IDT for 2017." National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress, vol. 2, 78-81 (*IRS Responses and National Taxpayer Advocate's Comments Regarding Most Serious Problems Identified in the 2015 Annual Report to Congress*).

system from which it will base its goal.[25] When and if the IRS does set goals for its non-ID theft filters, it should consider a more ambitious goal than the 50 percent FPR set for its ID theft filters.[26]

As stated above, FPRs for fraud detection rose from 54 to 66 percent for the period from January 1, 2017 through September 30, 2017, compared to the same period in 2016.[27] This means that 66 percent or about 60,000 out of the 90,410 returns selected by the system were legitimate returns.[28] Despite the RRP selecting two thirds of its IWV inventory in error, the IRS RRP monthly report stated, "All Filters are operating as expected; No filter changes are recommended at this time."[29]

High FPRs result in many legitimate taxpayers having their refunds held unnecessarily. As noted earlier, TAS Research analyzed tax year 2016 returns from the 2017 filing season, the latest data available. Of the about 65,700 returns selected for IVO review in which taxpayers ultimately received their refunds, nearly 63 percent took ten or fewer weeks to process, but about 37 percent of these refunds were held 11 weeks or longer.[30] Prior to October 2015, the IRS was required to take action, such as manually freezing or releasing a refund, if it was to hold refunds beyond 11 weeks. However, after October 2015, the IRS changed its policy, holding all refunds indefinitely until a determination is made.

Despite the Return Review Program selecting two thirds of its Income Wage Verification inventory in error, the IRS Return Review Program monthly report stated, "All Filters are operating as expected; No filter changes are recommended at this time."

The IRS Holds Refunds for Months Before Issuing a Notice of Disallowance, and in Some Cases, a Notice of Disallowance Has Never Been Issued

Since 2014 through September 30, 2017, the IRS held about 24,000 refunds for which a notice of disallowance was sent to the taxpayer on average 31 weeks after the return was selected by the IWV program (this is about 20 weeks beyond an 11-week time period in which the IRS previously had to

25 National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress, vol. 2, 82.

26 *See Id.*

27 IRS response to TAS information request (Oct. 19, 2017).

28 *Id.*

29 IRS, Identify Theft (IDT) & Integrity & Verification Operation (IVO) Selections Performance Report, PowerPoint slide 5, (Sept. 6, 2017).

30 TAS Research and Analysis, IRS CDW IMF Transaction History Table and Individual Returns Transaction File Table for tax module 2016. The computation of these numbers is based on a population of IVO returns that were identified by having an initial IVO posting transaction code and action code and having a refund due. Then these returns were filtered to exclude any returns with reversed credit for withheld taxes, any returns with additional tax assessment or carryback allowance or carryback disallowance, any returns with overpayment interest transfer, and any returns with posted duplicate return or posted amended return, posted consolidated generated amended return, late reply, or Department of Labor referral.

Holding refunds for an extended period of time before sending a notice of disallowance, or holding the refund and never sending a notice of disallowance, resembles the practices under the highly criticized IRS Questionable Refund Program and raises significant taxpayer rights and due process concerns.

either release the refund or take action on the return).[31] For about 5,800 refunds held during the same period the IRS has not yet issued a notice of disallowance.[32] Holding refunds for an extended period of time before sending a notice of disallowance, or holding the refund and never sending a notice of disallowance, resembles the practices under the highly criticized IRS Questionable Refund Program (QRP) and raises significant taxpayer rights and due process concerns.[33] To avoid the problems experienced as a result of the QRP, it is essential that the IRS reinstate the 11-week limitation on holding refunds, which required the IRS to either release the refund after 11 weeks or take action on it.[34] This would properly observe the taxpayer's *right to finality* and the taxpayer's *right to challenge the IRS's position and be heard*.

Legitimate Taxpayers Who Get Entangled in the IRS Refund Fraud Filters Are Subjected to Poor Customer Service

Nearly sixty thousand taxpayers with legitimate returns who ultimately received their refunds were subjected to a frustrating and often elusive process when attempting to determine the cause of their refund delay.[35] If the IRS is scrutinizing the return for possible refund fraud, the taxpayer will be instructed to contact the IRS's general Accounts Management (AM) Customer Service line, which did not answer about one out of every four calls during FY 2017.[36]

When taxpayers reach a CSR, he or she will find the CSR does not have access to the case history which is stored on the IRS's EFDS system, and therefore cannot give specific responses to taxpayer inquiries.[37] CSRs take down information and refer it to the IWV group in IVO. IVO, however, does not call back

31 TAS Research and Analysis, IRS CDW, IMF Transaction History Table, Individual Returns Transaction File Table and Notice Delivery System Notice Table for CYs 2014-2017. The computation of these numbers is based on a population of IVO returns that were identified by having an initial IVO posting transaction code and action code and having a refund due and a subsequent posting of transaction code and action code for identified to meet OMM criteria or identified to be potentially fraudulent or identified to need additional time to complete the review. These returns were filtered to exclude any returns receiving refunds, any returns with additional tax assessment or carryback allowance or carryback disallowance, and any returns with posted duplicate return or posted amended return, posted consolidated generated amended return, late reply, or Department of Labor referral. These filtered returns were matched to the notice file with disallowance letters and any unmatched returns were excluded. Weeks of delay measured from date of initial IVO posting transaction code and action code to date of disallowance letter.

32 TAS Research and Analysis, IRS CDW IMF Transaction History Table, Individual Returns Transaction File Table and Notice Delivery System Notice Table for CYs 2014-2017. *See also* footnote 31, *supra*.

33 National Taxpayer Advocate 2005 Annual Report to Congress 25-54.

34 IRM 25.25.11.2, *Wage/Withholding Only (WOW) (Notice CP05A) Overview* (Oct. 10, 2017). The IRS may send the taxpayer a notice requesting additional information regarding their withholdings. However, this notice is not necessarily sent within an 11-week time period from when the return was selected by the Income Wage Verification (IWV) Program, and does not provide any information regarding the taxpayer's right to file a refund suit in federal court.

35 IRS response to TAS information request (Oct. 19, 2017).

36 W&I, *BPR* (Nov. 9, 2017).

37 IRM 21.5.6.4.35.3 (Oct. 1, 2015).

or correspond with a taxpayer based on the referral from a CSR. If the information forwarded by the CSR is not verifiable, IVO will simply close out the referral on an Account Management Services (AMS) application, without contacting the taxpayer.[38] If a taxpayer tries to get information from the "Where's My Refund" application, he or she will receive a generic message prompting a call to the IRS. As we previously recommended, the IRS should establish a direct line to reach IVO so that affected taxpayers can resolve refund issues with an employee knowledgeable of his or her return issues. This would decrease resolution time and save resources downstream since the taxpayer would not need to call the general AM line.

CONCLUSION

The National Taxpayer Advocate recognizes the need to detect and prevent refunds resulting from fraud from being issued, and acknowledges the important steps the IRS has taken to improve its fraud detection program. However, reducing fraud must be accomplished while respecting and protecting the taxpayer's right to *a fair and just tax system*. This means the IRS is obligated to design and implement systems that impact as few legitimate taxpayers as possible and allow legitimate taxpayers to reach an IRS employee to resolve any discrepancies, thereby avoiding unnecessary and prolonged refund delays.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Expand the Security Summit by including participants from the financial sector, the banking sector, the commercial sector, and consumer and privacy advocate sectors.
2. Revise the Security Summit's charter to broaden its scope to include non-identity theft refund fraud.
3. Reinstate the 11-week process thereby requiring the IRS to either release the refund or to take some other action on the account, such as requesting additional information from the taxpayer or sending a notice of disallowance.
4. Establish a direct phone line to the IVO unit and provide information via "Where is my Refund" application to those taxpayers whose refunds are held because of suspected fraud.

38 IVO does not correspond with a taxpayer based on a referral from a customer service representative (CSR). To the contrary, if it is just a refund status inquiry not associated with any verifiable information, IVO employees will just close out the referral on Account Management Services (AMS). IRM 25.25.5.2 (May 17, 2016); IRM 25.25.5.4 (Dec. 10, 2015); IRM 25.25.5.4.1 (May 17, 2016).

MSP #21 REFUND ANTICIPATION LOANS: Increased Demand for Refund Anticipation Loans Coincides with Delays in the Issuance of Refunds

RESPONSIBLE OFFICIALS

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John D. (Don) Fort, Chief, Criminal Investigation

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Retain Representation*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Demand for refund anticipation loans (RALs) has more than tripled over the past year.[2] Over 90 percent of the returns filed with RAL indicators were filed by February 15.[3] This substantial increase in demand coincides with the effective date of the provision in Internal Revenue Code (IRC) § 201 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act) that requires the IRS to hold all refunds that include Earned Income Tax Credit (EITC) and Additional Child Tax Credit (ACTC) until February 15.[4] While the IRS is statutorily required to delay refund issuance, such delay improves tax administration by allowing the IRS to match return information with information reporting documents. However, in the process, taxpayers are absorbing the costs of these short-term loans and, in many cases, they might not even realize the true cost due to the hidden nature of the indirect fees.[5]

ANALYSIS OF PROBLEM

Background

The Demand for Refund Anticipation Loans

Taxpayers have various refund delivery options, of which the most popular is direct deposit into the taxpayer's bank account. Eight out of ten refunds are delivered through direct deposit, which is a no

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 As of May 23, 2017, the IRS accepted over 1.7 million returns with refund anticipation loan (RAL) indicators, up from 468,330 in the same time period in 2016. Returns with refund anticipation check (RAC) indicators decreased during this period with about 21.5 million in 2016 and over 20.2 million in 2017. IRS, *Daily E-File at a Glance*, U.S. Totals for Individual Returns, Nationwide (May 24, 2017).

3 IRS, *Daily E-File at a Glance*, U.S. Totals for Individual Returns, Nationwide (Feb. 15, 2017). As of February 15, 2017, the IRS accepted over 1.56 million returns with RAL indicators, up from 437,245 in the same time period in 2016. Therefore, approximately 90 percent of the total 1.7 million RAL returns filed (as of Aug. 23, 2017) were filed by Feb. 15, 2017.

4 Protecting Americans from Tax Hikes Act of 2015 (the PATH Act), enacted as part of the Consolidated Appropriations Act, 2016, Division Q, Pub. L. No. 114–113, 129 Stat. 2242 (Dec. 18, 2015); *See, e.g.*, Jackson Hewitt, *How Fast Will You Get Your Tax Refund This Year?*, https://www.jacksonhewitt.com/Resource-Center/Your-Tax-Refund/ (last visited Sept. 8, 2017).

5 Chi Chi Wu (National Consumer Law Center) and Michael Best (Consumer Federation of America), *Big Changes Burden Taxpayers: New Law Delays Refunds, Drives Demand for Loans; Immigrant Taxpayers Face Challenges* 3-4 (Mar. 2017).

Demand for refund anticipation loans (RALs) has more than tripled over the past year. Over 90 percent of the returns filed with RAL indicators were filed by February 15.

cost option. When combined with e-filing, this method is the quickest way for taxpayers to receive refunds, with more than nine out of ten direct deposit refunds delivered within 21 days.[6] However, direct deposit is not available to unbanked taxpayers.[7] Unbanked taxpayers can choose to receive a paper check, which takes up to six weeks and may involve check cashing fees, or purchase a commercial product that may reduce the wait but typically involves high fees. Such commercial products include RALs, refund anticipation checks (RACs and also known as refund transfers), and debit cards.[8] These products also provide a mechanism by which the taxpayer can pay tax preparation fees with the anticipated tax refund.[9]

RALs are short term interest-bearing loans secured by the taxpayer's expected refund. The loans are made by financial institutions, facilitated by tax preparers and tax preparation software, and enable taxpayers to receive advances of a portion of their refund (typically an amount up to $1,300). The taxpayer contracts with the financial institution for the loan and receives the funds a day or two after applying. The refund is then sent to an account held by the financial institution, which offsets the refund with the amount of the loan, and then disburses the remaining balance, if any, to the taxpayer.[10]

The History of Refund Anticipation Loans

RALs were introduced in the tax preparation market in 1987. In 2000, the IRS instated the Debt Indicator (DI) to provide information on refund offsets.[11] The National Taxpayer Advocate has raised

6 IRS, *Direct Deposit Your Refund* (Mar. 27, 2017). As of Aug. 18, 2017, almost 88 million refunds were delivered by direct deposit out of a total of over 108 million refunds issued to individual taxpayers. The number of direct deposit refunds increased by one percent from the same time in 2016. *IRS Filing Season Statistics*, Cumulative Individual Income Tax Returns, (Aug. 18, 2017).

7 Unbanked taxpayers are taxpayers with no bank accounts.

8 RALs are loans secured by a taxpayer's anticipated tax refund. RACs are temporary bank accounts established on behalf of a taxpayer into which the IRS can direct deposit a refund and out of which a bank typically issues a payment to the taxpayer. For more information on RALs and RACs, see National Taxpayer Advocate Fiscal Year 2007 Objectives Report to Congress, vol. 2, 2-18 (Study: *The Role of the IRS In the Refund Anticipation Loan Industry*). In addition, some financial institutions offer pay stub loans, also known as holiday loans, in which the tax preparer prepares an estimated return based on the last pay stub, because the taxpayer does not yet have a W-2. The lender advances a small portion of the refund with the pay stub loan and the remainder of the refund is available after the preparer prepares and files the return once the W-2 is available. The IRS does not track pay stub loans specifically. However, it is possible that these loans are included in the RAL data because the tax return would likely list the taxpayer's temporary bank account associated with these loans. An example of a pay stub loan is the Express Refund Advance by MetaBank. *See* https://www.jacksonhewitt.com/file-taxes-last-pay-stub/ (last visited on Nov. 14, 2017).

9 Urban Institute and Internal Revenue Service, *Characteristics of Users of Refund Anticipation Loans and Refund Anticipation Checks* 33 (2010); IRS Working Group on Refund Anticipation Loans and Other Refund Settlement Products, *Background Information* 8 (Mar. 2010).

10 *See* Urban Institute and Internal Revenue Service, *Characteristics of Users of Refund Anticipation Loans and Refund Anticipation Checks* (2010); Karen Masken, Mark Mazur, Joanne Meikle, and Roy Nord, IRS Office of Research, Analysis, and Statistics, *Do Products Offering Expedited Refunds Increase Tax Compliance?* (Nov. 2007).

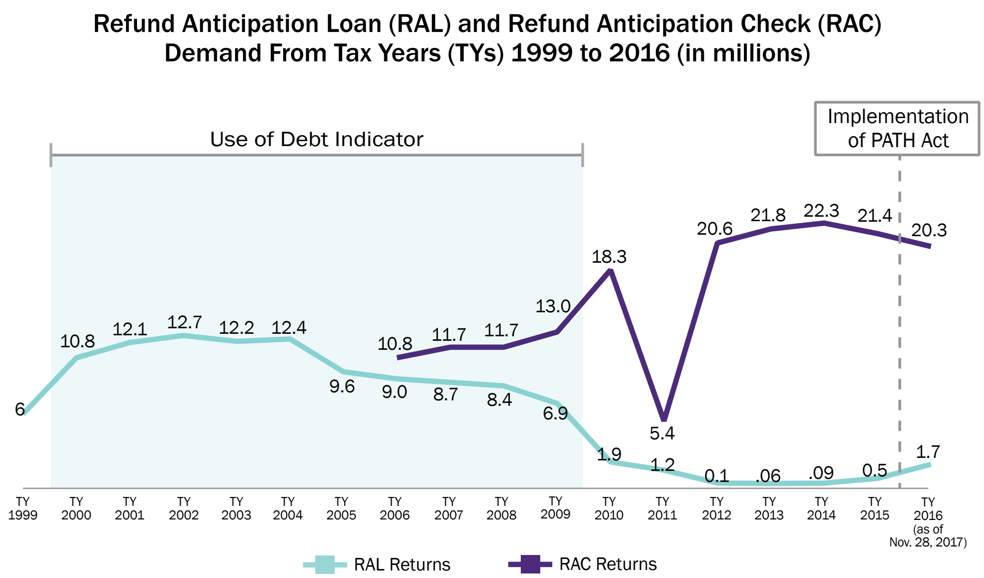
11 The Debt Indicator (DI) was used as an underwriting tool for RALs. The DI was included in the acknowledge file for electronically filed returns and indicated whether the individual taxpayer would have any portion of the refund offset for delinquent tax or other debts, such as unpaid child support or delinquent federally funded student loans. RAL lenders used the DI to gauge whether the taxpayer's entire anticipated refund would be released by the IRS. IRS, *IRS Removes Debt Indicator for 2011 Tax Filing Season*, IR-2010-89 (Aug. 5, 2010); Urban Institute and Internal Revenue Service, *Characteristics of Users of Refund Anticipation Loans and Refund Anticipation Checks* 12 (2010).

concerns about the high costs as well as compliance risks associated with these products since 2005.[12] The IRS stopped providing the DI to the financial institutions beginning in Filing Season (FS) 2011 and, as a result, most banks exited the RAL market by 2012.

A Spike in RAL Demand Coincides with the Effective Date of the PATH Act

Beginning in FS 2017, RALs have reemerged in the refund product market. The increase in demand coincided with the effective date of the provisions in the PATH Act preventing the IRS to release EITC or ACTC refunds before February 15.[13] The demand for RALs spiked significantly in FS 2017.[14] The chart below shows the demand for RALs and RACs from Tax Year (TY) 1999 to 2016.

FIGURE 1.21.1[15]



12 National Taxpayer Advocate 2011 Annual Report to Congress 404-419; National Taxpayer Advocate 2008 Annual Report to Congress 427; National Taxpayer Advocate Fiscal Year 2007 Objectives Report to Congress, *The Role of the IRS in the Refund Anticipation Loan Industry, Vol. II* (June 30, 2006); *Tax Return Preparation Options for Taxpayers: Hearing Before S. Comm. On Finance*, 109th Cong. (Apr. 4, 2006) 1-5 (statement of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2005 Annual Report to Congress 162-79; *Fraud in Income Tax Return Preparation: Hearing Before Subcomm. on Oversight, H. Comm. on Ways & Means*, 109th Cong. (July 20, 2005) (statement of Nina E. Olson, National Taxpayer Advocate).

13 To address the EITC improper payment rate, Congress included a directive in the PATH Act that requires the IRS to delay payment of any refund that includes the EITC or the refundable portion of the Child Tax Credit (CTC) until February 15 of each filing year. The freeze on refunds involving EITC or the refundable portion of the CTC applies to refunds made after December 31, 2016. Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113, Division Q, Title II, § 201(b), 129 Stat. 2242, 3076 (2015) (codified at IRC § 6402(m)).

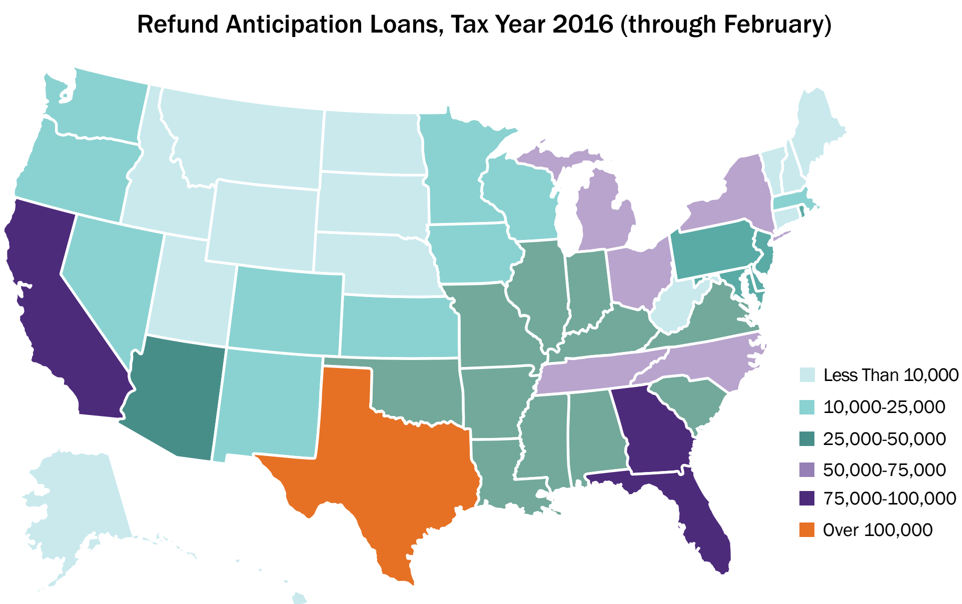
14 IRS, *IRS Removes Debt Indicator for 2011 Tax Filing Season*, IR-2010-89 (Aug. 5, 2010); Chi Chi Wu and Chantal Hernandez, National Consumer Law Center, *Minefield of Risks: Taxpayers Face Perils from Unregulated Preparers, Lack of Fee Disclosure, and Tax-Time Financial Products* 7 (Mar. 2016).

15 Counts from Urban Institute and Internal Revenue Service, *Characteristics of Users of Refund Anticipation Loans and Refund Anticipation Checks* (2010) for tax years 1999 through 2007 and from Compliance Data Warehouse (CDW) for tax years 2008 through 2016 (as of Aug. 29, 2017). The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

There was a 72 percent *decrease* in demand after TY 2009 when the IRS discontinued the DI and a significant *increase* in demand during FS 2017. More importantly, 90 percent of returns filed with RAL indicators were filed on or before February 15.[16] This substantial increase in demand coincides with the effective date of the provision in the PATH Act requiring the IRS to delay the issuance of refunds with EITC and ACTC until February 15.[17] Taxpayers who are facing financial hardship and need the money before February 15 to pay bills may be willing to incur the additional costs.

The map below illustrates the number of RAL filers across the continental United States.

FIGURE 1.21.2, TY 2016 RAL Filings Through Feb. 15, 2017



Texas had the most filings, with approximately 156,000 RAL returns, or 10.6 percent of the total, almost twice that of Florida and California. Larger representation was also noted for states such as Georgia, North Carolina and Ohio.[18]

The Compliance Risk Associated with RALs

The National Taxpayer Advocate is particularly concerned about the rate of noncompliance for returns with RALs. For filings through February 15, 2017, 83 percent included EITC claims and the median Adjusted Gross Income (AGI) was $20,600 (average AGI was $24,800).[19] The following chart provides the number of RAL returns in which the taxpayer received their expected refund, less than

16 IRS, *Daily E-File at a Glance*, U.S. Totals for Individual Returns, Nationwide (Feb. 15, 2017).

17 *See, e.g.*, Jackson Hewitt, *How Fast Will You Get Your Tax Refund This Year?*, https://www.jacksonhewitt.com/Resource-Center/Your-Tax-Refund/ (last visited Sept. 8, 2017).

18 State counts of RAL filings are from IRS, CDW, Individual Returns Transaction File (IRTF), Form 1040. Data represents tax year 2016 returns filed with a RAL indicator through February 15. The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

19 EITC, Adjusted Gross Income (AGI) and RAL counts are from IRS, CDW, IRTF, Form 1040. Data represents tax year 2016 returns filed with a RAL indicator through February 15. The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

the anticipated refund, or no refund. The chart also indicates if the refund was subject to an offset (indicating either no offset, partial offset of the refund, or full offset of the refund). In the chart, when a TY 2016 refund is offset either partially or fully in FS 2017, it is used to repay a federal tax debt from a prior tax year.[20] Therefore, an offset, whether partial or full, that occurs in FS 2017 does not indicate TY 2016 noncompliance.

FIGURE 1.21.3, FS 2017 RAL Return Refunds, Filed by Feb. 15, 2017 (counts rounded to nearest hundred)[21]

Refund Status	Count	No Offset	Partial Offset	Full Offset
Expected Refund Received	1,398,000			
Percent of Total	95.3%			
Less Refund Received	54,900	7,900	47,000	
Percent of Total	3.7%	0.5%	3.2%	
No Refund Received	13,300	5,000	400	7,800
Percent of Total	0.9%	0.3%	0.03%	0.5%
Total	**1,466,200**			

Therefore, the above chart indicates that the IRS did not issue the entire claimed refund for reasons other than refund offsets on less than one percent of the RAL returns. A subset of this population was subject to a refund hold due to issues including Income Wage Verification, Taxpayer Protection Program Identity Theft filters and similar programs. The following chart illustrates the number of RAL returns filed during FS 2017 with refund holds, also indicating whether or not the refund was subject to offset:

FIGURE 1.21.4, FS 2017 Refund Holds for RAL Returns (counts rounded to nearest hundred)[22]

Refund Status	Count	No Offset	Partial Offset	Full Offset
Less Refund Received	2,300	1,000	1,300	
No Refund Received	4,000	3,600	100	300
Total	**6,300**			
Percent of Total RALs	**0.4%**			

20 Internal Revenue Manual (IRM) 21.4.6.2, *What is a Refund Offset* (Sept. 22, 2017). IRC § 6402 provides authority for the Treasury Secretary to apply a taxpayer's refund to any outstanding federal tax debt, child support obligation, other federal agency debt, state income tax debt, or unemployment compensation debt prior to crediting the overpayment to a future tax year or issuing a refund. The offsets in the chart only include offsets for past due federal tax debts.

21 IRS, CDW, IRTF, Form 1040, and Individual Master File (IMF) Transaction History for individuals filing returns through Feb. 15, 2017 for the tax year ending Dec. 31, 2016. Totals were compiled for returns with a RAL indicator. The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

22 IRS, CDW, IRTF, Form 1040, and IMF Transaction History for individuals filing returns through Feb. 15, 2017 for the tax year ending Dec. 31, 2016. Totals were compiled for returns with a RAL indicator and for all returns. The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

While the initial noncompliance rate for RAL returns appears low, it is higher than the rate for overall individual returns filed in the same time period.[23] The Taxpayer Advocate Service will evaluate the compliance rates of RAL returns into the future as awareness of and demand for the product continues to increase. Our concern stems from past noncompliance associated with these products. For example, a 2007 study conducted by IRS Research found a significant correlation between taxpayers using RALs and noncompliance. In fact, the study found that RAL users are 27 percent to 36 percent more noncompliant than taxpayers who do not use a bank product.[24]

Taxpayers Still Pay for "No-Fee RALs"

In the wake of the PATH Act, some lenders are now offering "no-fee" RALs.[25] For FS 2017, the loans were limited to amounts up to $1,300, depending on the lender. With no-fee RALs, the taxpayer does not directly pay a fee or incur any interest charges for the loan. The preparer pays the loan fee to the financial institution.[26] The no-fee RAL differs from those offered in the past as they are now nonrecourse loans, meaning that the taxpayer is not liable if the IRS does not release the entire anticipated refund in a timely manner.[27] In addition, at least one of the lenders provided that there is no negative credit reporting of the taxpayer in such a case.[28] On its face, it appears that the financial institution takes the greatest risk with this new refund product. However, the taxpayer does not necessarily walk away from the deal without any consequences if the IRS fails to release part or all of the refund, because the taxpayer may be subject to taxation on cancellation of debt income.[29]

While the taxpayer does not directly pay any fees when purchasing a no-fee RAL, it is inevitable that the banks and preparers are recouping the costs indirectly. Banks often charge preparers a fee for the RAL. In addition, banks can also recoup the costs of providing RALs through indirect means. For example, during FS 2017, River City Bank required RAL customers to also purchase a RAC (also known as a refund transfer) at a cost of $44.95. If the taxpayer decided against purchasing a RAL and only

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23 While approximately 95 percent of all RAL returns received their expected refund, 96 percent of all individual TY 2016 returns filed through Feb. 15, 2017 received their expected refund. Further, while 0.4 percent of RAL returns were subject to a refund hold, 0.2 percent of all individual returns filed through Feb. 15, 2017 were subject to refund holds. Therefore, the initial no-fee RAL data appears to show low noncompliance but, when compared to overall individual returns filed in the same time period, it may signal potential noncompliance issues. IRS, CDW, IRTF, Form 1040, and IMF Transaction History for individuals filing returns through Feb. 15, 2017 for the tax year ending Dec. 31, 2016. Totals were compiled for returns with a RAL indicator and for all returns. The IRS did not provide information to confirm or disprove the figures during the TAS Fact Check process.

24 Karen Masken, Mark Mazur, Joanne Meikle, and Roy Nord, IRS Office of Research, Analysis, and Statistics, *Do Products Offering Expedited Refunds Increase Tax Compliance?* 19 (Nov. 2007).

25 Some of the financial institutions that offered "no-fee" RALs during FS 2017 include: MetaBank (lender for H&R Block through FS 2017 and Jackson Hewitt), Santa Barbara Tax Products Group, Republic Bank & Trust (lender for Liberty Tax), and River City Bank. Chi Chi Wu, National Consumer Law Center, and Michael Best, Consumer Federation of America, *Big Changes Burden Taxpayers: New Law Delays Refunds, Drives Demand for Loans; Immigrant Taxpayers Face Challenges* 3-4 (Mar. 2017).

26 Chi Chi Wu, National Consumer Law Center, and Michael Best, Consumer Federation of America, *Big Changes Burden Taxpayers: New Law Delays Refunds, Drives Demand for Loans; Immigrant Taxpayers Face Challenges* 3-4 (Mar. 2017); Chi Chi Wu and Chantal Hernandez, National Consumer Law Center, *Minefield of Risks: Taxpayers Face Perils from Unregulated Preparers, Lack of Fee Disclosure, and Tax-Time Financial Products* 7 (Mar. 2016); *See, e.g.*, Republic Bancorp, Inc., Form 10-K for year which ended on December Dec. 31, 2016 at 12.

27 Chi Chi Wu (National Consumer Law Center) and Michael Best (Consumer Federation of America), *Big Changes Burden Taxpayers: New Law Delays Refunds, Drives Demand for Loans; Immigrant Taxpayers Face Challenges* 3 (Mar. 2017).

28 Republic Bancorp, Inc., Form 10-K for year ending Dec. 31, 2016 at 12.

29 *See* IRC § 61(a)(12); Rev. Rul. 91-31, 1991-1 CB 19 (1991). Depending on the amount of the debt discharge, the lender may be subject to reporting requirements, in which case the lender issues to the taxpayer IRS Form 1099-C. IRC § 6050P. For detailed explanation of the taxation of, as well as exceptions for and exclusions from cancellation of debt income, see IRS Pub. 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments (For Individuals)*.

Because tax preparers directly incur the refund anticipation loan fees, the IRS should require Electronic Return Originators to prepare a "truth-in-lending" statement if they are offering a Refund Antipication Loan product. This statement would incorporate clear language and design to help the taxpayer better understand the terms of the loan product, including any "hidden" or indirect costs of the loan product.

purchased a RAC, the RAC fee would be $29.95.[30] Therefore, there is a $15 price difference in the RAC depending on whether the taxpayer also purchased a RAL. Other lenders directly charge preparers a fee for the RAL.[31]

Preparers can also recoup the costs they incur to offer no-fee RALs to their clients by increasing return preparation fees. Due to the lack of transparency in preparation fees charged by many preparers, the hidden fees may be difficult to identify. To prevent this, at least one no-fee RAL bank prohibits preparers from passing this cost along to taxpayers by padding fees.[32] Some preparers may be willing to incur the RAL fee as a marketing expense to get clients in the door.[33]

While some taxpayers facing an immediate financial hardship may be willing to incur any additional costs associated with RALs, all taxpayers would benefit from a detailed breakdown of fees incurred. Because tax preparers directly incur the RAL fees, the IRS should require Electronic Return Originators (EROs) to prepare a "truth-in-lending" statement if they are offering a RAL product.[34] This statement would incorporate clear language and design to help the taxpayer better understand the terms of the loan product, including any "hidden" or indirect costs of the loan product. Working with the industry and consumer advocates, the IRS could develop and require a standard form for disclosures. The IRS could enforce this requirement through its e-file monitoring authority.[35]

In addition, as the demand for no-fee RALs continues to increase, it is incumbent on the IRS to conduct a consumer education campaign before the filing season about RALs and the hidden costs associated with these loan products. The campaign should warn taxpayers to carefully review the accuracy of their returns, especially if they purchase a RAL.

30 River City Bank, *2017 Freedom to Choose Pricing Tiers*, http://www.rcbtaxdivision.com/pricing.aspx (last visited Aug. 18, 2017).

31 Chi Chi Wu (National Consumer Law Center) and Michael Best (Consumer Federation of America), *Big Changes Burden Taxpayers: New Law Delays Refunds, Drives Demand for Loans; Immigrant Taxpayers Face Challenges* 3-4 (Mar. 2017).

32 *Id.* at 4-5; *See, e.g.*, Republic Bancorp, Inc., Form 10-K for the fiscal year which ended on Dec. 31, 2016, at 12 ("All fees for the product were paid by the Tax Providers with a restriction prohibiting the Tax Providers from passing along the fees to the taxpayer customer.").

33 Stacy Cowley, *Tax Refund Loans Are Revamped and Resurrected*, The New York Times (Jan. 15, 2017).

34 Truth-in-Lending disclosures are now termed "Loan Estimates" for mortgage applications submitted before Oct. 3, 2015. The Loan Estimate provides the applicant with important information about estimated interest rate, monthly payments, and total closing costs for the loan. It also informs the applicant about estimated tax and insurance costs, any anticipated changes in interest rate, penalties, and a negative amortization feature, if applicable. Consumer Financial Protection Bureau, *What is a Loan Estimate?* (Aug. 4, 2017).

35 *See* IRS Pub 3112, *IRS e-file Application and Participation*; IRS Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns* Rev. Proc. 2007-40, 2007-26 I.R.B. (June 25, 2007).

CONCLUSION

Demand for RALs substantially increased in FS 2017, likely due to the PATH Act's required delay in the issuance of EITC and ACTC refunds. The private industry accommodated this demand by offering no-fee RALs. While the tax preparation industry and financial institutions are claiming to absorb the costs associated with these refund products, the IRS should survey the products currently available on the market and evaluate the impact on taxpayers as well as tax administration. Finally, regardless of which party absorbs the costs of these refund products, taxpayers will benefit from better consumer education about these products and a clear disclosure of all fees and terms associated with the product.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Survey the RAL products currently on the market, including detailed analysis of direct and indirect fees, to understand how taxpayers and tax administration are impacted.
2. Conduct a consumer education campaign before the filing season about RALs and RACs, including some tips on how to identify indirect costs associated with these products.
3. Revise Revenue Procedure 2007-40; IRS Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*; and IRS Publication 3112, *Applying and Participating in IRS e-file*, to require all e-file participants offering RAL and RAC products to provide a standard "truth-in-lending" statement to help the taxpayer better understand the terms of the loan product, including any "hidden" or "indirect costs of the loan product."

INTRODUCTION: Legislative Recommendations

Section 7803(c)(2)(B)(ii)(VIII) of the Internal Revenue Code (IRC) requires the National Taxpayer Advocate to include in her Annual Report to Congress, among other things, legislative recommendations to resolve problems encountered by taxpayers.

The chart immediately following this introduction summarizes congressional action on recommendations the National Taxpayer Advocate proposed in her 2001 through 2016 Annual Reports.[1] The National Taxpayer Advocate places a high priority on working with the tax-writing committees and other interested parties to try to resolve problems encountered by taxpayers. In addition to submitting legislative proposals in each Annual Report, the National Taxpayer Advocate meets regularly with members of Congress and their staffs and testifies at hearings on the problems faced by taxpayers to ensure that Congress has an opportunity to receive and consider a taxpayer perspective. Also, for the first time this year, the National Taxpayer Advocate has included with her Annual Report a separate volume, *The National Taxpayer Advocate Purple Book*, which proposes 50 legislative recommendations intended to strengthen taxpayer rights and improve tax administration.[2] Each recommendation is presented in a format similar to the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections. Our hope is to make it a user-friendly resource for Members of Congress and their staffs.

The following discussion highlights legislative activity during the first session of the 115th Congress relating to the National Taxpayer Advocate's proposals.

Tax Reform

Shortly before this report went to print, Congress enacted comprehensive tax reform legislation for the first time in over three decades.[3] This legislation included two of the National Taxpayer Advocate's prior proposals:

- **Extending the time limit for contesting an IRS levy.**[4] This provision amended IRC § 6343(b) to extend the time to return levied funds or proceeds from nine months to two years. It also amended IRC § 6532(c) to extend the period within which a third party can bring a suit for return of levied funds or proceeds from nine months to two years.[5]
- **Children's Income ("Kiddie Tax").**[6] This provision simplifies the "Kiddie Tax" by applying the tax rates for trusts and estates to net unearned income, thereby separating the child's tax calculation from the parent's return.[7]

1 An electronic version of the chart is available on the TAS website at www.TaxpayerAdvocate.irs.gov/Reports. The chart lists all legislative recommendations the National Taxpayer Advocate has made since 2001 and identifies each section of the Internal Revenue Code affected by the recommendations.

2 *See* National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*.

3 Pub. L. No. 115-97 (2017).

4 *Id.*, § 11071 (2017).

5 *See* National Taxpayer Advocate 2001 Annual Report to Congress 202-09 (Legislative Recommendation: *Return of Levy or Sale Proceeds*).

6 Pub. L. No. 115-97, § 11001(a) (2017).

7 *See* National Taxpayer Advocate 2002 Annual Report to Congress 231-34 (Key Legislative Recommendation: *Children's Income*).

In addition, provisions in the initial version of this legislation would have enacted two of the National Taxpayer Advocate's past proposals:

- **Repeal of the Alternative Minimum Tax (AMT).**[8] This provision would have repealed the AMT for both individuals and corporations. Although the enacted bill repealed the AMT for corporations, it did not repeal it for individuals. However, the new law modified the AMT to increase the exemption amounts for individuals.[9]
- **Simplify and streamline education tax incentives.**[10] A few provisions would have simplified and streamlined the education tax incentives by consolidating, creating uniformity among, or adding permanency to, the various education tax incentives. However, these provisions were not included in the final version of the bill.

Also, as described in a Joint Committee on Taxation publication, the Chairman of the Senate Committee on Finance made modifications to Chairman's mark of the legislation that would have included two of the National Taxpayer Advocate's prior recommendations:[11]

- **Individuals held harmless on improper levies on retirement plans.**[12] This provision would hold individuals harmless on improper levies on individual retirement plans.[13]
- **Modifications to user fees requirements for installment agreements.**[14] This provision would have modified the user fee requirement for low income taxpayers (below 250 percent of the Federal poverty guidelines) in two ways. First, it would have waived the user fee if the low income taxpayer entered into an installment agreement under which the taxpayer agreed to make automated installment payments through a debit account. Second, it would have left low income taxpayers who are unable to agree to make payments electronically subject to the required user fee, but it would have required the IRS to reimburse the fee upon completion of the installment agreement.[15]

8 Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 2001 (2017). *See* National Taxpayer Advocate 2013 Annual Report to Congress 292-301 (Legislative Recommendation: *Repeal the Alternative Minimum Tax*).

9 Pub. L. No. 115-97, § 12003 (2017).

10 H.R. 1, 115th Cong. §§ 1201, 1202, & 1204 (2017). *See* National Taxpayer Advocate 2008 Annual Report to Congress 370–72 (Legislative Recommendation: *Simplify and Streamline Education Tax Incentives*); National Taxpayer Advocate 2004 Annual Report to Congress 403–22 (Key Legislative Recommendation: *Simplification of Provisions to Encourage Education*).

11 Joint Committee on Taxation, JCX-56-17, *Description of the Chairman's Modification to the Chairman's Mark of the "Tax Cuts and Jobs Act"* (Nov. 14, 2017).

12 *Id.* at 21-24.

13 *See* National Taxpayer Advocate 2001 Annual Report to Congress 202–14 (Legislative Recommendation: *Reinstatement of Retirement Account*).

14 Joint Committee on Taxation, JCX-56-17, *Description of the Chairman's Modification to the Chairman's Mark of the "Tax Cuts and Jobs Act"* 25-26 (Nov. 14, 2017).

15 *See* National Taxpayer Advocate 2006 Annual Report to Congress 141-56 (Most Serious Problem: *Collection Issues of Low Income Taxpayers*) (recommending that the IRS implement an installment agreement (IA) user fee waiver for low income taxpayers and adopt a graduated scale for other IA user fees based on the amount of work required).

Taxpayer Bill of Rights Enhancement Act of 2017

On September 12, 2017, Senators Grassley and Thune introduced the Taxpayer Bill of Rights Enhancement Act of 2017, which would enact three of the National Taxpayer Advocate's past proposals:[16]

- **Individuals held harmless on improper levies on retirement plans.**[17] This provision would hold individuals harmless on improper levies on individual retirement plans.[18]
- **Clarification of application of federal tax deposit penalty.**[19] This provision would amend IRC § 6656 to reduce the current ten percent penalty rate for failure to make a deposit in the manner required to a two percent penalty rate.[20]
- **Access to Appeals.**[21] This provision would require the IRS to have at least one Appeals officer and one settlement officer located and permanently available in each State, the District of Columbia, and Puerto Rico.[22]

Taxpayer Protection Act of 2017

On April 26, 2017, Representatives Lewis, DelBene, Blumenauer, and Davis introduced legislation, entitled the Taxpayer Protection Act of 2017, which would enact several of the National Taxpayer Advocate's recommendations from her 2015 Annual Report, including:[23]

- **Repeal of suspension of period of limitations during the pending of an application for a Taxpayer Assistance Order (TAO).**[24] This provision would repeal IRC § 7811(d), which currently suspends the statute of limitations during the period beginning on the date of a taxpayer's TAO application and ending on the date of the National Taxpayer Advocate's decision with respect to the application as well as any period specified by the National Taxpayer Advocate in a TAO issued pursuant to the TAO application.[25]
- **Limitation on levies on retirement savings.**[26] This provision would amend IRC § 6334(a) to exempt from levy any individual's interest in a qualified retirement plan before the individual has attained normal retirement age (or 65 in the case of an individual retirement account or a plan that does not specify a normal retirement age) or after the attainment of retirement age (or 65) if the levy would create an economic hardship (within the meaning of IRC § 6343(a)(1)(D)) due to the financial condition of the taxpayer. The provision also contains an exception to the limitation

16 Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. (2017).

17 S. 1793, 115th Cong. § 302 (2017).

18 *See* National Taxpayer Advocate 2001 Annual Report to Congress 202–214 (Legislative Recommendation: *Reinstatement of Retirement Account*).

19 S. 1793, 115th Cong. § 309 (2017).

20 *See* National Taxpayer Advocate 2001 Annual Report to Congress 222 (Additional Legislative Recommendation: *Federal Tax Deposit (FTD) Avoidance Penalty*).

21 S. 1793, 115th Cong. § 502 (2017).

22 *See* National Taxpayer Advocate 2014 Annual Report to Congress 311 (Legislative Recommendation: *Access to Appeals: Require that Appeals Have At Least One Appeals Officer and Settlement Officer Located and Permanently Available within Every State, the District of Columbia, and Puerto Rico*); National Taxpayer Advocate 2009 Annual Report to Congress 346-50 (Legislative Recommendation: *Strengthen the Independence of the IRS Office of Appeals and Require at Least One Appeals Officer and Settlement Officer in Each State*).

23 Taxpayer Protection Act of 2017, H.R. 2171, 115th Cong. (2017).

24 H.R. 2171, 115th Cong. § 202 (2017).

25 *See* National Taxpayer Advocate 2015 Annual Report to Congress 316-28 (Legislative Recommendation: *Statute of Limitations: Repeal or Fix Statute Suspension Under IRC § 7811(d)*).

26 H.R. 2171, 115th Cong. § 203 (2017).

on retirement plan levies for flagrant acts, which are situations in which the IRS determines a taxpayer filed a fraudulent return or acted with the intent to evade or defeat any tax or its collection or payment.[27]

This bill also contains several of the National Taxpayer Advocate's proposals from Annual Reports prior to 2015, including:

- **Repeal of rules relating to tax collection contracts.**[28] This provision would repeal the private debt collection provisions contained in IRC §§ 6306 and 6307. The National Taxpayer Advocate has identified both the current and a prior iteration of the IRS's private debt collection program as most serious problems and previously recommended that these provisions be repealed.[29]
- **Repeal of partial payment requirement for submissions of offers-in-compromise.**[30] This provision would repeal the current partial payment requirement on submissions of offers-in-compromise under IRC § 7122(c)(1).[31] In addition, this provision would add a new section to IRC § 7122 to apply any user fee for an offer-in-compromise to reduce the tax that is the subject of that offer.[32]
- **Taxpayer notification of suspected identity theft.**[33] This provision would require the IRS to notify taxpayers of suspected identity theft.[34]
- **Single point of contact for identity theft victims.**[35] This provision would require the IRS to establish new procedures to ensure that any taxpayer whose return has been delayed or otherwise adversely affected due to identity theft has a single point of contact at the IRS throughout the processing of his or her case. The single point of contact would be required to track the taxpayer's case from start to finish and coordinate with other specialized units to resolve case issues as quickly as possible.[36] In addition, under this provision, any identity theft case involving multiple

27 *See* National Taxpayer Advocate 2015 Annual Report to Congress 340-45 (Legislative Recommendation: *Levies on Retirement Accounts: Amend IRC § 6334 to Include a Definition of Flagrancy and Require Consideration of Basic Living Expenses at Retirement Before Levying on Retirement Accounts*).

28 H.R. 2171, 115th Cong. § 101 (2017).

29 *See* Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship*, *supra*; National Taxpayer Advocate 2016 Annual Report to Congress 172-91 (Most Serious Problem: *Private Debt Collection (PDC): The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*); National Taxpayer Advocate 2005 Annual Report to Congress 76-93 (Most Serious Problem: *Training of Private Debt Collection Employees*); National Taxpayer Advocate 2006 Annual Report to Congress 34-61, 458-462 (Most Serious Problem: *True Costs and Benefits of Private Debt Collection and Legislative Recommendation: Repeal Private Debt Collection Provisions*).

30 H.R. 2171, 115th Cong. § 206 (2017).

31 *See* National Taxpayer Advocate 2006 Annual Report to Congress 507-19 (Legislative Recommendation: *Improve Offer in Compromise Eligibility*).

32 H.R. 2171, 115th Cong. § 206 (2017).

33 *Id.*

34 *See* National Taxpayer Advocate 2011 Annual Report to Congress 61 (Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burdens on Taxpayers and the IRS*).

35 H.R. 2171, 115th Cong. § 302(a) (2017).

36 *See, e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress 83 (Most Serious Problem: *Identity Theft: The IRS Should Adopt a New Approach to Identity Theft Victim Assistance that Minimizes Burden and Anxiety for Such Taxpayers*). For the most current information on the IRS's handling of identity theft cases, see Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra* (noting that the IRS has adopted a centralized approach to identity theft victim assistance, including assignment of a sole contact person for certain victims).

units of the IRS or multiple tax years would require the single point of contact to be one full-time IRS employee.[37]

- **Referrals to low income taxpayer clinics permitted.**[38] This provision would amend IRC § 7526(c) to allow IRS employees to refer taxpayers for advice and assistance to low income taxpayer clinics receiving grant funding from the IRS.[39]
- **Tax return preparer oversight.**[40] The National Taxpayer Advocate has recommended that Congress authorize the IRS to create an oversight and penalty regime for return preparers.[41] This provision would amend 31 U.S.C. § 330 to authorize the Treasury Department to conduct oversight over tax return preparers. It would also provide a definition of the term "tax return preparer" and give the IRS the authority to impose Title 31 penalties on tax return preparers for violations of law.

Identity Theft and Tax Fraud Prevention Act of 2017

The National Taxpayer Advocate has discussed the problems of identity theft and the IRS's procedures for addressing it in many of her past Annual Reports.[42] On March 9, 2017, Senator Nelson and six other Senators introduced the Identity Theft and Tax Fraud Prevention Act, a bill that focuses on identity theft issues.[43] This bill would require the IRS, in consultation with the National Taxpayer Advocate, to develop and implement publicly available guidelines for management of cases involving stolen identity refund fraud in a manner that reduces the administrative burden on taxpayers who are victims of such fraud.[44] The bill would also require the IRS to notify taxpayers of suspected identity theft.[45] Further, a provision in the bill would amend 31 U.S.C. § 330 to authorize the Treasury Department to conduct oversight over tax return preparers, provide a definition of the term "tax return preparer" for purposes of title 31, and give the IRS the authority to impose penalties under title 31 on tax return preparers for violations of law.[46] Finally, the bill would require electronically prepared paper returns that are filed on paper to include a scannable code that would allow the return to be converted to electronic format.[47]

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37 H.R. 2171, 115th Cong. § 302(b) (2017).

38 H.R. 2171, 115th Cong. § 303 (2017).

39 *See* National Taxpayer Advocate 2007 Annual Report to Congress 551–53 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

40 H.R. 2171, 115th Cong. § 401 (2017).

41 *See, e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*); National Taxpayer Advocate 2008 Annual Report to Congress 423-26 (Legislative Recommendation: *The Time Has Come to Regulate Federal Tax Return Preparers*).

42 For a comprehensive history and discussion of the identity theft problem, see National Taxpayer Advocate 2015 Annual Report to Congress 180-87 (Most Serious Problem: *Identity Theft (IDT): The IRS's Procedures for Assisting Victims of IDT, While Improved, Still Impose Excessive Burden and Delay Refunds for Too Long*); For the most current information on the IRS's handling of identity theft cases, see Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*.

43 Identity Theft and Tax Fraud Prevention Act, S. 606, 115th Cong. (2017).

44 S. 606, 115th Cong. § 101(a) (2017).

45 S. 606, 115th Cong. § 104 (2017). *See* National Taxpayer Advocate 2011 Annual Report to Congress 61 (Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burdens on Taxpayers and the IRS*).

46 S. 606, 115th Cong. § 115 (2017). *See, e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*); National Taxpayer Advocate 2008 Annual Report to Congress 423-26 (Legislative Recommendation: *The Time Has Come to Regulate Federal Tax Return Preparers*).

47 S. 606, 115th Cong. § 205 (2017). *See* National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 70, 91, 96.

Stolen Identity Refund Fraud Prevention Act of 2017

On January 11, 2017, Representative Renacci and 13 other Representatives introduced the Stolen Identity Refund Fraud Prevention Act of 2017, which would enact two of the National Taxpayer Advocate's prior proposals.[48] First, the bill would establish a centralized point of contact for identify theft victims.[49] Second, the bill would add a new Code section requiring the IRS to provide notifications, instructions, and forms to suspected victims of identity theft.[50]

Tax Refund Protection Act of 2017

On April 6, 2017, Representative Bonamici introduced the Tax Refund Protection Act of 2017.[51] This proposed legislation would add a new Code section authorize the Treasury Department to conduct oversight over tax return preparers.[52]

Volunteer Income Tax Assistance (VITA) Act

On January 23, 2017, Senators Brown and Coons and Representative Davis introduced companion bills entitled the Volunteer Income Tax Assistance (VITA) Act.[53] The legislation would establish a Community Volunteer Income Tax Assistance Matching Grant Program (VITA grant program).[54] The VITA grant program would be administered in a manner that is substantially similar to the Community Volunteer Income Tax Assistance matching grants demonstration program established under Title I of Division D of the Consolidated Appropriations Act, 2008. In addition, the legislation would authorize the Secretary to promote the benefits of, and encourage the use of, tax return preparation through the VITA program by mass communications, referrals, and other means.[55] It would also encourage VITA grant recipients to refer eligible taxpayers to local or regional Low Income Taxpayer Clinics.[56] Finally, the legislation would allow the IRS to refer taxpayers to qualified VITA programs.[57]

48 Stolen Identity Refund Fraud Prevention Act of 2017, H.R. 439, 115th Cong. (2017).

49 H.R. 439, 115th Cong. § 2 (2017). *See* National Taxpayer Advocate 2013 Annual Report to Congress 83 (Most Serious Problem: *Identity Theft: The IRS Should Adopt a New Approach to Identity Theft Victim Assistance that Minimizes Burden and Anxiety for Such Taxpayers*).

50 H.R. 439, 115th Cong. § 3(a) (2017). *See* National Taxpayer Advocate 2011 Annual Report to Congress 61 (Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burdens on Taxpayers and the IRS*).

51 Tax Refund Protection Act of 2017, H.R. 1996, 115th Cong. (2017).

52 H.R. 1996, 115th Cong. § 2(a) (2017). *See, e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*); National Taxpayer Advocate 2008 Annual Report to Congress 423-26 (Legislative Recommendation: *The Time Has Come to Regulate Federal Tax Return Preparers*).

53 Volunteer Income Tax Assistance (VITA) Act, S. 193, 115th Cong. (2017); Volunteer Income Tax Assistance (VITA) Act, H.R. 605, 115th Cong. (2017).

54 S. 193, 115th Cong. § 4 (2017); H.R. 605, 115th Cong. § 4 (2017).

55 *See* National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VITA/TCE Funding: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*).

56 *See* National Taxpayer Advocate 2014 Annual Report to Congress, vol. 2, 1-26 (Research Study: *Low Income Taxpayer Clinic Program: A Look at Those Eligible to Seek Help from the Clinics*); National Taxpayer Advocate 2007 Annual Report to Congress 551–53 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

57 *See* National Taxpayer Advocate 2007 Annual Report to Congress 551–53 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

Volunteer Income Tax Assistance Permanence Act of 2017

On March 30, 2017, and on June 15, 2017, Senators Brown and Heller and Representatives Curbelo and Davis, respectively, introduced the Volunteer Income Tax Assistance Permanence Act of 2017, two bills that are substantially similar to each other and to the companion bills discussed directly above.[58]

IRS Whistleblower Improvements Act of 2017

In her 2015 Annual Report, the National Taxpayer Advocate discussed problems relating to the IRS's whistleblower program and made both administrative and legislative recommendations to improve it.[59] On March 29, 2017, Senators Grassley and Wyden introduced the IRS Whistleblower Improvements Act of 2017, a bill dedicated to whistleblower reform issues.[60] Included in this bill is a provision that would impose a penalty on whistleblowers for unauthorized disclosure of tax information.[61] In addition, the bill would amend IRC § 7623 to include anti-retaliation protection for tax whistleblowers.[62]

Strengthening Taxpayer Rights Act of 2017

On July 20, 2017, Representative Doggett and six other Representatives introduced legislation that would enact two of the National Taxpayer Advocate's prior proposals:[63]

- **Limit redisclosures and uses of consent-based disclosures of tax return information.**[64] This provision would amend IRC § 6103(c) to indicate that individuals designated by the taxpayer to receive return information are not permitted to use the information for any purpose other than the express purpose for which consent was granted and shall not disclose return information to any other person without the express permission of, or request by, the taxpayer.[65]

58 Volunteer Income Tax Assistance Permanence Act of 2017, S. 797, 115th Cong. (2017); Volunteer Income Tax Assistance Permanence Act of 2017, H.R. 2901, 115th Cong. (2017).

59 *See* National Taxpayer Advocate 2015 Annual Report to Congress 143-58 (Most Serious Problem: *Whistleblower Program: The IRS Whistleblower Program Does Not Meet Whistleblowers' Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayers' Confidential Information from Re-Disclosure by Whistleblowers*); National Taxpayer Advocate 2015 Annual Report to Congress 409-12 (Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*); National Taxpayer Advocate 2015 Annual Report to Congress 413-18 (Legislative Recommendation: *Whistleblower Program*: *Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*); National Taxpayer Advocate 2015 Annual Report to Congress 419-25 (Legislative Recommendation: *Whistleblower Program: Amend IRC §§ 7623 and 6103 to Provide Consistent Treatment of Recovered Foreign Account Tax Compliance Act (FATCA) and Report of Foreign Bank and Financial Accounts (FBAR) Penalties for Whistleblower Award Purposes*).

60 IRS Whistleblower Improvements Act of 2017, S. 762, 115th Cong. (2017).

61 S. 762, 115th Cong. § 2(a) (2017). *See* National Taxpayer Advocate 2015 Annual Report to Congress 413-18 (Legislative Recommendation: *Whistleblower Program*: *Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*).

62 S. 762, 115th Cong. § 2(b) (2017). *See* National Taxpayer Advocate 2015 Annual Report to Congress 409-12 (Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*).

63 Strengthening Taxpayer Rights Act of 2017, H.R. 3340, 115th Cong. (2017).

64 H.R. 3340, 115th Cong. § 102 (2017).

65 *See* National Taxpayer Advocate 2007 Annual Report to Congress 554-55 (Additional Legislative Recommendation: *Consent-Based Disclosures of Tax Return Information Under Internal Revenue Code Section 6103(c)*).

- ***De novo* Tax Court review of innocent spouse relief determinations.**[66] This provision would amend IRC § 6015(e) to provide that the standard and scope of review for Tax Court review of IRS innocent spouse relief determinations is *de novo*.[67]

66 H.R. 3340, 115th Cong. § 202 (2017).

67 *See* National Taxpayer Advocate 2011 Annual Report to Congress 531-36 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinations Under Internal Revenue Code Section 6015(f) is* De Novo).

National Taxpayer Advocate Legislative Recommendations With Congressional Action

Alternative Minimum Tax (AMT)				
Repeal the Individual AMT National Taxpayer Advocate 2001 Annual Report to Congress 82–100; National Taxpayer Advocate 2004 Annual Report to Congress 383–85; National Taxpayer Advocate 2008 Annual Report to Congress 356–62.	Repeal the AMT outright.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Passed House, Placed on Senate Calendar 11/28/2017
Legislative Activity 113th Congress	S 1616	Lee	10/30/2013	Referred to the Finance Committee
	HR 243	Ross	1/14/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 86	Bachmann	1/5/2011	Referred to the Ways & Means Committee
	HR 99	Dreler	1/5/2011	Referred to the Ways & Means Committee
	HR 547	Garrett	2/8/2011	Referred to the Ways & Means Committee
	HR 3400	Garrett	11/10/2011	Referred to the Ways & Means Committee
	S 727	Wyden	4/5/2011	Referred to the Finance Committee
	S 820	Shelby	4/14/2011	Referred to the Finance Committee
	HR 3804	Huelskamp	1/23/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3018	Wyden	2/23/2010	Referred to the Finance Committee
	HR 240	Garrett	1/7/2009	Referred to the Ways & Means Committee
	HR 782	Paul	1/28/2009	Referred to the Ways & Means Committee
	S 932	Shelby	4/30/2009	Referred to the Finance Committee
Legislative Activity 110th Congress	S 55	Baucus	1/4/2007	Referred to the Finance Committee
	S 14	Kyl	4/17/2007	Referred to the Finance Committee
	S 1040	Shelby	3/29/2007	Referred to the Finance Committee
	HR 1366	English	3/7/2007	Referred to the Ways & Means Committee
	HR 1942	Garrett	4/19/2007	Referred to the Ways & Means Committee
	HR 3970	Rangel	10/25/2007	Referred to the Ways & Means Committee
	S 2293	Lott	11/1/2007	Placed on the Senate Legislative Calendar under General Orders. Calendar No. 464
Legislative Activity 109th Congress	HR 1186	English	3/9/2005	Referred to the Ways & Means Committee
	S 1103	Baucus	5/23/2005	Referred to the Finance Committee
	HR 2950	Neal	6/16/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 43	Collins	1/7/2003	Referred to the Ways & Means Committee
	HR 1233	English	3/12/2003	Referred to the Ways & Means Committee
	S 1040	Shelby	5/12/2003	Referred to the Finance Committee
	HR 3060	N. Smith	9/10/2003	Referred to the Ways & Means Committee
	HR 4131	Houghton	4/2/2004	Referred to the Ways & Means Committee
	HR 4164	Shuster	4/2/2004	Referred to the Ways & Means Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 107th Congress	HR 437	English	2/6/2001	Referred to the Ways & Means Committee
	S 616	Hutchison	3/26/2002	Referred to the Finance Committee
	HR 5166	Portman	7/18/2002	Referred to the Ways & Means Committee
Index AMT for Inflation National Taxpayer Advocate 2001 Annual Report to Congress 82–100.	If full repeal of the individual AMT is not possible, it should be indexed for inflation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3223	McConnell	9/13/2010	Placed on the Senate Calendar
	HR 5077	Hall	4/20/2010	Referred to the Ways & Means Committee
	HR 719	Lee	1/27/2009	Referred to the Ways & Means Committee
	S 722	Baucus	3/26/2009	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 1942	Garrett	4/19/2007	Referred to the Ways & Means Committee
Legislative Activity 109th Congress	HR 703	Garrett	2/9/2005	Referred to the Ways & Means Committee
	HR 4096	Reynolds	10/20/2005	12/7/2005 Passed the House; 12/13/2005 Placed on the Senate Legislative Calendar
Legislative Activity 108th Congress	HR 22	Houghton	1/7/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 5505	Houghton	10/1/2002	Referred to the Ways & Means Committee
Eliminate Several Adjustments for Individual AMT National Taxpayer Advocate 2001 Annual Report to Congress 82–100.	Eliminate personal exemptions, the standard deduction, deductible state and local taxes, and miscellaneous itemized deductions as adjustment items for individual AMT purposes.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 336	DeMint	2/14/2011	Referred to the Finance Committee
Legislative Activity 110th Congress	S 102	Kerry	1/4/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 1861	Harkin	10/7/2005	Referred to the Finance Committee
Legislative Activity 108th Congress	HR 1939	Neal	5/12/2003	Referred to the Ways & Means Committee
Private Debt Collection (PDC)				
Repeal PDC Provisions National Taxpayer Advocate 2006 Annual Report to Congress 458–62.	Repeal IRC § 6306, thereby terminating the PDC initiative.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	HR 796	Lewis	2/3/2009	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	S 335	Dorgan	1/18/2007	Referred to the Finance Committee
	HR 695	Van Hollen	1/24/2007	Referred to the Ways & Means Committee
	HR 3056	Rangel	7/17/2007	10/10/2007 Passed the House; 10/15/2007 Referred to the Finance Committee

Tax Preparation and Low Income Taxpayer Clinics (LITC)				
Matching Grants Program for Return Preparation National Taxpayer Advocate 2002 Annual Report to Congress vii–viii.	Create a grant program for return preparation similar to the LITC grant program. The program should be designed to avoid competition with VITA and should support the IRS's goal (and need) to have returns electronically filed.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2901	Curbelo	6/15/2017	Referred to the Ways & Means Committee
	S 797	Brown	3/30/2017	Referred to Finance Committee
	HR 605	Davis	1/23/2017	Referred to the Ways & Means Committee
	S 193	Brown	1/23/2017	Referred to Finance Committee
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division E (2015).**			
	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4835	Honda	3/22/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	**Pub. L. No. 113-235, Division E, 128 STAT. 2130, 2336 (2014).**			
Legislative Activity 111th Congress	**Pub. L. No. 111-117, Div. C, Title I, 123 Stat. 3034, 3163 (2009).**			
Legislative Activity 110th Congress	**Pub. L. No. 110-161, Div. D, Title I, 121 Stat. 1975, 1976 (2007).**			
	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
	S 1967	Clinton	8/2/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with S. Rep. No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders. Calendar No. 614
Legislative Activity 108th Congress	S 476	Grassley	2/27/2003	Referred to the Finance Committee
	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
	HR 3991	Houghton	3/19/2001	Referred to the Ways & Means Committee
	HR 7	Baucus	7/16/2002	Reported by Chairman Baucus with an amendment; referred to the Finance Committee

Referrals to LITCs National Taxpayer Advocate 2007 Annual Report to Congress 551–53.	Amend IRC § 7526(c) to add a special rule stating that notwithstanding any other provision of law, IRS employees may refer taxpayers to LITCs receiving funding under this section. This change will allow IRS employees to refer a taxpayer to a specific clinic for assistance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 1573	Durbin	9/15/2011	Placed on the Senate Legislative Calendar under General Orders; Calendar No. 171
	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
Regulation of Income Tax Return Preparers National Taxpayer Advocate 2002 Annual Report to Congress 216–30; National Taxpayer Advocate 2003 Annual Report to Congress 270–301; National Taxpayer Advocate 2007 Annual Report to Congress 83–95 & 140–55; National Taxpayer Advocate 2008 Annual Report to Congress 423–26; National Taxpayer Advocate 2009 Annual Report to Congress 41–69; National Taxpayer Advocate 2009 Annual Report to Congress 60-74.	Create an effective oversight and penalty regime for return preparers by taking the following steps: ◆ Enact a registration, examination, certification, and enforcement program for federal tax return preparers; ◆ Direct the Secretary of the Treasury to establish a joint task force to obtain accurate data about the composition of the return preparer community and make recommendations about the most effective means to ensure accurate and professional return preparation and oversight; ◆ Require the Secretary of the Treasury to study the impact cross-marketing tax preparation services with other consumer products and services has on the accuracy of returns and tax compliance; and ◆ Require the IRS to take steps within its existing administrative authority, including requiring a checkbox on all returns in which preparers would enter their category of return preparer (*i.e.*, attorney, CPA, enrolled agent, or unenrolled preparer) and developing a simple, easy-to-read pamphlet for taxpayers that explains their protections.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 1996	Bonamici	4/6/2017	Referred to House Financial Services
	S 606	Nelson	3/9/2017	Referred to the Finance Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Identity Theft				
Single Point of Contact National Taxpayer Advocate 2013 Annual Report to Congress 61.	Designate a single point of contact for identity theft victims to work with the identity theft victim until all related issues are resolved.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 439	Renacci	1/11/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	S 3157	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 3156	Hatch	7/12/2016	Referred to Finance Committee
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 767	Nelson	3/9/2015	Referred to Finance Committee
Legislative Activity 113th Congress	S 2736	Hatch	7/31/2014	Referred to Finance Committee
Notification of Suspected Identity Theft National Taxpayer Advocate 2011 Annual Report 75-83.	Require the IRS to notify taxpayers of suspected identity theft, including employment-related identity identity.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 439	Renacci	1/11/2017	Referred to the Ways & Means Committee
	S 606	Nelson	3/9/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3157	Hatch	7/12/2016	Referred to Finance Committee
	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee

Public Awareness Campaign for Low Income Taxpayer Clinics National Taxpayer Advocate 2014 Annual Report to Congress 411–16; National Taxpayer Advocate 2014 Annual Report to Congress, vol. 2, 1–26; National Taxpayer Advocate 2007 Annual Report to Congress 551-53.	Authorize the Secretary to promote the benefits of and encourage the use of qualified LITCs through the use of mass communications, referrals, and other means.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Public Awareness Campaign on Registration Requirements National Taxpayer Advocate 2002 Annual Report to Congress 216–30.	Authorize the IRS to conduct a public information and consumer education campaign, utilizing paid advertising, to inform the public of the requirements that paid preparers must sign the return prepared for a fee and display registration cards.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with S. Rep. No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Increase Preparer Penalties National Taxpayer Advocate 2003 Annual Report to Congress 270–301.	Strengthen oversight of all preparers by enhancing due diligence and signature requirements, increasing the dollar amount of preparer penalties, and assessing and collecting those penalties, as appropriate.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	**Pub. L. No. 112-41 § 501, 125 Stat. 428, 459 (2011).**			
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 4318	Crowley/ Ramstad	12/6/2007	Referred to the Ways & Means Committee
	S 2851	Bunning	4/14/2008	Referred to the Finance Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Refund Delivery Options National Taxpayer Advocate 2008 Report to Congress 427–41.	Direct the Department of the Treasury and the IRS to (1) minimize refund turnaround times; (2) implement a Revenue Protection Indicator; (3) develop a program to enable unbanked taxpayers to receive refunds on stored value cards (SVCs); and (4) conduct a public awareness campaign to disseminate accurate information about refund delivery options.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Senate Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
Small Business Issues				
Health Insurance Deduction/Self-Employed Individuals National Taxpayer Advocate 2001 Annual Report to Congress 223; National Taxpayer Advocate 2008 Annual Report to Congress 388–89.	Allow self-employed taxpayers to deduct the costs of health insurance premiums for purposes of self-employment taxes.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	**Pub. L. No. 111-240, § 2504 STAT 2560 (2010).**			
	S 725	Bingaman	3/26/2009	Referred to the Finance Committee
	HR 1470	Kind	3/12/2009	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	S 2239	Bingaman	10/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 663	Bingaman	3/17/2005	Referred to the Finance Committee
	S 3857	Smith	9/16/2006	Referred to the Finance Committee
Legislative Activity 108th Congress	HR 741	Sanchez	2/12/2003	Referred to the Ways & Means Committee
	HR 1873	Manzullo Velazquez	4/30/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	S 2130	Bingaman	4/15/2002	Referred to the Finance Committee

Married Couples as Business Co-owners National Taxpayer Advocate 2002 Annual Report to Congress 172–84.	Amend IRC § 761(a) to allow a married couple operating a business as co-owners to elect out of subchapter K of the IRC and file one Schedule C (or Schedule F in the case of a farming business) and two Schedules SE if certain conditions apply.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	**Pub.L. No. 110-28, Title VIII, § 8215, 121 Stat. 193, 194 (2007).**			
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in Senate, with an amendment
	S 842	Kerry	4/9/2003	Referred to the Finance Committee
	HR 1640	Udall	4/3/2003	Referred to the Ways & Means Committee
	HR 1558	Doggett	4/2/2003	Referred to the Ways & Means Committee
Income Averaging for Commercial Fishermen National Taxpayer Advocate 2001 Annual Report to Congress 226.	Amend IRC § 1301(a) to provide commercial fishermen the benefit of income averaging currently available to farmers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	**Pub. L. No. 108-357, § 314, 118 Stat. 1468, 1469 (2004).**			
Election to Be Treated as an S Corporation National Taxpayer Advocate 2004 Annual Report to Congress 390–93.	Amend IRC § 1362(a) to allow a small business corporation to elect to be treated as an S corporation no later than the date it timely files (including extensions) its first Form 1120S, *U.S. Income Tax Return for an S Corporation.*			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 2271	Franken	3/29/2012	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Regulation of Payroll Tax Deposits Agents National Taxpayer Advocate 2004 Annual Report to Congress 394–99.	◆ Amend the Code to require any person who enters into an agreement with an employer to collect, report, and pay any employment taxes to furnish a performance bond that specifically guarantees payment of federal payroll taxes collected, deducted, or withheld by such person from an employer and from wages or compensation paid to employees; ◆ Amend IRC § 3504 to require agents with an approved Form 2678, *Employer/Payer Appointment of Agent*, to allocate reported and paid employment taxes among their clients using a form prescribed by the IRS and impose a penalty for the failure to file absent reasonable cause; and ◆ Amend the U.S. Bankruptcy Code to clarify that IRC § 6672 penalties survive bankruptcy in the case of non-individual debtors.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division E, § 106 (2015).**			
Legislative Activity 113th Congress	S 900	Mikulski	05/08/2013	Referred to the Finance Committee
Legislative Activity 110th Congress	S 1773	Snowe	7/12/2007	Referred to the Finance Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	S 3583	Snowe	6/27/2006	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Issue Dual Address Change Notice National Taxpayer Advocate 2004 Annual Report to Congress 394–99.	Issue dual address change notices related to an employer making employment tax payments (with one notice sent to both the employer's former and new address).			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division E, § 106 (2015).**			
Legislative Activity 113th Congress	**Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5, 190 (2014) and Pub. L. No. 113-235, Division E, Title I, § 106, 128 Stat. 2130, 2338 (2014).**			
Special Consideration for Offer in Compromise National Taxpayer Advocate 2004 Annual Report to Congress 394–99.	Give special consideration to an offer in compromise (OIC) request from a victim of fraud or bankruptcy by a third-party payroll tax preparer.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 113th Congress	**Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5, 190 (2014) and Pub. L. No. 113-235, Division E, Title I, § 106, 128 Stat. 2130, 2338 (2014).**			
Simplification				
Reduce the Number of Tax Preferences National Taxpayer Advocate 2010 Annual Report to Congress 365–72.	Simplify the complexity of the tax code generally by reducing the number of tax preferences.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee
Simplify and Streamline Education Tax Incentives National Taxpayer Advocate 2008 Annual Report to Congress 370–72; National Taxpayer Advocate 2004 Annual Report to Congress 403–22.	Enact reforms to simplify and streamline the education tax incentives by consolidating, creating uniformity among, or adding permanency to the various education tax incentives. Specifically, (1) incentives under § 25A should be consolidated with § 222 and possibly § 221; (2) the education provisions should be made more consistent regarding the relationship of the student to the taxpayer; (3) the definitions for "Qualified Higher Education Expenses" and "Eligible Education Institution" should be simplified; (4) the income level and phase-out calculations should be more consistent under the various provisions; (5) all dollar amounts should be indexed for inflation; and (6) after initial use of sunset provisions and simplification amendments, the incentives should be made permanent.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Passed House, Placed on Senate Calendar 11/28/2017
Legislative Activity 114th Congress	S 699	Schumer	3/10/2015	Referred to the Finance Committee
	HR 1260	Doggett	3/4/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 835	Schumer	4/25/2013	Referred to the Finance Committee
	HR 1738	Doggett	4/25/2013	Referred to the Ways & Means Committee
	HR 3476	Israel	11/13/2013	Referred to the Ways & Means Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee
	S 3267	Schumer	6/6/2012	Referred to the Finance Committee
	HR 6522	Israel	9/21/2012	Referred to the Ways & Means Committee
Simplify and Streamline Retirement Savings Tax Incentives National Taxpayer Advocate 2008 Annual Report to Congress 373–74; National Taxpayer Advocate 2004 Annual Report to Congress 423–32.	Consolidate existing retirement incentives, particularly where the differences in plan attributes are minor. For instance, Congress should consider establishing one retirement plan for individual taxpayers, one for plans offered by small businesses, and one suitable for large businesses and governmental entities (eliminating plans that are limited to governmental entities). At a minimum, Congress should establish uniform rules regarding hardship withdrawals, plan loans, and portability.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee
Children Income National Taxpayer Advcate 2002 Annual Report to Congress 231-234	Repeal the rules under Internal Revenue Code section 1(g) that govern the taxation of investment income of children under age 14 and thereby sever the link between the computation of the child's tax liability and the parent's tax return.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Pub. L. No. 115-97, § 11001 (2017)
Tax Gap Provisions				
Corporate Information Reporting National Taxpayer Advocate 2008 Annual Report to Congress 388.	Require businesses that pay $600 or more during the year to non-corporate and corporate service providers to file an information report with each provider and with the IRS. Information reporting already is required on payments for services to non-corporate providers. This applies to payments made after December 31, 2011.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 1796	Baucus	10/19/2009	10/19/2009 Placed on Senate Legislative Calendar under General Orders; Calendar No. 184
Reporting on Customer's Basis in Security Transaction National Taxpayer Advocate 2005 Annual Report to Congress 433–41.	Require brokers to keep track of an investor's basis, transfer basis information to a successor broker if the investor transfers the stock or mutual fund holding, and report basis information to the taxpayer and the IRS (along with the proceeds generated by a sale) on Form 1099-B.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	**Pub. L. No. 110-343, § 403, 121 Stat. 3854, 3855 (2008).**			
	HR 878	Emanuel	2/7/2007	Referred to the Ways & Means Committee
	S 601	Bayh	2/14/2007	Referred to the Finance Committee
	S 1111	Wyden	4/16/2007	Referred to the Finance Committee
	HR 2147	Emanuel	5/3/2007	Referred to the Ways & Means Committee
	HR 3996 PCS	Rangel	10/30/2007	11/14/2007 Placed on the Senate Calendar; became Pub. L. No. 110-166 (2007) without this provision
Legislative Activity 109th Congress	S 2414	Bayh	3/14/2006	Referred to the Finance Committee
	HR 5176	Emanual	4/25/2006	Referred to the Ways & Means Committee
	HR 5367	Emanual	5/11/2006	Referred to the Ways & Means Committee

IRS Forms Revisions National Taxpayer Advocate 2004 Annual Report to Congress 480; National Taxpayer Advocate 2010 Annual Report to Congress 40.	Revise Form 1040, Schedule C, to include a line item showing the amount of self-employment income that was reported on Forms 1099-MISC.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
IRS to Promote Estimated Tax Payments Through the Electronic Federal Tax Payment System (EFTPS) National Taxpayer Advocate 2005 Annual Report to Congress 381–96.	Amend IRC § 6302(h) to require the IRS to promote estimated tax payments through EFTPS and establish a goal of collecting at least 75 percent of all estimated tax payment dollars through EFTPS by fiscal year 2012.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Study of Use of Voluntary Withholding Agreements National Taxpayer Advocate 2004 Annual Report to Congress 478–89; National Taxpayer Advocate 2005 Annual Report to Congress 381-96.	Amend IRC § 3402(p)(3) to specifically authorize voluntary withholdings agreements between independent contractors and service-recipients as defined in IRC § 6041A(a)(1).			
	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336. 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Require Form 1099 Reporting for Incorporated Service Providers National Taxpayer Advocate 2007 Annual Report to Congress 494–96.	Require service recipients to issue Forms 1099-MISC to incorporated service providers and increase the penalties for failure to comply with the information reporting requirements.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	**Pub. L No. 111-148 § 9006 (2010).** However, this Act also contains a reporting requirement for goods sold, which the National Taxpayer Advocate opposes because of the enormous burden it places on businesses. See Legislative Recommendation: Repeal the Information Reporting Requirement for Purchases of Goods over $600, but Require Reporting on Corporate and Certain Other Payments.			

Require Financial Institutions to Report All Accounts to the IRS by Eliminating the $10 Threshold on Interest Reporting National Taxpayer Advocate 2007 Annual Report to Congress 501–02.	Eliminate the $10 interest threshold beneath which financial institutions are not required to file Form 1099-INT reports with the IRS.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Revise Form 1040, Schedule C to Break Out Gross Receipts Reported on Payee Statements Such as Form 1099 National Taxpayer Advocate 2007 Annual Report to Congress 40.	Administrative recommendation that the IRS add a line to Schedule C, so that taxpayers would separately report the amount of income reported to them on Forms 1099 and other income not reported on Forms 1099. If enacted by statute, the IRS would be required to implement this recommendation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Include a Checkbox on Business Returns Requiring Taxpayers to Verify That They Filed All Required Forms 1099 National Taxpayer Advocate 2007 Annual Report to Congress 40.	Administrative recommendation that the IRS require all businesses to answer two questions on their income tax returns: "Did you make any payments over $600 in the aggregate during the year to any unincorporated trade or business?" and "If yes, did you file all required Forms 1099?" S 3795 would require the IRS to study whether placing a checkbox or similar indicator on business tax returns would affect voluntary compliance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Authorize Voluntary Withholding Upon Request National Taxpayer Advocate 2007 Annual Report to Congress 493–94.	Authorize voluntary withholding agreements between independent contractors and service recipients.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Require Backup Withholding on Certain Payments When TINs Cannot Be Validated National Taxpayer Advocate 2005 Annual Report to Congress 238–48.	Administrative recommendation that the IRS require payors to commence backup withholding if they do not receive verification of a payee's TIN. (S 3795 would require voluntary withholding on certain payments.)			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Worker Classification National Taxpayer Advocate 2008 Annual Report to Congress 375–90.	Direct Treasury and the Joint Committee on Taxation to report on the operation of the revised worker classification rules and provide recommendations to increase compliance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee

Taxpayer Bill of Rights and *De Minimis* "Apology" Payments				
Taxpayer Bill of Rights National Taxpayer Advocate 2014 Annual Report to Congress; National Taxpayer Advocate 2013 Annual Report to Congress; National Taxpayer Advocate 2011 Annual Report to Congress 493-518; National Taxpayer Advocate 2007 Annual Report to Congress 478–48.	Enact a Taxpayer Bill of Rights setting forth the fundamental rights and obligations of U.S. taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 401 (2015).**			
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 943	Portman	4/15/2015	Referred to the Finance Committee
	S 951	Ayotte	4/15/2015	Referred to the Finance Committee
	HR 1058	Roskam	2/25/2015	Passed the House of Representatives, and was referred to the Senate Finance Committee on 4/16/2015
Legislative Activity 113th Congress	HR 2768	Roskam	6/22/2013	Passed the House of Representatives, and was referred to the Senate Finance Committee on 8/31/2013
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Ways & Means Committee
	HR 5047	Becerra	4/15/2010	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
***De Minimis* "Apology" Payments** National Taxpayer Advocate 2007 Annual Report to Congress 490.	Grant the National Taxpayer Advocate the discretionary, nondelegable authority to provide *de minimis* compensation to taxpayers where the action or inaction of the IRS has caused excessive expense or undue burden to the taxpayer and the taxpayer meets the IRC § 7811 definition of significant hardship.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Toll the Time Period for Financially Disabled Taxpayers to Request Return of Levy Proceeds to Better Protect Their Right to a Fair and Just Tax System National Taxpayer Advocate 2015 Annual Report to Congress 368-75	Requiring Tolling for Claims of Financially Disabled Taxpayers			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee

Simplify the Tax Treatment of Cancellation of Debt Income National Taxpayer Advocate 2008 Annual Report to Congress 391–96.	Enact one of several proposed alternatives to remove taxpayers with modest amounts of debt cancellation from the cancellation of debt income regime.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee, and the Financial Services Committee
Legislative Activity 111th Congress	HR 4561	Lewis	2/2/2010	Referred to the Ways & Means Committee
Joint and Several Liability				
Tax Court Review of Request for Equitable Innocent Spouse Relief National Taxpayer Advocate 2001 Annual Report to Congress 128–65.	Amend IRC § 6015(e) to clarify that taxpayers have the right to petition the Tax Court to challenge determinations in cases seeking relief under IRC § 6015(f) alone.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	**Pub. L. No. 109-432, § 408, 120 Stat. 3061, 3062 (2006).**			
Effect of Automatic Stay Imposed in Bankruptcy Cases upon Innocent Spouse and CDP Petitions in Tax Court National Taxpayer Advocate 2004 Annual Report to Congress 490–92.	Allow a taxpayer seeking review of an innocent spouse claim or a collection case in U.S. Tax Court a 60-day suspension of the period for filing a petition for review, when the U.S. Bankruptcy Court has issued an automatic stay in a bankruptcy case involving the taxpayer's claim.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 725	Cornyn	4/15/2013	Referred to the Finance Committee
	HR 3479	Thornberry	11/13/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Ways & Means Committee
Clarify that the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) Is *De Novo*. National Taxpayer Advocate 2011 Annual Report to Congress 531–36.	Amend IRC § 6015 to specify that the scope and standard of review in tax court determinations under IRC § 6015(f) is *de novo*.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee, and the Financial Services Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 725	Cornyn	4/15/2013	Referred to the Finance Committee
	HR 3479	Thornberry	11/13/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 60550	Becerra	6/28/2012	Referred to the Ways & Means Committee

Collection Issues				
Improve Offer In Compromise Program Accessibility National Taxpayer Advocate 2006 Annual Report to Congress 507–19.	Repeal the partial payment requirement, or if repeal is not possible, (1) provide taxpayers with the right to appeal to the IRS Appeals function the IRS's decision to return an offer without considering it on the merits; (2) reduce the partial payment to 20 percent of current income and liquid assets that could be disposed of immediately without significant cost; and (3) create an economic hardship exception to the requirement.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 111th Congress	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
	HR 2342	Lewis	5/12/2009	Referred to the Ways & Means Committee
Strengthen Taxpayer Protections in the Filing and Reporting of Federal Tax Liens 2009 National Taxpayer Advocate Report to Congress 357–64.	Provide clear and specific guidance about the factors the IRS must consider when filing a Notice of Federal Tax Lien (NFTL) and amend the Fair Credit Reporting Act to set specific timeframes for reporting derogatory tax lien information on credit reports.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
	HR 6439	Hastings	11/18/2010	Referred to the Ways & Means Committee
Permit the IRS to Release Levies on Small Business Taxpayers 2011 National Taxpayer Advocate Report to Congress 537–43.	Amend IRC § 6343(a)(1)(d) to: permit the IRS, in its discretion, to release a levy against the taxpayer's property or rights to property if the IRS determines that the satisfaction of the levy is creating an economic hardship due to the financial condition of the taxpayer's business.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	HR 4368	McDermott	4/17/2012	Referred to the Ways & Means Committee

Return of Levy or Sale Proceeds National Taxpayer Advocate 2001 Annual Report to Congress 202–14.	Amend IRC § 6343(b) to extend the period of time within which a third party can request a return of levied funds or the proceeds from the sale of levied property from nine months to two years from the date of levy. This amendment would also extend the period of time available to taxpayers under IRC § 6343(d) within which to request a return of levied funds or sale proceeds.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Pub. L. No. 115-97, § 11001 (2017)
	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 1677	Rangel	3/26/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 1321 RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 3991	Houghton	3/19/2002	Defeated in House
	HR 586	Lewis	2/13/2001	4/18/02 Passed the House with an amendment; referred to the Senate
Reinstatement of Retirement Accounts National Taxpayer Advocate 2001 Annual Report to Congress 202–14.	Amend the following IRC sections to allow contributions to individual retirement accounts and other qualified plans from the funds returned to the taxpayer or to third parties under IRC § 6343: ◆ § 401 – Qualified Pension, Profit Sharing, Keogh, and Stock Bonus Plans ◆ § 408 – Individual Retirement Account, and SEP-Individual Retirement Account ◆ § 408A – Roth Individual Retirement Account.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 1578	Grassley	6/16/2015	Finance Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 1677	Rangel	3/26/2007	Referred to the Finance Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated in HR 1528 through an amendment and HR 1528 passed in lieu of S 882
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to Senate
	HR 3991	Houghton	3/19/2002	Defeated in the House
Levies on Retirement Accounts National Taxpayer Advocate 2015 Annual Report to Congress 340-45.	Require the IRS to issue regulations describing a full financial analysis of the taxpayer's projected basic living expenses at retirement prior to allowing a determination to levy on a retirement account.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Consolidation of Appeals of Collection Due Process (CDP) Determinations National Taxpayer Advocate 2005 Annual Report to Congress 451–70.	Consolidate judicial review of CDP hearings in the United States Tax Court, clarify the role and scope of Tax Court oversight of Appeals' continuing jurisdiction over CDP cases, and address the Tax Court's standard of review for the underlying liability in CDP cases.			
Legislative Activity 109th Congress	**Pub. L. No. 109-280, § 855, 120 Stat. 1019 (2006).**			
Partial Payment Installment Agreements National Taxpayer Advocate 2001 Annual Report to Congress 210–14.	Amend IRC § 6159 to allow the IRS to enter into installment agreements that do not provide for full payment of the tax liability over the statutory limitations period for collection of tax where it appears to be in the best interests of the taxpayer and the IRS.			
Legislative Activity 108th Congress	**Pub. L. No. 108-357, § 833, 118 Stat. 1418, 1600 (2004).**			
Waiver of Installment Agreement Fees for Low Income Taxpayers National Taxpayer Advocate 2006 Annual Report to Congress 141–56.	Implement an installment agreement (IA) user fee waiver for low income taxpayers and adopt a graduated scale for other IA user fees based on the amount of work required.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee

Strengthen the Independence of the IRS Office of Appeals National Taxpayer Advocate 2009 Annual Report to Congress 346-50.	Strengthen the independence of the IRS Office of Appeals and require at least one appeals officer and settlement officer in each state. In addition the Office of Appeals should be independent from the IRS, should eliminate prohibited ex parte communications with the IRS.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
Penalties and Interest				
Erroneous Refund Penalty National Taxpayer Advocate 2014 Annual Report to Congress 351; National Taxpayer Advocate 2011 Annual Report to Congress 544.	Amend section 6676 to clarify that the penalty does not apply to individual taxpayers who acted with reasonable cause and in good faith in erroneously claiming a credit or refund. Taking into account all of taxpayers' facts and circumstances in determining whether they had such reasonable cause would bring this statutory penalty into conformity with the TBOR *right to a fair and just tax system*.			
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 209 (2015).**			
Protect Good Faith Taxpayers by Expanding the Availability of Penalty Reductions, Establishing Specific Penalty Abatement Procedures, and Providing Appeal Rights National Taxpayer Advocate 2015 Annual Report to Congress 376-82.	Expand the notice period allowing taxpayers to correct their returns and avoid application of the frivolous return penalty from 30 days to 60 days and establish the same mechanism for correcting returns			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Interest Rate and Failure to Pay Penalty National Taxpayer Advocate 2001 Annual Report to Congress 179–82.	Repeal the failure to pay penalty provisions of IRC § 6651 while revising IRC § 6621 to allow for a higher underpayment interest rate.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee

Interest Abatement on Erroneous Refunds National Taxpayer Advocate 2001 Annual Report to Congress 183–87.	Amend IRC § 6404(e)(2) to require the Secretary to abate the assessment of all interest on any erroneous refund under IRC § 6602 until the date the demand for repayment is made, unless the taxpayer (or a related party) has in any way caused such an erroneous refund. Further, the Secretary should have discretion not to abate any or all such interest where the Secretary can establish that the taxpayer had notice of the erroneous refund before the date of demand and the taxpayer did not attempt to resolve the issue with the IRS within 30 days of such notice.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	HR 726	Sanchez	2/9/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
First Time Penalty Waiver National Taxpayer Advocate 2001 Annual Report to Congress 188–92.	Authorize the IRS to provide penalty relief for first-time filers and taxpayers with excellent compliance histories who make reasonable attempts to comply with the tax rules.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 3991	Houghton	3/19/2002	Defeated in the House
Federal Tax Deposit (FTD) Avoidance Penalty National Taxpayer Advocate 2001 Annual Report to Congress 222.	Reduce the maximum FTD penalty rate from ten to two percent for taxpayers who make deposits on time but not in the manner prescribed in the IRC.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee, reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
	HR 3991	Houghton	3/19/2002	Defeated in the House

Family Issues				
Uniform Definition of a Qualifying Child National Taxpayer Advocate 2001 Annual Report to Congress 78–100.	Create a uniform definition of "qualifying child" applicable to tax provisions relating to children and family status.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	**Pub. L. No. 108-311, § 201, 118 Stat. 1169-1175 (2004).**			
Means-Tested Public Assistance Benefits National Taxpayer Advocate 2001 Annual Report to Congress 76–127.	Amend the IRC §§ 152, 2(b) and 7703(b) to provide that means-tested public benefits are excluded from the computation of support in determining whether a taxpayer is entitled to claim the dependency exemption and from the cost of maintenance test for the purpose of head-of-household filing status or "not married" status.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 22	Houghton	1/3/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 5505	Houghton	10/01/2002	Referred to the Ways & Means Committee
Credits for the Elderly or the Permanently Disabled National Taxpayer Advocate 2001 Annual Report to Congress 218–19.	Amend IRC § 22 to adjust the income threshold amount for past inflation and provide for future indexing for inflation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 107th Congress	S 2131	Bingaman	4/15/2002	Referred to the Finance Committee
Electronic Filing Issues				
Scannable Returns National Taxpayer Advocate 2013 Annual Report to Congress Vol. 2, § 5, 70, 91, 96.	Require electronically prepared paper returns to include scannable 2-D code.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	S 606	Nelson	3/9/2017	Referred to Finance Committee
Legislative Activity 113th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee
Return Filing and Processing National Taxpayer Advocate 2013 Annual Report to Congress, Vol. 2, 68-96.	Eliminate the March 31st deadline for e-filed information reports. All information reports, whether e-filed or filed on paper, would be due at the end of February.			
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 201 (2015).**			
Safe Harbor for *De Minimis* Errors Returns and Payee Statements National Taxpayer Advocate 2013 Annual Report to Congress Vol. 2, § 5, 70, 91, 96.	Safe harbor for *de minimis* errors on information			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 202 (2015).**			
Legislative Activity 113th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee

Direct Filing Portal National Taxpayer Advocate 2004 Annual Report to Congress 471–77.	Amend IRC § 6011(f) to require the IRS to post fill-in forms on its website and make electronic filing free to all individual taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 110th Congress	S 1074	Akaka	3/29/2007	Referred to the Finance Committee
	HR 5801	Lampson	4/15/2008	Referred to the Ways & Means Committee
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 Referred to the Finance Committee; Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Free Electronic Filing For All Taxpayers National Taxpayer Advocate 2013 Annual Report to Congress Vol. 2, § 5, 70, 91, 96	Revise IRC § 6011(f) to provide that the Secretary shall make electronic return preparation and electronic filing available without charge to all individual taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee
Office of the Taxpayer Advocate				
Repeal or Fix Statute Suspension Under IRC § 7811(d) National Taxpayer Advocate 2015 Annual Report to Congress 316–28.	Repeal suspension of statute of limitations during pending application for Taxpayer Assistance Order or clarify.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Confidentiality of Taxpayer Communications National Taxpayer Advocate 2002 Annual Report to Congress 198–215.	Strengthen the independence of the National Taxpayer Advocate and the Office of the Taxpayer Advocate by amending IRC §§ 7803(c)(3) and 7811. Amend IRC § 7803(c)(4)(A)(iv) to clarify that, notwithstanding any other provision of the IRC, Local Taxpayer Advocates have the discretion to withhold from the IRS the fact that a taxpayer contacted the Taxpayer Advocate Service or any information provided by a taxpayer to TAS.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Access to Independent Legal Counsel National Taxpayer Advocate 2002 Annual Report to Congress 198–215.	Amend IRC § 7803(c)(3) to provide for the position of Counsel to the National Taxpayer Advocate, who shall advise the National Taxpayer Advocate on matters pertaining to taxpayer rights, tax administration, and the Office of Taxpayer Advocate, including commenting on rules, regulations, and significant procedures, and the preparation of *amicus* briefs.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	Referred to the Senate
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee

Taxpayer Advocate Directive National Taxpayer Advocate 2012 Annual Report to Congress 573–602; National Taxpayer Advocate 2002 Annual Report to Congress 419–22.	Amended IRC § 7811 to provide the National Taxpayer Advocate with the non-delegable authority to issue a Taxpayer Advocate Directive to the Internal Revenue Service with respect to any program, proposed program, action, or failure to act that may create a significant hardship for a taxpayer segment or taxpayers at large.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Exempt Organizations (EO)				
EO Judicial and Administrative Review National Taxpayer Advocate 2014 Annual Report to Congress 573–602, 371–79.	Amend IRC § 7428 to allow taxpayers seeking exemption as IRC § 501(c)(4), (c)(5), or (c)(6) organizations to seek a declaratory judgment on the same footing as those seeking exempt status as IRC § 501(c)(3) organizations.			
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 406 (2015).**			
Notification to Exempt Organizations National Taxpayer Advocate 2011 Annual Report to Congress 444.	Require the IRS to notify exempt organizations that have not filed an annual notice or return for two consecutive years that the IRS has no record of receiving a return or notice and that the organization's exemption will be revoked if it does not file by the next filing deadline			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
Other Issues				
Modify Internal Revenue Code Section 6707A to Ameliorate Unconscionable Impact National Taxpayer Advocate 2008 Annual Report to Congress 419–22.	Modify IRC § 6707A to ameliorate unconscionable impact. Section 6707A of the IRC imposes a penalty of $100,000 per individual per year and $200,000 per entity per year for failure to make special disclosures of a "listed transaction."			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	**Pub. L. No. 111-124, § 2041 Stat. 2560 (2010).**			
	S 2771	Baucus	11/16/2009	Referred to the Finance Committee
	HR 4068	Lewis	11/16/2009	Referred to the Ways & Means Committee
	S 2917	Baucus	12/18/2009	Referred to the Finance Committee
Eliminate Tax Strategy Patents National Taxpayer Advocate 2007 Annual Report to Congress 512–24.	Bar tax strategy patents, which increase compliance costs and undermine respect for congressionally-created incentives, or require the PTO to send any tax strategy patent applications to the IRS so that abuse can be mitigated.			
Legislative Activity 112th Congress	**Pub. L. No. 112-29 § 14(a), 125 Stat. 284, 327 (2011).**			

Restrict Tax Return Disclosures to Necessary Content National Taxpayer Advocate 2007 Annual Report to Congress 554–555.	Limit the disclosure of tax returns and tax return information requested through taxpayer consent solely to the extent necessary to achieve the purpose for which consent was requested.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee
Disclosure Regarding Suicide Threats National Taxpayer Advocate 2001 Annual Report to Congress 227.	Amend IRC § 6103(i)(3)(B) to allow the IRS to contact and provide necessary return information to specified local law enforcement agencies and local suicide prevention authorities, in addition to federal and state law enforcement agencies in situations involving danger of death or physical injury.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated in HR 1528 through an amendment and HR 1528 passed in lieu of S 882
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
Attorney Fees National Taxpayer Advocate 2002 Annual Report to Congress 161–71.	Allow successful plaintiffs in nonphysical personal injury cases who must include legal fees in gross income to deduct the fees "above the line." Thus, the net tax effect would not vary depending on the state in which a plaintiff resides.			
Legislative Activity 108th Congress	**Pub. L. No. 108-357, § 703, 118 Stat. 1418, 1546-48 (2004).**			
Attainment of Age Definition National Taxpayer Advocate 2003 Annual Report to Congress 308–11.	Amend IRC § 7701 by adding a new subsection as follows: "Attainment of Age. An individual attains the next age on the anniversary of his date of birth."			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 4841	Burns	7/15/2004	7/21/2004 Passed the House; 7/22/2004 Received in the Senate
Home-Based Service Workers (HBSW) National Taxpayer Advocate 2001 Annual Report to Congress 193–201.	Amend IRC § 3121(d) to clarify that HBSWs are employees rather than independent contractors.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
Legislative Activity 107th Congress	S 2129	Bingaman	4/15/2002	Referred to the Finance Committee
Restrict Access to the Death Master File (DMF) National Taxpayer Advocate 2011 Annual Report to Congress 519–23.	Restrict access to certain personally identifiable information in the DMF. The National Taxpayer Advocate is not recommending a specific approach at this time, but outlines below several available options.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 113th Congress	**H.J. Res. 59, 113th Cong. § 203 (2013).**			
Legislative Activity 112th Congress	S 3432	Nelson	7/25/2012	Referred to the Finance Committee
	HR 6205	Nugent	7/26/2012	Referred to the Ways & Means Committee

Amend the Adoption Credit to Acknowledge Jurisdiction of Native American Tribes National Taxpayer Advocate 2012 Annual Report to Congress 521.	Amend IRC § 7871(a) to include the adoption credit (IRC § 23) in the list of Code sections for which a Native American tribal government is treated as a "State".			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 835	Heitkamp	3/23/2015	Referred to the Finance Committee
	HR 1542	Kilmer	3/23/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 835	Johnson	7/09/2014	Referred to the Finance Committee
	HR 1738	Kilmer	6/12/2013	Referred to the Ways & Means Committee
Filing Due Dates of Partnerships and Certain Trusts National Taxpayer Advocate 2003 Annual Report to Congress 302.	Amend Internal Revenue Code section 6072(a) to change the regular filing deadline for partnerships described in Section 6031 and trusts described in Section 6012(a)(4) as follows: ◆ For partnerships and trusts making returns on the basis of a calendar year: Change the regular filing deadline from the 15th day of April following the close of the calendar year to the 15th day of March following the close of the calendar year. ◆ For partnerships and trusts making returns on the basis of a fiscal year: Change the regular filing deadline from the 15th day of the fourth month following the close of the fiscal year to the 15th day of the third month following the close of the fiscal year			
Legislative Activity 114th Congress	**Pub. L. No. 114-41 § 2006, 129 Stat. 443, 457 (2015).**			
Foreign Account Reporting National Taxpayer Advocate 2014 Annual Report to Congress 331.	Align the FBAR filing deadline and threshold(s) with the Form 8938 filing deadline and threshold(s). Change the FBAR filing due date to coincide with the due date applicable to a taxpayer's federal income tax return and Form 8938 (including extensions).			
Legislative Activity 114th Congress (July 31, 2015)	**Pub. L. No. 114-41 § 2006, 129 Stat. 443, 458-459 (2015).**			
Individual Taxpayer Identification Numbers (ITINs)				
Requirements for the Issuance of ITINs National Taxpayer Advocate 2008 Annual Report to Congress 126; National Taxpayer Advocate 2010 Annual Report to Congress 319.	Administrative recommendation that the IRS should promote the Certified Acceptance Agent program and use other federal agencies to perform acceptance agent duties as contemplated in the Treasury Regulation (*e.g.*, the Postal Service performs a similar service in processing passport applications).			
Legislative Activity 114th Congress (July 31, 2015)	**Pub. L. No. 114-113, Division Q § 203 (2015).**			
Develop a Process To Verify That Previously Issued ITINs Have Been Used for Tax Administration Purposes National Taxpayer Advocate 2008 Annual Report to Congress 126; National Taxpayer Advocate 2010 Annual Report to Congress 319.	Administrative recommendation the IRS should develop a process to verify that previously issued ITINs have been used for tax administration purposes and revoke unused ITINs on a regular basis after notifying ITIN holders.			
Legislative Activity 114th Congress	**Pub. L. No. 114-113, Division Q § 203 (2015).**			
Whistleblower National Taxpayer Advocate 2015 Annual Report to Congress 409–12.	Amend IRC § 7623 to include anti-retaliation protection for tax whistleblowers and impose a penalty on whistleblowers for unauthorized disclosure of tax information.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 762	Grassley	3/29/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders

LR #1 TIMING OF REFUNDS: Direct the IRS to Study the Impact of Delaying the Issuance of Refunds to Allow Sufficient Time to Process Information Returns and Perform Document-Matching

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

PROBLEM

Refund fraud is a significant problem in tax administration. Not only do fraudulent refund claims impose a large financial burden on the government (and thus all taxpayers), but it also causes innocent taxpayers to become entangled in a complex and time-consuming set of procedures to resolve the issue. In December 2015, Congress enacted the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), which contained two key provisions that became effective in 2017 intended to help combat tax refund fraud.[2]

First, the PATH Act changed the due date for filing Forms W-2, *Wage and Tax Statement*, and certain Forms 1099-MISC, *Miscellaneous Income*. Prior to 2017, the due date for these information reporting forms was the last day of March (or February, if not filed electronically). The PATH Act moved up the due date for these information returns to January 31, starting in 2017.[3] With the accelerated deadline, the IRS should be able to conduct matching and verify income much earlier in the filing season than in prior years.

Second, the PATH Act prohibits the IRS from issuing tax refunds before February 15 if the taxpayer has claimed either the Additional Child Tax Credit (ACTC) or the Earned Income Tax Credit (EITC).[4] This provision provides time for the IRS to conduct upfront matching of the tax return information to the information return data before issuing refunds that include refundable credits.

The PATH Act provisions are a step in the right direction, but more could be done to protect from refund fraud and ensure the accuracy of returns. Due in part to delays in transcribing data from paper-filed information returns, the IRS completed verification on only a small portion of the wage and non-employee compensation information before it started paying out refunds in the 2017 filing season. Getting more employers and payors to electronically file information returns would enable the IRS to process this data much sooner in the filing season.

1 *See* Taxpayer Bill of Rights (TBOR), http://www.TaxpayerAdvocate.irs.gov/Taxpayer-Rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Protecting Americans from Tax Hikes Act of 2015 (PATH Act), Pub. L. No. 114-113, Division Q, Title II, § 201, 129 Stat. 2242, 3076 (2015).

3 PATH Act, Pub. L. No. 114-113, Division Q, Title II, § 201(a), 129 Stat. 2242, 3076 (2015) (codified at IRC § 6071(c)).

4 *Id.* (codified at IRC § 6402(m)).

Example

Taxpayer, a wage earner, electronically files a tax year (TY) 2016 Form 1040 on January 23, 2017. Taxpayer is eager to file as early as possible because he is claiming a refund of $2,000, none of which is from a refundable credit. Taxpayer receives a refund by direct deposit on February 5, 2017. However, in June 2017, the IRS discovers that Taxpayer overstated withholdings on the return. Once notified of this discrepancy, Taxpayer reviews his Form W-2 and realizes that he typed in the wrong amount of withholdings by inverting two numbers (he entered $12,112 of withholding instead of $11,212). As a result, Taxpayer received $900 more than he was entitled to from the IRS. However, Taxpayer had used the full amount of the refund received four months ago to purchase new appliances that his family needed. After a series of discussions with an IRS Collections Officer spanning three months, Taxpayer enters into an installment agreement in September 2017 to pay off the amount owed (plus penalties) over one year, with interest. Had the IRS delayed issuing Taxpayer's refund until March, the IRS could have verified the correct withholding amount against the Form W-2 submitted by Taxpayer's employer by the January 31 due date. There are, however, considerations of taxpayer and employer burden that must be identified and addressed before delaying the issuance of refunds to all taxpayers.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress:

- Require employers with more than five employees to electronically file Forms W-2 and 941, and require payors who issue more than five Forms 1099-MISC with nonemployee compensation to electronically file Forms 1099-MISC.
- To promote electronic filing, direct the IRS to create fillable Forms 941 and Forms 1099-MISC that can be electronically filed at no cost directly from the irs.gov website.
- In collaboration with the National Taxpayer Advocate, require the IRS to conduct a comprehensive study on the benefits and burdens of delaying the issuance of refunds until March, and then submit a Report to Congress with its findings and recommendations.

PRESENT LAW

Payors are required to file an information return concerning certain transactions with the payee.[5] These information returns (such as Forms W-2 and Forms 1099) are intended to assist taxpayers in preparing their income tax returns and to help the IRS determine whether such income tax returns are correct and complete. If payments made in the course of business to a person[6] amount to $600 or more in any taxable year, the payor is required to file a return reporting these payments.[7] Payments subject to this reporting requirement include rents, salaries, wages, premiums, annuities, compensations, remunerations, rewards, fees, benefits, and any other fixed or determinable gains, profits or income. There is also a reporting requirement for various types of investment income, including interest (threshold of $10 or more), dividends (threshold of $10 or more), and gross proceeds from brokered transactions.[8]

5 IRC §§ 6041-6050W.

6 The term "person" is broadly defined "to mean and include an individual, a trust, estate, partnership association, company or corporation." IRC § 7701(a)(1).

7 IRC § 6041(a); Treas. Reg. § 1.6041-1(a)(1).

8 IRC §§ 6041, 6042 (dividends), 6045 (brokered transactions), and 6049 (interest).

Payors are required to provide the payee with a written statement or information return showing the total payments made during the tax year and contact information for the payor.[9] The statement must be supplied to payees by January 31 of the following calendar year.[10] Payors generally must file the information return with the IRS on or before the last day of February of the following calendar year (the last day of March if filing electronically).[11] However, the PATH Act amended IRC § 6071 by inserting IRC § 6071(c), which provides that, beginning in 2017, Forms W-2 and W-3, and any returns or statements reporting nonemployee compensation shall be filed on or before January 31.[12] Therefore, the deadline to send these information returns to the government will be the same as the deadline to send to the payees.

Section 201(b) of the PATH Act prohibits the IRS from issuing refunds containing refundable credits (such as the ACTC or the EITC) before February 15. This provision became effective in 2017.[13] The legislative history offers a simple rationale for this change — "At the time that the taxpayer files a return claiming a refundable credit, the Internal Revenue Service is generally not in possession of information needed to confirm the taxpayer's eligibility for such credit…."[14]

REASONS FOR CHANGE

Upfront Matching Benefits Tax Administration by Protecting Revenue and Protects Taxpayers From the Burdens of Unwinding the Harm Caused by Identity Theft

While there are benefits to having the IRS deliver tax refunds quickly to taxpayers, this convenience comes at a steep cost. Refund fraud has cost the government (and thus, taxpayers) more than one billion dollars each year.[15] Taxpayers who are ensnared by identity theft (IDT) schemes must spend months dealing with the IRS and creditors to unwind the harm caused by the perpetrators.[16]

Third-party information reporting is a crucial element in maximizing tax compliance and reducing overclaims. IRS tax gap data show when taxpayers have no choice about reporting their income, tax compliance rates are remarkably high. For example, workers classified as employees have little opportunity to underreport their earned income because it is subject to income tax withholding and information reporting on Form W-2. In fact, recent IRS data show that taxpayers report about

9 IRC § 6041(d).

10 *Id.*

11 IRC § 6071(b).

12 PATH Act, Pub. L. No. 114-113, Division Q, Title II, § 201(a), 129 Stat. 2242, 3076 (2015) (codified at IRC § 6071(c)).

13 PATH Act, Pub. L. No. 114-113, Division Q, Title II, § 201(b), 129 Stat. 2242, 3076 (2015) (codified at IRC § 6402(m)).

14 J. Committee on Tax'n, JCX-144-15, *Technical Explanation of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40)* at 120 (Dec. 17, 2015).

15 The Treasury Inspector General for Tax Administration (TIGTA) estimated that the amount of potentially fraudulent tax refunds for TY 2013 exceeded $1.6 billion (down $523 million from the previous tax year). TIGTA, Ref. No. 2017-40-2017, *Efforts Continue to Result in Improved Identification of Fraudulent Tax Returns Involving Identity Theft; However, Accuracy of Measures Needs Improvement* 7 (Feb. 7, 2017).

16 *See* Most Serious Problem: *As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*.

99 percent of their wages and salaries.[17] In contrast, those taxpayers whose income is not subject to information reporting, report about 37 percent on their returns.[18]

Thus, the government will benefit from the revenue protection aspect of upfront matching. Enabling the IRS to conduct upfront data matching would reduce tax refund fraud, identity theft, and inadvertent errors by stopping the refund associated with a mismatch. Further, the IRS would devote fewer resources to collection activities on basic omission and understatement cases, and could use the savings to provide better taxpayer service and resolve more complex issues.

At the time the taxpayer files a return, the IRS may not have access to the information necessary to match the information reported on the returns to the third party data from the information returns — despite the accelerated deadline for filing certain information returns that came into effect for the 2017 filing season. The tables below show the volume of various information returns received for TYs 2015 and 2016, along with the percentage of such information returns received by February 15 of the following year.

FIGURE 2.1.1, 2016 Filing Season (TY 2015)[19]

	Count	Received by 2/15	Percent Received by 2/15
W-2	247,811,203	95,492,467	39%
1099-MISC with NEC[20]	55,607,682	1,159,619	2%
1099-INT	138,071,455	8,323,929	6%
1099-R	94,144,144	5,791,434	6%
1099-G	73,683,026	12,518,761	17%

FIGURE 2.1.2, 2017 Filing Season (TY 2016)[21]

	Count	Received by 2/15	Percent Received by 2/15
W-2	248,235,492	214,724,338	87%
1099-MISC with NEC [22]	54,236,251	2,594,902	5%
1099-INT	134,259,297	7,779,343	6%
1099-R	95,779,078	6,274,828	7%
1099-G	79,946,205	16,122,112	20%

17 IRS, *Tax Gap Estimates for Tax Years 2008–2010: Attachment 3, Figure 1, Effect of Information Reporting on Individual Income Tax Reporting Compliance, Tax Years 2008–2010* (Apr. 2016), https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf.

18 IRS, *Tax Gap Estimates for Tax Years 2008–2010: Attachment 3, Figure 1, Effect of Information Reporting on Individual Income Tax Reporting Compliance, Tax Years 2008–2010* (Apr. 2016), https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf.

19 IRS, Compliance Data Warehouse (CDW), Information Returns Master File (IRMF) (TY 2015).

20 This includes Forms 1099 showing nonemployee compensation greater than zero.

21 IRS, CDW, IRMF (TY 2016).

22 This includes Forms 1099 showing nonemployee compensation greater than zero.

By Week 7 (the week closest to February 15) of the 2017 filing season, the IRS had received 87 percent of the Forms W-2 that it would ultimately receive related to TY 2016.[23] That is a significant increase over the prior year, before the accelerated information return filing due date was in effect, when only 39 percent of the Forms W-2 filed for TY 2015 was received by the IRS by February 15.[24]

Despite having received 87 percent of the information documents by February 15,[25] the IRS was able to verify by February 15 only 35 percent of the wage information for returns where the taxpayer claimed the ACTC or EITC during the 2017 filing season, according to the Government Accountability Office (GAO).[26] One reason for the difficulties verifying the wage information is the volume of paper-filed information returns, which takes weeks for the Social Security Administration (SSA) to process and transmit to the IRS.[27]

Electronic Filing of Forms 941 Would Provide the IRS Real-Time Access to Data and Enable It to Combat Employer-Related Identity Theft

Employers currently are not required to file Forms 941 electronically but can do so voluntarily.[28] Many perpetrators are now targeting businesses via large-scale data breaches and some are targeting employers to fabricate falsified Forms W-2.[29] In some schemes, an identity thief uses the victim's Employer Identification Number (EIN) to file fraudulent employment tax returns along with fabricated Forms W-2 in an attempt to substantiate individual returns claiming refunds. In other instances, an identity thief uses a victim's EIN to file tax returns claiming falsified refundable credits.[30] According to the IRS, employment-related identity theft has increased three-fold in 2017 as compared to the 2016 filing season.[31]

Having earlier access to Form 941 data would enable the IRS to scrutinize the wages and withholding data and conduct matching with Forms W-2. Currently (as of the third quarter of 2017), fewer than half of employers file their quarterly employment tax returns electronically.[32]

Congress Should Promote Electronic Filing of Information Returns to Avoid Costly and Time Consuming Data Transcription of Paper-Filed Returns

IRC § 6011(e)(1) authorizes the IRS to issue regulations that provide standards for determining which returns must be filed on magnetic media or in other machine-readable form. IRC § 6011(e)(2) provides that when issuing regulations, the IRS cannot require any person to file returns on magnetic media

23 IRS, CDW, IRMF (TY 2016).

24 IRS, CDW, IRMF (TY 2015).

25 IRS response to TAS information request (Oct. 17, 2017).

26 Government Accountability Office (GAO), GAO-17-525T, *New Wage Verification Process Holds Promise but IRS Faced Implementation Challenges* 7 (Apr. 26, 2017).

27 GAO, GAO-17-525T, *New Wage Verification Process Holds Promise but IRS Faced Implementation Challenges* 8 (Apr. 26, 2017).

28 *See* https://www.irs.gov/businesses/small-businesses-self-employed/e-file-form-940-941-or-944-for-small-businesses (last visited Dec. 28, 2017).

29 *See* Most Serious Problem: *As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*.

30 *See* Internal Revenue Manual (IRM) 25.23.9.2, *BMF Identity Theft – Overview* (Sept. 12, 2017).

31 The Return Integrity and Compliance Services (RICS) function reported 5,497 incidents of business identity theft in processing year 2016, compared to 16,394 such incidents in processing year 2017. IRS response to TAS information request (Nov. 3, 2017).

32 Through the third quarter of 2017, 44 percent of the 6,158,941 Forms 941 were electronically filed. IRS, CDW (TY 2017). Most employers file Form 941, *Employer's Quarterly Federal Tax Return*. *See* Treas. Reg. § 31.6011(a)-1(a)(1). *See also* Treas. Reg. § 31.6011(a)-1(a)(2) through (5) (details about when an employer must use something other than Form 941).

unless the person is required to file at least 250 returns during the calendar year, except that partnerships having more than 100 partners must file returns on magnetic media. The term "person" is broadly defined to include "an individual, a trust, estate, partnership, association, company or corporation."[33] Under Treasury regulations, taxpayers must file Forms W-2 and 1099-MISC electronically when they must file 250 or more information returns.[34] "[T]he 250-threshold applies separately to each type of form required to be filed."[35] In this day and age, a threshold of 250 seems much too lenient for the requirement to electronically file information returns.

FIGURE 2.1.3, 2017 Filing Season (TY 2016)[36]

	Count	eFiled	Percent eFiled
W-2	248,235,492	227,284,625	92%
1099-MISC with NEC[37]	54,236,251	29,694,348	55%
1099-INT	134,259,297	133,686,059	100%
1099-R	95,779,078	95,534,263	100%
1099-G	79,946,205	79,927,825	100%

The chart above shows that 92 percent of Forms W-2 and 55 percent of Forms 1099-MISC with non-employee compensation were electronically filed in filing season 2017. However, that still means 21 million Forms W-2 and 25 million Forms 1099-MISC were paper filed. Transcribing data from paper-filed information returns is a labor-intensive task and is much more expensive than electronic data processing. For example, the SSA reports a cost of $0.53 to process each paper W-2, as compared with a cost of $0.002 for each electronically filed W-2.[38]

Not only is transcribing paper-filed information returns an inefficient use of IRS and SSA resources, but the length of time it takes to get the data in usable form prevents the IRS from performing the document matching prior to issuing refunds. For example, in 2017 the SSA estimated that it had processed and transmitted less than 22 percent of paper-filed Forms W-2 to the IRS by March 31, which is well after the IRS started issuing refunds.[39]

Out of the 6.5 million employers who filed Forms W-2 for TY 2016, 56 percent issued them to five or fewer employees.[40] Given the advances in software and digital accounting systems, there is no reason that all but the smallest of employers need to file paper information returns. There are still some employers for whom an electronic filing requirement would impose disproportionate burden. For example, an elderly individual who pays one or several health aides and is required to file Forms W-2s

33 IRC § 7701(a)(1). *See also* Treas. Reg. § 301.6011-2(a)(3).

34 Treas. Reg. § 301.6011-2(c)(1)(i).

35 Treas. Reg. § 301.6011-2(c)(1)(iii).

36 IRS, CDW, IRMF (TY 2016).

37 This includes Forms 1099-MISC showing nonemployee compensation greater than zero.

38 *See* GAO, GAO-14-633, *Identity Theft: Additional Actions Could Help IRS Combat the Large, Evolving Threat of Refund Fraud* (Oct. 20, 2014).

39 The Social Security Administration estimated that it had processed and transmitted to the IRS 3.8 million of approximately 17.4 million paper-filed Forms W-2 by Mar. 31, 2017. GAO, GAO-17-525T, *New Wage Verification Process Holds Promise but IRS Faced Implementation Challenges* 8 (Apr. 26, 2017).

40 IRS CDW, IRMF (TY 2016).

may not have the technological skills to file electronically without help.[41] But a threshold of five should provide most of the benefits of electronic submission of these forms without imposing undue burden on very small employers.

Employers with more than five employees, and payors who issue more than five Forms 1099-MISC containing non-employee compensation, should be required to electronically file their information returns. The GAO made a similar recommendation, suggesting that Congress should "lower the threshold for electronic filing of W-2s from 250 returns annually to between five to ten returns, as appropriate."[42] This would avoid the cost and delay with transcription and processing, and enable the IRS to gain access to this data in time to verify wages and non-employee compensation before paying out refunds.

The IRS Should Develop Fillable Forms 941 and Forms 1099-MISC That Can Be Electronically Filed at No Cost

The IRS should do all it can to make electronic filing easier. For example, the SSA currently has a fillable Form W-2 available on its website that employers can use to submit Forms W-2 electronically for free.[43] This easily accessible, free fillable form may account for the high e-filing rate of Forms W-2. The IRS should develop a similar fillable Form 941, *Employer's Quarterly Federal Tax Return*, and a fillable Form 1099-MISC for those small businesses that may not have access to tax software in order to electronically file. By doing so and making it easier for businesses to file electronically, the IRS will then be in a better position to protect revenue by identifying and resolving inaccurate income reporting at the time of return filing and preventing the release of improper refunds.

The IRS Should Conduct a Comprehensive Study Exploring the Benefits and Drawbacks of Delaying the Issuance of All Refunds

There is a constant tension between the desire to get refunds out to taxpayers quickly and the need to protect against refund error or fraud. One way for the IRS to ensure it has sufficient time to determine the validity of refund claims is to push back the date the IRS will start to issue tax refunds. For instance, the IRS could follow the lead of some states that moved the beginning date for issuing tax refunds to March 1 of the year following the close of the tax year.[44] If the IRS did not begin to issue refunds until March of each year, it would have a minimum of a four-week window from the information return filing deadline of January 31 to cross-check the reported income before releasing refunds. However, such a significant shift in the timeframe for refund issuance raises concerns about the burden placed on various stakeholders. Thus, the IRS should study the impact of moving back the refund issuance date on taxpayers, the tax practitioner community, the IRS, and other affected stakeholders.

Pushing back the issuance of refunds likely would not receive an initial favorable reaction from the taxpaying public. Many taxpayers use the tax system as a savings mechanism and expect to receive their refunds quickly. Tax refund season has been ingrained in American culture, so some taxpayers have

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41 Note that taxpayers may request waivers of the electronic filing requirement if they cannot comply due to technological constraints or if compliance with the requirement would result in undue financial burden. *See* IRS Pub. 8508, *Request for Waiver From Filing Information Returns Electronically* (Rev. 9-2017).

42 GAO, GAO-16-578T, *IRS Needs a Comprehensive Customer Service Strategy and Needs to Better Combat Identity Theft Refund Fraud and Protect Taxpayer Data* 13 (Apr. 19, 2016).

43 See www.ssa.gov/employer/what.htm (last visited Dec. 1, 2017).

44 *See, e.g.*, New Jersey Division of Tax'n, https://www20.state.nj.us/TYTR_TGI_INQ/jsp/prompt.jsp (last visited Dec. 14, 2017); Utah State Tax Commission, https://tax.utah.ov/commission/releases//2015-10-22.pdf.

become conditioned to rely on receiving tax refunds early in the filing season — particularly, low income taxpayers whose tax refunds may represent a significant portion of their adjusted gross income.

In addition, retailers have also come to rely on the delivery of tax refunds early in the filing season to spur consumer spending, and may oppose any delays in the IRS delivering refunds. Moreover, delaying issuance of refunds may cause some taxpayers to seek out payday-loan type vehicles to receive a portion of their refund earlier.[45]

Pushing back the date for issuing refunds without also pushing back the due date for filing returns will compress the filing season, leading to a host of other issues. If refunds were held until March 1, then that leaves just 45 days until the end of the filing season, which could have a negative impact on the tax practitioner community. Tax professionals discussed these concerns at the National Taxpayer Advocate Public Forum held on April 8, 2016.[46] Compressing the tax filing season creates additional stress on the preparer and practitioner community, since clients will likely delay requesting return preparation assistance until closer to the refund-issuance date. Consequently, preparers and practitioners must assist their existing client base within a narrower timeframe.

The same pressure will be felt by the IRS, as it must re-examine their allocation of employees during the compressed filing season. With presumably more accurate information reporting, should the IRS shift employees from its Automated Underreporter function to Accounts Management? When the IRS discovers problems with information return data matching, should it create a "soft notice" to send out to taxpayers as a way of dealing with resource limitations? By doing so, it could track how many taxpayers opt to self-correct their return information, without the IRS undergoing a real (as opposed to an "unreal") audit.[47] Can the IRS continue to rely on seasonal employees during a shortened filing season, especially if there are exam issues that arise?

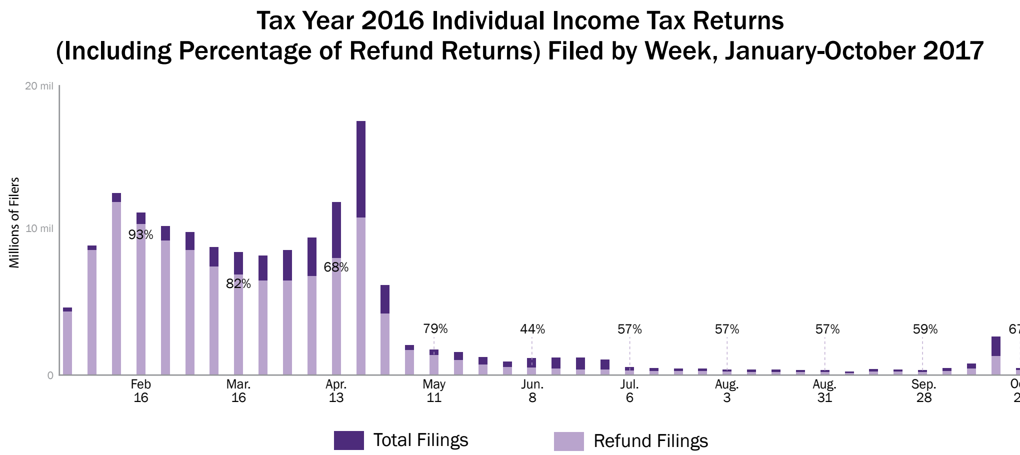
Taxpayers will also be impacted by the compressed filing season. The table below shows the number of tax returns filed by week in the 2017 filing season, as well as the percentage of taxpayers seeking tax refunds.

45 *See* Most Serious Problem: *Refund Anticipation Loans: Increased Demand for Refund Anticipation Loans Coincides with Delays in the Issuance of Refunds*, *supra*.

46 National Taxpayer Advocate Public Forum Transcript 47-57, 78 (Harrisburg, PA; Apr. 8, 2016).

47 *See* Most Serious Problem: *Audit Rates: The IRS Is Conducting Significant Types and Amounts of Compliance Activities That It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections*, *supra*; National Taxpayer Advocate Blog, *What's an Audit Anyway* (Jan. 25, 2012), https://taxpayeradvocate.irs.gov/news/what%E2%80%99s-an-audit-anyway.

FIGURE 2.1.4, TY 2016 Individual Tax Returns Filed by Week, 2017 Extended Filing Season[48]



With 78 percent of taxpayers expecting refunds, certainly many of them have come to rely on receiving tax refunds in late January or early February. Particularly for lower income taxpayers whose refunds may account for a significant percentage of their annual income, delaying the issuance of refunds may lead to them seeking short-term loans with unfavorable terms. Such lending practices could be an unintended consequence of the IRS delaying the issuance of refunds.

If the filing season is shifted back to ease the stress of a compressed filing season, the IRS should also study the potential impact on the federal fisc. What would be the anticipated filing patterns for taxpayers seeking refunds and taxpayers with balance due returns if refunds were held until March 1 and the filing season was extended to May 31? For a government that has relied on a certain influx of monies coming in on or around the April 15 filing deadline, what would be the impact on the federal government's cashflow if the due date for filing returns and making payments was extended by 45 days?

EXPLANATION OF RECOMMENDATION

The earlier availability of Forms W-2 and 1099-MISC would help the IRS in its efforts to combat identity theft and refund fraud. Electronic filing would provide the IRS with real-time data on wages and withholding, without the delays and errors associated with transcribing data from paper filed forms. Where information returns such as Forms W-2 and 1099s are processed before the IRS processes a taxpayer's tax return, the IRS can match the data on the tax return with the data reported on the information returns. If there are significant disparities, the IRS can review the tax return more carefully before paying a refund. From the government's perspective, data matching reduces the revenue loss associated with improper payments and stolen refunds. From the taxpayer's perspective, the IRS helps the legitimate taxpayer either avoid a refund delay or resolve a delay more quickly by spotting an IDT return before a refund is paid.

48 IRS, CDW, IRMF (TY 2016). The distribution of the dark purple bars shows the count of total filings by week of the filing season. The light purple bars show the count of the total filings that were refunds.

For similar reasons, earlier availability of Forms 941 would help the IRS combat business IDT, a growing subset of the IDT problem. The IRS handled nearly three times as many business IDT cases in 2017 as it did in 2016, an increase of more than 10,000 cases.[49] Yet in 2017, less than half of Forms 941 were filed electronically.[50] Greater electronic filing of Forms 941 would allow the IRS to match Form 941 data against W-2 and 1099 data to identify instances of potential business IDT fraud.

Lower Threshold for Electronic Filing

Each filing season, the IRS receives and processes hundreds of millions of information returns. Most of these information returns are filed electronically — 227 million of the approximately 248 million Forms W-2 and 62 million of the 91 million Forms 1099-MISC received in 2017 were filed electronically.[51] However, that still leaves 21 million Forms W-2 and 29 million Forms 1099-MISC that must be manually entered into SSA or IRS computer systems, and manual data entry necessarily produces transcription errors. When a transcription error on an information return occurs, the IRS's document matching process will identify a disparity that may delay a refund or initiate an erroneous adjustment notice, causing needless hassle for the taxpayer and unnecessary work for the IRS.

This manual transcription process can take months — well after the IRS has started to issue refunds. If the IRS is unable to validate data reported on certain information returns, that defeats the purpose of the accelerated due date for those information returns.

The current threshold of 250 returns that triggers the requirement for electronic filing was established in 1989.[52] In light of the significant advances in technology and digital capability that have taken place since that time, the National Taxpayer Advocate believes the threshold should be reduced substantially. Thus, we recommend that Congress require employers with more than five employees (and payors issuing more than five Forms 1099-MISC) to electronically file their information returns.

Fillable Forms Remove Barriers to Electronic Filing

Some smaller businesses may not want to or cannot incur the expense of purchasing or licensing tax compliance software that would enable them to electronically file information returns. Through the third quarter of 2017, nearly 3.5 million Forms 941 (56 percent of all Forms 941 filed) were paper filed. To discourage these businesses from filing information returns on paper, the IRS should develop free, fillable Forms 941 and Forms 1099-MISC on its website, and allow businesses to electronically file these forms for free, without the use of any tax software. We note that the SSA has a fillable Form W-2 available on its website that employers can use to submit Forms W-2 electronically at no cost.[53] The IRS should be able to develop a fillable Form 1099-MISC with similar functionality to facilitate electronic filing. The increase in electronically-filed information returns will be well worth the IRS investment in developing the fillable forms.[54]

49 The RICS function reported 5,497 incidents of business identity theft in processing year 2016, compared to 16,394 such incidents in processing year 2017. IRS response to TAS information request (Nov. 3, 2017).

50 IRS, CDW, IRMF (TY 2017).

51 IRS, CDW, IRMF (TY 2016).

52 Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7713, 103 Stat. 2106, 2394 (codified as amended at 26 U.S.C. § 6011 (1989)).

53 *See* www.ssa.gov/employer/what.htm (last visited Dec. 1, 2017).

54 Although the final version of Pub. L. No. 115-97 (2017) did not include a provision modifying the reporting requirements of Form 941, a proposal to include the name, address, and wages of each employee was included in version of the tax reform bill approved by the House. *See* H.R. Rep. No. 115-409, at 142-144 (2017). *See also* H.R. Conf. Rep. No. 115-466, at 235 (2017).

Delaying Issuance of All Refunds Will Allow the IRS More Time to Verify Refund Claims Against Information Reporting

The National Taxpayer Advocate believes that the IRS should be given a sufficient window of time to verify data before it issues tax refunds. The PATH Act provides the IRS with a two-week window for the IRS to perform matching before issuing refunds that include refundable credits. Based on data and experience gained from the 2017 filing season, the IRS needs more than two weeks to perform its data matching. In order to better understand the complexities attendant with gaining more time, the National Taxpayer Advocate recommends that the IRS, in conjunction with the Taxpayer Advocate Service, should conduct a comprehensive study to weigh the benefits and burdens of delaying the issuance of all refunds, and of extending the filing season. The IRS should report its findings and recommendations in a report to Congress.

LR #2

ELECTRONIC MAILBOX RULE: Revise the Mailbox Rule to Include All Time-Sensitive Documents and Payments Electronically Transmitted to the IRS

PROBLEM

Currently, the "statutory mailbox rule" in Internal Revenue Code (IRC) § 7502 does not apply to the electronic transmission of many time-sensitive documents and payments to the IRS. The rule provides that if a time-sensitive document or payment arrives late but is postmarked on or before the due date, the postmark date is treated as the date the IRS receives the document or payment. Further, IRC § 7502(c) provides that registered or certified mail, or methods deemed substantially equivalent by the Secretary of Treasury, is *prima facie* evidence of delivery. The rule applies to documents and payments sent through the U.S. Postal Service, designated private delivery services, and electronic return transmitters.[1] However, the statute and regulations thereunder do not extend the rule to other forms of electronic transmission. Taxpayers can electronically submit documents in several ways, including: faxing, posting a document to an online account, or emailing documents to a secure e-mailbox. Taxpayers can also electronically submit payments to the IRS either online or by phone with such payment options as (1) Direct Pay, where funds are debited from the taxpayer's bank account; (2) credit or debit card payments; and (3) the Electronic Federal Tax Payment System (EFTPS).[2]

The IRS is moving forward with plans to provide more opportunities for taxpayers to use self-service tools and interact with the IRS digitally. While taxpayers will continue to have the option to submit documents and payments through the U.S. Postal Service and designated delivery services to invoke the statutory mailbox rule, some taxpayers may electronically submit their time-sensitive documents and payments completely unaware that the rule does not apply to protect them. This issue will only be exacerbated when the IRS launches the "self-correction" feature on the taxpayer online account application that is planned to enable taxpayers to submit documents electronically.[3] Therefore, taxpayer rights will be impaired if the IRS cannot apply the statutory mailbox rule to the electronic submission of time-sensitive documents and payments.[4]

EXAMPLE

The IRS levied on taxpayer's individual retirement account on January 2, 2017 to satisfy a $10,000 tax liability from tax year 2009. On August 15, 2017, Taxpayer entered into an installment agreement to fully satisfy the liability. On September 15, 2017, Taxpayer faxed to the IRS a written wrongful levy claim. Taxpayer called the IRS on October 15, 2017 to check the status of the claim and learned that the IRS has no record of receiving the faxed wrongful levy claim. Taxpayer has a copy of the faxed claim and a fax confirmation sheet, showing that it was timely faxed, but he is told that such copies do not prove that he actually submitted the document to the IRS. Taxpayer is also told that any attempt to

1 Internal Revenue Code (IRC) § 7502(e).

2 https://www.irs.gov/payments (last visited Nov. 8, 2017).

3 *See* IRS, *Working Draft: IRS Future State: The Path Traveled and the Road Ahead* 9 (Dec. 2016), https://www.irs.gov/pub/newsroom/future_state_102v2.pdf (last visited Oct. 4, 2017).

4 National Taxpayer Advocate 2016 Annual Report to Congress 26-27 (Special Focus: IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration).

resubmit the claim will be rejected because he did not submit the claim within nine months of the date of the levy, as required under IRC § 6343.[5]

RECOMMENDATION

Revise IRC § 7502(c)(2) to authorize the Secretary of Treasury to provide by regulation the extent by which the statutory mailbox rule applies to the electronic transmission of time-sensitive documents and payments, in addition to the electronic filing of tax returns.

PRESENT LAW

The "statutory mailbox rule" is set forth in IRC § 7502. Section 7502(a)(1) provides that, if the requirements set forth in the section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope. If the postmark date is on or before the last day of the period prescribed for filing the document or making the payment, the document or payment is considered timely-filed or paid even if it is received after the due date. Sections 7502(b) and (c) provide that the provision applies to documents sent by U.S. postal mail, private delivery services, and electronic filing through an electronic return transmitter.

IRC § 7502(c)(2) provides that the Secretary of Treasury is authorized to provide by regulations the extent to which this statutory mailbox rule applies to certified mail or electronic filing. Treasury Regulation § 301.7502-1(d) provides that a document filed electronically with an electronic return transmitter (as defined in Revenue Procedure 2000-31, § 3.01(4)) in the manner and time prescribed by the Commissioner of Internal Revenue is deemed to be filed on the date of the electronic postmark, if such date is on or before the due date. Section 3.01(4) Revenue Procedure 2000-31 provides that a "transmitter" "transmits electronic tax return information directly to the Service."[6]

In *Pearson v. Commissioner*, the Tax Court, sitting *en banc*, held that postage bought over the internet that is affixed to an envelope creates a private postmark as of the date of purchase for purposes of the regulations issued under IRC § 7502 . The court also held that internal tracking data of the U.S. Postal Service (USPS) is not treated as a USPS postmark for purposes of those regulations.[7]

REASONS FOR CHANGE

Traditionally, taxpayers primarily communicated with the IRS by mail, phone, or face-to-face interactions. However, IRS plans are well under way to increase digital interactions with taxpayers. Such increased digital interactions include the following:

- **The Online Account Application.** The IRS has launched and continues to further develop capabilities for the online taxpayer account application. Future capabilities include the

5 Effective December 22, 2017, the nine-month period in IRC § 6343 has been extended to two years. The two-year period applies to levies made after that date or to levies for which the previous nine-month period had not yet expired as of the date of enactment. Pub. L. No. 115-97; § 11071 (2017).

6 Rev. Proc. 2000-31, 2000-31 I.R.B. 146 (July 31, 2000).

7 *Pearson v. Comm'r*, 149 T.C. No. 20 (Nov. 29, 2017) (The taxpayer used Stamps.com, a U.S. Postal Service approved commercial vendor).

ability of taxpayers to self-correct, which is expected to enable taxpayers and their authorized representatives to submit documents online.[8]

- **Faxed Documents.** The IRS has a Servicewide policy for the acceptance of faxes in routine tax administration operations and the list of forms that the IRS will accept by fax is extensive.[9] In 2015, the IRS eliminated any dollar thresholds previously required to accept by fax consents to assess additional tax, taxpayer closing agreements, and consents to extend the time to assess tax.[10]
- **Taxpayer Digital Communications.** Several organizations within the IRS, including TAS and Small Business/Self-Employed Exam, conducted a pilot of the Taxpayer Digital Communication (TDC) Secure Messaging system. TDC enables taxpayers to send and receive electronic webmail, along with certain digital documents, through a secure portal.[11]
- **Electronic Payments.** Taxpayers can make payments to the IRS in a variety of ways, including such electronic methods as credit and debit card payments, online Direct Pay, and EFTPS.[12]

Both taxpayers and the IRS will realize many benefits with increased digital interaction. Taxpayers will benefit from the availability of more modern, fast, and convenient methods to submit documents and payments. The IRS will benefit from quicker processing times and reduced resources devoted to answering phones and opening mail. However, the IRS needs to plan for the risks associated with the electronic submission of documents and payments. In particular, there is a risk that the IRS will not properly receive the digital transmission. For example, the faxed document may sit on a fax machine and never get delivered to the proper IRS employee. Aside from any potential IRC § 6103 disclosure violations on the part of the IRS, the taxpayer may be harmed if the document is time-sensitive.[13] In such case, the taxpayer may have the burden to prove that the IRS received the document by a certain deadline. Calling the IRS to confirm receipt may be good business practice and alleviate concerns, but the taxpayer still has nothing in writing to prove that the IRS received the document on a certain date.

Taxpayers also face this problem when making electronic payments. For example, if a taxpayer makes an electronic payment at 6 p.m. on April 15, the IRS may not actually receive the payment until April 16.[14] The taxpayer has a confirmation of payment from April 15, but IRC § 7502 does not protect the taxpayer under these circumstances, and the payment would be deemed late. Considering that the government receives the funds earlier in the digital scenario than if the taxpayer mailed a check at the

8 *Draft IRS Compliance Concept of Operations (CONOPS)* 3, 19-22 (June 8 2014), on file with TAS; IRS, *Working Draft: IRS Future State: The Path Traveled and the Road Ahead* 9 (Dec. 2016), https://www.irs.gov/pub/newsroom/future_state_102v2.pdf (last visited Oct. 4, 2017).

9 Memorandum for Division Commissioners; Chief, Criminal Investigation; Chief, Appeals; National Taxpayer Advocate from Deputy Commissioner for Services and Enforcement, Revision of Policy for Use of Fax Submissions (Nov. 15, 2015).

10 The broadened fax policy relates to the following documents: Form 866, *Agreement as to Final Determination of Tax Liability*; Form 870, *Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment*; Form 906, *Closing Agreement on Final Determination Covering Specific Matters*; Form 4549, *Income Tax Examination Changes*; Form 872, *Consent to Extend the Time to Assess Tax*; and Form SS-10, *Consent to Extend the Time to Assess Employment Taxes*. Memorandum for Division Commissioners; Chief, Criminal Investigation; Chief, Appeals; National Taxpayer Advocate from Deputy Commissioner for Services and Enforcement, Revision of Policy for Use of Fax Submissions (Nov. 15, 2015).

11 Luca Gattoni-Celli, *IRS Plans to Launch Secure Messaging Pilots for Exams, TAS*, Tax Notes Today (Feb. 2, 2017).

12 https://www.irs.gov/payments (last visited Nov. 9, 2017).

13 IRC § 6103 provides that the IRS must keep returns and return information confidential, except when disclosure is authorized by law.

14 Effective September 11, 2017, the Department of Treasury amended its regulation governing the use of the Automated Clearing House (ACH) by federal agencies. As of September 15, 2017, ACH debits are eligible for same-day processing. Submissions made by 2:45 p.m. EST would be settled by 5:00 p.m. EST. 31 C.F.R. Part 210.

post office on April 15, it makes no sense that the government would penalize the taxpayer for choosing an electronic payment option.[15]

Based on discussions with the IRS's Office of Chief Counsel, it is TAS's understanding that the IRS's position regarding digital transmissions of documents, such as through fax and email, does not invoke the mailbox rule. Therefore, the date the taxpayer sends it is irrelevant, even with a proof of transmittal. The IRS will only look to the date the IRS actually receives it. The rationale behind this decision, as articulated to the National Taxpayer Advocate by the Office of Chief Counsel, is that people can modify the dates on fax machines and computers.[16]

Therefore, as currently enacted, the statutory mailbox rule in IRC § 7502 does not apply to these electronic transmissions of documents or payments to the IRS. If the IRS wants to encourage taxpayers to use digital methods of document submission and payment, taxpayers should have the same protections when they submit electronically as they do when they mail a document or check through the U.S. Postal Service or a designated delivery service. Even the Tax Court in *Pearson v. Commissioner* recognized the need to bring the statutory mailbox rule into the 21st century. The court, sitting *en banc*, held that postage bought over the internet and affixed to an envelope creates a private postmark as of the date of purchase for purposes of the regulations issued under IRC § 7502.[17]

In fact, without an electronic version of the statutory mailbox rule, practitioners might hesitate to send any time-sensitive documents or payments electronically for fear of committing malpractice. Moreover, unrepresented or unsophisticated taxpayers may be harmed because they assume the date of sending a digital document or payment will control. Using a digital method could compromise taxpayer rights and protections, especially the *right to challenge the IRS's position and be heard*. It also impacts the taxpayer's *right to a fair and just tax system* because the electronic transmission of documents and payments facilitates the timely submission of documents and payments.[18] Accordingly, it is essential that IRC § 7502 address this issue to encourage taxpayers and their representatives to interact digitally with the IRS.

EXPLANATION OF RECOMMENDATION

In order to encourage taxpayers to use electronic methods to transmit documents, they need assurances that the statutory mailbox rule applies. Accordingly, Congress should revise IRC § 7502(c)(2) to authorize the Secretary of Treasury to provide by regulations the extent to which the statutory mailbox rule applies to the electronic submission of time-sensitive documents and payments.[19] That is, the regulations should clearly state that the statutory mailbox rule applies to the electronic transmissions of documents and payments in addition to the electronic filing of forms through an electronic return transmitter. The regulations should also provide the extent to which the confirmation or receipt of electronic transmission affords the same protections as a postmark from the U.S. Postal Service or

15 *See* Letter from U.S. Senator Charles E. Schumer to Doug Shulman (Nov. 18, 2010) (on file with TAS).

16 Meeting with IRS Office of Chief Counsel on Mailbox Rule (Feb. 8, 2016).

17 *Pearson v. Comm'r*, 149 T.C. No. 20 (Nov. 29, 2017).

18 Pursuant to the taxpayer's *right to a fair and just tax system*, taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels. *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

19 Congress should also revise IRC § 7502(d)(3) to add at the end a reference to electronically submitted documents and payments as permitted by regulations prescribed by the Secretary of Treasury.

another designated delivery service. Further, the regulations should provide the means by which a taxpayer can electronically transmit the document and receive a receipt or confirmation which is *prima facie* evidence that the IRS received the document or payment on the date reflected on the receipt. For example, if the IRS cannot rely upon a date generated by the taxpayer's own fax machine, the regulations should provide the IRS the flexibility to issue administrative guidance providing options for the taxpayer by listing designated commercial faxing services. Consideration should be given to taxpayers in more rural geographic locations where it may be difficult to travel to such commercial faxing services. In addition, the IRS can develop the online account application to provide a date-stamped confirmation of receipt that the taxpayer can rely upon as evidence of IRS receipt.

In drafting the administrative guidance and policy regarding fax confirmations, it is important to note that criminal penalties under IRC § 7206 for falsifying records would apply to these electronic submission receipts and confirmations in the same manner as they would to other taxpayer records. Therefore, the IRS should consider allowing taxpayers to use their own personal fax machines and require the taxpayer to make a statement, signed under penalties of perjury, about the accuracy of the date stamp on the fax confirmation if the date of IRS receipt becomes an issue.

LR #3 EQUITABLE DOCTRINES: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case

PROBLEM

Various provisions in the Internal Revenue Code (IRC) authorize proceedings or suits against the government. These actions are generally brought in the Tax Court, a United States district court, or the Court of Federal Claims.[1] For example, taxpayers who seek to challenge the IRS's assertion that they owe additional tax, without first paying the additional tax, must petition the Tax Court.[2] Taxpayers who wish to contest the IRS's denial of a claim for a whistleblower award or seek certain declaratory judgments must also petition the Tax Court.[3] Taxpayers whose claims for tax refunds have been denied by the IRS cannot bring refund suits in the Tax Court, but may seek refunds in the United States district courts or in the United States Court of Federal Claims. Suits for civil damages arising from unauthorized conduct by the IRS must be also brought in these federal courts.[4] The periods for petitioning the Tax Court or bringing suit in a United States district court or the Court of Federal Claims are prescribed in IRC provisions or Treasury regulations, sometimes in language that confuses taxpayers.[5] The sanction for failing to commence suit within those times is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim. There are judicial doctrines pursuant to which a court may excuse a late suit, but the Tax Court has held, and courts of appeal have agreed, that the time limits for petitioning the Tax Court are jurisdictional requirements that cannot be modified by applying equitable doctrines.[6] The courts do not agree as to whether the time limits for filing tax suits in United States district courts or the Court of Federal Claims are jurisdictional or are instead statutes of limitation subject to judicial doctrines that could excuse late suits.[7]

1 As discussed below, some tax claims may also be heard by U.S. Bankruptcy courts.

2 *See*, *e.g.*, Internal Revenue Code (IRC) § 6213 (deficiency cases); IRC §§ 6320(c), 6330(d) (collection due process cases); IRC § 6015(e) (innocent spouse cases), discussed below.

3 IRC § 7623(b) (whistleblower awards); IRC § 7476 (declaratory judgment that a retirement plan qualifies or continues to qualify for favorable tax treatment).

4 28 U.S.C. § 1346 (refund suits); IRC § 7426 (wrongful levy suits); IRC §§ 7431-7433 (civil damages suits). *See also* IRC § 7428 (declaratory judgment suits for recognition of exempt status as an IRC § 501(c) organization, which may be brought in these federal courts as well as in the Tax Court).

5 *See*, *e.g.*, Treas. Reg. § 301.6330-1(b)(1), providing "[t]he taxpayer must request the CDP [collection due process] hearing within the 30–day period commencing on the day after the date of the CDP Notice," discussed below.

6 *See*, *e.g.*, *Tilden v. Comm'r*, 846 F.3d 882 (7th Cir. 2017) (deficiency case); *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017) (innocent spouse case), discussed below.

7 *Compare RHI Holdings, Inc. v. U.S.*, 142 F.3d 1459, 1460, 1463 (Fed. Cir. 1998) *with Howard Bank v. U.S. 759* F. Supp. 1073, 1080 (D. Vt.1991), *aff'd*, 948 F.2d 1275 (2d Cir. 1991) (refund suits); *compare Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000) *with Volpicelli v. U.S.*, *777 F.3d 1042* (9th Cir. 2015) (wrongful levy suits); and *compare Aloe Vera of America, Inc. v. U.S.*, 580 F.3d 867, 871-72 (9th Cir. 2009) *with U.S. v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) *and Bennett v. U.S.*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (suits for civil damages).

EXAMPLE

Taxpayer A and her spouse filed a joint return that understated the amount of tax the couple owed. The couple did not seek Tax Court review of the asserted deficiency, and the IRS assessed additional tax. Taxpayer A then submitted Form 8857, *Request for Innocent Spouse Relief*, to the IRS, seeking innocent spouse relief under IRC § 6015. The IRS sent a Notice of Determination to Taxpayer A, denying relief. The Notice of Determination advised Taxpayer A that she could request Tax Court review of the IRS's determination to deny relief by filing a Tax Court petition within 90 days of the date of the Notice of Determination.[8] The date on the Notice of Determination was October 7, 2014. According to Taxpayer A's calculations, the 90-day period for petitioning the Tax Court would expire on January 7, 2015; she filed her Tax Court petition on January 6, 2015. Because 90 days from October 7, 2014 was actually January 5, 2015, Taxpayer A's petition was not timely under the statute. The Tax Court held it did not have jurisdiction to hear the claim and dismissed the case.[9] The Court of Appeals for the Second Circuit agreed with the Tax Court's decision.[10]

In contesting the dismissal of her case, Taxpayer A alleged that on two occasions she had spoken with IRS employees who informed her the 90-day period would expire on January 7, 2015. If the Tax Court had employed the judicial doctrine of equitable tolling, it might have considered this evidence, and in the light of the evidence may have excused Taxpayer A's late petition and allowed her to proceed with her case. However, the Tax Court has repeatedly held that the time limit under IRC § 6015 for petitioning the Tax Court is jurisdictional and not subject to equitable estoppel.[11]

RECOMMENDATION

1. Enact a new section of the IRC, or amend IRC § 7442, to provide that the following time limits are not jurisdictional and are subject to the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling:
    a. The periods within which taxpayers may petition the Tax Court, and
    b. The periods set out in the IRC within which taxpayers may commence suit in United States district courts or the Court of Federal Claims.
2. Amend IRC § 7459(d) to clarify that a Tax Court decision dismissing a petition filed in response to a statutory notice of deficiency as untimely is not a decision on the merits and does not require entry of a decision reflecting the deficiency.

CURRENT LAW

Tax Court Jurisdiction

In general, the Tax Court is the only judicial forum in which a taxpayer can challenge the IRS's assertion that he or she is liable for a deficiency in tax (generally, an amount greater than that shown

8 *See* IRC § 6015(e)(1)(A).

9 *See* Dec. 29, 2015 Order in Tax Court Docket No. 471-15.

10 *See Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017).

11 *See, e.g.*, *Pollock v. Comm'r*, 132 T.C. 21 (2009); *Elgart v. Comm'r*, T.C. Memo. 1996–379.

on the taxpayer's return) before paying the asserted liability in full.[12] Before a taxpayer can litigate a deficiency case in the Tax Court, however, the IRS must issue a statutory notice of deficiency.[13] For this reason, a statutory notice is often called the "ticket" to Tax Court — without it, the taxpayer does not have the right to petition the Tax Court for a redetermination of the deficiency.[14] In addition, the taxpayer must file his or her Tax Court petition within a specified period (generally, 90 days) after the IRS mails the statutory notice of deficiency.[15] If a taxpayer does not timely petition the Tax Court for review of a notice of deficiency, the IRS must assess the additional tax.[16] If the taxpayer does petition the Tax Court, the Tax Court may decide the case on the merits. In that case, as the Supreme Court explained:

> [i]ncome taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.[17]

The Tax Court may also dispose of the deficiency case without considering the merits. For example, it may hold a party in default and enter judgment against that party.[18] It may dismiss the case due to the petitioner's failure to prosecute and enter judgment against the petitioner.[19] Under IRC § 7459(d), an order dismissing the petition for these reasons is treated as sustaining the deficiency.[20] Thus, these orders of dismissal are *res judicata* to the same extent as are judgments on the merits — if raised as an affirmative defense by the government, affected taxpayers are not permitted to resurrect and relitigate the same claims in a later proceeding, either in the Tax Court or in a different judicial forum. They cannot, for example, pay the asserted tax and then bring a suit for refund.

However, a Tax Court order dismissing for lack of jurisdiction an untimely petition filed in response to a statutory notice of deficiency is not a decision on the merits for purposes of applying the doctrine of res judicata.[21] Thus, dismissal in this situation does not prevent the taxpayer from paying the asserted deficiency and bringing suit for refund.

12 IRC § 6213(a). IRC § 6211(a) defines "deficiency" as "the amount by which the correct tax exceeds the excess of: (1) the sum of the amount reported on the taxpayer's return for such tax if a return was filed and an amount of tax was reported on the return plus amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of any rebate."

13 IRC § 6213(a).

14 As discussed below, taxpayers who cannot challenge a tax liability in the Tax Court may still have the opportunity to challenge the liability in a U.S. district court or the U.S. Court of Federal Claims. These courts have jurisdiction over suits for federal tax refunds. 28 U.S.C. § 1346(a)(1). Unlike in the Tax Court, in order to receive judicial review of a tax liability in one of the refund forums, a taxpayer generally must first pay the disputed income tax in full and then file a claim for refund with the IRS. *See Flora v. United States*, 362 U.S. 145 (1960).

15 IRC § 6213(a).

16 IRC § 6213(c).

17 *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948). The doctrine of *res judicata* prevents relitigation of a taxpayer's liability for a given tax year both as to matters that were actually litigated in the prior suit and matters that could have been raised. *Sunnen*, 333 U.S. 591, 597-98 (1948).

18 Rule 123(a), Tax Court Rules of Practice and Procedure.

19 Rule 123(b), Tax Court Rules of Practice and Procedure.

20 IRC § 7459 (d) provides: "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court unless the Tax Court cannot determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction."

21 IRC § 7459(d); Rule 123(d), Tax Court Rules of Practice and Procedure.

The Tax Court Has Jurisdiction to Decide Various Types of Cases

Most Tax Court cases arise when taxpayers file a petition in response to a statutory notice of deficiency.[22] However, there are other situations in which the Tax Court is the only forum in which taxpayers, by filing a petition within a prescribed time after the IRS issues a required notice, may litigate their tax liability without first paying the tax asserted. Examples are where:

- The IRS, at the conclusion of a collection due process (CDP) hearing, determines to proceed with a lien or levy;[23]
- The IRS denies a taxpayer's request for innocent spouse relief that was not made in response to a statutory notice of deficiency or during a CDP hearing (referred to as a stand-alone request for relief);[24]
- The IRS denies a request for abatement of interest attributable to unreasonable errors and delays by the IRS;[25] or
- The IRS determines worker classification and the corresponding amount of employment tax.[26]

As in deficiency cases, if taxpayers do not timely petition the Tax Court for review of these determinations, the IRS may assess additional tax (if the tax was not already assessed) and proceed to collect it.

The Tax Court is also the only judicial forum in which a taxpayer may seek review of the IRS's position in other types of cases. For example, the Tax Court is the only court with jurisdiction to review the

22 *See* Arthur L. Nims, III, Chief Judge of the Tax Court, *Tax Court Management of Jumbo Cases: the New Challenge*, 38 Fed. B. News & J. 330 (Aug. 1991) (describing the Tax Court's deficiency jurisdiction as its "core mission" and deficiency cases as the "mainstay" of its operations).

23 At the conclusion of an IRC § 6330 due process hearing, the IRS issues a Notice of Determination. Treas. Reg. § 301.6330-1(e)(3), Q&AE8. Taxpayers, within 30 days after the IRS mails a notice of determination, may petition the Tax Court for review of the determination. IRC §§ 6320(c), 6330(d); *Weber v. Comm'r*, 122 T.C. 258 (2004); Rule 330, Tax Court Rules of Practice and Procedure. The Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, 1019, amended IRC § 6330(d)(1) to provide exclusive jurisdiction to the Tax Court in all collection due process cases. However, review of the underlying liability will only be available if the taxpayer did not receive the statutory notice of deficiency or otherwise have the opportunity to dispute the tax liability. IRC § 6330(c)(2)(B).

24 IRC § 6015(e). Taxpayers, within 90 days after the IRS mails a notice of determination, may petition the Tax Court for review of the determination. IRC § 6015(e)(1)(A); Rule 320, Tax Court Rules of Practice and Procedure. Innocent spouse relief may be raised in bankruptcy proceedings, under 11 U.S.C.A. § 505(a). *In re Pendergraft*, 119 A.F.T.R. 2d (RIA) 1229 (Bankr. S.D. Tex. 2017); *Michaud v. U.S.*, 206 B.R. 1 (Bankr. D.N.H. 1997). The National Taxpayer Advocate's position is that innocent spouse relief may also be raised as a defense in district court collection proceedings. *See*, *e.g.*, National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*). Some district courts have held otherwise, however. *See*, *e.g.*, *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) and cases relying on it. The National Taxpayer Advocate reiterates her recommendation this year. *See National Taxpayer Advocate Purple Book: Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*, *infra*. For further discussion of this issue, see Most Litigated Issue: *Relief From Joint and Several Liability Under IRC § 6015, infra*.

25 IRC § 6404(e)(1). Taxpayers, within 180 days after the IRS mails a notice of final determination not to abate, may petition the Tax Court for review of the determination. IRC § 6404(h)(1); Rule 280, Tax Court Rules of Practice and Procedure. The Tax Court has exclusive jurisdiction to review a refusal to abate interest under § 6404(e)(1). *Hinck v. U.S.*, 550 U.S. 501, 503 (2007).

26 IRC § 7436(a). Taxpayers, within 90 days after the IRS sends its determination by certified or registered mail, may seek Tax Court review of the determination. IRC § 7436(b), Rule 290, Tax Court Rules of Practice and Procedure. Congress enacted IRC § 7436 for the express purpose of allowing taxpayers to seek Tax Court review as an alternative to first paying the tax and then seeking a refund in a U.S. district court or the U.S. Court of Federal Claims. *See* H.R. Rep. No. 105-148 at 639 (1997); S. Rep. No. 105-33 at 304 (1997); *Flora v. U.S.*, 362 U.S. 145 (1960), discussed below.

IRS's denial of a tax whistleblower's claim for an award.[27] A taxpayer seeking a declaratory judgment that a retirement plan qualifies or continues to qualify for favorable tax treatment must petition the Tax Court.[28] Taxpayers who do not timely file their petitions have no other forum in which to challenge the IRS's position.

As some scholars have noted:

> At times, however, depriving one of access to the courts because of an arbitrary deadline is simply too severe a sanction. Certain circumstances may excuse a late complaint and the statutory clock will not run, it will be stopped or tolled. Four doctrines identify circumstances where tolling applies. First, equitable tolling applies when it is unfair to hold the plaintiff to the statutory deadline because of some extraordinary event that impeded the plaintiff's compliance. Second, equitable estoppel applies when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit. Third, forfeiture applies when the parties have acted as if the case need not operate under the statutory deadlines. Fourth, waiver applies when the parties have explicitly agreed that their case need not operate under legal deadlines.[29]

In 2015, Congress amended IRC § 7803 to require the Commissioner of Internal Revenue to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title." Among these rights are the right to appeal an IRS decision in an independent forum and the right to a fair and just tax system.[30]

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27 IRC § 7623(b). Taxpayers, within 30 days after the IRS sends its determination, may seek Tax Court review of the determination. IRC § 7623(b)(4), Rule 340, Tax Court Rules of Practice and Procedure. The Tax Court's jurisdiction is exclusive. *DaCosta v. U.S.*, 82 Fed. Cl. 549, 555 (2008).

28 IRC § 7476. Taxpayers may seek Tax Court review of the determination if they do so "before the ninety-first day after the day after such notice is mailed to such person." IRC § 7476(b)(5). If no such notice was mailed and 270 days have expired since the request for the determination was made taxpayers will be deemed to have exhausted their administrative remedies and may seek a Tax Court determination. IRC § 7476(b)(3). A similar provision allows taxpayers whose request for innocent spouse relief has gone unanswered for six months to petition the Tax Court for a determination. IRC § 6015(e)(1)(A). *See Vu v. Comm'r*, T.C. Summ. Op. 2016-75 for facts that illustrate how both the 90-day and six-month deadlines may be at issue in a case.

29 Michael J. Kaufman, John M. Wunderlich, *Leave Time For Trouble: The Limitations Periods Under the Securities Laws*, 40 J. Corp. L. 143 (2014). Arguably, Congress has already adopted, as a jurisdictional provision, the principals that underlie the equitable doctrine of equitable estoppel in the context of deficiency suits. IRC § 6213(a) requires that the notice specify the date by which a petition must be filed with the Tax Court and further provides that a petition filed by such specified date will be treated as timely filed. Thus, taxpayers may rely on the date shown on the notice of deficiency, even if it is not the 90th day after the date of the notice of deficiency. The National Taxpayer Advocate recommended that in innocent spouse cases the IRS be required to provide in the notice of final determination the last date to petition the Tax Court, and provide for the taxpayer to be able to petition the Tax Court by the later of the date specified in the notice of final determination or 90 days from the date of the notice. National Taxpayer Advocate 2001 Annual Report to Congress 159, 160 (Key Legislative Recommendation: *Joint and Several Liability, Final Determination Rights*). This year, she reiterates that recommendation and also recommends that the last day to file Tax Court petitions in IRC § 6330 collection due process cases be placed on notices of determinations. *See* Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated as Timely, infra*.

30 IRC § 7803(a)(3), added by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015).

The Tax Court and Other Courts Have Held That the Tax Court Does Not Have Jurisdiction to Apply Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling

In considering its jurisdiction to redetermine deficiencies, hear appeals from IRS CDP proceedings, or consider stand-alone innocent spouse claims, the Tax Court has held that the statutory times for petitioning the Tax Court are jurisdictional.[31] Thus, in the absence of a timely-filed petition, it does not have jurisdiction to hear the case, including a claim that the petition should, under equitable doctrines, be deemed timely.[32] Several Courts of Appeal have agreed with the Tax Court with respect to deficiency cases and stand-alone innocent spouse cases.[33] IRC § 7442, which describes the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are never statutes of limitation subject to equitable doctrines.[34]

Federal Court Jurisdiction Over Taxpayer Suits

In a variety of situations, the IRC gives taxpayers the right to obtain judicial review in federal courts other than the Tax Court if they commence the suit within a specified period. For example, taxpayers who cannot challenge a tax liability in the Tax Court may still have the opportunity to challenge the liability in a United States district court or the United States Court of Federal Claims. These courts, unlike the Tax Court, have jurisdiction over suits for federal tax refunds.[35] In order to receive judicial review in one of these forums, a taxpayer generally must first pay the disputed tax in full and then file a claim for refund with the IRS.[36] In general, the taxpayer must commence the suit within two years after

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31 *See*, *e.g.*, *Guralnik v. Comm'r*, 146 T.C. 230, 238 (2016) (noting that "[i]n cases too numerous to mention, dating back to 1924, we have held that the statutorily-prescribed filing period in deficiency cases is jurisdictional" and "reaffirm[ing] our rulings that the 30-day filing period prescribed by section 6330(d)(1) is jurisdictional and accordingly hold that equitable tolling does not apply.") *See also Pollock v. Comm'r*, 132 T.C. 21, 32 (2009) (holding that "section 6015(e)(1)(A)'s 90-day limit is jurisdictional and therefore doesn't allow for equitable tolling, even though such a result may be very harsh for Pollock.").

32 For a fuller description of how courts determine whether equitable doctrines may apply, cases in which courts, including the Supreme Court, have actually applied equitable doctrines to jurisdictional time periods, and "the Supreme Court's continuing but uncertain distinction between periods that are jurisdictional and those that are 'mere' claims-processing rules," see Bryan T. Camp, *Equitable Principles and Jurisdictional Time Periods*, *Part 1*, 2017 Tax Notes 37-34 (Sept. 11, 2017).

33 *See*, *e.g.*, *Tilden v. Comm'r*, 846 F.3d 882 (7th Cir. 2017) (deficiency case); *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017) (innocent spouse case).

34 IRC § 7442 provides in its entirety:

> The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

35 28 U.S.C. § 1346(a)(1).

36 IRC § 7422(a). *See Flora v. U.S.*, 362 U.S. 145 (1960). If the disputed tax is a divisible tax (such as employment or excise tax), the taxpayer need only pay the amount of tax attributable to a single transaction or event (for example, employment taxes for one employee for one quarter) in order to file suit in one of the courts with jurisdiction over federal tax refund suits. *Id*. at 171, n. 37 and 175; *Fidelity Bank, N.A. v. U.S.*, 616 F.2d 1181 (10th Cir. 1980) (employment taxes); *U.S. v. Papandon*, 331 F.3d 52 (2d Cir. 2003) (excise taxes).

the IRS denies the claim.[37] The Courts of Appeal do not agree as to whether this two-year period is jurisdictional or whether it is a period of limitation subject to equitable doctrines.[38]

As another example, IRC § 7426 provides a judicial remedy to a person whose property was wrongfully seized to satisfy the tax liability of someone else. Under IRC § 6532(c)(1), suit to enjoin enforcement of the levy or sale, or to recover the property (or proceeds from the sale of the property) must be brought in a United States district court within nine months of the date of levy.[39] Several federal courts have held that the IRC § 6532(c) period is jurisdictional and not subject to equitable tolling,[40] but at least one Court of Appeals has held otherwise.[41]

Similarly, IRC §§ 7431-7433 generally allow taxpayers, if they bring suit within the specified periods, to seek civil damages in a United States district court or bankruptcy court with respect to unauthorized actions by the IRS.[42] At least one Court of Appeals has held that the two-year period for bringing suit under IRC § 7431 is jurisdictional and not subject to equitable tolling.[43] Some district courts have held that the two-year period for bringing suits under IRC § 7433 may be equitably tolled.[44] At least one district court noted that the issue was unsettled.[45]

IRC provisions also permit taxpayers to seek declaratory judgments in federal courts. For example, under IRC § 7428, taxpayers may request the Tax Court, the United States Court of Federal Claims,

37 IRC § 6532. Another pre-requisite to bringing a refund suit is to first make an administrative refund request from the IRS. A separate time limit, found in IRC § 6511, applies for making these administrative claims. Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. However, taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2). The Supreme Court, in the *Brockamp* case, held the three-year time limit of IRC § 6511(a) was jurisdictional and not subject to equitable tolling. *U.S. v. Brockamp*, 519 U.S. 347 (1997). In response, Congress effectively overruled the result reached by the court in *Brockamp* by adding subsection (h) to IRC § 6511, providing for tolling of the IRC § 6511(a) time limit in cases where taxpayers are financially disabled. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740. The National Taxpayer Advocate has recommended that the provision be adjusted to better protect more taxpayers who lack the capacity to file a refund claim while balancing the IRS's need to administer requests for relief. Specifically, she recommended clarifying that the impairment can be determined by a health professional and that a qualifying disability includes one that materially limits an individual's management of his or her financial affairs, rather than only one that leaves the individual "unable to manage" these affairs. *See* National Taxpayer Advocate 2013 Annual Report to Congress 302, Legislative Recommendation: *Broaden Relief from Timeframes for Filing a Claim for Refund for Taxpayers with Physical or Mental Impairments*.

38 *Compare RHI Holdings, Inc. v. U.S.*, 142 F.3d 1459, 1460, 1463 (Fed. Cir. 1998) (holding that "[r]egardless of any confusion that the IRS's actions may have caused RHI," because IRC § 6532 does not "contain[s] an implied equitable exception, considerations of equitable principles are not appropriate") with *Howard Bank v. U.S.*, 759 F. Supp. 1073, 1080 (D. Vt. 1991, *aff'd*, 948 F.2d 1275, 2d Cir. 1991) (based on a conversation with the IRS the taxpayer reasonably believed the IRS had withdrawn its disallowance of refund so that the final determination was pending with the IRS; the IRS was estopped from raising the two-year limitations period as a bar to the refund suit).

39 Damages may also be recovered for the wrongful levy if suit is brought "within 2 years after the date the right of action accrues." IRC § 7426(h)(2), incorporating IRC § 7433(d).

40 *See Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-54 (3d Cir. 2000) and cases cited therein.

41 *Volpicelli v. U.S.*, 777 F.3d 1042 (9th Cir. 2015).

42 IRC §§ 7431 (unauthorized inspection or disclosure of returns and return information); 7432 (failure to timely release a lien); and 7433 (unauthorized collection actions).

43 *Aloe Vera of America, Inc. v. U.S.*, 580 F. 3d 867, 871-72 (9th Cir. 2009).

44 *See, e.g., U.S. v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) (doctrine of equitable tolling may apply to IRC § 7433 claims); *Ramos v. U.S.*, No. C 01-21148-RS, 2002 WL 31466751, (N.D. Cal. Nov. 1, 2002) (IRC § 7433 permits equitable tolling).

45 *Bennett v. U.S.*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (noting that "[w]hether the statutes of limitations in 26 U.S.C. §§ 7432 and 7433 may be suspended by equitable tolling has not been definitively determined.").

or the District Court for the District of Columbia to review the IRS's determination to deny their application for recognition of exempt status as an IRC § 501(c) organization. They must request review "before the 91st day after the date" the notice of determination was mailed.[46]

Virtually all tax cases are brought in the Tax Court rather than in United States district courts or the Court of Federal Claims. For example, in Fiscal Year (FY) 2015, there were approximately 30,400 cases pending in the Tax Court, 600 tax cases in the district courts, and 200 tax cases in the Court of Federal Claims.[47] Thus, Tax Court cases comprised approximately 97 percent of the total number of federal tax cases docketed in trial courts. Of the 32,377 petitions filed in the Tax Court in FY 2015 (not all of which had yet been docketed), the vast majority, 27,096, or 84 percent, were filed by taxpayers proceeding *pro se* (without representation).[48]

Federal Courts Have Long Applied Equitable Doctrines to Determine Whether to Excuse Late Filings in Non-Tax Contexts

As discussed above, the doctrine of equitable tolling applies to excuse a late filing where some extraordinary event impeded the plaintiff's compliance with the statutory deadline. Since the Supreme Court decided the *Bowen* case in 1986, it has been settled that the time limit for bringing suit to challenge the Social Security Administration's determination to deny or terminate disability benefits is subject to equitable tolling.[49] Since the Supreme Court decided the *Irwin* case in 1990, it has been settled that the time limit for bringing suit to challenge a decision by the Equal Employment Opportunity Commission (EEOC) is subject to equitable tolling.[50] As discussed below, the outcomes in these two cases show how the doctrine is applied to grant or deny relief from a late filing.

In *Bowen*, the Court applied the doctrine of equitable tolling to suspend the time frame for bringing suit. The plaintiffs in *Bowen* showed that the agency had unlawfully employed a "secret" presumption that resulted in findings of lack of disability in their cases even though they actually qualified for benefits under the controlling statute and regulations. The Court found that "the Government's secretive conduct prevent[ed] plaintiffs from knowing of a violation of rights" and "the full extent of the Government's clandestine policy was uncovered only in the course of this litigation."[51]

In *Irwin*, the applicable time period was not tolled. The plaintiff in *Irwin* did not file his complaint within the statutory period of 30 days from the day the EEOC notice was received. Notice was sent to the plaintiff's attorney, who was out of the office when the notice was received. The plaintiff did file within 30 days of the date he personally received notice, however. The Court held, "the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect."[52] As the Court explained:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies

46 IRC § 7428(b)(3). If no such notice was mailed and 270 days have expired since the request for the determination was made taxpayers will be deemed to have exhausted their administrative remedies and may seek a declaratory judgment. IRC § 7428(b)(2).

47 IRS Office of Chief Counsel report to American Bar Association, Tax Section, Court Procedure Committee, Fiscal Year 2015 3.

48 *Id*. at 13.

49 *Bowen v. City of New York*, 476 U.S. 467 (1986).

50 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, (1990).

51 *Bowen v. City of New York*, 476 U.S. 467 (1986).

52 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

> by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.[53]

The doctrine of equitable estoppel, which may excuse a filing that was late due to something the defendant did to prevent a timely suit, is even less likely to apply than the doctrine of equitable tolling. As one scholar has noted, "equitable tolling is theoretically easier to prove [than equitable estoppel], but that is like saying climbing Mount Everest is easier than climbing K2."[54]

As discussed above, the doctrine of forfeiture applies when the parties have acted as if the statutory deadlines do not apply, and the doctrine of waiver applies when the parties have explicitly so agreed. In the 2006 *Day* case, the Supreme Court considered both doctrines when a state prisoner filed an untimely petition seeking *habeas corpus* relief (*i.e.*, he claimed he was being held unlawfully).[55] The State conceded that the petition was timely filed, but it later emerged that the State did not properly compute the relevant time limit. As the Court observed, "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto."[56] The Court also noted, "we would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." However, the Court found nothing in the record to suggest that the State had "strategically" withheld the defense or chose to relinquish it; the State had simply made an inadvertent computational error.[57] Thus, the defense had not been forfeited or waived. The lower court's dismissal of the petition was affirmed.

REASONS FOR CHANGE

Treating the IRC time limits for commencing a judicial proceeding as jurisdictional leads to unfair outcomes. It is perhaps for this reason that the courts do not always agree as to whether a time limit is jurisdictional. Unrepresented taxpayers in particular may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation. Clarifying that IRC time periods are not jurisdictional would resolve uncertainty in the courts, reduce litigation, and provide uniformity. By amending IRC § 7803 in 2015, Congress recognized that taxpayers have the right to a fair and just tax system; they are entitled to expect that the tax system will take into account their facts and circumstances. Allowing courts to consider judicial doctrines that could mitigate the harsh results that follow from treating the IRC deadlines as jurisdictional requirements would support this right. Jurisprudence in non-tax contexts demonstrates the difficulty plaintiffs encounter when they seek to excuse an untimely filing by relying on an equitable doctrine. There is no reason to suppose that taxpayers would succeed, or expect to succeed, more often if they were allowed to raise equitable doctrines to excuse a late filing to commence tax litigation. But the *right to a fair and just tax system* requires that these doctrines be available to taxpayers in the rare cases they would apply.

53 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

54 Bryan T. Camp, *Equitable Principles and Jurisdictional Time Periods, Part 1*, 2017 Tax Notes 37-34, 13 (Sept. 11, 2017).

55 *Day v. McDonough*, 547 U.S. 198 (2006).

56 *Id.* at 202 (2006) (citing Federal Rules of Civil Procedures 8(c), 12(b), and 15(a)). *See also* Rule 39, Tax Court Rules of Practice and Procedure, requiring that some matters such as statute of limitations defenses be pleaded: "A mere denial in a responsive pleading will not be sufficient to raise any such issue."

57 *Day v. McDonough*, 547 U.S. 198, 200 (2006).

EXPLANATION OF PROVISION

Under the proposal, the IRC time limits for petitioning the Tax Court and bringing suit in other federal courts would be treated as not jurisdictional. Thus, when taxpayers file petitions or commence suits beyond the applicable statutory periods, the courts would have jurisdiction to deem the suits timely under the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling. Taxpayers would still be required to demonstrate that an equitable doctrine applies in their cases, and the courts could still dismiss their petitions or complaints as untimely. Untimely petitions, including those filed in response to a statutory notice of deficiency, would no longer be subject to dismissal for lack of jurisdiction. Thus, taxpayers whose petitions in response to a statutory notice of deficiency are dismissed as *untimely* would no longer have the protection of IRC § 7459(d). IRC § 7459(d) specifies that a dismissal for *lack of jurisdiction* is not a decision on the merits, and thereby preserves these taxpayers' right to pay the asserted tax and seek a refund. Clarifying that a dismissal of an untimely petition filed in response to a statutory notice of deficiency is not a decision on the merits and does not require entry of a decision reflecting the deficiency would permit the taxpayer to pay the asserted deficiency and seek a refund. This would afford the same treatment to taxpayers whose petitions are dismissed for lack of jurisdiction as those whose petitions are dismissed as untimely.

LR #4 COLLECTION DUE PROCESS (CDP): Amend IRC § 6330 to Allow the Tax Court Jurisdiction to Determine Overpayments

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

PROBLEM

Taxpayers have the fundamental *right to pay no more than the correct amount of tax*. Internal Revenue Code (IRC) §§ 6320 and 6330 provide taxpayers the protection of an administrative hearing, known as a collection due process (CDP) hearing, before the IRS proceeds to collect an assessed deficiency by lien or levy. At the conclusion of the CDP hearing, the Tax Court has jurisdiction under IRC § 6330 to review the IRS's determination to proceed with a lien or levy. The Tax Court may review issues that were properly at issue in the CDP hearing, including, in certain circumstances, challenges to the underlying liability.

Review of the taxpayer's underlying liability could show that a taxpayer has actually *overpaid* his or her tax liability for the period at issue.[2] However, unlike in deficiency cases under IRC § 6512(b), IRC § 6330 does not confer jurisdiction to the Tax Court in CDP cases to determine the extent to which the taxpayer has made an overpayment and is entitled to a refund or credit for the tax period at issue.[3] To receive a refund or credit, the taxpayer will be required to take the additional steps of filing a separate administrative refund claim with the IRS and, if unsuccessful, bringing a refund suit in a United States district court or the Court of Federal Claims. This limitation on the Tax Court's jurisdiction to determine an overpayment and order a refund in CDP cases prevents taxpayers from obtaining resolution of their tax disputes for a given tax year in one forum and places unnecessary financial and administrative burden for taxpayers and the court system.

EXAMPLE

Taxpayer received a CP 504, *Notice of Intent to Seize (Levy) Your Property or Rights to Property* from the IRS, informing her that the IRS proposed to collect by levy unpaid tax for tax year 2013. Taxpayer was confused, as she had not received a statutory notice of deficiency and did not believe she owed the amount shown on the CP 504.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 The IRC does not define "overpayment." However, the Supreme Court stated that an overpayment occurs "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *U.S. v. Dalm*, 494 U.S. 596, 609 n. 6 (1990). *See also*, *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

3 *See Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006); *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015).

Taxpayer promptly called the number provided on the CP 504 to review her account with an IRS representative and to attempt to resolve the matter. The IRS representative informed her that a statutory notice of deficiency had been sent even though taxpayer had never received it. Because the taxpayer didn't respond to the notice of deficiency by timely petitioning the Tax Court, judicial review was not available at that point. The IRS proceeded with its intent to levy, and Taxpayer next received a Letter 1058, *Final Notice Reply Within 30 Days*.

Taxpayer immediately filed a Form 12153, *Request for a Collection Due Process or Equivalent Hearing*. Since taxpayer had not received a statutory notice of deficiency or a prior opportunity to question the amount the IRS proposed to assess, at the CDP hearing taxpayer challenged her underlying tax liability pursuant to IRC § 6330(c)(2)(B). Specifically, she sought to demonstrate that her income tax withholding and estimated tax payments for the year at issue had already overpaid her tax liability for that year. The IRS Appeals officer disagreed and determined to proceed with a levy to collect taxpayer's alleged outstanding income tax liability.

Taxpayer timely petitioned the Tax Court pursuant to IRC § 6330(d)(1), seeking a determination that a collection action by the IRS was improper because her income tax withholding and estimated tax payments for the year at issue had already overpaid her tax liability for that year. Because the underlying liability was at issue, the Tax Court's review was *de novo*, rather than for an abuse of discretion. The Tax Court agreed with taxpayer, and the IRS conceded. Thus, the issue of whether to levy was moot. However, the Tax Court concluded it lacked jurisdiction to determine an overpayment or order a refund for taxpayer. Taxpayer's only avenue for obtaining a refund is to file an administrative refund claim with the IRS and if that claim is denied, bring suit in a United States district court or the Court of Federal Claims.

RECOMMENDATION

To allow for a more efficient resolution of tax disputes and promote the taxpayers' *right to pay no more than the correct amount of tax*, the National Taxpayer Advocate recommends that Congress amend IRC § 6330 to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits if the court determines the amount of the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.

PRESENT LAW

Tax Court Has Jurisdiction to Determine Overpayments in Deficiency Cases

The Tax Court has jurisdiction to determine the amount of any deficiency. IRC § 6211(a) defines "deficiency" as "the amount by which the correct tax exceeds the excess of: (1) the sum of the amount reported on the taxpayer's return for such tax if a return was filed and an amount of tax was reported on the return plus amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of any rebate."

When the Board of Tax Appeals, the predecessor of the Tax Court, was created in 1924, it lacked jurisdiction to determine whether a taxpayer had overpaid his or her tax liability at issue in a deficiency proceeding in most circumstances.[4] The Revenue Act of 1926 provided the Board jurisdiction to

4 *Comm'r v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 421 n. 7 (1943).

determine an overpayment in a deficiency proceeding, but the Board still lacked authority to order payment of any resulting refund.[5]

Recognizing the additional burden this limitation placed on taxpayers who were required to seek enforcement of Tax Court overpayment determinations in an alternate forum, Congress enacted IRC § 6512(b) as a part of the Technical and Miscellaneous Revenue Act of 1988 to extend the Tax Court's jurisdiction.[6] IRC § 6512(b) provides the Tax Court the jurisdiction to determine "an overpayment of income tax for the same calendar year or calendar quarter, [or] of estate tax in respect of the same decedent." When the Tax Court does determine that the taxpayer has made an overpayment, it has jurisdiction to order a refund or credit of that overpayment if the Secretary fails to do so.[7] The Tax Court still has no jurisdiction to review the merits of any credit or offset that would reduce the amount of a determined liability.[8] Thus, "the Tax Court may order payment of a determined refund, but the Commissioner may apply the refund against other outstanding liabilities of the taxpayer free from Tax Court review."[9]

The Tax Court's Jurisdiction Does Not Include Determining Overpayments in CDP Cases

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) created procedures for CDP, designed to "increase fairness to taxpayers" by requiring the IRS to "afford taxpayers adequate notice of collection activity and a meaningful hearing" before depriving them of their property.[10] After a CDP hearing, the taxpayer has the additional protection of petitioning the Tax Court to review the determination before the IRS can undertake any collection action.[11] The Tax Court is the primary pre-payment forum for taxpayers to challenge perceived abuses in the IRS's exercise of its administrative collection powers.[12]

IRC § 6330(d)(1) provides that a taxpayer "may, within 30 days of a determination under this section, petition the Tax Court for review of such determination," but does not clarify the scope of the Tax Court's review in such cases. The extent of the Tax Court's authority to review such CDP determinations has been developed through case law.

5 The Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9 (1926).

6 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014); *see also* S. Rep. No.100-309, at 17 (1988).

7 IRC § 6512(b)(2).

8 IRC § 6512(b)(4). IRC § 6402 gives the Secretary the authority to issue refunds or offset tax liability at his or her discretion.

9 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014).

10 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105–206, § 3401, 112 Stat. 685, 746; S. Rep. No. 105-174, at 67 (1998). *See also* J. Comm. on Tax'n, *General Explanation of Tax Legislation Enacted in 1998*, JCS–6–98, 81 (Nov. 24, 1998). As discussed below, the statutes provide for a hearing before the IRS (a CDP hearing) and for Tax Court review of the IRS's determination that results from that hearing before the IRS takes enforced collection action. IRC §§ 6320(b), (c); 6330(b)-(e).

11 IRC § 6330(d)(1). The Tax Court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing. An issue is not properly raised if the taxpayer fails to request Appeals consideration of the issue or the taxpayer requests consideration but fails to present any evidence regarding that issue after being given a reasonable opportunity. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3.

12 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014).

Case Law

Following the passage of RRA 98, the Tax Court struggled to determine the scope of its jurisdiction to review determinations made under IRC § 6330. The court initially viewed IRC § 6330 as providing taxpayers a broad opportunity for remedy in the Tax Court. In *Montgomery v. Commissioner*, the Tax Court held the "substantive and procedural protections contained in IRC § 6320 and IRC § 6330 reflect congressional intent that the Commissioner of Internal Revenue should collect the correct amount of tax, and do so by observing all the applicable laws and administrative procedures."[13] In a concurring opinion, Judge Gale suggested that the lack of limiting language in IRC § 6330 indicated a wide grant of jurisdiction to the Tax Court in reviewing a taxpayer's underlying liability.[14] In another concurring opinion, however, Judge Goeke noted that the majority opinion did not reach the question of whether the Tax Court had authority to order a refund if the taxpayers establish that they have overpaid their tax liability.[15]

In *Greene-Thapedi v. Commissioner*, the Tax Court answered that question and held it did not have jurisdiction to determine an overpayment for the tax year at issue or to order a refund or credit even though the amount of the taxpayer's underlying tax liability for the year at issue in the CDP proceeding was less than the amounts paid for that year.[16] The court compared the specific language used in IRC § 6512 circumscribing the Tax Court's overpayment jurisdiction for deficiency cases with the lack of such limiting language in IRC § 6330.[17] The Tax Court held that such jurisdiction to determine an overpayment and order a refund in CDP cases could not arise by inference alone without explicit statutory authority.[18] Dissenting in *Greene-Thapedi*, Judge Vasquez criticized the "unfair results" produced by the majority's restrictive interpretation, saying, "[t]o narrowly interpret the statute to prevent the Tax Court from deciding an overpayment exists frustrates our congressionally conferred jurisdiction."[19]

In *Willson v. Commissioner*,[20] the D.C. Circuit reached a similar holding that the Tax Court's authority to review a taxpayer's underlying liability in a CDP case did not extend to ordering the IRS to return funds improperly received from the taxpayer. During the course of proceedings in the Tax Court, the IRS abated the assessment against the taxpayer but did not refund payments the taxpayer had already made on the liability.[21] The D.C. Circuit affirmed the Tax Court's dismissal of the case as moot, holding that the removal of the levy was "all the relief that section 6330 authorizes the tax court to grant him."[22]

13 *Montgomery v. Comm'r*, 122 T.C. 1, 21-22 (2004).
14 *Id.* at 122 T.C. at 15-17 (Gale, J, concurring).
15 *Montgomery*, 122 T.C. at 20 (Goeke, J, concurring).
16 *Greene-Thapedi v. Comm'r*, 126 T.C. 1, 11 (2006).
17 *Id.* at 126 T.C. at 12 (noting IRC § 6511 and IRC § 6512 include limits to refund jurisdiction in a deficiency case, including restricting the time period for filing a claim for a refund).
18 *Greene-Thapedi*, 126 T.C. at 11.
19 *Greene-Thapedi*, 126 T.C. at 24 (Vasquez, J., dissenting).
20 *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015).
21 *Id.* at 320.
22 *Id.* at 321.

REASONS FOR CHANGE

The Tax Court's Jurisdiction in Deficiency and CDP Cases That Involve a Challenge to a Taxpayer's Underlying Liability Should Be Consistent

The benefits of allowing the Tax Court to determine an overpayment and order a refund in deficiency cases also apply to CDP cases. The Senate explained its rationale for legislating IRC § 6512(b)(2) as follows:

> "The committee believes that if the Tax Court determines that a taxpayer is due a refund and the IRS fails to issue that refund, the taxpayer should not have to incur the additional time, trouble, and expense of enforcing the Tax Court's decision in another forum. Rather, the taxpayer should be able to enforce the decision in the court that entered the decision."[23]

Where a taxpayer's underlying liability is at issue, the same rational for resolving the dispute in one forum, as identified by the Senate, is present. Therefore, as in deficiency cases, the taxpayer "should be able to enforce the decision in the court that entered the decision" in CDP cases as well.[24]

Furthermore, the Tax Court's review in CDP cases involving a challenge to a taxpayer's underlying liability mirrors that in deficiency proceedings where there is jurisdiction to determine an overpayment. Where the underlying liability is at issue, the Tax Court's review in both deficiency and CDP cases is *de novo*, which affords no deference to the IRS's determination.[25] As in deficiency cases, the *de novo* standard in CDP cases requires the Tax Court take a fresh look at the underlying facts and circumstances to determine the taxpayer's underlying liability. In CDP cases, this type of holistic review requires the Tax Court to consider whether the taxpayer has satisfied his or her underlying tax liability in order to determine whether the IRS can proceed with a collection action. Therefore, as it already does in deficiency cases, the Tax Court should be able to determine an overpayment and order a refund because the Tax Court would have already calculated this amount in reaching its decision.

The Current Limitations of the Tax Court's Overpayment Jurisdiction Place an Unnecessary Burden on Taxpayers Seeking Finality in Their Disputes With the IRS and May Result in Taxpayers Paying More Than the Correct Amount of Tax

As explained above, under the current jurisdictional framework, taxpayers seeking an overpayment determination in a CDP case may be foreclosed from having their tax liability disputes completely resolved before the Tax Court. The inability to order a refund in overpayment cases undercuts the Tax Court's value as a pre-payment forum and the primary venue for CDP review. Through CDP jurisdiction, the Tax Court offers taxpayers the important benefit of being able to challenge a collection action before the tax is collected. Without jurisdiction in overpayment cases, a taxpayer's "only remedy may be to fully pay the tax, file a refund claim, and if unsuccessful, institute a tax refund suit in Federal District Court or the Court of Federal Claims."[26]

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23 S. Rep. No.100-309, at 17 (1988).

24 *Id.*

25 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. Rep. No. 105-599, at 266. *See also* IRS Chief Counsel Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* (May 5, 2014). The term *de novo* means anew. Black's Law Dictionary (10th ed. 2014).

26 *Greene-Thapedi v. Comm'r*, 126 T.C. at 14 (Colvin, J., concurring).

Forcing a taxpayer to resolve a single tax controversy in multiple forums undermines the taxpayers' *right to finality* and creates unnecessary costs and delay while impeding the efficient use of judicial resources. For a taxpayer claiming to have already paid the IRS too much, the unplanned expense of trying to get a refund in another forum could cause serious economic harm. Furthermore, the Tax Court as a forum may feel more comfortable for taxpayers, as the Tax Court's procedures are more informal in recognition that most taxpayers there proceed without representation.[27] The limitations of the Tax Court's jurisdiction for overpayment determinations in CDP cases create "a trap for the unwary."[28]

EXPLANATION OF RECOMMENDATION

Under this recommendation, the Tax Court would have the authority in a CDP case to not only order the IRS halt a collection action, but to also order a refund if it determines the amount a taxpayer has paid the IRS exceeds the taxpayer's liability. The Tax Court would follow the procedures already established to determine an overpayment in deficiency cases under IRC § 6512. This change would not create additional cases, as it would only apply to cases properly before the Tax Court involving challenges to a taxpayer's underlying liability.[29] Instead, this recommendation will likely conserve judicial resources by allowing taxpayers to seek complete resolution of overpayment disputes in Tax Court without having to bring cases in multiple forums. Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and issue refunds in CDP cases will protect taxpayer rights, reduce taxpayer burden, and better ensure the IRS collects the correct amount of tax.

27 *See* National Taxpayer Advocate 2016 Annual Report to Congress 364, 374 (Legislative Recommendation: *Collection Due Process (CDP): Amend Internal Revenue Code § 6330 to Provide That the Standard and Scope of Tax Court Review in CDP Cases Is De Novo Regardless of Whether the Underlying Liability Is at Issue*) ("For example, pursuant to agreements with some Low Income Taxpayer Clinics (LITCs) and other student tax clinics, the Tax Court sends taxpayers who do not already have representation in a docketed case a "stuffer" or notice that informs them LITC assistance may be available.").

28 *Greene-Thapedi*, 126 T.C. at 26 (Vasquez, J., dissenting) ("Particularly as section 6330 cases involve a prepayment posture and an opportunity to contest collection of the amount of tax owed, and the tax must be paid in full as a prerequisite to commencement of a refund suit brought in U.S. District Court or the U.S. Court of Federal Claims, lack of jurisdiction to decide an overpayment in section 6330 cases would leave taxpayers in a "Catch-22" where their tax was overpaid but the period of limitations on claiming the refund may have run, the look-back rules of section 6511(b) may limit or eliminate the amount of the refund, or res judicata may bar their claim.").

29 In general, requests for CDP hearings and resulting petitions to Tax Court have decreased since 2012. *See* National Taxpayer Advocate 2017 Annual Report to Congress (Most Litigated Issue: *Appeals from Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330*), *supra*.

LR #5

COLLECTION DUE PROCESS AND INNOCENT SPOUSE NOTICES: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated As Timely

TAXPAYER RIGHT(S) IMPACTED[1]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PROBLEM

The United States Tax Court plays a "unique and critical role as a prepayment forum," which taxpayers can access without having to pay the disputed amount of tax in advance.[2] The Tax Court has jurisdiction over a multitude of issues, including appeals from Collection Due Process (CDP) hearings and relief from joint and several liability.[3] The current language in several IRS CDP and innocent spouse notices of determination confuses taxpayers, especially pro se taxpayers, and causes them to misinterpret the deadline to file a petition with the Tax Court.

For example, the IRS notice of determination L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code*, refers to "a 30-day period *beginning the day after the date of this letter*" (emphasis added) within which taxpayers may petition the Tax Court for review of the IRS's determination to proceed with collection by lien or levy.[4] Several recent court cases demonstrate that the language in various notices confuses taxpayers and cause them to misinterpret the deadline to file a petition with the Tax Court.[5] If a taxpayer misses the deadline, the Tax Court does not have jurisdiction to review the IRS's determination and the taxpayers are deprived of

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Hon. James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update*, 2016 TNT 106-8, Tax Notes Today (June 2, 2016).

3 *See* IRC §§ 6320 & 6330 for Collection Due Process (CDP) jurisdiction. *See also,* IRC § 6015 for jurisdiction on relief from joint and several liability.

4 IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Rev. Dec. 2016).

5 In at least four recent cases, taxpayers filed their petitions one day late because they miscalculated the time period for filing their Tax Court petitions. *See, e.g., Duggan v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 4100-15L (2015); *Pottgen v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 1410-15L (2016); *Integrated Event Management, Inc. v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 27674-16SL (2017); *Protter v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 22975-15SL (2017). These cases are not cited for precedent, rather only for the fact patterns showing taxpayers miscalculated the deadline to file.

their CDP rights.[6] Additionally, taxpayers can be confused about the 30-day deadline to request a CDP hearing with the IRS, which is a prerequisite to petition the Tax Court for judicial review.[7]

Similarly, taxpayers challenging the IRS's determination to deny relief from joint and several liability under Internal Revenue Code (IRC) § 6015 (innocent spouse relief) may also benefit from clearer notices.[8] For innocent spouse cases, IRS Letter 5086, *Final Determination* (Rev. Feb. 2015), IRS Letter 5087, *Final Determination* (Rev. Feb. 2015), and IRS Letter 5088, *Final Determination* (Rev. Feb. 2015) each state: "*You must file your petition within 90 days from the date of this letter*."[9] (emphasis added). In several recent cases, the taxpayers seeking innocent spouse relief missed the 90-day deadline which was fatal for their cases.[10] Courts of Appeals consistently interpreted the deadline as a jurisdictional requirement and held the Tax Court lacks jurisdiction to hear untimely petitions for innocent spouse relief, regardless of whether equitable considerations supporting the extension of the prescribed time period exist.[11]

Furthermore, U.S. taxpayers residing abroad need to overcome barriers (such as delays in international mail, language differences, time zones, and the lack of access to tax professionals) to meet the deadlines prescribed in the CDP and innocent spouse notices.[12]

The absence of a codified requirement to provide the last date to file a request for a CDP hearing, or to file a CDP or innocent spouse petition with the Tax Court jeopardizes the taxpayers' rights *to be informed*, *to appeal the IRS's decision in an independent forum*, and *to a fair and just tax system*. In contrast, the IRC requires the IRS to specify the "last date" for filing a Tax Court petition in a notice of deficiency and provides an additional 60 days to file a petition for taxpayers residing abroad.[13]

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6 If the taxpayer does not request a hearing within the 30-day period, the taxpayer may still be entitled to an equivalent hearing with Appeals but will not have any appeal rights allowing the taxpayer to file for judicial review of the equivalency hearing determination. Treas. Reg. § 301.6330-1(i).

7 *See*, *e.g.*, *Weiss v. Comm'r*, 147 T.C. 179 (2016), *appeal docketed*, Docket. No. 16-1407 (D.C. Cir. Nov. 23, 2016) (holding that when the date appearing on IRS Letter 1058A was earlier than the date of mailing, the 30-day window was appropriately calculated by date of mailing, rather than the date appearing on the letter).

8 *See* IRS Form 8857, *Request for Innocent Spouse Relief, Instructions* (Jan. 2014). *See also* Treas. Reg. § 1.6015-1(a); Internal Revenue Manual (IRM) 25.15.3.10.2, *Final Determination Letters* (July 29, 2014).

9 IRC § 6015(e)(1)(A) provides the taxpayer up to 90 days to petition the U.S. Tax Court from the date the IRS mails the notice of final determination for relief, or the date which is six months after the request for relief is filed.

10 *See*, *e.g.*, *Vu v. Comm'r*, T.C. Summ. Op. 2016-75; *Nauflett v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 17-1986 (2016).

11 *See Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017); *Rubel v. Rubel*, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016); *Calvo v. Comm'r*, 117 A.F.T.R.2d (RIA) 2246 (D.C. Cir. 2016). *See also* Legislative Recommendation: *Equitable Doctrines: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case, infra.*

12 *See*, *e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 72-81 (Most Serious Problem: *International Taxpayer Service: The IRS's Strategy for Service on Demand Fails to Compensate for the Closure of International Tax Attaché Offices and Does Not Sufficiently Address the Unique Needs of International Taxpayers*); National Taxpayer Advocate 2014 Annual Report to Congress 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*); National Taxpayer Advocate 2010 Annual Report to Congress 221-34 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*).

13 *See* IRC §§ 6320(a), 6330(a), 6015(e) and 6213(a). IRC § 6213(a) provides that "any petition filed with the Tax Court on or before the last date specified for filing such petition by the [IRS] in the notice of deficiency shall be treated as timely filed" and allows international taxpayers (*i.e.*, taxpayers residing or traveling abroad) an additional 60 days to file a petition in the Tax Court in response to a statutory notice of deficiency (for a total of 150 days compared to 90 days allowed to domestic taxpayers).

Example 1

Taxpayer A's daughter received the notice of determination sustaining a levy on Taxpayer A's bank account dated March 28, 2016, via certified mail. Taxpayer A's daughter put away the letter and forgot to inform Taxpayer A of the letter. After a period of time, Taxpayer A noticed the letter from the IRS and decided to appeal to the Tax Court. Taxpayer A mailed his petition for judicial review of the notice of determination via the fastest delivery method on Thursday, April 27, 2016.

Taxpayer A believed that his petition for a hearing was timely because the day he mailed the petition was 30 days from the date on the letter, which was March 28, 2016. The letter read that the 30-day period began "*the day after the date of this letter*." Thus, Taxpayer A, calculated the date on the letter as day zero and the next day as day one, believing that April 27 would be day 30. The Tax Court, however, disagreed and issued an order stating that it lacked jurisdiction upon receiving a motion for summary judgment from the IRS. Even though the letter read that the 30-day period began "*the day after the date of this letter*," the IRS calculated the date on the letter as day one, and the next day as day two, thus calculating the 30th day to be April 26, 2016. Based on the IRS's method of calculating, the letter that had been mailed on April 27, 2016, was deemed to be mailed by Taxpayer A on the 31st day. Due to Taxpayer A's hastened mailing and confusion regarding the method of counting, Taxpayer A was denied an opportunity for judicial review of the IRS's determination.

Example 2

The IRS denied innocent spouse relief to Taxpayer B, who relocated to Vietnam, under IRC § 6015 and sent her a final notice of determination. Taxpayer B was not represented by an attorney licensed in U.S. law while abroad and had difficulty in preparing her petition. She filed her petition to the Tax Court on the 91st day, having mailed her petition from overseas. However, unlike in a notice of deficiency, taxpayers abroad do not get more time than taxpayers in the United States (*e.g.*, 150 days instead of 90 days) to file a petition. As a result, Taxpayer B had no opportunity to file a timely Tax Court petition and be allowed the opportunity to have judicial review of the IRS's determination.

RECOMMENDATIONS

To increase fairness to taxpayers and to improve the consistency of the Internal Revenue Code, the National Taxpayer Advocate recommends that Congress:

- Amend IRC §§ 6320(a)(3), 6330(a)(3), 6330(d)(1), and 6015(e)(1)(A) to require the IRS to include a specific date, similar to the "last date" to file on the statutory notice of deficiency, by which a taxpayer must file his or her request for CDP hearing with the IRS, and his or her CDP or innocent spouse petition in the U.S. Tax Court.
- Amend IRC § 6330(d)(1) and § 6015(e)(1)(A) to deem CDP and innocent spouse petitions filed by the later of the date on the notice of determination or the last statutory date (if the IRS miscalculates the last date on the notice) as timely filed.
- Amend IRC §§ 6320(a)(3), 6330(a)(3), 6330(d)(1), and 6015(e)(1)(A)(ii) to allow an additional 60 days for taxpayers outside the U.S. to request a CDP hearing, or to file a CDP or innocent spouse petition in the U.S. Tax Court, similar to IRC § 6213(a).

PRESENT LAW

Under IRC §§ 6320 and 6330, taxpayers have the right to an administrative hearing, known as a CDP hearing, with respect to the collection of an assessed deficiency by lien or levy. IRC § 6320(a)(3)(B) requires the IRS to provide a notice to the taxpayer that informs him or her about "the right …. to request a hearing during the 30-day period beginning on the day after the 5-day period" after the day of the filing of the notice of federal tax lien.[14] Similarly, IRC § 6330(a)(3) requires that the notice to the taxpayer include "the right of the person to request a hearing during the 30-day period" commencing on the day after the date of the CDP notice.[15] At the conclusion of the CDP hearing, the Appeals Officer issues a notice of determination.[16] Taxpayers may then petition the U.S. Tax Court for review of the notice of determination "within 30 days" thereafter.[17]

IRC § 6015 provides three ways for a taxpayer to obtain partial or full relief from an IRS debt resulting from a return filed jointly with a spouse or ex-spouse.[18] Taxpayers seeking relief under IRC § 6015 generally file Form 8857, *Request for Innocent Spouse Relief*.[19] The IRS then issues taxpayers a final notice of determination granting or denying relief in whole or in part.[20] The taxpayer has 90 days from the date the IRS mails the notice to file a petition with the Tax Court.[21] Similar to the CDP provisions, IRC § 6015(e)(1)(A) does not require the IRS to specify the date by which a petition the Tax Court must be filed.[22]

On the other hand, IRC § 6213(a) provides that "any petition filed with the Tax Court on or before the last date specified for filing such petition by the [IRS] in the notice of deficiency shall be treated as timely filed" and extends the period for filing a petition from 90 days to 150 days for taxpayers residing abroad.[23] Unlike IRC § 6213, CDP and innocent spouse provisions do not have an extended period of time to file a petition, for taxpayers abroad.[24]

14 IRC § 6320(a)(3)(B). *See also* Treas. Reg. § 301.6320-1(b)(1).

15 IRC § 6330(a)(3). *See also* Treas. Reg. § 301.6330-1(b)(1).

16 Treas. Reg. § 301.6330-1(e)(3), Q&A-E8.

17 IRC §§ 6320(c), 6330(d)(1). *See also* Treas. Reg. § 301.6330-1(f)(1). Treas. Reg. § 301.6330-1(f)(1) clarifies that "the taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination to the Tax Court." However, the Treasury Regulation does not require the notice to calculate that date for taxpayers.

18 *See* IRC § 6015.

19 *See* IRS Form 8857, *Request for Innocent Spouse Relief, Instructions* (Jan. 2014).

20 *See* Treas. Reg. § 1.6015-1(a). *See also* IRM 25.15.3.10.2, *Final Determination Letters* (Rev. July 29, 2014). IRS Letter 5086, *Final Determination* (Feb. 2015), notifies the requesting spouse of the determination to allow relief. Additionally, Letter 5087, *Final Determination* (Feb. 2015), notifies the requesting spouse of the determination to allow partial relief. Finally, Letter 5088, *Final Determination* (Feb. 2015), notifies the requesting spouse of the final determination to disallow relief. All three letters state: "You must file your petition within 90 days from the date of this letter."

21 IRC § 6015(e)(1)(A)(ii). *See also* Legislative Recommendation: *Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case, infra*.

22 IRC § 6015(e)(1)(A).

23 IRC § 6213(a).

24 *Compare* IRC §§ 6320, 6330, and 6015 (lacking an extended period of time to file a petition for taxpayers abroad), *with* IRC § 6213(a) (providing "[w]thin 90 days, *or 150 days if the notice is addressed to a person outside the United States* … the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.") (emphasis added).

REASONS FOR CHANGE

The current language in the CDP notices of determination, which follows the language in the regulations, may cause taxpayers, especially *pro se* taxpayers, to misinterpret the filing deadline.[25] The deadline to file a Tax Court petition is described in various places as follows:

- IRC § 6330(d)(1) provides that the taxpayer may, "*within 30 days of a determination under this section*, petition the Tax Court for review of such determination" (emphasis added).
- The Treasury regulations under IRC §§ 6320 and 6330 provide that the taxpayer may "appeal such determinations made by Appeals within the 30-day period *commencing the day after the date of the Notice of Determination to the Tax Court*" (emphasis added).[26]
- IRS Letter 3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code*, issued to taxpayers to advise them of their right to seek Tax Court review after a determination by Appeals, advises "i[f] you want to dispute this determination in court, you must file a petition with the United States Tax Court within a 30-day period *beginning the day after the date of this letter*" (emphasis added).[27]

The consequence of not filing a timely petition is dire. If a taxpayer misses the deadline, the Tax Court does not have jurisdiction to review the IRS's determination and taxpayers are deprived of their CDP rights.[28]

In at least four recent cases,[29] taxpayers filed their petitions one day late because they miscalculated the time period for filing their Tax Court petitions which can be specifically related to the current language in the IRS notice of determination referring to "a 30-day period *beginning the day after the date of this letter*" (emphasis added).[30] Unsophisticated taxpayers are more likely to rely on the language in the IRS notice and apply a common parlance interpretation of the phrase, rather than read the relevant statute and regulations.

25 *See* IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Dec. 2016); Treas. Reg. § 301.6320-1(f); Treas. Reg. § 301.6330-1(f). TAS has a Notice Team which is currently focusing on developing solutions to this and other identified problems with notices.

26 Treas. Reg. § 301.6320-1(f); Treas. Reg. § 301.6330-1(f).

27 IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Dec. 2016).

28 If the taxpayer does not request a hearing within the 30-day period, the taxpayer may still be entitled to an equivalent hearing with Appeals but will not have any appeal rights allowing the taxpayer to file for judicial review of the equivalency hearing determination. Treas. Reg. § 301.6330-1(i).

29 *See, e.g.*, *Duggan v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 4100-15L (2015) (dismissing for lack of jurisdiction where petition was filed "31 days after the mailing of the notices of determination."); *Pottgen v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 1410-15L (2016) (dismissing for lack of jurisdiction where petition was received by Tax Court one day late); *Integrated Event Management, Inc. v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 27674-16SL (2017) (dismissing for lack of jurisdiction where petition was filed one day late, disagreeing with Taxpayer's calculation putting the day of the letter as day zero rather than as day one); *Protter v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 22975-15SL (2017) (dismissing for lack of jurisdiction where petition was mailed 31 days after the date on the notice of determination, disagreeing with Taxpayer's construction of the operative language effectively putting the day of the letter as day zero). These cases are only cited here for the fact patterns showing taxpayers miscalculated the deadline.

30 IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Dec. 2016).

Furthermore, there have been cases where taxpayers have miscalculated the 30-day deadline to request a CDP hearing with the IRS, which is a prerequisite to petition the Tax Court for judicial review later.[31] This confirms that even a seemingly easy and straightforward calculation of 30 days confuses some taxpayers.

IRC § 6015(e)(1)(A) provides the taxpayer up to 90 days to petition the U.S. Tax Court from the date the IRS mails the notice of final determination for relief, or the date which is six months after the request for relief is filed.[32] For innocent spouse cases, IRS Letter 5086, *Final Determination* (Rev. Feb. 2015), IRS Letter 5087, *Final Determination* (Rev. Feb. 2015), and IRS Letter 5088, *Final Determination* (Rev. Feb. 2015) each state: "*You must file your petition within 90 days from the date of this letter*." (emphasis added).

In several recent cases, the taxpayers seeking innocent spouse relief missed the 90-day deadline which was fatal for their cases.[33] Courts of Appeals consistently interpreted the deadline as a jurisdictional requirement and held the Tax Court lacks jurisdiction to hear untimely petitions for innocent spouse relief, regardless of whether equitable considerations supporting the extension of the prescribed time period exist.[34]

The absence of the requirement to provide the last date to file a request for a CDP hearing or to file a CDP or innocent spouse petition with the Tax Court jeopardizes the taxpayers' rights *to be informed*, *to appeal the IRS's decision in an independent forum*, and *to a fair and just tax system*. It is also inconsistent with the current statutory requirement that the IRS notices of deficiency specify the "last date" for filing a petition and that deems petitions filed by such date as timely filed.[35] Therefore, the "last" file-by dates on these notices will help avoid any confusion for taxpayers and prevent instances where taxpayers are denied rights because of misinterpretation of the IRS notices.

Furthermore, U.S. taxpayers residing abroad need to overcome barriers (such as delays in international mail, language differences, time zones, and the lack of access to tax professionals) to meet the deadlines prescribed in the CDP and innocent spouse notices.[36] Thus, providing an additional 60 days to these

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31 *See*, *e.g.*, *Weiss v. Comm'r*, 147 T.C. 179 (2016), *appeal docketed*, Docket. No. 16-1407 (D.C. Cir. Nov. 23, 2016) (holding that when date appearing on IRS Letter 1058A was earlier than date of mailing, 30-day window was appropriately calculated by date of mailing, rather than date appearing on letter). In this case, the Revenue Officer (RO) attempted to hand-deliver the levy notice during a field call on February 11, 2009, but was deterred by Mr. Weiss's dog and mailed that same levy notice by certified mail to the Mr. Weiss's last known address two days after, on February 13, 2009. The United States Tax Court held that the time period for making a CDP request runs from the date the IRS mails the notice and not from the date of the notice.

32 IRC § 6015(e)(1)(A).

33 *See*, *e.g.*, *Vu v. Comm'r*, T.C. Summ. Op. 2016-75; *Nauflett v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 17-1986 (2016).

34 *See Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017); *Rubel v. Rubel*, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016); *Calvo v. Comm'r*, 117 A.F.T.R.2d (RIA) 2246 (D.C. Cir. 2016). *See also* Legislative Recommendation: *Equitable Doctrines: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case*, *infra*.

35 *See* IRC § 6213(a).

36 *See*, *e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 72-81 (Most Serious Problem: *International Taxpayer Service: The IRS's Strategy for Service on Demand Fails to Compensate for the Closure of International Tax Attaché Offices and Does Not Sufficiently Address the Unique Needs of International Taxpayers*); National Taxpayer Advocate 2014 Annual Report to Congress 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*); National Taxpayer Advocate 2010 Annual Report to Congress 221-34 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*).

taxpayers would improve the fairness of the U.S. tax system and make it consistent with the current notice of deficiency provision.[37]

EXPLANATION OF RECOMMENDATION

The proposed legislative change would require the IRS to calculate and provide the last date for filing on all notices of determination issued under §§ 6320, 6330, and 6015 to make them consistent with the requirements for statutory notices of deficiency under IRC § 6213(a). These statutory requirements would ensure that notices include an exact date, expressly calculated and stated clearly on the letter, by which the taxpayer must file their petition to the Tax Court or a request for a CDP hearing with the IRS. This would not impose undue burden on the IRS as it currently has procedures to calculate the last date to file-by for the notices of deficiency.[38] The IRS can implement such procedures for all notices and letters, including making minor changes to:

- IRS Letter 1058/1058A, *Final Notice of Intent to Levy and Notice of Your Right to a Hearing* (Rev. Jan. 2017);
- IRS Letter 3172, *Notice of Federal Tax Lien and Your Rights to a Hearing Under IRC 6320* (Rev. March 2017);
- IRS Letter 3193, *Notice of Determination: Concerning Collection Action(S) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Rev. Dec. 2016); and
- IRS Letter 5086, *Final Determination* (Rev. Feb. 2015), IRS Letter 5087, *Final Determination* (Rev. Feb. 2015), and IRS Letter 5088, *Final Determination* (Rev. Feb. 2015).

The proposed legislative change would also deem requests for CDP hearing and petitions to the Tax Court to review CDP and innocent spouse determinations as timely filed as long as they are filed by the "last date" listed in the IRS notice. Under this legislative recommendation taxpayers are allowed the later of the date on the notice or the last statutory date, which provides an additional protection if the IRS miscalculates the date on the notice.

The 60-day extension of the deadline to file CDP and innocent spouse petitions for taxpayers abroad is consistent with the current notice of deficiency file-by deadlines and would not create additional administrative burden for the IRS.[39] The National Taxpayer Advocate has previously recommended statutory fixes requiring that any final determination letter the IRS issues in connection with a request for innocent spouse relief in a manner similar to that provided by IRC § 6213(a) and reiterates that recommendation.[40] Similarly, she recommended to allow 120 days for taxpayers outside the U.S. to file

37 IRC § 6213(a) provides taxpayers living outside the United States 150 days to file a petition to respond to a notice of deficiency. IRC § 6213(a).

38 IRM 4.8.9, *Statutory Notices of Deficiency* (Aug. 11, 2016), Exhibit 4.8.9-2, *Computation of Last Day to File a Petition with United States Tax Court and Computation of Default Date*, provides IRS employees a template to follow when calculating the deadline.

39 For example, current instructions to employees provide the following calculation of the last date to file petition with the Tax Court for a redetermination of a deficiency: "the date of Statutory Notice of Deficiency issued + 90/150 days for 90/150 letter + 15 days for notification of Tax Court petition." IRM 4.8.9, *Statutory Notices of Deficiency* (Aug. 11, 2016), Exhibit 4.8.9-2, *Computation of Last Day to File a Petition with United States Tax Court and Computation of Default Date*.

40 *See* National Taxpayer Advocate 2006 Annual Report to Congress 535-36 (*Additional Legislative Recommendation: Extend Period for Filing a Tax Court Petition; Improve Final Determination Letters*); National Taxpayer Advocate 2001 Annual Report to Congress 159-65.

a request with the IRS for an abatement of an assessment arising from mathematical or clerical errors to respond to the IRS math error notices for taxpayers abroad.[41]

41 *See* National Taxpayer Advocate 2016 Annual Report to Congress 393-97 (Legislative Recommendation: *International Due Dates: Amend Internal Revenue Code § 6213(b)(2)(A) to Provide Additional Time to Request Abatement of a Mathematical or Clerical Error Assessment to Taxpayers Living Abroad Similar to the Timeframe Afforded to Taxpayers to Respond to a Notice of Deficiency*).

LR #6 USER FEES: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

Consistent with its mission, the IRS offers various services that help people report and pay their taxes. Due to budget constraints, however, it has been charging new fees or hiking existing fees for these services.[2] For example, the IRS has recently increased (or proposed to increase) a wide range of fees including the fees for installment agreements (IAs),[3] offers in compromise (OICs),[4] pre-filing agreements (PFAs),[5] private letter rulings (PLRs),[6] and special enrollment examinations (SEE).[7]

The IRS cites the Independent Offices Appropriation Act of 1952 (IOAA), Office of Management and Budget (OMB) Circular A-25, and budget constraints as the reasons for its most recent fee hikes.[8] Unlike services provided by other agencies, however, the government is often the primary beneficiary of the IRS's services, which help people pay taxes.[9] Thus, IRS user fees may discourage people from paying their taxes and cost the government more — in lost tax revenue and increased enforcement costs — than they bring in.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 In 2016 the IRS proposed increasing the fees for installment agreements (IAs) and offers in compromise (OICs) because of "constraints on IRS resources." *See User Fees for IAs*, 81 Fed. Reg. 56,543, 56,544 (Aug. 22, 2016); *User Fees for OICs*, 81 Fed. Reg. 70,654, 70,655 (Oct. 13, 2016).

3 *User Fees for IAs*, T.D. 9798, 81 Fed. Reg. 86,955 (Dec. 2, 2016).

4 *User Fees for OICs*, 81 Fed. Reg. 70,654 (Oct. 13, 2016) (proposing to increase the OIC fee from $186 to $300). For the National Taxpayer Advocate's comments, see National Taxpayer Advocate Memo to Associate Chief Counsel (Procedure and Administration), *Comments on User Fees for OICs* (Nov. 28, 2016), https://www.regulations.gov/document?D=IRS-2016-0038-0003.

5 Rev. Proc. 2016-30, § 10, 2016-21 I.R.B. 981 (increasing the pre-filing agreement (PFA) fee from $50,000 to $218,600).

6 Rev. Proc. 2015-1, App'x A(3), 2015-1 I.R.B. 1 (2015) (increasing the private letter ruling (PLR) fee from $19,000 to $28,300). Previously, the fee for PLRs from Tax Exempt/Government Entities (TE/GE) was $10,000. Rev. Proc. 2014-8, § 6.08, 2014-1 I.R.B. 242 (2014).

7 *Special Enrollment Examination User Fee for Enrolled Agents*, 82 Fed. Reg. 33,009 (July 19, 2017) (increasing the IRS's portion of the fee from $11 to $81).

8 *See, e.g.*, 31 U.S.C. § 483a (1976), *re-codified at* 31 U.S.C. § 9701 (2017); Office of Management and Budget (OMB), Circular A-25, 58 Fed. Reg. 38,142 (July 15, 1993), (hereinafter "OMB Circular A-25").

9 *See, e.g.*, *Steele v. United States*, 2017-1 U.S. Tax Cas. (CCH) P50,238, 2017 U.S. Dist. LEXIS 84117 (D.D.C. 2017), *appeal docketed*, No. 1:14-cv-01523 (D.D.C., Sept. 6, 2017) (holding the fee for preparer tax identification numbers (PTINs) was invalid primarily because "if a benefit exists, it inures to the IRS, who, through the use of PTINs, may better identify and keep track of tax return preparers and the returns that they have prepared.").

In addition, charging for fundamental tax services that allow taxpayers to exercise their rights creates a pay-to-play system that seems inconsistent with the *right to a fair and just tax system*. If charging taxpayers to exercise their rights reduces trust in government and faith in the legitimacy of the tax system, it could even reduce the revenue that the government collects from other taxpayers by reducing voluntary compliance overall.[10]

Without additional legislation, resource constraints could prompt the IRS to begin charging for all kinds of fundamental tax services such as: filing an appeal, receiving assistance from the Taxpayer Advocate Service, asking for an audit reconsideration, entering a closing agreement, visiting a taxpayer assistance center, calling the IRS, receiving a communication (*e.g.*, a call, letter, or notice), making a payment, submitting a tax form, using the "where's my refund" website, or asking the IRS to withdraw a lien.

EXAMPLE

In 2016, the IRS raised the fee for taxpayers to enter into IAs to pay their taxes plus interest and penalties over time. In response to comments about how the government benefits from IAs, the IRS responded that "the benefit to the fisc of collecting outstanding taxes is not an additional benefit to the government because the IRS would collect those amounts through other means absent the installment agreement."[11] The IRS did not provide any data to support this assertion, and did not consider the cost of collecting those taxes through other means. Nor did it address the potential violation of taxpayer rights that could otherwise occur. It explained "there is no requirement that the agency weigh this public benefit against the specific benefit to the identifiable recipient."[12] The IRS's analysis suggests that if it can identify someone who arguably receives a "special benefit," then it is required to impose a user fee (or request a waiver from OMB), even if the fee would cost the government more in tax revenue or enforcement costs than it generates, and even if it would violate the Taxpayer Bill of Rights.

In response to a comment observing that the IRS is required by law to enter into certain "guaranteed" IAs — a law that supports the taxpayer's *right to privacy* by ensuring that enforcement is "no more intrusive than necessary" — the IRS explained that an "issuing agency may charge a fee even though the agency is required to issue such benefit."[13] In other words, the IRS believes it is permitted (or maybe even required) to charge a fee for access to or application of fundamental taxpayer rights.

RECOMMENDATIONS

To ensure the IRS adequately considers the consequences of increasing fees, the National Taxpayer Advocate recommends that Congress prohibit the IRS from increasing fees for tax-related services unless it first determines, after considering public comments, that:

(1) The proposed fee will not reduce government revenue (*e.g.*, by directly or indirectly discouraging voluntary tax compliance);

10 *See*, *e.g.*, National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 138-150; National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 1-28; OECD, Forum on Tax Administration, Small/Medium Enterprise (SME) Compliance Subgroup, *Understanding and Influencing Taxpayers' Compliance Behaviour* (Nov. 2010); OECD, Forum on Tax Administration Subgroup, *Right from the Start: Influencing the Compliance Environment for Small and Medium Enterprises* (Jan. 2012); Tom Tyler, *Why People Obey the Law* (2006); Tom Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 Ohio St. J. Crim. L. 307-359 (Fall 2009); Erich Kirchler, *The Economic Psychology of Tax Behaviour* (2007).

11 *User Fees for IAs*, T.D. 9798, 81 Fed. Reg. 86,955, 86,957 (Dec. 2, 2016).

12 *Id*. Perhaps OMB Circulars should be revisited in light of the TBOR, which has been codified by Congress.

13 *Id.*

(2) The proposed fee will not increase government expenses (*e.g.*, by increasing enforcement costs or noncompliance); and

(3) The proposed fee will not undermine or deter taxpayers from claiming the protection of taxpayer rights.

PRESENT LAW

The IOAA generally requires federal agencies to consider establishing user fees for any "service or thing of value provided by the agency," and the OMB requires them to consider charging "full cost" for those that convey "special benefits," unless it grants a waiver.[14] Agencies have discretion to request a fee waiver "where the cost of collecting the fees would represent an unduly large part of the fee for the activity or any other condition exists that, in the opinion of the agency head, justifies an exception."[15] When an agency charges a fee, however, the IOAA specifies that "[e]ach charge shall be — (1) fair; and (2) based on — (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." Various other laws give the IRS discretion to set a "reasonable" fee for specific items.[16]

OMB Circular A-25 says that agencies may impose fees for services except when "identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public." It does not distinguish between services that benefit the government and those that do not. Rather, it says that even

> when the public obtains benefits as a necessary consequence of an agency's provision of special benefits to an identifiable recipient (*i.e.*, the public benefits are not independent of, but merely incidental to, the special benefits), an agency need not allocate any costs to the public.

As an example, it suggests that agencies may charge full cost for services such as granting patents, passports, and licenses, and conducting customs inspections after regular duty hours, even though such services may benefit the general public.

However, a Senate report preceding the IOAA suggested that agencies consider fees for services to "special beneficiaries," but not for "fundamental government services" that benefit the general public or where "there is doubt as to the degree or preponderance of benefit."[17] This report is consistent with recommendations by economists and the Government Accountability Office that agencies not charge for services that primarily benefit the general public, and that they charge a reduced fee for services that

14 31 U.S.C. § 9701(b) ("service or thing of value provided by the agency"); OMB Circular A-25 ("special benefit").

15 OMB Circular A-25.

16 *See, e.g.*, IRC § 6103(p)(2) (reproduction of returns and the disclosure of return information, such as a U.S. Residency Certification, Income Verification Express Service (IVES), and copies); IRC § 7528 (letter rulings, opinion letters, determination letters, art valuation, and similar requests); IRC § 6104(d)(1)(B) (copying and mailing exempt organization (EO) materials and returns); IRC § 6108(b) (statistical studies); 5 U.S.C. § 552(a)(4)(A) (Freedom of Information Act (FOIA) document search, duplication, and review); IRC § 6110(k) (reproduction of Chief Counsel Advice); 29 U.S.C. 1202a (Employee Plan Compliance Resolution System under Rev. Proc. 2016-51, 2016-42 I.R.B. 465 (Sept. 29, 2016)). The IRS must also collect a $500 user fee from any person claiming a deduction for a historical preservation easement. *See* IRC § 170(f)(13).

17 S. Rep. No. 2120, 81st Cong., 2d Sess. 3-4 (1950). Services that promote tax compliance are perhaps the most fundamental government service because the government could not exist without taxes. *See, e.g.*, *Bull v. US*, 295 U.S. 247, 259-260 (1935) ("taxes are the lifeblood of government…").

provide a public benefit.[18] Moreover, courts have held that the IOAA does not authorize full-cost fees for services that primarily benefit the general public (*e.g.*, the cost of regulating the industry) just because specific beneficiaries can be identified.[19] Thus, there is a limit to the services that may be subject to a fee, but the precise outlines of that limit are unclear.

The IRS has an incentive to push the envelope by raising fees and imposing new ones. Unlike other federal agencies, it may retain and spend certain user fee revenue.[20] The IRS has a lot of flexibility in how it spends user fees. It generally does not have to use fee revenue to fund the services that generated it.[21] While the IRS submits its user fee spending plan to the Department of Treasury and OMB for approval, it does not need congressional approval.[22]

18 *See*, *e.g.*, Government Accountability Office (GAO), GAO-08-386SP, *Federal User Fees: A Design Guide* 7 (May 2008), http://www.gao.gov/assets/210/203357.pdf ("if a program primarily benefits the general public (*e.g.*, national defense), it should be supported by general revenue, not user fees; if a program primarily benefits identifiable users, such as customers of the U.S. Postal Service, it should be funded by fees; and if a program benefits both the general public and users, it should be funded in part by fees and in part by general revenues."); Clayton P. Gillette, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. Rev. 795, 873 (1987) ("Where provision of the good or service creates substantial external benefits, user fees should be reduced to reflect judgments about the relative magnitudes of the marginal social benefits entailed.").

19 *See Nat'l Cable Television Assn., Inc. v. United States et al.*, 415 U.S. 336 (1974) (holding CATV operators could not be charged for regulations, even though the regulations limited the franchise fees charged to operators); *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 346-350 (1974) (holding electric and gas utilities could not be charged for regulations that helped them gain access to markets, to capital, and supplies); *Elec. Indus Ass'n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (explaining the Federal Communications Commission (FCC) could charge equipment manufacturers fees for tariff filings and equipment certifications, which they needed to conduct business, but remanding because the FCC could not charge for other regulatory costs that benefit the public); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) (noting "[I]f the service provides both a specific benefit to an identifiable beneficiary and an independent benefit to the public, then the agency must pro rate its costs, lest the specific beneficiary be charged for agency costs attributable to the public benefit."); *Steele v. United States*, 2017-1 U.S. Tax Cas. (CCH) P50,238, 2017 U.S. Dist. LEXIS 84117 (D.D.C. 2017), *appeal docketed*, No. 1:14-cv-01523 (D.D.C., Sept. 6, 2017) (holding the IOAA did not authorize the IRS to charge for PTINs, in part, because "if a benefit exists, it inures to the IRS").

20 *Compare* 31 U.S.C. § 3302(b) (requiring agencies to return user fee receipts to the Treasury) *with* Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 3, 108 Stat. 2382 (1994) (allowing the IRS to retain certain user fee receipts) and Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 209, 119 Stat. 2396 (2006) (same).

21 IRS response to TAS information request (June 30, 2017).

22 GAO, GAO-17-492T, *2016 Filing Season* 4 n.7 (Mar. 8, 2016), http://www.gao.gov/assets/690/683246.pdf. Congress increased the IRS's appropriation for taxpayer services from fiscal year (FY) 2013 to FY 2016. Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2017-40-013, *Analysis of Resources Allocated to Taxpayer Services* 5 (Dec. 2016), https://www.treasury.gov/tigta/auditreports/2017reports/201740013fr.pdf. In FY 2015, however, the IRS diverted fee revenue from taxpayer service to operations support, primarily to implement various legislative mandates. *Id*. H.R. 4885 would limit the IRS's authority to spend user fee revenue without authorization from Congress.

REASONS FOR CHANGE

IRS Services Often Generate Revenue, Reduce Costs, and Implement Taxpayer Rights

PFAs and PLRs benefit the government.[23] When a taxpayer requests a PFA, the IRS may agree to examine and resolve an issue on the return before it is filed.[24] According to the IRS, PFA exams are better than post-filing exams because:

- Records and people are more readily available before a return is filed;
- PFAs foster a cooperative relationship;
- PFAs are faster;
- PFAs make any post-filing exam quicker;
- PFAs improve resource allocation by addressing significant issue(s); and
- PFAs reduce compliance burden and costs.[25]

PLRs can provide similar benefits. Even more importantly, they help educate the public about how experts at the IRS would apply the law in similar cases, even if they do not necessarily represent the IRS's official position and other taxpayers cannot rely on them.[26]

As discussed above, IAs and OICs also benefit the government. The IRS's goal for the OIC program is to collect what is reasonably collectible at the least cost and at the earliest possible time.[27] As a condition of the agreement taxpayers must remain compliant for at least five years.[28] In addition, OICs enable the IRS to avoid wasting resources by trying to collect more in the future from taxpayers who cannot afford to pay without experiencing economic hardship (and thereby also helping the IRS avoid violating taxpayer rights).[29]

Similarly, IAs allow the taxpayer to pay over time, sparing the IRS the expense of enforced collection. Thus, IAs and OICs independently benefit all taxpayers. Any benefit to the applicant is designed as an incentive to encourage tax debtors who cannot pay in full to apply for an IA or OIC so that the government may benefit (*e.g.*, by collecting the reasonable collection potential at a minimal cost to the government and by securing at least five years of voluntary compliance going forward). Thus, it is costly for the IRS to charge for OICs and IAs, and doing so may undermine the IRS's mission.

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23 The PLR and PFA fees are not governed by the Independent Offices Appropriation Act of 1952 (IOAA), but the IRS can still consider the extent to which these services benefit the general public and the government when setting fees for these services. *See* IRC § 7528(b)(2)(A) ("The Secretary shall provide for such exemptions (and reduced fees) under such program [for issuing 'ruling letters, opinion letters, and determination letters, and other similar requests'] as the Secretary determines to be appropriate.").

24 IRM 4.30.1 (Jan. 9, 2002).

25 *See*, *e.g.*, IRS, *Pre-Filing Agreement Program - Orientation Guide* (Feb. 27, 2017), https://www.irs.gov/businesses/pre-filing-agreement-program-orientation-guide.

26 *See* Rev. Proc. 2017-1, § 11.02, 2017-1 I.R.B. 1 ("A taxpayer may not rely on a letter ruling issued to another taxpayer. See § 6110(k)(3).").

27 Policy Statement P-5-100, *reprinted at* IRM 1.2.14.1.17 (Jan. 30, 1992).

28 IRS, Form 656, *Offer in Compromise* (Mar. 2017) (providing in item j that OICs require five years of future compliance).

29 The IRS loses revenue when it rejects an OIC based on the (false) premise that it will collect more from the taxpayer in the future. The IRS ultimately collects surprisingly little on OICs that are returned, withdrawn, or rejected. IRS, *Analysis of Various Aspects of the OIC Program* (Sept. 2004) (finding, for example, that for OICs from businesses that were not accepted, no collections were subsequently credited to the offer-related modules in 60% of the processable returns, 46% of the rejected OICs and 40% of those withdrawn); National Taxpayer Advocate 2017 Annual Report to Congress vol. 2 (*A Study of the IRS Offer in Compromise Program*).

In addition, each of these services also furthers taxpayer rights, such as the *right to privacy* (including the right to expect that enforcement will be "no more intrusive than necessary"), the *right to quality service*, the *right to be informed*, the *right to finality*, and the *right to a fair and just tax system* (including the right to expect "the tax system to consider facts and circumstances that might affect their … ability to pay"). Thus, charging for them erodes taxpayer rights.

Research Suggests That Even Small Fees Can Significantly Reduce Uptake and Re-Frame Tax Compliance Decisions, Potentially Reducing Compliance

The effect of IRS user fees could be more complicated than it seems. Fees can significantly reduce uptake even among those who can afford them, perhaps by making the uptake decision more complicated.[30] Free services could generate goodwill, trust, and a cooperative attitude toward the IRS, which studies suggest could improve voluntary compliance.[31] If people learn that others are using IRS services to comply, they may be more likely to view compliance as the norm.[32] By contrast, if the IRS charges to help people comply, it could monetize the transaction, eroding tax morale.[33] In other words, helping people comply (for free) reinforces the view that tax compliance is a civic and moral duty, whereas charging for assistance reinforces the view that compliance is just a monetary transaction, which is "smart" to undertake only if it makes economic sense.

The IRS Is Not Required to Consider Whether Services Generate Revenue, Reduce Costs, or Erode Taxpayer Rights Protections Before Increasing Fees

The IOAA does not expressly require the IRS to quantify or consider the public benefit of the service.[34] Nor is the IRS required to consider if imposing the fee would increase the IRS's enforcement costs, reduce tax revenue, or violate taxpayer rights.[35] Moreover, the IRS does not appear to consider these factors when imposing or raising fees.[36]

In 2016, the IRS proposed increasing the fees for IAs and OICs due to "constraints on IRS resources."[37] Similarly, in its Fiscal Year 2015 biennial review the IRS proposed to use its discretion to set a "reasonable" fee that is higher than the cost of certain services: (1) because the cost of providing the services "can vary significantly," (2) to avoid "raising the fee one year only to lower the next," or (3)

30 *See*, *e.g.*, Mary Ann Bates *et al*., *The Price is Wrong*, Field Act. Sci. Rep. (June 12, 2012), http://factsreports.revues.org/1554 (discussing the negative effect of fees on the uptake of health-related products or services such as deworming, water disinfectant, and insecticidal bed nets).

31 *See*, *e.g.*, Erich Kirchler, *The Economic Psychology of Tax Behaviour* (2007).

32 For a survey of studies showing the impact of behavioral insights including norms on tax compliance, see National Taxpayer Advocate 2016 Annual Report to Congress vol. 3 (Literature Review: *Behavioral Science Lessons for Taxpayer Compliance*).

33 *See generally*, Kathleen D. Vohs, Nicole L. Mead & Miranda R. Goode, *The Psychological Consequences of Money*, 314 Sci. 1154 (2006) (conducting experiments that suggest people are less helpful after thinking about money); James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 Psychol. Sci. 787, 792-93 (2004) (showing that people sometimes expend more effort in exchange for no payment (a social market) than they expend when they receive low payment (a monetary market)).

34 See *User Fees for Installment Agreements (IAs)*, T.D. 9798, 81 Fed. Reg. 86,955, 86,957 (Dec. 2, 2016).

35 *Id.*

36 When the IRS has received comments suggesting a fee would not be in the public interest, it has focused solely on the fact that it might deploy the fee revenue for "other activities." *Special Enrollment Examination User Fee for Enrolled Agents*, 82 Fed. Reg. 33,009, 33,011 (July 19, 2017) (acknowledging that "[e]nrolled agents play a valuable role in the tax administration process" but that "subsidizing the cost of the EA–SEE program requires diverting resources from other activities that are in the public interest and that inure to the public generally.").

37 *See*, *e.g.*, *User Fees for IAs*, Notice of Proposed Rulemaking (NPRM), 81 Fed. Reg. 56,543, 56,544 (Aug. 22, 2016); *User Fees for OICs*, NPRM, 81 Fed. Reg. 70,654, 70,655 (Oct. 13, 2016). Because PFA and PLR fees are not governed by the IOAA, the IRS raised them without public notice and comment.

to "reduce the number and frequency" of requests for service — services that promote voluntary compliance.[38]

Without additional legislation, resource constraints could prompt the IRS to begin charging for all kinds of fundamental tax services such as filing an appeal, receiving assistance from the Taxpayer Advocate Service, asking for an audit reconsideration, entering a closing agreement, visiting a taxpayer assistance center, calling the IRS, receiving a communication (*e.g.*, a call, letter, or notice), making a payment, submitting a tax form, using the "where's my refund" website, or asking the IRS to withdraw a lien.

The National Taxpayer Advocate has recommended that the IRS avoid fees that increase enforcement costs, reduce voluntary compliance, erode taxpayer rights, or otherwise create difficulties in achieving the IRS's mission.[39] The IRS agreed to consider these factors in its biennial reviews.[40] However, this change only applies to certain new user fees, and it is unclear how the IRS will quantify and evaluate these considerations.[41] Moreover, the IRS has not agreed to include its analysis in its public notices of proposed rulemaking or otherwise subject the analysis to public scrutiny.[42]

EXPLANATION OF RECOMMENDATIONS

Before increasing any fee for tax-related service, this recommendation would require the IRS to consider public comments concerning whether the service (1) increases government revenue, (2) reduces government expenses, such as enforcement costs, or (3) erodes access to taxpayer rights, such as the *right to privacy* (including the right to expect that enforcement be "no more intrusive than necessary") and the *right to a fair and just tax system* (including the right to expect "the tax system to consider facts and circumstances that might affect their … ability to pay"). Unless the IRS could reasonably conclude that the proposed fee increase would not reduce tax revenue, increase enforcement costs, or undermine taxpayer rights, it would not be authorized to increase the fee. This new requirement would not apply to fees for services that are not tax-related, such as those for fulfilling requests under the Freedom of Information Act.

38 IRS response to TAS information request (July 6, 2017) (explaining why an IRS Operating Division proposed, in the FY 2015 biennial user fee review, to impose above-cost fees for many of the services it provides).

39 National Taxpayer Advocate 2015 Annual Report to Congress 14-22 (Most Serious Problem: *The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*).

40 *See*, *e.g.*, National Taxpayer Advocate FY 2017 Objectives Report to Congress 8-10 (TAS Comments on IRS Response).

41 National Taxpayer Advocate FY 2017 Objectives Report to Congress, vol. 2, 8-10; IRM 1.35.19.20(2)(e)-(g) (July 19, 2016) (for potential new user fees, requiring IRS business units to consider the "effect of the fee on voluntary compliance, taxpayer burden, and taxpayer rights. The change in demand for service resulting from the proposed fee," and explaining that "[t]he IRS will avoid fees that impact enforcement costs, voluntary compliance, or otherwise create other difficulties in achieving the IRS's mission.").

42 Executive Order 12866 already requires the IRS to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)." Executive Order 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011), *supplementing* Executive Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); CCDM 32.1.5.4.7.5.3 (Oct. 15, 2015). According to the IRS, this order does not apply to the OIC or IA fee regulations. *See*, *e.g.*, *User Fees for OICs*, 81 Fed. Reg. 70,654, 70,657 (Oct. 13, 2016). For a discussion of problems with the administration of this requirement, see GAO, GAO-16-720, *Regulatory Guidance Processes, Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance* 35 (2016).

LR #7

INTERNATIONAL PENALTIES: Provide Uniformity for the Reasonable Cause Exception to Initial and Continuation Penalties for the Failure to File Information Returns Under IRC §§ 6038, 6038A, 6038D, 6677, and 6679

TAXPAYER RIGHT(S) IMPACTED[1]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PROBLEM

A taxpayer who fails to timely file certain international information returns using the required forms may be penalized pursuant to several Internal Revenue Code (IRC or the Code) provisions:

- § 6038 (penalty for failure to file information with respect to certain foreign corporations and partnerships);
- § 6038A (penalty for failure to file information with respect to certain foreign-owned corporations);
- § 6038D (penalty for failure to file information with respect to foreign financial assets);
- § 6677 (penalty for failure to file information with respect to certain foreign trusts); and
- § 6679 (penalty for failure to file returns with respect to foreign corporations or foreign partnerships).[2]

Each section generally imposes a $10,000 initial penalty and additional continuation penalties, which generally accrue every thirty days if the taxpayer does not file the required return within ninety days after being notified by the IRS until the required return is filed, or until the penalties reach statutory maximum.[3]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue Code (IRC) §§ 6038(a)(1), 6038A(a), 6038D(a), 6677(a), and 6679(a). Further, IRC § 6038A(d) also assesses an additional $10,000 penalty if the taxpayer does not maintain adequate records as required by IRC § 6038A.

3 A continuation penalty is generally $10,000 each month after 90 days of being notified by the IRS. *See* IRC § 6038(b), IRC § 6038A(d), IRC § 6038D(d), IRC § 6677(a), and IRC § 6679(a). IRC §§ 6038, 6038D, and 6679 each provide for a maximum $50,000 continuation penalty. IRC § 6677 provides for a maximum penalty equal to the gross amount that was reportable. IRC § 6038A, however, does not establish a statutory maximum for the penalty.

Despite the similarities in how these penalties are imposed, the following issues may cause confusion for taxpayers, practitioners, and IRS employees alike:

- Some Code provisions provide the reasonable cause exception for the initial penalty only, while others provide it for both the initial and the continuation penalties.[4]
- Reasonable cause language contained in the various Code sections imposing penalties for the failure to file information returns is inconsistent.[5]
- The reasonable cause exception language contained in the Code for some of these penalties does not specifically address facts and circumstances of taxpayers residing abroad and foreign taxpayers with tax filing obligations in the United States. These taxpayers may find it difficult to timely file U.S. information returns prior to determining their tax liability and filing taxes in their countries of residence which may have different tax years and filing deadlines.[6]

Providing uniformity to and simplifying the application of the reasonable cause exception for all international information return penalties will promote the taxpayers' *rights to pay no more than the correct amount of tax* and *to a fair and just tax system*, while improving the administration of the penalty regime by the IRS.[7]

Example 1

Taxpayer A is a U.S. citizen, living in Malaysia,[8] who owns 100 percent of the stock of a foreign corporation. Under IRC § 6038 and the regulations thereunder, any American citizen who controls a foreign corporation generally must file Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*.[9] The foreign corporation owned by Taxpayer A manufacturers custom automobile parts. The foreign corporation secured large contracts for the first time during tax year 2015 and Taxpayer A was not aware of the obligation to file Form 5471. On April 18, 2016, the IRS

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4 *Compare* IRC §§ 6677(d) and 6038D(g) (providing that the reasonable cause exception applies to both the initial and continuation penalties), *with* IRC §§ 6038(c)(4)(B) and 6038A(d)(3) (providing for no reasonable cause abatement after the 90-day period, from the date of the IRS notice of failure to file to the taxpayers, starts to run), and IRC § 6679(a) (providing that only the initial penalty can be abated for reasonable cause). Under IRC §§ 6038 and 6038A, the start of the 90-day period after expiration of which continuation penalties are imposed is delayed until the last day on which reasonable cause existed for the initial penalty. However, after the 90-day period starts to run and the taxpayer does not furnish the required information return within ninety days, continuation penalties imposed under IRC §§ 6038 or 6038A *cannot* be abated due to reasonable cause.

5 The language of the reasonable cause exception under IRC §§ 6677(d) and 6038D(g) differs to the language found in IRC §§ 6038(c)(4)(B) and 6038A(d)(3), and IRC § 6679(a). This inconsistency in the statutory penalty provisions has caused confusion amongst taxpayers and private practitioners. *See, e.g.*, Lisa O. Nelson & Jonathan T. Amitrano, *Amending and Aligning the IRS International Penalty Structure*, 157 Tax Notes 113 (Oct. 2, 2017).

6 Although, in general, reasonable cause determinations are made based on "all the facts and circumstances," IRC does not define what constitutes reasonable cause and not "willful neglect" in the context of international penalties, nor does it (or regulations) specifically address facts and circumstances of taxpayers residing abroad and foreign taxpayers with tax filing obligations in the U.S. *See, e.g.*, IRC § 6038A; Treas. Reg. § 1.6038A–4(b)(1)(iii).

7 Per TBOR, taxpayers have the *right to a fair and just tax system*, which includes "the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely." *See* TBOR, https://taxpayeradvocate.irs.gov/taxpayer-rights. Subjecting overseas taxpayers to a penalty without taking into account their unique facts and circumstances impairs this right. Taxpayers also have the *right to pay no more than the correct amount of tax*, which includes "the right to pay only the amount of tax legally due, including interest and penalties…."

8 *The U.S. currently does not have a tax treaty with Malaysia. See irs.gov, United* States Income Tax Treaties - A to Z, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last updated Aug. 17, 2017).

9 IRS Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*, https://www.irs.gov/pub/irs-pdf/f5471.pdf (Dec. 2015). *See* IRC § 6038(a).

mailed notice CP 215,[10] notifying Taxpayer A of the $10,000 initial penalty and additional continuation penalties if Taxpayer A does not file the Form 5471 within 90 days of receipt of the CP 215. Because of a recent move, Taxpayer A did not receive any IRS notice and failed to file Form 5471 within the 90 days. In October 2017, while meeting with his accounting firm to prepare and file Malaysian taxes, Taxpayer A became aware of the obligation to file the Form 5471 in the U.S. Despite Taxpayer A's best efforts, it took about six months to gather business records, prepare, and file the required returns. By this time, the Form 5471 had been 12 months past due. Even though the IRS agreed to delay the start of the 90-day period upon expiration of which continuation penalties are imposed for six months (until the last day on which reasonable cause existed for the initial penalty), the penalties had compounded to $40,000 ($10,000 for the initial penalty and $10,000 continuation penalty for every 30 days after the 90-day period started to run when Taxpayer A learned of the filing requirement). Taxpayer A consulted with his tax preparer who contacted the IRS to request the abatement of all penalties. The IRS abated the initial penalty but could not abate the continuation penalties because the law does not provide reasonable cause relief after the ninety day period starts to run and the taxpayer did not furnish the required information return within ninety days.[11] Thus, Taxpayer A was ultimately liable for $30,000 in continuation penalties. Had Taxpayer A not filed the Form 5471 in April 2017, the penalty would continue to accrue in $10,000 increments at least until the $50,000 statutory maximum was reached for the continuation penalty under IRC § 6038.

Example 2

Taxpayer B, a U.S. citizen living in India, owns more than a 50 percent interest in a small business (a foreign partnership) headquartered in India specializing in computer software manufacturing. Taxpayer B contributed property during the prior tax year to the partnership in exchange for a larger interest in the partnership to attain a more than 50 percent ownership. IRC § 6046A and the regulations thereunder generally require a filing of Form 8865 if the taxpayer is a U.S. person who contributed property during the tax year to a foreign partnership in exchange for an at least ten percent interest in the partnership.[12] Taxpayer B recently relocated to a more rural part of India to take part in a government development initiative and left a change of address notification with the local post office. The IRS mailed Taxpayer B a notice of failure to file as required under IRC § 6046A and the regulations thereunder, but Taxpayer B did not receive any notice from the IRS.

Taxpayer B found out about the obligation to file months later while meeting with his accountant in regards to his tax filing in India.[13] Taxpayer B immediately filed the Form 8865 arguing the reasonable cause exception applied because he had not received any IRS notice. While the IRS abated the initial penalty of $10,000, it could not abate the continuation penalties (capped at $50,000) because the law does not provide a reasonable cause exception to the continuation penalty.[14]

10 IRS Letter CP 215, *Notice of Penalty Charge* (Sept. 12, 2017).

11 The IRS referred his tax preparer to Internal Revenue Manual (IRM) 20.1.9.3.5(2) in interpreting the legal requirements for abatement. *See* IRM 20.1.9.3.5(2), *International Penalties, Reasonable Cause* (July 8, 2015) (stating "Continuation Penalty — There is no reasonable cause exception for this penalty.").

12 IRC § 6046A(a); Treas. Reg. § 1.6046A-1(a). *See also* Schedule P of Form 8865, *Acquisitions, Dispositions, and Changes of Interests in a Foreign Partnership (under section 6046A)* (2017).

13 The corporate due date for filing taxes under section 139(1) of India's Income Tax Act, 1961 (ITA) is generally September 30 of the tax year. *See* § 139(1), Income Tax Act (ITA) (1961).

14 IRC § 6679. *See also* IRM 20.1.9.15.5(3), *International Penalties, Reasonable Cause* (Mar. 21, 2013) (indicating that under IRC § 6679, "[r]easonable cause does not apply to the continuation penalty.").

Taxpayer B also received a distribution from a foreign trust in India and did not file Form 3520 as required under IRC § 6048 and the regulations thereunder.[15] The IRS assessed an initial penalty of $10,000 pursuant to IRC § 6677(a) and additional continuation penalties of $10,000 (capped not to exceed the gross reportable amount). Upon Taxpayer B demonstrating reasonable cause, the IRS abated all penalties since IRC § 6677(d) contains reasonable cause exception for both the initial and continuation penalties.

RECOMMENDATIONS

To provide consistent and uniform rules for reasonable cause exception for both the initial and continuation penalties for failure to file certain information returns and to take into account taxpayers' facts and circumstances the National Taxpayer Advocate recommends that Congress amend:

- IRC §§ 6038(c)(4)(B), 6038A(d)(3), and IRC § 6679(a)(1) to insert the reasonable cause language contained in IRC §§ 6038D(g) and 6677(d), more specifically to state: "*no penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect*";
- IRC §§ 6038(c)(4)(B), 6038A(d)(3), and IRC § 6679(a) to explicitly specify that the reasonable cause exception applies to both the initial and continuation penalties; and
- IRC §§ 6038, 6038A, 6038D, 6677, and 6679 to provide that the term "willful neglect" does not include a taxpayer's first failure to file the required U.S. information returns if the filing deadline in the foreign country differs from that in the U.S.

PRESENT LAW

IRC §§ 6038, 6038A, 6038D, 6677, and 6679 each penalize taxpayers that fail to timely file the required information returns with an initial penalty of $10,000 and subsequent continuation penalties which are generally added every 30 days if the taxpayer fails to file the required forms within ninety days of receiving the IRS notice or letter.

IRC § 6038 - Penalty for Failure to File Information with Respect to Certain Foreign Corporations and Partnerships

Under IRC § 6038 and the regulations thereunder, U.S. persons must in certain cases report information with respect to certain foreign corporations and partnerships.[16] For example, a U.S. person who controls a foreign corporation or foreign partnership generally has a reporting obligation under IRC § 6038 and the regulations thereunder. In general, a U.S. person satisfies a reporting obligation under IRC § 6038 by completing Form 5471 or Form 8865, as applicable, and attaching the Form to the U.S. person's timely filed income tax return.[17]

15 *See* IRS Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts* (2016).

16 IRC § 6038 requires that a taxpayer file "information as the Secretary may prescribe" and the regulations specify which form is required to be filed. *See* IRC § 6038(a); Treas. Reg. §§ 1.6038-2.

17 *See* IRS Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations* (Dec. 2015). *See also* IRS Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*. As explained in the Instructions to Form 8865, Form 8865 is used to satisfy reporting obligations under various Code sections: IRC §§ 6038, 6038B, and 6038A, and the related regulations. *See Instructions for Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships* (Oct. 6, 2017).

If the taxpayer fails to satisfy a reporting obligation under IRC 6038, IRC § 6038(b)(1) provides for a $10,000 initial penalty and IRC § 6038(b)(2) provides for continuation penalties of $10,000 for each 30-day period after the initial ninety days from the IRS notification to the taxpayer. IRC § 6038(b)(2) also caps the continuation penalty at $60,000 (consisting of a $10,000 initial penalty plus $50,000 in continuation penalties). Treasury regulations provide a reasonable cause exception for abatement of the initial penalty for the failure to file the required forms.[18] However, neither IRC § 6038 nor the regulations thereunder provide for continuation penalty abatement for reasonable cause.[19]

IRC § 6038A - Penalty for Failure to File Information with Respect to Certain Domestic Corporations

Under IRC § 6038A and the regulations thereunder, certain domestic corporations must report certain information with respect to certain related persons.[20] For example, a domestic corporation directly or indirectly owned at least 25 percent by a foreign person (individual or entity) generally has a reporting obligation under IRC §6038A if certain transactions occur between the corporation and related persons.[21] In general, a domestic corporation satisfies a reporting obligation under IRC § 6038A by completing Form 5472 and attaching the Form to its timely filed income tax return.[22]

If a reporting corporation fails to satisfy a reporting obligation under IRC § 6038A, IRC § 6038A and the regulations thereunder impose an initial penalty of $10,000, followed by continuation penalties of $10,000 for each 30-day period starting 90 days after the IRS mails the notification to the taxpayer. The reasonable cause exception applies to both the initial penalty and continuation penalty,[23] and the maximum amount of the continuation penalties is not capped.[24]

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18 Treas. Reg. § 1.6038-2(k)(3).

19 In addition to the monetary penalty, IRC § 6038(c) also provides for a ten percent reduction of the foreign tax credit (FTC) available under IRC §§ 901, 902, and 960. IRC § 6038(a) - (c). Under IRC § 6038, the start of the 90-day period after expiration of which continuation penalties are imposed is delayed until the last day on which reasonable cause existed for the initial penalty. However, after the 90-day period starts to run and the taxpayer does not furnish the required information return within 90 days, continuation penalties imposed under IRC § 6038 cannot be abated due to reasonable cause.

20 IRC § 6038A requires that a taxpayer file "at such time and in such manner as the Secretary shall by regulations prescribe" and the regulations specify which form is required to be filed. *See* IRC § 6038A(a); Treas. Reg. § 1.6038-2(k)(3).

21 IRC § 6038A(a); Treas. Reg. §§ 1.6038A-1 through 1.6038A-7. The regulations contain two *de minimis* exceptions to the reporting requirement. *See* Treas. Reg. §§ 1.6038A-1(h) and 1.6038A-1(i). *See also* IRS Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Under Sections 6038A and 6038C of the Internal Revenue Code)*, https://www.irs.gov/pub/irs-pdf/f5472.pdf (Dec. 2012). Form 5472 must be filed with the reporting corporation's income tax return for the taxable year by the due date (including extensions) of that return. Treas. Reg. § 1.6038A-2(d). *See also* IRS Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Under Sections 6038A and 6038C of the Internal Revenue Code)*, https://www.irs.gov/pub/irs-pdf/f5472.pdf (Dec. 2012). As explained in the instructions to Form 5472, the Form is used to satisfy reporting obligations under IRC §§ 6038A and 6038C. *See Instructions for Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business* (Dec. 2014), https://www.irs.gov/pub/irs-pdf/i5472.pdf.

22 IRS Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Under Sections 6038A and 6038C of the Internal Revenue Code)*, https://www.irs.gov/pub/irs-pdf/f5472.pdf (Dec. 2012).

23 Treas. Reg. § 1.6038A-4(b). *See also* IRM 20.1.9.5.5, *Reasonable Cause* (July 8, 2015).

24 IRC § 6038A(d)(2); Treas. Reg. § 1.6038A-4(d)(4). Notably, the regulation states that the IRS will "apply the reasonable cause exception liberally in the case of a small corporation…." Treas. Reg. 1.6038A-4(b)(2)(ii). Under IRC § 6038A the start of the 90-day period after expiration of which continuation penalties are imposed is delayed until the last day on which reasonable cause existed for the initial penalty. However, after the 90-day period starts to run and the taxpayer does not furnish the required information return within 90 days, continuation penalties imposed under IRC § 6038A cannot be abated due to reasonable cause.

IRC § 6038D - Penalty for Failure to File Information with Respect to Foreign Financial Assets

The *Foreign Account Tax Compliance Act*, added IRC § 6038D to the IRC.[25] Under IRC § 6038D and the regulations thereunder, certain persons must file information with respect to certain foreign financial assets.[26] In general, a person satisfies a reporting obligation under IRC § 6038D by completing Form 8938 and attaching the Form to its timely filed annual return.[27]

Under the statute and regulations thereunder, the failure to file Form 8938 results in an initial penalty of $10,000 and continuation penalties of $10,000 every 30 days if the form is not filed after ninety days of IRS notification. Similar to IRC § 6038, IRC § 6038D caps the continuation penalty so that the taxpayer may not be required to pay more than $60,000 (consisting of a $10,000 initial penalty plus $50,000 in continuation penalties).[28] However, unlike IRC §§ 6038, 6038A and 6679, the language in IRC § 6038D allows reasonable cause abatement of *both* the initial and the continuation penalties.[29] The reasonable cause exception language is in the IRC, providing that "no penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect."[30]

IRC § 6677 - Penalty for Failure to File Information with Respect to Certain Foreign Trusts

Under IRC § 6048 and the regulations thereunder, certain persons must file information with respect to certain foreign trusts.[31] For example, a U.S. person who owns assets of a foreign trust and receives a distribution from the trust generally has a reporting obligation under IRC § 6048. In general, a U.S. person satisfies a reporting obligation under IRC § 6048 by completing Form 3520 and filing it by the 15th day of the 4th month following the end of the person's tax year.[32]

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25 Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, § 511, 124 Stat. 71 (2010). As the Joint Committee on Taxation's Technical Explanation of the *Hiring Incentives to Restore Employment Act* explains, although the nature of the information required under IRC § 6038D is similar to the information disclosed on an Foreign Bank Account Report (FBAR), it is not identical and was not intended as a substitute for compliance with the FBAR reporting requirements. *See* J. Comm. on Tax'n, JCX-4-10, *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," under Consideration by the Senate* (Feb 23, 2010).

26 IRC § 6038D requires that a taxpayer "shall attach to such person's return of tax imposed by subtitle A for such taxable year the information described in subsection (c) with respect to each such asset" and the regulations thereunder specify the forms required to be attached. *See* IRC § 6038D(a); Treas. Reg. § 1.6038D-2(a).

27 IRC § 6038D(a); Treas. Reg. § 1.6038D-2(a). *See also* IRS Form 8938, *Statement of Specified Foreign Financial Assets* (2016), https://www.irs.gov/pub/irs-pdf/f8938.pdf.

28 IRC § 6038D(d)(2); Treas. Reg. § 1.6038D-8(c).

29 IRC § 6038D(g); Treas. Reg. § 1.6038D-8(e). Treasury Regulation § 1.6038D-8(e)(3) further states that the reasonable cause exception determination for this section "is made on a case-by-case basis, taking into account all pertinent facts and circumstances." This approach comports with the taxpayer's *right to a fair and just tax system*, which requires the IRS "to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely." *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

30 IRC § 6038D(g); Treas. Reg. § 1.6038D-8(e). *See also* IRM 20.1.9.22.5, *Reasonable Cause* (Mar. 21, 2013).

31 IRC § 6677 provides that the information is to be filed as "determined by the Secretary" and refers to IRC § 6048 which authorizes the Secretary to prescribe the information required to be reported. The regulations thereunder specify the forms required to be attached. *See* IRC § 6677(a); IRC § 6048; Treas. Reg. § 404.6048-1. *See also Instructions for Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts* (Nov. 20, 2017), https://www.irs.gov/pub/irs-pdf/i3520.pdf; *Instructions for Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner* (Nov. 20, 2017), https://www.irs.gov/pub/irs-pdf/i3520a.pdf.

32 IRC § 6677; IRC § 6048. IRC § 6048 requires that U.S. persons who own assets of a foreign trust, or who received a distribution or loan from a foreign trust, to file Form 3520 (or to file Form 3520-A for a foreign trust with a U.S. owner). *See* IRS Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts* (2016), https://www.irs.gov/pub/irs-pdf/f3520.pdf. *See also* IRS Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner* (Under section 6048(b)) (2016), https://www.irs.gov/pub/irs-pdf/f3520a.pdf.

IRC § 6677 and the regulations thereunder impose an initial penalty of the greater of $10,000 or 35 percent of the gross reportable amount if a taxpayer fails to file the forms required under IRC § 6048.[33] The continuation penalties of $10,000 are imposed every thirty days after ninety days pass from the time of the IRS notice or letter informing the taxpayer of the initial penalty. However, continuation penalties cannot exceed the gross reportable amount on Form 3520 or Form 3520-A.[34] Similar to IRC § 6038D(g), there is a reasonable cause exception under IRC § 6677(d) which applies to both the initial and continuation penalties.[35] The reasonable cause language is codified and identical to the reasonable cause exception under IRC § 6038D(g) described above.[36]

IRC § 6679 - Penalty for Failure to File Returns with Respect to Foreign Corporations or Foreign Partnerships

IRC § 6679 provides a penalty for a failure to comply with IRC §§ 6046 or 6046A reporting obligations. Under IRC §§ 6046 and 6046A and the regulations thereunder, taxpayers must file returns with respect to certain foreign corporations or foreign partnerships.[37] For example, a U.S. citizen who is an officer or director of a foreign corporation in which a U.S. person has acquired ten percent or more of the stock of the corporation generally has a reporting obligation under IRC § 6046.[38] In general, a U.S. person satisfies a reporting obligation under IRC § 6046 by completing Form 5471 and attaching the Form to the U.S. person's timely filed income tax return.

Under IRC § 6046A and the regulations thereunder, certain persons must file information with respect to certain interests in foreign partnerships. For example, a U.S. person who acquires an at least ten percent interest in a foreign partnership generally has a reporting obligation under IRC 6046A.[39] In general, a U.S. person satisfies a reporting obligation under IRC § 6046A by completing Form 8865 and attaching the Form the U.S person's timely filed income tax return.

Under these requirements, an initial penalty of $10,000 is imposed on any taxpayer who fails to comply with IRC §§ 6046 and 6046A, unless the taxpayer can show reasonable cause.[40] If any failure to comply with a reporting obligation under IRC §§ 6046 or 6046A continues for more than ninety days after the IRS mails a notice of such failure to the taxpayer, IRC § 6679 and the regulations thereunder impose continuation penalties of $10,000 for every 30 days thereafter (capped at $60,000 in total for both initial and continuation penalties).[41] The statute does not define "reasonable cause," and while the

33 This penalty is imposed in addition to any criminal penalty provided by other laws. IRC § 6677(a)-(a)(2), as amended by the Foreign Account Tax Compliance Act, part of the Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, IRC § 535(a), 124 Stat. 71 (2010).

34 IRC § 6677(a)(2).

35 IRC § 6677(d). *See also* IRM 20.1.9.22.5, *Reasonable Cause* (Mar. 21, 2013).

36 *Compare* IRC § 6038D(g) *with* IRC § 6677(d).

37 IRC § 6679 refers to requirements under IRC §§ 6046 and 6046A which state that the filing must done "as the Secretary prescribes" (IRC § 6046) and as "the Secretary shall by regulations prescribe" (IRC § 6046A). IRC §§ 6679(a), 6046(b), and 6046A(b). The regulations thereunder specify the forms required to be attached. *See* Treas. Reg. §§ Treas. Reg. 1.6046-1 and 1.6046A-1.

38 IRC § 6046(a); Treas. Reg. 1.6046-1. *See* IRS Schedule O of Form 5471, *Organization or Reorganization of Foreign Corporation, and Acquisitions and Dispositions of its Stock*, https://www.irs.gov/pub/irs-pdf/f5471so.pdf (Dec. 2012).

39 IRC § 6046A(a); Treas. Reg. § 1.6046A-1(a). *See* Schedule P of Form 8865, *Acquisitions, Dispositions, and Changes of Interests in a Foreign Partnership (under section 6046A)*, https://www.irs.gov/pub/irs-pdf/f8865sp.pdf (2017).

40 IRC § 6679(a)(1); Treas. Reg. § 301.6679-1.

41 *Id.*

statute and the Treasury regulation provide for a reasonable cause exception for the initial penalty, the exception does not apply for the continuation penalties.[42]

REASONS FOR CHANGE

The IRS increasingly collects more revenue from penalties than it did in the past. The IRS assessed about 39.6 million civil penalties (or $27.3 billion in aggregate) in Fiscal Year (FY) 2016, up from about 15 million (or $1.3 billion in aggregate) in FY 1978.[43] In adjusted for inflation dollars, the IRS assessed 4.7 times more civil penalties in FY 2016 than in FY 1978. It also abated about 5.2 million civil penalties (or $9 billion in aggregate) in FY 2016, up from 1.4 million (or $338 million in aggregate) in FY 1978.[44] As demonstrated by Figure 2.7.1., the IRS imposes an increasing number of penalties for the failure to file various international information returns.

42 IRC § 6679(a)(1); Treas. Reg. § 301.6679-1(a)(3) (providing that "[i]f the taxpayer exercises ordinary business care and prudence and is nevertheless unable to furnish any item of information required under section 6035, 6046, or 6046A and the regulations thereunder, such failure shall be considered due to a reasonable cause"). IRC § 6679, does not provide for a reasonable cause abatement of the continuation penalty. *See also* IRM 20.1.9.15.5, *International Penalties, Reasonable Cause* (Mar. 21, 2013). This is because the continuation penalty is found in section 6679(a)(2), and the only reference to reasonable cause is found in section 6679(a)(1), which refers only to the initial penalty and not the continuation penalty.

43 The earliest year comparable information was found in an IRS Data Book. IRS Data Book (FY 2016) (Table 17); IRS Data Book (FY 1978) (Table 13).

44 IRS Data Book (FY 2016) (Table 17); IRS Data Book (FY 1978) (Table 13).

FIGURE 2.7.1, International Penalties Assessed and Abated in the Aggregate in FYs 2013 and 2016[45]

Fiscal Year Assessed	Penalty Type	Penalty Assessed	Penalty Abated	Net Penalty	Percent Abated
2013	Initial Penalty - IRC § 6038 (Penalty Codes 599 and 623)	$40,478,250	$32,891,099	$7,587,151	81.3 %
2013	Continuation Penalty - IRC § 6038 (Penalty Code 619)	$5,193,983	$1,617,567	$3,576,416	31.1 %
2013	Initial Penalty - IRC § 6038A (Penalty Code 625)	$350,000	$56,500	$293,500	16.1 %
2013	Continuation Penalty - IRC § 6038A (Penalty Code 711)	$150,336,000	$123,754,528	$26,581,472	82.3 %
2013	Initial Penalty - IRC § 6677 (Penalty Codes 659 and 660)	$111,697,966	$80,897,639	$30,800,327	72.4 %
2013	Initial Penalty - IRC § 6679 (Penalty Code 613)	$30,000	$0	$30,000	0 %
2016	Initial Penalty - IRC § 6038 (Penalty Codes 599 and 623)	$55,993,300	$35,629,000	$20,364,300	63.6 %
2016	Continuation Penalty - IRC § 6038 (Penalty Codes 619 and 712)	$49,761,336	$13,770,000	$35,991,336	27.7 %
2016	Initial Penalty - IRC § 6038A (Penalty Code 625)	$610,000	$0	$610,000	0 %
2016	Continuation Penalty - IRC § 6038A (Penalty Codes 701 and 711)	$309,732,100	$226,218,100	$83,514,000	73.0 %
2016	Initial Penalty - IRC § 6038D (Penalty Code 700)	$60,000	$0	$60,000	0 %
2016	Initial Penalty - IRC § 6677 (Penalty Codes 659 and 660)	$709,187,004	$7,000,000	$702,187,004	0.98 %
2016	Continuation Penalty - IRC § 6677 (Penalty Codes 702 and 703)	$6,645,580	$0	$6,645,580	0 %
2016	Initial Penalty - IRC § 6679 (Penalty Code 613)	$60,000	$0	$60,000	0 %
2016	Continuation Penalty - IRC § 6679 (Penalty Code 704)	$2,687,250	$15,315	$2,671,935	0.6 %

Almost 30 years ago, Congress recommended the IRS "develop better information concerning the administration and effects of penalties" to ensure they promote voluntary tax compliance.[46] It is

45 This data was obtained from TAS Research (from the January 2017 Enforcement Revenue Information System database on the IRS Compliance Data Warehouse).

46 See H.R. Rep. No. 101-386, at 661 (1989) (Conf. Rep).

the IRS's longstanding policy to do so,[47] and many of the IRS's stakeholders, including the National Taxpayer Advocate, have recommended changes to the penalty regime.[48]

Currently, as they are written, IRC §§ 6038, 6038A, 6038D, 6677, and 6679 may be confusing for taxpayers, practitioners and IRS employees because they do not contain uniform language regarding the reasonable cause exception.[49] IRC §§ 6038D and 6677 explicitly allow for a reasonable cause as an exception to both the initial penalty and the continuation penalties, whereas, IRC § 6679 *only* allows reasonable cause as an exception for the initial penalty, even if affected taxpayers can show reasonable cause for failing to file both the initial and continuation penalties. At the same time, IRC §§ 6038 and 6038A provide that the start of the ninety day period after expiration of which continuation penalties are imposed is delayed until the last day on which reasonable cause existed for the initial penalty. However, after the 90-day period starts to run and the taxpayer does not furnish the required information return within ninety days, continuation penalties imposed under IRC §§ 6038 or 6038A cannot be abated due to reasonable cause.

In addition, reasonable cause language contained in the various Code sections imposing penalties for the failure to file information returns is inconsistent. IRC §§ 6038D(g) and 6677(d), contain the following reasonable cause language: "*no penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect*." (emphasis added).[50] Unlike §§ 6038D(g) and 6677(d), IRC §§ 6038 and 6038A do not contain a separate subsection describing reasonable cause. Instead IRC §§ 6038(c)(4)(B) and 6038A(d)(3) include language delaying "the beginning of the 90-day period after notice" by the IRS until "the last day on which…. reasonable cause existed…."[51] Moreover, as stated above, IRC § 6679(a)(1) imposes the initial $10,000 penalty "unless it is shown that such failure is due to reasonable cause," but does not provide reasonable cause relief for the increase in penalty where failure continues after notification (*i.e.*, continuation penalties) at all.[52]

Finally, the reasonable cause exception language does not specifically take into consideration whether there is a mismatch in filing requirements or filing deadlines between foreign jurisdictions and the U.S., and does not consider such mismatch as a factor negating "willful neglect." Although, in general, reasonable cause determinations are made based on "all the facts and circumstances," current law does not define what constitutes reasonable cause and not "willful neglect" in the context of international penalties, nor does it specifically address facts and circumstances of taxpayers residing abroad and foreign taxpayers with tax filing obligations in the U.S. Thus, U.S. taxpayers residing abroad and foreign taxpayers with U.S. filing obligations may find it difficult to timely file U.S. information returns

47 *Policy Statement 20-1* (Formerly P–1–18), reprinted at IRM 1.2.20.1.1(1)-(2) (June 29, 2004). *See also* IRM 20.1.1, *Introduction and Penalty Relief* (Aug. 5, 2014).

48 In the past, the National Taxpayer Advocate has written extensively about penalties, touching on topics of fairness, equity, and whether penalties are effective in promoting taxpayer compliance. *See* National Taxpayer Advocate 2008 Annual Report to Congress, vol. 2, 24 (*A Framework for Reforming the Penalty Regime*) (recommending legislation to make the penalty proportional to the decrease in tax, establish a "reasonable cause" exception, and to eliminate the potential for stacking). *See also* National Taxpayer Advocate 2014 Annual Report to Congress 94-101 (Most Serious Problem: *Penalty Studies: The IRS Does Not Ensure Penalties Promote Voluntary Compliance, as Recommended by Congress and Others*); National Taxpayer Advocate 2014 Annual Report to Congress 351-356 (Legislative Recommendation: *Erroneous Refund Penalty: Amend Section 6676 to Permit "Reasonable Cause" Relief*).

49 *See, e.g.*, Lisa O. Nelson & Jonathan T. Amitrano, *Amending and Aligning the IRS International Penalty Structure*, 157 Tax Notes 113 (Oct. 2, 2017).

50 IRC § 6038D(g); IRC § 6677(d).

51 *See* IRC §§ 6038(c)(4)(B) and 6038A(d)(3). *See also* Treas. Reg. § 1.6038-2(k)(3) & (4), Treas. Reg. § 1.6038A-4(b).

52 IRC § 6679(a)(1) & (2); Treas. Reg. § 301.6679-1(a)(3).

prior to determining their tax liability and filing taxes in their countries of residence which may have different tax years and filing deadlines.

Providing uniformity to and simplifying the application of the reasonable cause exception will promote the taxpayers' *right to pay no more than the correct amount of tax* and their *right to a fair and just tax system*, and improve the administration of the penalty regime by the IRS.

EXPLANATION OF RECOMMENDATION

The proposed legislative changes would promote voluntary compliance by simplifying and streamlining the reasonable cause exception making these penalties more simple and fair.[53] Complicated tax laws make it more likely that taxpayers who have acted reasonably in trying to comply will, nonetheless, fail and be subjected to penalties, thus eroding future voluntary compliance. Additionally, penalizing taxpayers who acted reasonably in trying to comply, especially taxpayers abroad who may have to file in multiple jurisdictions, will alienate them further.[54]

The proposed legislative changes will achieve consistency, simplicity, and uniformity in the application of reasonable cause exception to various international information return penalties. This could be achieved by inserting the uniform reasonable cause language currently contained in IRC § 6038D and IRC § 6677:

> "No penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect."[55]

In addition, providing that the reasonable cause exception is available for both initial and continuation penalties will eliminate inconsistency and associated unfairness, *i.e.*, when the facts that may lead to abatement of the initial penalty, become irrelevant for continuation penalties for which reasonable cause does not apply.

Finally, specifying that the term "willful neglect" does not include a taxpayer's first-time failure to file certain information by the due date if the delay is caused by different tax filing deadlines in foreign jurisdictions will allow the IRS to consider all relevant facts and circumstances of overseas taxpayers.[56]

53 The IRM states that "[t]he Internal Revenue Service has a responsibility to collect the proper amount of tax revenue in the most efficient manner. Penalties provide the Service with an important tool to achieve that goal because they enhance voluntary compliance by taxpayers." IRM 1.2.20.1.1, *Policy Statement 20-1* (Formerly P–1–18) (June 29, 2004).

54 *See* National Taxpayer Advocate 2008 Annual Report to Congress vol. 2 (*A Framework for Reforming the Penalty Regime*).

55 IRC § 6038D(g); § 6677(d).

56 Additionally, the National Taxpayer Advocate has expressed concerns in the past about notices not reaching taxpayers and about the IRS failure to mail notices to taxpayers last known addresses. *See, e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress 526-36 (Legislative Recommendation: *Amend IRC § 7701 to Provide a Definition of "Last Known Address," and Require the IRS to Mail Duplicate Notices to Credible Alternate Addresses*); National Taxpayer Advocate 2010 Annual Report to Congress 221-34 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*); National Taxpayer Advocate 2008 Annual Report to Congress 449-51 (Legislative Recommendation: *Mailing Duplicate Notices to Credible Alternate Addresses*).

LR #8

NATIONAL RESEARCH PROGRAM (NRP) AUDITS: Compensate Taxpayers for "No Change" NRP Audits and Waive Assessment of Tax, Interest, and Penalties Resulting from NRP Audits

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to a Fair and Just Tax System*

PROBLEM

The IRS conducts random audits of taxpayers returns through its National Research Program (NRP).[2] This random audit program, which was established in 2000 and replaced a prior initiative called the Taxpayer Compliance Measurement Program (TCMP), benefits tax administration in several ways.[3] First, NRP audits enable the IRS to gather strategic information about taxpayer compliance behavior to improve the allocation of resources to enforcement and other activities.[4] Second, NRP audits assist the IRS in developing and updating its workload selection formulas so that it pursues productive examinations and does not unnecessarily burden taxpayers or waste resources.[5] Third, NRP audits collect data with the goal of gathering insight into the causes of taxpayer reporting errors to aid in improving taxpayer service (*e.g.*, improved forms, communications, education, and suggesting legislative changes).[6] Also, the IRS uses data from NRP audits to calculate and update estimates of the tax gap, which measures taxpayer noncompliance with the tax laws.[7] In addition, besides benefitting tax administration, NRP studies benefit Congress by providing taxpayer compliance information that is useful in formulating tax policy.[8] Finally, NRP audits ensure that the IRS is auditing the right

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that were adopted by the IRS are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 The IRS conducts different types of National Research Program (NRP) studies. The IRS's NRP website lists four different types of reporting compliance research studies it is conducting: Form 1040 Individual Income Tax, Form 941 Employment Tax, Form 1120 Corporate Income Tax, and Form 720 Excise Tax. *See* IRS, *NRP Data Users and Researchers*, https://nrp.web.irs.gov/data_users.aspx (last visited Nov. 29, 2017).

3 For a thorough discussion of the NRP and its predecessor, the Taxpayer Compliance Measurement Program (TCMP), *see* Robert E. Brown and Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255 (2003). *See also* Internal Revenue Manual (IRM) 4.22.1, *National Research Program (NRP), National Research Program Overview* (Sept. 6, 2017); IRM 4.22.1.4, *NRP Benefits* (Sept. 6, 2017).

4 *See* Robert E. Brown and Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255, 1264-65 (2003). This article discusses three measures of taxpayer compliance: payment compliance, filing compliance, and reporting compliance.

5 *See* Robert E. Brown and Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255, 1265 (2003); IRM 4.22.1.4, *NRP Benefits* (Sept. 6, 2017). This IRM section notes that NRP data are used to update the IRS's Discriminant Index Function (DIF) formulas, which are used to select tax returns for examination. *See also* IRM 4.1.2.7, *Discriminant Function (DIF) Overview* (Oct. 19, 2017).

6 *See* Robert E. Brown and Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255, 1265 (2003).

7 *Id.* The tax gap is the difference between what the IRS believes taxpayers owe and what taxpayers pay voluntarily and timely. *See* Nina E. Olson, Minding the Gap: A Ten-Step Program for Better Tax Compliance, 20 Stan. L. & Pol'y Rev. 7, 8 (2009); Mark J. Mazur and Alan H. Plumley, Understanding the Tax Gap, Vol. LX, No. 3 National Tax Journal 569 (2007).

8 *See* IRS, *NRP Overview and Benefits*, https://nrp.web.irs.gov/Data_Users_Researchers/NRP_Overview_OMB_072012.pdf (last visited Nov. 29, 2017) (noting "At the 2014 IRS Research Conference, keynote speaker Senator Charles Grassley pointed out the importance of NRP studies to help guide Congress in its tax policy.").

taxpayers, which builds trust by all taxpayers in the tax system, as it helps make sure both that the government uses its powers legitimately and that all taxpayers pay what is due under the law.

Although the NRP benefits tax administration, Congress, and taxpayers as a whole, it is burdensome for tens of thousands of individual taxpayers (or businesses) that are subject to these audits.[9] These taxpayers, even if they are fully compliant, must contend with a random and intensive IRS audit that consumes their time and money (if they hire a tax professional to represent them before the IRS), and may impose an emotional toll.[10] Taxpayers are not currently compensated for any costs they incur relating to NRP audits and the IRS may assess tax, interest, and penalties as it does during a regular audit. This undermines taxpayers' *right to a fair and just tax system*, as taxpayers selected for NRP audits are performing a public service by being subject to audits that are more comprehensive and significantly more intrusive than standard audits.

Example

A taxpayer with an impeccable history of compliance is selected by the IRS for a random NRP audit. The taxpayer spends a significant amount of time and money dealing with this audit, which is more intensive than a typical IRS audit, including producing documents and substantiation for each line on his Form 1040. After concluding the audit (which may have been expanded to include other years or related taxpayers or entities), the IRS does not make any change to the taxpayer's tax liability. The taxpayer is not reimbursed for any of his costs, feels used by the tax agency, and is left with a sense of unfairness about the entire process.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend the Internal Revenue Code (IRC) to:

- Provide compensation to taxpayers who are selected for NRP audits where the IRS does not make a change to the taxpayer's tax liability ("no change audits"); and
- Relieve taxpayers from the assessment of tax, penalties, and interest as a result of NRP audits absent fraud or an intent to evade federal taxes.

PRESENT LAW

There is no provision under present law that allows compensation of taxpayers who are audited under the NRP or provides relief from the assessment of tax, interest, and penalties imposed during an NRP audit.

9 *See* IRS, *NRP Data Users and Researchers*, https://nrp.web.irs.gov/data_users.aspx (last visited Nov. 29, 2017), which notes that the NRP Form 1040 Individual Income Tax Study focuses on Form 1040, 1040A, and 1040EZ returns and has a sample size of approximately 13,000-14,000 returns each year.

10 *See* IRS, *National Research Program Frequently Asked Questions*, https://nrp.web.irs.gov/FAQ_general.aspx (last visited Nov. 29, 2017) (noting that taxpayers selected for an NRP audit "will be subjected to a more intensive audit than usual."). *See also* Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 Conn. L. Rev. 161, 169 (2008) (noting how a fully compliant taxpayer may suffer emotional distress as a result of a random audit).

REASONS FOR CHANGE

Taxpayers who are selected for NRP audits may be fully compliant with the tax laws but are randomly selected to serve as test subjects (*i.e.*, "guinea pigs") for tax administration purposes, which has a future benefit for the IRS, Congress, and the taxpaying public as a whole. In July 1995, the House of Representatives Committee on Ways and Means, Subcommittee on Oversight, held a hearing on the NRP's predecessor, the TCMP.[11] In her opening remarks, Chairman Nancy Johnson noted the burden of these audits on taxpayers:

> TCMP audits are costly to taxpayers whether it is the cost of the taxpayer's own time or whether that of a hired tax professional. In addition, the audits seem as unfair for those whose returns show no indication of a need for audit. We have to ask ourselves, is it fair for government to place a burden and expense on innocent people in order to better identify those who may not be so innocent? Should taxpayers be compensated for their participation? If so, how would that best be accomplished?[12]

The Subcommittee on Oversight received testimony during the hearing and in subsequent responses to questions that noted how burdensome TCMP audits were for taxpayers and how they were selected for a research project that benefits the tax system as a whole. Proposals mentioned at the hearing included compensating taxpayers selected for TCMP audits as well as possibly waiving tax, interest, and penalties assessed during the audit.[13]

After the TCMP hearing, Congress acknowledged the burden that TCMP audits placed on taxpayers and proposed legislation to compensate individual taxpayers by providing a tax credit of up to $3,000 for TCMP-related expenses.[14] The history of this proposal is noted in a Committee on Ways and Means report:

> Testimony presented at the hearing indicated that while the data gathered through TCMP surveys is useful for tax administration purposes, the process is burdensome for the taxpayers whose tax returns are selected for TCMP audits. Information gathered at the hearing served the basis for a provision which was included in the Committee on Ways and Means title of H.R. 2491, the Balanced Budget Act of 1995, to provide a tax credit to individuals (not including estates, trusts, partnerships[,] or S corporations) for up to $3,000 of expenses incurred in connection with a TCMP audit of the taxpayer. Subsequent to House passage of this measure, the IRS announced that it was canceling the planned TCMP, and the provision was dropped from the final conference agreement on H.R. 2491.[15]

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11 *Taxpayer Compliance Measurement Program: Hearing Before H. Subcomm. on Oversight of the Comm. On Ways and Means*, 104th Cong. (1995).

12 *Id.* (statement of Rep. Nancy Johnson, Chariman, H. Subcomm. on Oversight).

13 *See*, *e.g.*, *Taxpayer Compliance Measurement Program: Hearing Before H. Subcomm. on Oversight of the Comm. On Ways and Means*, 104th Cong. 55-6 (1995) (The hearing testimony included reference to an excerpt of meeting minutes of a Compliance Subgroup of the Commissioner's Advisory Group from February 1, 1994. These minutes note that taxpayers selected for TCMP audits were participating in a research project that benefitted the tax system as a whole and that the Subgroup spoke to individuals, both inside and outside the IRS, who felt that this should be clearly recognized in the way TCMP audits are handled. The minutes note that the Subgroup heard a variety of views on this, including reimbursing compliant taxpayers for some portion of the cost of a TCMP audit and waiving certain penalties, interest, or tax).

14 *See* H.R. Rep. No. 104-280, vol. 2, at 28 (1995).

15 H.R. Rep. No. 104-872, at 55 (1997).

Thus, Congress has recognized the burden that IRS research audits place on taxpayers and the need to compensate taxpayers for this burden. Compensating taxpayers for NRP audits has also been proposed by academic commentators.[16] Similarly, Congress has been presented with testimony regarding waiving tax, interest, and penalty assessments made during NRP audits, a proposal that has also been suggested by academics.[17]

The IRS attempts to make NRP audits less burdensome than their TCMP predecessor ones by conducting significant front-end work, through a process called "case-building," before contacting taxpayers.[18] The IRS is to be commended for this as it places less burden on taxpayers than that under the old TCMP program. Nonetheless, NRP audits are still burdensome and intensive for taxpayers, who must deal with time, financial, emotional, and even reputational costs. The proposed legislative change to compensate (through a tax credit or other means) taxpayers selected for an NRP audit and where no change is made to the taxpayer's tax liability would demonstrate that the government cares about fundamental notions of fairness in the tax system and recognizes the financial costs incurred by taxpayers where they are serving as test subjects for the benefit of the IRS, Congress, and the tax system as a whole. In addition, waiving a tax assessment during an NRP audit might encourage taxpayers to let their guard down and be more forthcoming during an audit, thereby providing greater insight into taxpayer behavior.[19]

EXPLANATION OF RECOMMENDATION

The proposal to amend the IRC to provide compensation to taxpayers selected for NRP audits where the IRS does not make a change to the taxpayer's tax liability could be carried out in the form of a refundable tax credit (capped at a certain amount). This proposal, which is substantially similar to prior proposed legislation, would recognize the fairness and compliance costs issues associated with NRP audits and promote taxpayers' *right to a fair and just tax system*.

In addition, the proposal suggests waiving any assessment of tax, interest and penalties resulting from an NRP audit. Such an approach will likely encourage taxpayers to be more cooperative and forthcoming during these audits. However, this relief would not apply to returns where tax fraud or an intent to evade is uncovered in an NRP audit.

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16 *See, e.g.*, Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 Conn. L. Rev. 161 (2008) (proposing compensating taxpayers for random audits not because they are unfair but rather because compensation may help overcome taxpayer perceptions of unfairness and thereby increase overall tax compliance); Joseph Bankman, *Tax Enforcement: Tax Shelters, the Cash Economy, and Compliance Costs*, 31 Ohio N.U. L. Rev. 1 (2004) (justifying government reimbursement of NRP costs through a sense of fairness and noting that reimbursement might also convince skeptical taxpayers that the government is considering taxpayer compliance costs in its audit strategy).

17 *See Taxpayer Compliance Measurement Program: Hearing Before H. Subcomm. on Oversight of the Comm. On Ways and Means*, 104th Cong. 55-6 (1995); Joseph Bankman, *Who Should Bear Tax Compliance Costs?*, Stanford Law School Working Paper 279 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=519783&rec=1&srcabs=1271168&alg=1&pos=10 (discussing the possibility of eliminating the revenue function of NRP audits) (last visited Nov. 29, 2017).

18 *See* Robert E. Brown and Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255, 1266-8 (2003); IRM 4.22.2.1.1, *Background* (Sept. 27, 2017) (noting that "One of the hallmarks of any NRP study is an enhanced focus on case building. Case building is the process of adding information to the case file, from both IRS and non-IRS sources, prior to classification. Use of this information during the classification process will identify or eliminate potential issues prior to contacting the taxpayer. The NRP approach maximizes the use of data available to the IRS and, to the extent possible, minimizes intrusiveness and taxpayer burden.").

19 *See* Joseph Bankman, *Who Should Bear Tax Compliance Costs?*, Stanford Law School Working Paper 279 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=519783&rec=1&srcabs=1271168&alg=1&pos=10 (discussing the benefits of removing the revenue function of NRP audits but also noting the downside); National Taxpayer Advocate 2016 Annual Report to Congress vol. 3, 44-101 (Literature Review: *Behavioral Science Lessons for Taxpayer Compliance*).

LR #9 Amend Internal Revenue Code Section 3402(p) to Allow Voluntary Withholding for Independent Contractors

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

PROBLEM

The sharing economy (also known as the gig economy) links a willing provider to a consumer of goods or services. Typically, there are three parties involved in a sharing economy transaction. Here, we will refer to them as *service providers* (the freelancers who provide the goods or services), *service recipients* (the consumers of such goods or services), and *service coordinators* (the third-party platforms that facilitate the transactions).[2]

Many service providers consider themselves as independent contractors, rather than employees of their service coordinator. As such, withholding is not required on payments made by the service coordinator to the service provider. However, some service providers may desire to have income tax withheld for them by the service coordinators, just as if they were employees. With the prevalence of gig workers in a sharing economy who do not work for an employer in the traditional sense, voluntary withholding agreements would benefit both the IRS (which would be ensured of receiving timely payment of taxes) and service providers (who would be able to avoid the burdens of making or missing quarterly estimated tax payments).

EXAMPLE

Taxpayer A uses his personal car to provide rides to passengers using both Lyft and Uber platforms. Taxpayer A is not an employee of either service coordinator, but instead operates as an independent contractor. Taxpayer A's passengers pay for the shared ride service through the Lyft or Uber app, and then the service coordinator pays Taxpayer A an agreed-upon percentage of the revenue received from the service recipient. Taxpayer A approaches the service coordinator and explains that he is having difficulty making timely estimated tax payments. Taxpayer A asks the service coordinator if it would be willing to withhold a certain percentage of each payment to Taxpayer A and send it to the IRS. The service coordinator responds that it is not sure if such voluntary withholding arrangements are authorized and is concerned that doing so would imply that Taxpayer A is an employee of the service coordinator.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/Taxpayer-Rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC §7803(a)(3)).

2 For an in-depth discussion of the sharing economy and how the IRS can provide better service to its participants, see Most Serious Problem: *Participants in the Sharing Economy Lack Adequate Guidance from the IRS*, *supra*.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress:

- Amend Internal Revenue Code (IRC) § 3402(p)(3) to specifically authorize voluntary withholdings agreements between independent contractors and service recipients.

PRESENT LAW

IRC § 3402(p) allows for voluntary income tax withholding agreements.[3] Specifically, IRC § 3402(p)(3) authorizes the Secretary of Treasury to promulgate regulations for withholding from any payment where the Secretary of Treasury finds that withholding would be appropriate, if the payor and the payee agree to such withholding.

The Secretary of Treasury has issued regulations that specify that an *employee and employer* may voluntarily enter into an agreement under IRC § 3402(p)(3)(A) to provide for the withholding of income tax.[4] However, the regulations do not specifically authorize voluntary withholding agreements between payees and payors that do not have an employee-employer relationship.

REASONS FOR CHANGE

Payments to employees are subject to income tax withholding.[5] Tax gap data shows that 99 percent of payments subject to third-party information reporting and income tax withholding are reported by taxpayers to the IRS.[6]

In contrast, payors are not required to withhold income tax on payments to independent contractors. Congress should permit independent contractors to enter into voluntary withholding agreements even if the payments are not wages. Service providers such as those in the sharing economy may not be accustomed to making periodic estimated tax payments to the IRS, and may prefer to have the option of asking the service coordinator to withhold income taxes as a way of reducing taxpayer burden and avoiding noncompliance.

Although current regulations provide that the Secretary of Treasury may issue guidance by publication in the Internal Revenue Bulletin describing other payments for which withholding under a voluntary withholding agreement would be appropriate, to date no such guidance has been issued that permits voluntary withholding agreements for independent contractors.[7] By explicitly expanding voluntary withholding agreements to include independent contractors, Congress will make it easier for independent contractors to meet their tax compliance obligations.

3 IRC § 3402(p)(1) provides for voluntary withholding on certain federal payments (such as Social Security benefits). IRC § 3402(p)(2) provides for voluntary withholding on unemployment compensation payments. IRC § 3402(p)(3) provides for "other voluntary withholding" agreements and authorizes the Secretary, by regulation, to provide for withholding from (1) payments from employer to employee that do not constitute wages, and (2) "any other type of payment with respect to which the Secretary finds that withholding would be appropriate…."

4 *See* Treas. Reg. § 31.3402(p)-1(a).

5 *See*, *e.g.*, IRC § 3402(a).

6 IRS, *Tax Gap Estimates for Tax Years 2008-2010* (Apr. 2016).

7 *See* Treas. Reg. § 31.3402(p)-1(c)

EXPLANATION OF RECOMMENDATION

Congress should amend IRC § 3402(p) to specifically allow payors and payees who do not have an employer-employee relationship to enter into voluntary withholding agreements. By doing so, it will help independent contractors (including many gig economy workers) meet their income tax payment obligations and reduce compliance burdens.[8]

8 The legislation should also make clear that the agreement would not be taken into account in determining whether the service provider is an employee (rather than an independent contractor) for tax purposes.

LR #10

CANCELLATION OF STUDENT LOANS: Amend IRC §§ 108(a) and 6050P to Provide That Gross Income Does Not Include, and Creditors Are Not Required to Report, Income from the Cancellation of Certain Student Loans

PROBLEM

Pursuant to a statutory framework in the Internal Revenue Code (IRC), creditors that forgive a debt are generally required to report the forgiveness to the IRS on Form 1099-C, *Cancellation of Debt*.[1] Taxpayers are generally required to include the amount of the forgiven debt in income.[2] However, there are situations in which canceled debt may be excluded from income, such as where the taxpayer was insolvent.[3] Whether a taxpayer is insolvent is a case-by-case determination. Taxpayers claim an exclusion by filing Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness*, with their returns.

Pursuant to statutory provisions outside of the IRC, creditors may be required to forgive certain debts.[4] These required discharges arise in circumstances that strongly suggest the taxpayer is insolvent or otherwise eligible to exclude the forgiven debt from income. However, the IRC does not contain any exclusions that correspond to discharges of debt pursuant to these non-IRC provisions. If the IRC were amended to recognize these limited provisions as exclusions, and clarify that lenders are not required to report these discharges on Form 1099-C, taxpayers who qualified for the exclusion would not be required to file Form 982, and the IRS would not be required to process these forms and make unnecessary facts and circumstances determinations.

The IRS has recognized that the IRC rules, when triggered by debt forgiveness mandated by non-IRC provisions, may create a compliance burden on taxpayers and an administrative burden on the IRS that is excessive in relation to the amount of taxable income that would result. Thus, the IRS has issued guidance that provides relief to taxpayers whose forgiven student loans arose with respect to specific institutions named in the guidance. However, more uniform relief is needed.

EXAMPLE

In 2014, X borrows from the U.S. Department of Education (ED) pursuant to the Direct Loan Program to finance her attendance at an institution of higher learning.[5] In 2016, when the balance of her outstanding Direct loans is $20,000, X establishes as a defense against repayment within the meaning of the Higher Education Act of 1965 that the school misled her and that its actions would give rise to a cause of action against the school under applicable state law. ED cancels X's outstanding student loan

1 Internal Revenue Code (IRC) § 6050P(a); Treas. Reg. § 1.6050P-1(a).

2 IRC § 61(a)(12).

3 IRC § 108(a)(1)(B).

4 Higher Education Act of 1965, Pub. L. 89-329, 79 Stat. 1219, as amended (HEA), implemented in various provisions of Title 20 of the U.S. Code and Title 34 of the Code of Federal Regulations, discussed below.

5 According to the U.S. Department of Education (ED), "the largest federal loan program is the William D. Ford Federal Direct Loan Program, established in 2010, for which the federal government is the lender. Interest on the loans provided under the Direct Loan Program may be subsidized, based on need, while the recipient is in school." *Loans for Undergraduate Students*, https://nces.ed.gov/programs/coe/pdf/coe_cub.pdf (last visited Nov. 20, 2017).

and reports the discharge to the IRS on Form 1099-C. Because X is insolvent at the time of discharge, she will not be required to include the forgiven debt in income, but if she does not file a return and claim the exclusion, the IRS will treat the amount of debt cancellation as income, and X may receive a Notice CP 2000, *Notice Proposing Adjustments to Income, Payments, or Credits*, which is the IRS's first step toward assessing the tax.

RECOMMENDATION

To reduce the administrative burden of both the taxpayer and the IRS, the National Taxpayer Advocate recommends that Congress amend IRC §§ 108(a) and 6050P to provide that gross income does not include, and creditors are not required to report, income from forgiveness of student loans discharged under the following provisions of the Higher Education Act of 1965 (HEA) as amended and related regulations:

- The Defense to Repayment process of 20 U.S.C. § 1087e and 34 C.F.R. §§ 685.206 and 682.209; or
- The income-driven repayment provisions of 20 U.S.C. § 1087e and 34 C.F.R §§ 685.209 and 685.221.

CURRENT LAW

IRC § 61(a)(12) generally requires a taxpayer whose debt is canceled to include the amount canceled in his or her income when filing a tax return.[6] IRC § 108(a) provides exceptions to this general rule.[7] For example, pursuant to IRC § 108(a)(1)(B), canceled debt may be excluded from income if the taxpayer is insolvent when the debt is canceled.[8]

Other bases for excluding canceled debt from income include:

- IRC § 108(f), where student debt is forgiven contingent on the student's working for a certain period of time in certain professions for any of a broad class of employers, or pursuant to a loan forgiveness program that is intended to provide for the increased availability of health care services in underserved or health professional shortage areas;[9]
- IRC § 108(f), where student debt is discharged after December 31, 2017, and before January 1, 2026, on account of a borrower's death or disability;[10]

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6 IRC § 61(a)(12).

7 IRC § 108(a) provides:

(a) Exclusion from Gross Income.—

(1) In general.—Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if—

(A) the discharge occurs in a title 11 case,

(B) the discharge occurs when the taxpayer is insolvent,

(C) the indebtedness discharged is qualified farm indebtedness,

(D) in the case of a taxpayer other than a C corporation, the indebtedness discharged is qualified real property business indebtedness, or

(E) the indebtedness discharged is qualified principal residence indebtedness which is discharged—

(i) before January 1, 2017, or

(ii) subject to an arrangement that is entered into and evidenced in writing before January 1, 2017.

8 The term "insolvent" means the excess of liabilities over the fair market value of assets. IRC § 108(d)(3).

9 IRC § 108(f)(2), (4).

10 IRC § 108(f)(5), added by Pub. L. No. 115-97, § 11031 (2017).

- HEA provisions pursuant to which an educational institution forgives certain student loans for certain public service;[11] and
- HEA provisions pursuant to which ED forgives student loans under the Closed School discharge procedure.[12]

Non-statutory grounds for excluding canceled debt in income may also be available. For example, taxpayers who demonstrate that a "debt" was invalid at inception or is otherwise unenforceable under state law may exclude its forgiveness from income.[13]

Ascertaining Whether Forgiven Student Loan Is Excludible From Income May Require a Case-by-Case Determination

In addition to the HEA provisions discussed above, other HEA provisions authorize or require ED to cancel student loans under circumstances that suggest the forgiven debt would be excludible from income under IRC § 108(a) or other authority, but do not explicitly exclude such cancellation from income. For example, under the HEA, the Defense to Repayment process requires ED to discharge certain loans if the borrower establishes, as a defense against repayment, that a school's actions would give rise to a cause of action against the school under applicable state law.[14] To assist it in making this determination, ED's *Application for Borrower Defense to Loan Repayment* asks, in a series of questions: "Did the school mislead you (or fail to tell you important information)" in matters such as:

- Promises of future employment, likelihood of finding a job, eligibility for certification or licensure in your field of study, how many students graduate, and/or earnings after graduation;
- How much your classes would cost, how you would pay for your education, the terms of loan repayment, and/or other issues about the cost of your education;
- Transferring your credits from this school to other schools; or

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11 *See* 20 U.S.C. § 1087ee(a)(5), dd(g)(4), applicable to Federal Perkins Loans. ED describes the Perkins Loans Program as "a school-based loan program for undergraduates and graduate students with exceptional financial need. Under this program, the school is lender." Federal Student Aid, ED, *Loans* https://studentaid.ed.gov/sa/types/loans (last visited Nov. 20, 2017).

12 *See* 20 U.S.C. § 1087(c)(4) (providing for loan discharge if the borrower (or the student on whose behalf a parent borrowed) could not complete the program of study at the school because the school closed while the borrower (or student) was enrolled, or if the borrower (or student) withdrew from the school no more than 120 days before the school closed and incorporating 20 U.S.C. § 1087ee(a)(5) with respect to forgiven Federal Family Education Loans (FFEL)), *and* 20 U.S.C. § 1087e(a)(1) (making FFEL terms applicable to Direct Loans). FFEL loans are made by non-federal entities and are generally insured by a state or private nonprofit loan insurance program. The federal government guarantees a portion of the amount a loan insurance program pays a lender for a loss due to a borrower's default. *See* 20 U.S.C. §§ 1085(d), 1078(c)(1). ED notes that loans are no longer being made under this program. ED, https://www2.ed.gov/programs/ffel/index.html (last visited Nov. 20, 2017).

13 *See, e.g.*, *Zarin v. Comm'r*, 916 F.2d 110 (3d Cir. 1990), *rev'g* 91 T.C. 1084 (1989) (cancellation of a gambling debt that was unenforceable as a matter of state law was not required to be included in income).

14 *See generally* 20 U.S.C. § 1087e(h), 34 C.F.R. § 685.206(c) (applicable to Direct Loans) and 34 C.F.R. § 682.209(g) (applicable to FFEL loans). *See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program*, 81 Fed. Reg. 75926 (Nov. 1, 2016), final regulations promulgating 34 C.F.R. § 685.222, which includes breach of contract or material misrepresentation by the school as potential bases for discharging a student loan. These provisions of the final regulations were suspended until further notice pending judicial review. *See* 82 Fed. Reg. 27621-01 (June 17, 2017).

- The availability or quality of job placement, career services assistance, or the school's connections to employers within your field of study.[15]

Once a claimant's application and supporting documents are reviewed, the claimant is notified of whether the loan will be discharged.

As the IRS recognized:

> [D]etermining whether one or more of these exceptions [the Defense to Repayment discharge process, the insolvency exclusion, or another tax law authority] is available to each affected borrower would require a fact intensive analysis of the particular borrower's situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions.[16]

In guidance issued in 2015 applicable to forgiven student loans involving a specific institution, the IRS concluded that this analysis "would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result."[17] Thus, the IRS determined that affected taxpayers were not required to include the forgiven loans in income.[18] The IRS subsequently issued similar guidance applicable to forgiven student loans involving a different institution.[19]

These Revenue Procedures provide much-needed *ad hoc* guidance, but do not address the needs of similarly situated taxpayers whose forgiven loans did not involve the specified institutions. Thus, taxpayers not within the ambit of the revenue procedures have no alternative but to shoulder a compliance burden "excessive in relation to the amount of taxable income that would result."[20]

Another example of a situation in which it appears an exception would likely apply to exclude forgiven student debt from income is where an income-driven repayment plan is in place. These plans allow certain student loan borrowers to repay their loans by remitting to ED a specified percentage of their

15 *See* Federal Student Aid, ED, *Application for Borrower Defense to Loan Repayment*, https://studentaid.ed.gov/sa/sites/default/files/borrower-defense-application.pdf (last visited Nov. 20, 2017). Each of these questions includes a follow-up question: "Did you choose to enroll in your school based in part on the issues describe [sic] above?" The application also asks: "Do you have any other reasons relating to your school that you believe qualify you for borrower defense, such as your school failing to perform its obligations under its contract with you, or that there is a judgment against your school in a Federal court, a State court, or in front of an administrative board or that you believe that you have a state law cause of action against the school? Is there some other reason you feel your school misled you?"

16 Rev. Proc. 2015-57 § 2.03.

17 *Id*. (providing that students who attended a school owned by Corinthian Colleges whose loans were forgiven by ED are not required to report the forgiven loans as income).

18 Rev. Proc. 2015-57 § 4.01.

19 *Id*. at § 2.03 (noting "[t]he Treasury Department and the IRS conclude that most borrowers whose Federal student loans taken out by taxpayers to finance attendance at a school owned by ACI [American Career Institutes] that are discharged under the Defense to Repayment discharge process would be able to exclude from gross income all or substantially all of the discharged amounts based on fraudulent or material misrepresentations made by the schools owned by ACI to the students or based on the insolvency exclusion or another tax law authority." The guidance provides that ACI students whose loans were forgiven by ED are not required to report the forgiven loans as income and notes that ED will not issue Form 1099-C for the forgiveness of ACI's student loans).

20 Rev. Proc. 2015-57 § 2.03.

discretionary income (10, 15, or 20 percent, depending on the plan) over a period of 20 or 25 years.[21] Discretionary income is the excess of the student's income over the federal poverty level or 150 percent of the federal poverty level, depending on the plan.[22] At the expiration of the repayment period, ED forgives the borrower's remaining loan balance. ED provides this example:

- You are single and your family size is one, your adjusted gross income (AGI, as reported on your federal income tax return) is $40,000, and you have $45,000 in eligible federal student loan debt.
- 150 percent of the 2016 federal poverty level for a family of one is $17,820. The difference between your AGI and 150 percent of the federal poverty guideline amount is $22,180. This is your discretionary income. Ten percent of your discretionary income is $2,218. Dividing this amount by 12 results in a monthly payment of $184.83.[23]

There is no statutory provision (other than IRC § 108, as discussed above) allowing taxpayers to exclude these forgiven loans from income, and the IRS has not issued any guidance analogous to Revenue Procedure 2015-57 or Revenue Procedure 2017-24 that would allow creditors and taxpayers to treat the canceled debt as excludible from income.

Even When Forgiven Student Loan Is Clearly Excluded From Income, Claiming the Exclusion Is Burdensome

A creditor that cancels a debt is generally required to report that amount to the IRS on Form 1099-C, and provide a copy to the taxpayer.[24] Form 1099-C does not indicate the extent to which the canceled debt is subject to an exception under IRC §108(a) or excludible from the debtor's income under IRC § 108(f). Form 1099-C does not show, for example, that a debtor was insolvent when the debt was canceled, because it would be difficult if not impossible for the creditor to determine whether that condition was met. The form also does not indicate when non-IRC statutory provisions may make a canceled student loan excludible from income, even though the creditor is able to identify those provisions. Thus, the IRS generally treats forgiven student loans reported on Form 1099-C as required to be included in income.[25] Taxpayers who wish to exclude canceled debt from income must generally claim the exclusion by filing Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness* with their returns. The National Taxpayer Advocate has for years described the difficulty taxpayers encounter in understanding Form 1099-C and preparing Form 982.[26] A recent TAS survey shows that

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21 For a description of various aspects of income-driven repayment plans (*e.g.*, Pay As You Earn Repayment Plans (PAYE), Revised Pay As You Earn Repayment Plans (REPAYE), Income-Based Repayment Plans (IBR), and Income-Contingent Repayment Plans (ICR)), *see* Federal Student Aid, ED, Income Driven Plans, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven (last visited Nov. 20, 2017).

22 20 U.S.C. § 1087e(d)(D); 34 C.F.R. §§ 685.209(a)(2)(i) (PAYE), 685.209(c)(2)(i) (REPAYE), and 685.221(b)(1) (IBR).

23 Federal Student Aid, ED, *Income-Driven Repayment Plans: Questions and Answers*, Q. 17, https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment-q-and-a.pdf (last visited Nov. 20, 2017).

24 IRC § 6050P(a). Treas. Reg. § 1.6050P-1(a) requires creditors that discharge an indebtedness of at least $600 during any calendar year to file a Form 1099-C information return with the IRS.

25 For a description of the IRS's reliance on Form 1099-C, which may be inaccurate and may not actually signal that a taxable event has occurred, *see* National Taxpayer Advocate 2010 Annual Report to Congress 149 (Most Serious Problem: *Third-Party Reporting of Cancellation-of-Debt Events is Not Always Accurate, and the IRS's Reliance on Such Reporting May Burden Taxpayers*).

26 The National Taxpayer Advocate has long identified cancellation of debt as a serious problem faced by taxpayers (National Taxpayer Advocate 2007 Annual Report to Congress 13 Most Serious Problem: *Tax Consequences of Cancellation of Debt Income*; National Taxpayer Advocate 2008 Annual Report to Congress 39 Most Serious Problem: *Understanding and Reporting the Tax Consequences of Cancellation of Debt Income*), and recommended simplifying the tax treatment of cancellation of debt income (National Taxpayer Advocate 2008 Annual Report to Congress 391, Legislative Recommendation: *Simplify the Tax Treatment of Cancellation of Debt Income*).

taxpayers who seek information on the IRS's website for information about an IRS notice frequently do not find it.[27]

Compounding the difficulty, the IRS no longer assists taxpayers with return preparation at its walk-in sites and no longer answers tax law questions outside of the tax filing season, which runs from January to April.[28] Student loan cancellation of debt is "out of scope" for both the Volunteer Income Tax Assistance (VITA) program (which provides free basic income tax return preparation to taxpayers who generally make $54,000 or less) and the Tax Counseling for the Elderly (TCE) program (which offers free tax help for taxpayers 60 years of age and older).[29]

REASONS FOR CHANGE

Student loans may be forgiven under circumstances that suggest the taxpayer would not be required to include the amount discharged in income. The IRS has already identified two instances in which students whose loans were forgiven pursuant to the Defense to Repayment discharge process were likely eligible to exclude the forgiven debt from income; the IRS determined not to assert that those taxpayers recognized gross income from the debt cancellation. Providing a uniform exclusion when student loans are forgiven pursuant to the Defense to Repayment process would treat similarly situated taxpayers alike without taxpayers being forced to seek guidance on an *ad hoc* basis.

In order for student loans to be forgiven pursuant to income-driven repayment provisions, the student must have made payments over a long period (at least 20 years).[30] Those payments, calculated on the basis of disposable income, which is in turn determined with reference to the federal poverty level, must have been insufficient to fully repay the debt at the end of that period. A taxpayer in this situation may be unlikely to have acquired assets in excess of liabilities, *i.e.*, he or she may qualify for the insolvency exception, but will be burdened by the requirement to file Form 982. Consuming IRS resources in the ensuing case-by-case determinations appears inefficient in relation to the amount of taxable income that would likely result.

27 *See* Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs* vol. 2, *infra*, noting that about 60 percent of taxpayers who used the web to get information about an IRS notice did not get full resolution, and of those, around half stated they did not find the information or service they were looking for.

28 *See* Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive in-Person Assistance*, *supra*.

29 *See* IRS, *Free Tax Return Preparation for Qualifying Taxpayers*, https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers (last visited Sept. 23, 2017). The income eligibility threshold for Volunteer Income Assistance Tax Assistance (VITA) assistance changes each year. *See* IRS Publication 5220, *VITA/TCE Volunteer Site Scope & Referral Chart* (Dec. 2016). *See also* Most Serious Problem: *VITA/TCE Programs: IRS Restrictions on Volunteer Income Tax Assistance (VITA) and Taxpayer Counseling for the Elderly (TCE) Programs Increase Taxpayer Burden and Adversely Impact Access to Free Tax Preparation for Low Income, Disabled, Rural, and Elderly Taxpayers, supra.*

30 *See* https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven.

EXPLANATION OF PROVISION

The proposal would not create a general exclusion for student loan discharges. The proposed amendment to IRC § 108(a) would apply in three situations in which the taxpayer may already qualify to exclude the forgiven debt in income and is thus consistent with the existing insolvency exclusion. These circumstances are where a student loan is forgiven under the Defense to Repayment process; or pursuant to income-driven repayment provisions. Amending IRC § 6050P to clarify that creditors are not required to report the canceled debt in these circumstances would eliminate the inefficiencies that arise when creditors issue unnecessary Forms 1099-C.

LR #11 VICTIMS OF TERRORIST ATTACKS: Amend IRC § 692 to Grant the President the Authority to Issue a Declaration That an Event Qualifies as a "Specified Terrorist Attack"

PROBLEM

Congress added subsection (d) to Internal Revenue Code (IRC) § 692 in the aftermath of the September 11, 2001 terrorist attacks. The new provision, intended to provide tax exemption to victims of terrorist attacks, applies with respect to three enumerated events: the April 19, 1995 Oklahoma City bombing of the Alfred P. Murrah Federal Building; the September 11, 2001 attacks; and anthrax attacks occurring between September 11, 2001 and January 1, 2002. IRC § 692(d) has not been amended to take into account terrorist attacks that have occurred after September 11, 2001.

EXAMPLE

In 2003, Taxpayer X was killed in a terrorist attack. IRC § 692(d), enacted in 2002, provides tax exemption to victims of certain terror attacks. X would otherwise qualify for relief under IRC § 692(d), but the enumerated events do not include the terrorist attack that killed X. Thus, X is not eligible for relief under IRC § 692(d).

RECOMMENDATION

Amend IRC § 692(d) to grant the President the authority to issue a declaration that an event qualifies as a "specified terrorist attack."

CURRENT LAW

Tax Relief Available for Victims of Terrorist Attacks Under IRC § 692

Tax exemption for U.S. military personnel who die in wartime (*i.e.*, before the President proclaims termination of war) has been a part of the IRC since World War II.[1] The exemption, now applicable to death in Presidentially designated "combat zones," is found in IRC § 692(a).[2]

1 Enacted as Supplement U to Chapter 1 (then § 421) of the Internal Revenue Code (IRC) by the Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 8, 57 Stat. 126 (1943), granting tax exemption to those who died "on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States," until the termination of World War II as proclaimed by the President.

2 IRC § 692(a) applies to "any individual who dies while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving." Under IRC § 112(c)(2), the President designates whether an area is a "combat zone." Tax exemption applies "with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone." Tax for such prior taxable years which is unpaid at the date of death "shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment." Subsection (b) of IRC § 692 was added in 1975 to provide rules for determining the date of death of an individual who was in missing status. *See* Pub. L. No. 93-597, § 4, 88 Stat. 1950 (1975).

Until 1984, Congress conferred similar tax relief to individuals who were killed in various hostile actions against the United States (rather than in combat zones) but it did so through separate legislation.[3]

In 1984, recognizing that the most recently designated combat zone was Vietnam (designated as such in 1964), yet Americans continued to die abroad in hostile actions directed against the United States, Congress amended IRC § 692.[4] New subsection (c) provided tax exemption to U.S. military personnel or civilian employees of the federal government killed outside of the United States in a "terroristic or military action."[5]

A "terroristic or military action" is defined as:

> (A) any terroristic activity which a preponderance of the evidence indicates was directed against the United States or any of its allies, and
>
> (B) any military action involving the Armed Forces of the United States and resulting from violence or aggression against the United States or any of its allies (or threat thereof).[6]

Neither IRC § 692 nor Treasury regulations under it explain who has the authority to determine whether a given event qualifies as a "terroristic or military action."[7]

The relief available under IRC § 692(c) consists of exemption from tax for the year of death and for at least one prior year, and for any years in the period between the date of injury and the date of death.[8] For example, someone who was injured and died in 1983 would be exempt from tax for 1983, the year of death, and 1982, the prior taxable year. Someone who was injured in 1983 and died from that injury two years later, in 1985, would be exempt from tax for 1985 (the year of death), for 1982 (the year that preceded the injury), for 1983 (the year of injury) and for 1984 (the year following the year of the injury that preceded the year of death).

In 1990, in the wake of the 1988 explosion of Pan American Flight 103 over Lockerbie, Scotland, Congress again enacted separate legislation to provide tax exemption for victims of terrorism who would

3 *See* Staff of J. Comm. on Tax'n, 107th Cong., *Technical Explanation of the "Victims of Terrorism Tax Relief Act of 2001," as Passed by the House and the Senate on December 20, 2001* (JCX-93-01), at 2, Dec. 21, 2001.

4 Pub. L. No. 98-259, § 1, 98 Stat. 142 (1984); S. Rep. No. 98-364 at 3-4 (1984), noting that the legislation was intended to apply with respect to the bombing of the U.S. Embassy in Beirut, Lebanon, or as a result of the bombing of the U.S. Marine headquarters there, with respect to other U.S. personnel who were participating in a United Nations peacekeeping force when killed in Lebanon by land mines or snipers in 1982 or 1983 (or thereafter), with respect to the U.S. service personnel who died as a result of the government's attempt to rescue the American hostages in Iran, and to U.S. service personnel who died in a military action in Grenada.

5 The Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 113(b), 115 Stat. 2427, 2435 (2002), discussed below, removed the requirement that death occur as a result of wounds or injury incurred while outside the United States.

6 IRC § 692(c)(2).

7 The same term is used without further definition in IRC § 7508A, which authorizes the IRS to postpone deadlines for performing certain acts with respect to taxes. However, related Treasury regulations appear to permit the Secretary to determine whether an event qualifies as "terroristic or military action." *See* Treas. Reg. § 301.7508A-1(b), providing that "in the case of a taxpayer determined by the Secretary to be affected by a federally declared disaster (as defined in section 1033(h)(3)) or a terroristic or military action (as defined in section 692(c)(2)), the Secretary may specify a postponement period…" To date, three events have been listed in the Internal Revenue Manual (IRM) as qualifying for relief under IRC § 7508A as "terroristic or military action": the April 19, 1995 attack, the September 11, 2001 attacks, and related anthrax attacks. *See* IRM 25.6.1.10.2.9.4, *Terroristic or Military Action* (May 17, 2004). As discussed below, these events are also covered by the terms of IRC § 692(d).

8 IRC § 692(c)(1), providing that "any tax imposed by this subtitle shall not apply—(A) with respect to the taxable year in which falls the date of his death, and (B) with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred."

not qualify for relief under IRC § 692.[9] Because Congress believed "there should be no doubt that all of the civilian victims of the bombing of Pan Am 103 should be accorded treatment comparable to those in the service of the government, including limited forgiveness from tax liability," the 1990 legislation provides tax exemption to civilian victims who were not employees of the federal government.[10]

After the Lockerbie tragedy but prior to passage of the 1990 legislation, the President constituted the Commission on Aviation Security and Terrorism.[11] On May 15, 1990, the Commission submitted a report that contained a series of recommendations. With respect to tax benefits:

> The Commission is persuaded that the definition of what constitutes an act of terrorism is best left to the Executive Branch. The Vice President's 1986 Task Force report noted that terrorism is easier to describe than define — and legal definitions in this area can be inadvertently too expansive or restrictive. The Commission believes the President, or a board he might establish for this purpose, will know the right circumstances of terrorism when they occur.[12]

Thus, the Commission recommended that the President "seek legislation to authorize and permanently appropriate funds to provide monetary benefits and tax relief for any American victim of an act of terrorism."[13]

In the 1990 legislation, Congress included a provision directing the President to submit to Congress "recommendations on whether or not legislation should be enacted to authorize the United States to provide monetary and tax relief as compensation to United States citizens who are victims of terrorism."[14] In carrying out this obligation, the President was authorized to "establish a board to develop criteria for compensation and to recommend changes to existing laws to establish a single comprehensive approach to victim compensation for terrorist acts."[15]

The events that gave rise to the next amendment of IRC § 692 occurred on September 11, 2001. As Congressman Thomas, Chairman of the House Committee on Ways and Means, who sponsored a bill to amend the statute explained:

> It would be ironic if we did not have this bill in front of us today, because what this bill basically does is take those provisions of the Tax Code already on the books which apply to the military and combat zones overseas or to private citizens who are attacked or are the subjects of terrorist attacks overseas and say, clearly, New York, the Pentagon, the Washington area, were combat zones, and that, therefore, it seems entirely appropriate that those provisions of the Tax Code which relieve tax responsibilities for individuals meeting a profile overseas ought to be brought here to our shores, and that, not just figuratively but

9 *See* Staff of J. Comm. on Tax'n, 107th Cong., *Technical Explanation of the "Victims of Terrorism Tax Relief Act of 2001," as Passed by the House and the Senate on December 20, 2001* (JCX-93-01), at 2, Dec. 21, 2001; Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, § 211, 104 Stat. 3066, 3085 (1990).

10 *See* 136 Cong. Rec. 33218 (Oct. 23, 1990) (Statement of Sen. Lautenberg, sponsor of S. 2822, enacted as the Aviation Security Improvement Act of 1990).

11 Exec. Order No. 12686, 54 Fed. Reg. 32629 (Aug. 4, 1989).

12 President's Commission on Aviation Security and Terrorism, Report to the President, at 107 (1990), https://ia600402.us.archive.org/28/items/PCASTreport/PCASTreport.pdf.

13 *Id.*

14 Aviation Security Improvement Act of 1990, Pub. L. No. 101-604 § 211, 104 Stat. 3066, 3085 (1990).

15 *Id.*

> literally in the Tax Code, the terrorist victims should be considered as though they were in a combat zone, which they were, and that they were subject to terrorist attacks, which they were. That basically was the genesis of the bill.[16]

The Victims of Terrorism Tax Relief Act of 2001, enacted in 2002 (the 2002 Act) added subsection (d) to IRC § 692. The new subsection provides tax exemption to "specified terrorist victims," defined as any decedent:

> (A) who dies as a result of wounds or injury incurred as a result of the terrorist attacks against the United States on April 19, 1995, or September 11, 2001, or
>
> (B) who dies as a result of illness incurred as a result of an attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002.[17]

The relief available under IRC § 692(d) consists of exemption from tax for the year of death and at least one prior year, similar to the relief available under subsection (c).[18] Unlike subsection (c), subsection (d) provides for a minimum benefit amount of $10,000 that can be claimed as a tax refund; also unlike subsection (c), it does not limit relief for civilian victims to employees of the United States.[19] There is no requirement that death occur as a result of wounds or injury incurred while outside the United States (and, as noted, the 2002 Act removed that requirement from subsection (c)).[20]

In 2003, in the wake of the Space Shuttle Columbia disaster, Congress extended the tax exemption under IRC § 692(d) to astronauts who lose their lives on a space mission.[21] Apart from a clerical amendment to subsection (a) of IRC § 692, the statute has not been amended since then.[22]

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16 147 Cong. Rec. 16940 (Sept. 13, 2001) (statement of Rep. Thomas), describing H.R. 2884, enacted after amendment as the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002).

17 IRC § 692(d)(4), enacted by the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 101, 115 Stat. 2427, 2428 (2002) (the 2002 Act). The reference to April 19, 1995 is to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and was added to the pending legislation without explanation by the S. Comm. on Finance. *See* 147 Cong. Rec. 22812, 22829 (Nov. 16, 2001) (statement of Sen. Baucus, member of the S. Comm. on Finance, explaining the House version of the bill and the Senate amendment to it). The amendment also added the reference to the post-September 11 anthrax attacks.

18 *See* IRC § 692(d)(1), providing from tax exemption "(A) with respect to the taxable year in which falls the date of death, and (B) with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds, injury, or illness referred to in paragraph (3) were incurred."

19 IRC § 692(d)(2). If a decedent's income tax for exempt years is less than $10,000, he or she is treated as having made a payment of tax equal to the excess of $10,000 over the amount of tax not imposed under subsection (d). The 2002 Act amended other sections of the IRC to provide tax benefits to victims of the 1995 and 2001 attacks: IRC § 101, to exclude certain death benefits from income; and IRC § 2201, to reduce estate taxes. Off-Code section 104 of the 2002 Act facilitates the treatment of payments by charitable organizations as exempt payments, while section 105 of the 2002 Act excludes cancellation of debt from income, but also did not amend the Code. The last two categories of relief are not available with respect to the 1995 attack. In addition to the specific tax relief for victims of the 1995 and 2001 attacks, the 2002 Act clarified and expanded prior law to provide tax benefits beyond exemption from income tax for victims of disaster and terrorist or military actions (*e.g.*, IRC § 139 was enacted to exclude disaster relief payments from income).

20 Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 113(b), 115 Stat. 2427, 2435 (2002).

21 IRC § 692(d)(5), added by the Military Family Tax Relief Act of 2003, Pub. L. No. 108-121, § 110, 117 Stat. 1335, 1342 (2003). *See* Staff of J. Comm. on Tax'n, *General Explanation of Tax Legislation Enacted in the 108th Congress, Part Four: Military Family Tax Relief Act of 2003 (Public Law 108-121) (JCS-5-05), at* 47 (Comm. Print 2005).

22 Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 221(a)(67), 128 Stat. 4010, 4048 (2014), a deadwood provision removing a reference in IRC § 692(a)(1) to service in a combat zone after June 24, 1950.

Relief and Assistance for Victims of Disasters or Emergencies

The federal government has provided disaster relief, often through *ad hoc* congressional appropriations, since the earliest days of the Republic.[23] In 1950, the modern statutory framework emerged pursuant to which various forms of relief ensue when the President, at the request of a State governor, declares a major disaster area.[24] Currently, the Stafford Act authorizes a governor or chief executive of an affected Indian tribal government to request a declaration that a major disaster has occurred or an emergency exists.[25] The President is also authorized to declare an emergency in the absence of a gubernatorial request in some circumstances.[26]

Disaster relief under the Stafford Act was available with respect to the April 19, 1995 and the September 11, 2001 attacks, as well as for the 2013 Boston Marathon attack.[27] However, an incident may not meet the definition of a major disaster, and the amount of damage it causes, when compared to state population and resources, may not meet required thresholds under the Stafford Act.[28] For example, the 2015 San Bernardino, California attack; the 2015 Charleston, South Carolina church shootings; the 2016 Orlando, Florida Pulse nightclub mass shooting; and the 2016 Ohio State University attack were not declared major disaster areas or emergencies.[29]

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23 For a description of the history of disaster relief, see Michele Landis Dauber, Forum: *"Overtaken By a Great Calamity:" Disaster Relief and the Origins of the American Welfare State: The Sympathetic State*, 23 Law & Hist. Rev. 387, 394 (2005).

24 *See* Disaster Relief Act of 1950, Pub. L. No. 81-875, § 2(a), 64 Stat. 1109 (1950).

25 The Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974), renamed the Robert T. Stafford Relief and Emergency Assistance Act by Pub. L. No. 100-707, § 102, 102 Stat. 4689 (1988) (Stafford Act), codified at 42 U.S.C. §§ 5121-5207. 42 U.S.C. § 5170(a) provides: "All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. … Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists." 42 U.S.C. § 5170(b) provides that the "Chief Executive of an affected Indian tribal government may submit a request for a declaration by the President that a major disaster exists." 42 U.S.C. § 5191 has similar provisions for requesting a presidential declaration that an emergency exists. 42 U.S.C. § 5122 defines an emergency as a situation in which "Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States." A major disaster is defined as "any natural catastrophe… or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby."

26 42 U.S.C. § 5191(b) provides "The President may exercise any authority vested in him by [section 5192 or section 5193 of this title, *i.e.*, direct federal emergency assistance] with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President's determination may be made without regard to subsection (a) of this section." The President declared an emergency under this provision with respect to the April 19, 1995 attack on the Alfred P. Murrah Federal Building and the September 11, 2001 attack on the Pentagon; both emergency declarations were followed by a major disaster declaration. (The attack on the World Trade Center in New York was immediately declared a major disaster on September 11, 2001 and did not receive an emergency declaration designation.) The President also declared an emergency under this provision with respect to the 2003 Space Shuttle Columbia explosion. Bruce R. Lindsay, Congressional Research Service, *Stafford Act Assistance and Acts of Terrorism* 2, 9, https://fas.org/sgp/crs/homesec/R44801.pdf (June 2, 2017).

27 Bruce R. Lindsay, Congressional Research Service, *Stafford Act Assistance and Acts of Terrorism* 12-14, https://fas.org/sgp/crs/homesec/R44801.pdf (June 2, 2017).

28 *Id*. at 2-3, 5-6.

29 Of these four incidents, the 2016 Orlando Florida Pulse nightclub shootings is the only one in which the State governor requested a Stafford Act declaration. *Id*. at 12.

REASONS FOR CHANGE

IRC § 692 has been amended on an *ad hoc* basis in response to specific events. Each amendment expanded the categories of persons eligible for relief. Its initial application to military personnel was expanded with the addition of subsection (c) to include civilian employees of the federal government killed outside of the United States. Subsection (c) was then modified to extend relief to civilian employees of the United States whether or not they were killed abroad. Subsection (d) extended relief to civilians whether or not they were employees of the federal government. Similarly, the statute has been amended to expand the range of events that may give rise to relief. Its initial application to death caused during wartime was expanded to include death caused in a combat zone and, with the addition of subsection (c), to death caused by a "terroristic or military action." Subsection (d) expanded relief to victims of a "specified terrorist attack" and expanded the relief to include a $10,000 minimum benefit.

Since at least 1990, Congress has recognized the need for a more comprehensive approach to determining the tax benefits available to victims of terrorism, as opposed to *ad hoc* legislation.[30] It has also been acknowledged that the President may be best positioned to make determinations in this area.[31] Giving the President authority to determine whether an event is a "specified terrorist attack" is consistent with the approach that applies to determinations of whether an event qualifies for disaster or emergency relief. Further, delegating this authority to the President may expedite relief to victims of "specified terrorist attacks" compared to the length of time needed for legislative action.

EXPLANATION OF PROVISION

The recommendation is to amend IRC § 692(d) to grant the President the authority to issue a declaration that an event qualifies as a "specified terrorist attack." The change would make tax relief available without the need for amendments to IRC § 692 or for separate legislation. This approach is similar to Stafford Act procedures, although a determination that an event qualifies as a "specified terrorist attack" would not affect whether a determination has been made for purposes of the Stafford Act. Subsection (c) of IRC § 692, which provides more limited relief than subsection (d), would remain intact.

30 Aviation Security Improvement Act of 1990, Pub. L. No. 101-604 § 211, 104 Stat. 3066, 3085 (1990).

31 President's Commission on Aviation Security and Terrorism, Report to the President 107 (1990), https://ia600402.us.archive.org/28/items/PCASTreport/PCASTreport.pdf.

INTRODUCTION: Most Litigated Issues

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(X) requires the National Taxpayer Advocate to identify in her Annual Report to Congress (ARC) the ten tax issues most litigated in federal courts (Most Litigated Issues).[1] The National Taxpayer Advocate may analyze these issues to develop recommendations to mitigate the disputes resulting in litigation.

TAS identified the Most Litigated Issues from June 1, 2016 through May 31, 2017, by using commercial legal research databases. For purposes of this section of the Annual Report, the term "litigated" means cases in which the court issued an opinion.[2] This year's Most Litigated Issues are:

- Accuracy-Related Penalty (IRC §§ 6662(b)(1) (2));[3]
- Trade or Business Expenses (IRC § 162(a) and related Code sections);
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
- Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
- Gross Income (IRC § 61 and related Code sections);
- Failure to File Penalty (IRC § 6651(a)(1)), Failure to Pay Penalty (IRC § 6651(a)(2)), and Failure to Pay Estimated Tax Penalty (IRC § 6654);
- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC § 7403);
- Charitable Deductions (IRC § 170);
- Family Status Issues Under IRC §§ 2, 24, 32, and 151; and
- Relief from Joint and Several Liability Under IRC § 6015.

Two topics, family status issues and relief from joint and several liability, were not identified as Most Litigated Issues last year.[4] These issues replaced the trust fund recovery penalty and the frivolous issues penalty as Most Litigated Issues.[5] Relief from joint and several liability last appeared in the Most Litigated Issues section in 2015[6] while family status issues was last identified as a Most Litigated Issue in 2010.[7] Accuracy-related penalties remained the top litigated issue this year, and we identified 138 cases, an increase of 16 cases (or 13 percent) compared to the last year.[8] Civil actions to enforce liens experienced the largest percentage increase, as we identified 60 cases this year compared with 32 cases last year, an 88 percent increase; however, this increase generally resulted from a change to our search

1 Federal tax cases are tried in the United States Tax Court, United States District Courts, the United States Court of Federal Claims, United States Bankruptcy Courts, United States Courts of Appeals, and the United States Supreme Court.

2 Many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers' cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Courts can issue less formal "bench orders," which are not published or precedential.

3 Internal Revenue Code (IRC) § 6662 also includes (b)(3), (b)(4), (5), (6), (7), and (8), but because those types of accuracy-related penalties were not heavily litigated, we have only analyzed (b)(1), and (2).

4 For a discussion of the National Taxpayer Advocate's concerns about family status issues and the complexity of claiming the various family-related credits, *see* 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

5 National Taxpayer Advocate 2016 Annual Report to Congress 410.

6 National Taxpayer Advocate 2015 Annual Report to Congress 527.

7 National Taxpayer Advocate 2010 Annual Report to Congress 487.

8 National Taxpayer Advocate 2016 Annual Report to Congress 413.

methodology.[9] Most case categories showed increases in terms of number of litigated cases this year except for CDP, which experienced a decline of about 14 percent.[10]

Overall, the total number of cases identified in the Most Litigated Issues section increased from 609 in 2016 to 692 this year, an almost 14 percent increase from last year,[11] reversing the trend of declining litigation identified over the last few years.[12] We also noticed a slight dip from last year in the percentage of cases involving *pro se* taxpayers who prevailed, as 15 percent of *pro se* taxpayers prevailed during this reporting period as compared to 17 percent in 2016.[13]

Once TAS identified the Most Litigated Issues, we analyzed each one in five sections: summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion.[14] Each case is listed in Appendix 3, which categorizes the cases by type of taxpayer (*i.e.*, individual or business).[15] Appendix 3 also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se* (*i.e.*, without representation), and lists the court's decision.[16]

We have also included a "Significant Cases" section summarizing decisions that are not among the top ten issues but are relevant to tax administration. In this section, we used the same reporting period, beginning on June 1, 2016 and ending on May 31, 2017, that we used for the ten Most Litigated Issues.

Further, for this reporting cycle we expanded our review to include Tax Court summary judgments and bench orders, which are unpublished.[17] Unpublished litigation from the Tax Court has become available

9 National Taxpayer Advocate 2016 Annual Report to Congress 491. In our 2016 Annual Report to Congress, we identified 32 cases involving civil actions to enforce tax liens under IRC § 7403. *See* National Taxpayer Advocate 2016 Annual Report to Congress 491. As we identified more lien enforcement cases this year than in the 2016 Annual Report, we revisited our case search criteria used to identify cases for this Most Litigated Issue and employed a more expansive search methodology using broader search terms to account for the fact that United States District Courts, which under IRC § 7403(a) have exclusive jurisdiction over lien enforcement actions, often do not cite to IRC § 7403 in case opinions. As a result, we identified a total of 50 lien enforcement cases for the 2016 reporting period. However, this increase in cases would not have materially changed the ranking of that Most Litigated Issue in the 2016 Annual Report to Congress.

10 National Taxpayer Advocate 2016 Annual Report to Congress 413.

11 *Id.*

12 As previously noted, we adjusted our methodology for identifying liens enforcement cases in this reporting cycle. However, applying the new methodology to the 2016 Most Litigated Issues resulted in the identification of additional cases for the topic of liens enforcement, which still results in an increase of 65 total cases between the 2016 and 2017 cycles or ten percent. We identified 640 cases in 2015, 731 cases in 2014, and 877 cases in 2013. *See* National Taxpayer Advocate 2015 Annual Report to Congress 429; National Taxpayer Advocate 2014 Annual Report to Congress 425; National Taxpayer Advocate 2013 Annual Report to Congress 324.

13 *See* National Taxpayer Advocate 2016 Annual Report to Congress 414.

14 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

15 Individuals filing Schedules C, E, or F are deemed business taxpayers for purposes of this discussion even if items reported on such schedules were not the subject of litigation.

16 "*Pro se*" means "for oneself; on one's own behalf; without a lawyer." Black's Law Dictionary (10th ed. 2014). For purposes of this analysis, we considered the court's decision with respect to the issue analyzed only. A "split" decision is defined as a partial allowance on the specific issue analyzed. The citations also indicate whether decisions were on appeal at the time this report went to print.

17 In prior years, our review of litigation in federal courts was generally limited to discussing Tax Court opinions published in commercial databases. Each division or memorandum opinion goes through a legislatively mandated pre-issuance review by the Chief Judge. IRC §§ 7459(b); 7460(a). While division opinions are precedential, orders are not, being issued "in the exercise of discretion" by a single judge. *See* 7463(b); Rule 50(f), Tax Court Rules of Practice and Procedure (denying precedential status to orders) and 152(c) (denying precedential status to bench opinions).

to the public in recent years through the court's website, but remains unavailable through electronic legal commercial databases.

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

Taxpayers can generally litigate a tax matter in four different types of courts:

- The United States Tax Court;
- United States District Courts;
- The United States Court of Federal Claims; and
- United States Bankruptcy Courts.

With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts.[18]

The Tax Court is a "prepayment" forum. In other words, taxpayers can access the Tax Court without having to pay the disputed tax in advance. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from CDP hearings, relief from joint and several liability, and determination of employment status.[19]

The United States District Courts and the United States Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in full,[20] and (2) the taxpayer has filed an administrative claim for refund.[21] The United States District Courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can receive a jury trial.[22] Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.[23]

18 *See* IRC § 7482, which provides that the United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the Tax Court. There are exceptions to this general rule. For example, IRC § 7463 provides special procedures for small Tax Court cases (where the amount of deficiency or claimed overpayment totals $50,000 or less) for which appellate review is not available. *See also* 28 U.S.C. § 1294 (appeals from a United States District Court are to the appropriate United States Court of Appeals); 28 U.S.C. § 1295 (appeals from the United States Court of Federal Claims are heard in the United States Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the United States Courts of Appeals may be reviewed by the United States Supreme Court).

19 *See, e.g.*, IRC §§ 6214; 7476-7479; 6330(d); 6015(e); 7436.

20 28 U.S.C. § 1346(a)(1). *See Flora v. United States*, 362 U.S. 145 (1960), *reh'g denied*, 362 U.S. 972 (1960).

21 IRC § 7422(a).

22 The bankruptcy court may only conduct a jury trial if the right to a trial by jury applies, all parties expressly consent, and the district court specifically designates the bankruptcy judge to exercise such jurisdiction. 28 U.S.C. § 157(e).

23 *See* 11 U.S.C. §§ 505(a)(1) and (a)(2)(A).

ANALYSIS OF *PRO SE* LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 3.0.1 lists the Most Litigated Issues for the review period June 1, 2016 through May 31, 2017, and identifies the number of cases, categorized by issue, in which taxpayers appeared without representation. As the figure illustrates, the issues with the highest rates of *pro se* appearance are summons enforcement and family status issues.

FIGURE 3.0.1, *Pro Se* Cases By Issue

Most Litigated Issue	Litigated Cases Reviewed	*Pro Se* Litigation	Percentage of *Pro Se* Cases
Accuracy-Related Penalty	138	84	61%
Trade or Business Expenses	99	62	63%
Summons Enforcement	89	64	72%
Collection Due Process	85	46	54%
Gross Income	85	57	67%
Failure to File, Failure to Pay, and Estimated Tax Penalties	60	39	65%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	60	30	50%
Charitable Deductions	28	14	50%
Family Status Issues	24	19	79%
Relief from Joint and Several Liability	24	15	63%
Total	**692**	**430**	**62%**

Figure 3.0.2 affirms our contention that taxpayers are more likely to prevail if they are represented. *Pro se* taxpayers prevailed in 15 percent of cases this year as compared to 17 percent last year, a two percent decrease in success rate. Thus, for this year, the success rate for represented taxpayers was nine percent greater than that of *pro se* taxpayers.

FIGURE 3.0.2, Outcomes For *Pro Se* and Represented Taxpayers

	Pro Se Taxpayers			Represented Taxpayers		
Most Litigated Issue	Total Cases	Taxpayer Prevailed in whole or in part	Percent	Total Cases	Taxpayer Prevailed in whole or in part	Percent
Accuracy-Related Penalty	84	14	17%	54	13	24%
Trade or Business Expenses	62	19	31%	37	15	41%
Summons Enforcement	64	0	0%	25	6	24%
Collection Due Process	46	4	9%	39	3	8%
Gross Income	57	10	18%	28	8	29%
Failure to File, Failure to Pay, and Estimated Tax Penalties	39	6	15%	21	6	29%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	30	0	0%	30	2	7%
Charitable Deductions	14	3	21%	14	5	36%
Family Status Issues	19	4	21%	5	1	20%
Relief from Joint and Several Liability	15	5	33%	9	3	33%
Total	**430**	**65**	**15%**	**262**	**62**	**24%**

ANALYSIS OF UNPUBLISHED OPINIONS

We identified 108 bench orders and 473 summary judgments[24] by searching the Tax Court orders on its website.[25] We identified 93 of 108 bench orders and 109 of 473 summary judgments associated with this cycle's ten Most Litigated Issues. These 202 cases are listed in in Tables 11 and 12 in Appendix 3. We selected cases in which either a decision was entered on the merits of a substantive issue, or there was a substantive discussion of a distinct tax law matter.[26] The most prevalent issues discussed in the bench opinions reviewed were gross income (32 cases or about 34 percent), trade or business expenses (25 cases or about 27 percent), accuracy-related penalty (25 cases or about 27 percent), family status issues (17 cases or 18 percent), and CDP issues (15 cases or 16 percent).

Over three-fourths (77 percent) of the 473 summary judgment orders we reviewed were procedural and did not discuss a substantive tax law issue. In contrast to bench opinions, CDP matters dominated this category of unpublished litigation, with 84 percent (92 cases) of the selected summary judgments. Notably 41 percent (45 cases) of summary judgments were entered by default as taxpayers did not file

24 Unlike bench orders, summary judgments are decisions without trial. U.S. Tax Court Rules of Practice and Procedure, Title XII. Denying summary judgment in full or in part leaves issues in play for litigation and is not a final disposition on the merits of the litigated issue, which is a prerequisite for including a case in the counts for the Most Litigated Issues.

25 We used the orders search tab applying the reporting period date restriction and key search phrases: "summary judgment" and "7459(b)." We did not analyze summary judgments and bench orders in other federal courts. *See* Public Access to Court Electronic Records (PACER) User Manual for ECF Courts, Sept. 2014, https://www.pacer.gov/documents/pacermanual.pdf (explaining PACER search functions).

26 Under Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then the Tax Court may enter a decision against that party, when appropriate, and in light of the evidence contained within the administrative record. *See* Rule 121(d), Tax Court Rules of Practice and Procedure. We included summary judgments entered upon default in situations where the order discussed the merits.

a response to the IRS's motion for summary judgment despite the court order to respond. Forty one percent of petitioners in summary judgment cases failed to provide the IRS with requested financial information to consider collection alternatives during the CDP hearing with the IRS Office of Appeals prior to filing a petition in the Tax Court.

Overall, the IRS prevailed in 89 percent of motions for summary judgment (97 cases) and in about 70 percent of bench opinions (65 cases). Split decisions resulted in seven percent (eight of 109) of summary judgment orders and in 17 percent (16 of 93) of bench opinions. Four taxpayers who prevailed in summary judgment cases were represented. Twelve taxpayers prevailed in bench opinions, nine of these taxpayers appeared *pro se*, three were represented. Overall, 80 percent (161 cases) of taxpayers appeared *pro se* in the unpublished opinions reviewed.[27]

27 *See* Appendix 3 (cite to appendix), *infra*.

Significant Cases

Each of the ten most litigated issues includes a discussion of the most significant cases involving those issues. For example, the accuracy-related penalty discussion (below) includes a summary of *Chai v. Commissioner*, which is significant because it held for the first time that the IRS generally has the burden of producing evidence that it obtained supervisory approval of penalties.[1] This section describes cases that do not involve any of the ten most litigated issues, but nonetheless highlight significant tax issues.[2]

In *King v. Commissioner*, the United States Court of Appeals for the Seventh Circuit held that the IRS can refuse to abate "unfair" liabilities under Internal Revenue Code (IRC) § 6404(a).[3]

On March 5, 2009, when a revenue agent asked Mr. King to sign Forms 2504, *Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment*, which would require him to pay additional employment taxes, he asked if he could pay in installments. After the agent said he could, he signed and returned the forms. The IRS received and processed the forms by April 13, 2009. However, the IRS did not inform him that his request for an installment agreement (IA) was incomplete or how to perfect it. Instead, the IRS sent him a series of uninformative collection letters. On June 10, 2009, after Mr. King called to inquire about his IA, a TAS employee discussed the requirements for an IA with him, and forwarded his request to a revenue officer (RO). The RO denied the IA. He suggested that Mr. King could sell property to pay his liabilities.

In October 2011, Mr. King obtained a reverse mortgage and paid his tax liability.[4] At his previously-scheduled Collection Due Process hearing, he requested abatement of interest accruing after March 5, 2009. Mr. King argued that he should not have to pay the interest that accrued after the IRS provided him with erroneous information about his eligibility for an IA. He said he would have paid earlier and avoided those charges if he had known the IRS would not grant him an IA. The IRS declined to abate the interest.

Mr. King filed an appeal *pro se* before the Tax Court, which held the IRS abused its discretion in denying the abatement.[5] IRC § 6404(a) authorizes the IRS to abate liability that: "(1) is excessive in amount, or (2) is assessed after the expiration of the period of limitation properly applicable thereto, or (3) is erroneously or illegally assessed."[6]

Mr. King argued that the interest was "excessive," which the Tax Court had interpreted, based on its plain meaning, as "unfair" under the facts and circumstances.[7] The Tax Court agreed, in part,

1 *Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017).

2 When identifying the ten most litigated issues, TAS analyzed federal decisions issued during the period beginning on June 1, 2016, and ending on May 31, 2017. For purposes of this section, we used the same period, except that we also included *Steele v. United States*, 2017-1 U.S. Tax Cas. (CCH) P50,238, 2017 U.S. Dist. LEXIS 84117 (D.D.C. 2017), *appeal docketed*, No. 1:14-cv-01523 (D.D.C., Sept. 6, 2017). We included it because it had such a significant effect on tax administration (as discussed below) and because it was decided shortly after the end of the normal one-year period.

3 *King v. Comm'r*, 829 F.3d 795 (7th Cir. 2016), *rev'g* T.C. Memo 2015-36.

4 *King v. Comm'r*, T.C. Memo. 2015-36.

5 *Id*.

6 Internal Revenue Code (IRC) § 6404(e) provides for abatement of interest attributable to certain unreasonable errors and delays by the IRS, provided no significant aspect of such error or delay can be attributed to the taxpayer. Our discussion focuses on IRC § 6404(a), however, because IRC § 6404(e) does not apply to employment tax liabilities.

7 *H & H Trim & Upholstery Co. v. Comm'r*, T.C. Memo. 2003-9; *Law Offices of Michael B.L. Hepps v. Comm'r*, T.C. Memo. 2005-138 (abating interest that would not have accrued "but for" the Commissioner's mistake and was, therefore, unfair and excessive).

concluding that "but for" the IRS's mistake, interest would not have accrued between April 13, 2009, when the IRS processed his Forms 2504, and June 10, 2009, when he was first informed by TAS that his IA application was incomplete. It would be unfair for the IRS to collect the interest that accrued during this period. Thus, the IRS should have abated it as "excessive in amount."

The IRS appealed to the United States Court of Appeals for the Seventh Circuit. While the appeal was pending, Mr. King died and his wife did not defend the appeal. Circuit Court Judge Posner reversed the Tax Court. First, he criticized the Tax Court's definition of "excessive," concluding that because it provided "no guidance" it was "a monkey wrench tossed into the machinery of tax collection."[8] The opinion explained that the nebulous standard of "unfairness" could invite litigation and result in a significant loss of tax revenue. By contrast, Treas. Reg. § 301.6404–1(a) defines "excessive in amount" as "in excess of the correct tax liability," which the opinion said, leaves no room to consider "unfairness."[9] Because the interest in this case was properly calculated it was not excessive, according to the opinion. Thus, the IRS's determination not to abate interest was reasonable.

This case is significant because taxpayers in the Seventh Circuit may no longer be eligible for abatement of interest (or other amounts) on the basis that it is unfair. However, similarly situated taxpayers whose cases are appealable to other circuits may continue to be eligible for such abatements.

In *Tilden v. Commissioner*, the United States Court of Appeals for the Seventh Circuit held that a Stamps.com postmark affixed by the taxpayer's representative was sufficient to make a Tax Court petition timely under IRC § 7502 (*i.e.*, the mailbox rule) because it arrived at the Tax Court when it "ordinarily" would have if it had been mailed on or before the deadline.[10]

A taxpayer filed a petition with the Tax Court after the due date. Under IRC § 6213(a), the petition was due on the 90th day after the IRS mailed the statutory notice of deficiency, but the court actually received the petition on the 98th day. The taxpayer's representative applied a mailing label, postage, a postmark, and certified mail sticker to the petition dated as of the 90th day using a system from Stamps.com.[11] U.S. Postal Service (USPS) tracking information revealed that the envelope arrived at a USPS facility on the 92nd day.

Under the mailbox rule (codified at IRC § 7502), a petition that would otherwise be late, is deemed timely if it bears a U.S. postmark showing it was deposited in the mail on or before the deadline, assuming it is properly addressed and has sufficient postage. Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1) expressly authorizes reliance on a postmark "made other than by the U.S. Postal Service," provided the

8 *King*, 829 F.3d at 798. The opinion did not discuss how the IRS is able to apply "fairness" standards in other contexts. *See*, *e.g.*, IRC § 6015(f)(1) (providing for "innocent spouse" relief if "taking into account all the facts and circumstances, it is *inequitable* to hold the individual liable…" (Emphasis added)); Treas. Reg. § 301.7122-1(b)(3)(ii) (providing the IRS will compromise liabilities when "collection of the full liability would undermine public confidence that the tax laws are being administered in a *fair* and *equitable* manner." (Emphasis added)). Nor did the opinion discuss the legislative history of IRC § 6404, which suggests it was to be used to abate interest in situations where the failure to do so "would be widely perceived as grossly *unfair*." S. Rep. No. 99-313, at 208 (1986) (Emphasis added).

9 IRC § 6404(a)(3) provides for abatement of amounts "erroneously or illegally assessed." At oral argument, Judge Posner asked how the IRS's interpretation of "excessive in amount" would avoid making IRC § 6404(a)(3) redundant and superfluous. Oral Argument, Dkt No. 15-2439 (2016), http://media.ca7.uscourts.gov/sound/external/gw.15-2439.15-2439_05_27_2016.mp3. However, the written opinion does not address this question.

10 *Tilden v. Comm'r*, 846 F.3d 882 (7th Cir. 2017), *rev'g* T.C. Memo. 2015-188.

11 Stamps.com provides a user the ability to buy and print USPS-approved postage from the user's computer, then drop the mailing into a mailbox, hand it to a postal employee, or schedule a USPS pick-up through the software. *Tilden*, T.C. Memo. 2015-188, n.4.

postmark is legible and the envelope arrives when it would "ordinarily" arrive if actually mailed on that date. The taxpayer argued that his petition was timely because it bore a timely postmark and arrived when it ordinarily would.

When an item arrives later than it ordinarily would, Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(2) provides that the taxpayer only gets the benefit of the mailbox rule if he or she establishes that the item was placed in the mail within the filing deadline, that the mail was delayed, and identifies the cause of the delay. The IRS initially argued that the mailbox rule was inapplicable because the petition arrived after it ordinarily would, and the taxpayer had not identified the cause of the delay.

The Tax Court rejected both arguments. Under the "knockout" rule of Treas. Reg. §§ 301.7502-1(c)(1)(iii)(A) and -1(c)(1)(iii)(B)(3), when an item has both USPS and non-USPS postmarks, the non-USPS postmark is disregarded. The court concluded that the petition was late because it had two postmarks, one applied by the taxpayer's representative and another applied by the USPS (too late), which knocked out the representative's (timely) postmark. The court acknowledged that the USPS tracking data was not really a postmark, but cited other cases treating it as the functional equivalent of a USPS postmark.

The taxpayer filed a motion for reconsideration, at which point the IRS conceded that the taxpayer's petition was timely because it had been received within the time in which it "ordinarily" would if mailed timely. The Tax Court denied the motion, concluding that the filing deadline provided by IRC § 6213(a) was jurisdictional and the court's jurisdiction could not be conferred by mere concession of the parties.

The Seventh Circuit reversed, holding the petition was timely because the representative-applied postmark triggered the mailbox rule. It reasoned that the parties agreed the petition had arrived when it ordinarily would, and that there was no USPS postmark to trigger the knockout rule. It rejected the Tax Court's conclusion that the USPS tracking information was the functional equivalent of a postmark.

However, the Seventh Circuit agreed with the Tax Court that the filing deadline provided by IRC § 6213(a) was a jurisdictional limitation, rather than a procedural one.[12] This distinction is important because procedural deadlines may be subject to waiver, forfeiture, and equitable exceptions, but jurisdictional deadlines may not. Although the IRS could not waive a jurisdictional requirement, it could agree to facts — such as when a letter would "ordinarily" reach the Tax Court — that would trigger jurisdiction. The Stamps.com postmark was sufficient to trigger the mailbox rule and make the taxpayer's petition timely because the parties agreed the petition arrived at the Tax Court when it ordinarily would have if it had been mailed on or before the deadline.

This case is significant because it extends the statutory mailbox rule to self-service postmarking software.[13] The case is also significant because the IRS appears to have changed its position in multiple cases concerning when a document would "ordinarily" reach the Tax Court, and some of these cases

12 For a pointed critique of this part of the decision, see Carlton Smith, *Tilden v. Comm'r: Seventh Circuit Reverses Tax Court's Untimely Mailing Ruling*, Procedurally Taxing Blog (Jan. 16, 2017), http://procedurallytaxing.com/tilden-v-commr-seventh-circuit-reverses-tax-courts-untimely-mailing-ruling/.

13 The case does not address whether the rule applies to electronic communications such as fax or email. As the IRS increasingly encourages taxpayers to communicate with it electronically, the National Taxpayer Advocate has recommended that it clarify the mailbox rule applies to electronically-submitted documents. *See* National Taxpayer Advocate 2016 Annual Report to Congress 16-20 (Special Focus: IRS Future State: *The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*).

could reach circuit courts, potentially leading to additional decisions about whether equitable exceptions (*e.g.*, equitable tolling and the common law mailbox rule) apply to tax-related filing deadlines.[14]

In *QinetiQ U.S. Holdings v. Commissioner*, the United States Court of Appeals for the Fourth Circuit held that a statutory notice of deficiency was valid even though it did not include a "reasoned explanation" because the requirements of IRC § 7522(a) superseded the requirements of the Administrative Procedure Act (APA).[15]

After an audit, the IRS issued a statutory notice of deficiency to QinetiQ U.S. Holdings, Inc. (QinetiQ). The statutory notice of deficiency said only that a specific deduction QinetiQ had claimed "under the provisions of [IRC §] 83 is disallowed in full as you have not established that you are entitled to such a deduction."[16] QinetiQ argued, in part, that the statutory notice of deficiency failed to provide a reasoned explanation, which is necessary for a court to review a final agency action under § 706 of the Administrative Procedure Act (APA).[17] The IRS's failure to articulate a "reasoned explanation" rendered the statutory notice of deficiency invalid, according to QinetiQ.

In a short unpublished order, the Tax Court held that the statutory notice of deficiency was subject to the standard provided for in IRC § 7522(a) instead of the APA.[18] Section 7522(a) says a statutory notice of deficiency "shall describe the basis for, and identify the amounts (if any) of, the tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice. An inadequate description under the preceding sentence shall not invalidate such notice." Thus, even if the description was inadequate, the notice would have been valid under IRC § 7522(a).[19]

QinetiQ appealed to the United States Court of Appeals for the Fourth Circuit. It argued that the explanations required by IRC § 7522 and the APA were cumulative, not exclusive.

The Fourth Circuit disagreed with QinetiQ, affirming the Tax Court. It concluded the APA's requirement of a reasoned explanation does not apply to a statutory notice of deficiency issued by the IRS. Unlike other courts reviewing agency action under the APA, the Tax Court may conduct a *de novo* review of the agency's action under the IRC § 7522. The Tax Court may consider new evidence and issues not presented at the agency level. The broad scope of the Tax Court's review is incompatible with the limited judicial review of final agency actions allowed under the APA, according to the Fourth Circuit.

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14 One commentator has observed that there were several Tax Court cases in which the IRS initially moved to dismiss the case for lack of jurisdiction, but subsequently asked that the court not to dismiss because the IRS had relied on the wrong provision of the section 7502 regulations in its initial motion. *See* Carlton Smith, *Tax Court Won't Rule in Similar Stamps.com Mailing Label Cases Until the Seventh Circuit Rules in Tilden v. Comm'r*, Procedurally Taxing Blog (May 9, 2016), http://procedurallytaxing.com/tax-court-wont-rule-in-similar-stamps-com-mailing-label-cases-until-the-seventh-circuit-rules-in-tilden-v-commr/. In each of these cases, Chief Judge Thornton issued an order formally staying proceedings "pending the ultimate outcome in *Tilden*." *Id*.

15 *QinetiQ U.S. Holdings v. Comm'r*, 845 F.3d 555 (4th Cir. 2016), *aff'g*, T.C. Memo. 2015-123.

16 *Id.* at 561.

17 Administrative Procedure Act (APA), 5 U.S.C. § 706(1). For further discussion of this issue, *see*, *e.g.*, Steve Johnson, *Reasoned Explanation and IRS Determination*, 63 Duke. L. J. 1771 (2014); Patrick J. Smith, *The APA's Reasoned-Explanation Rule and IRS Deficiency Notices*, 134 Tax Notes 331 (Jan. 16, 2012).

18 Order, *QinetiQ U.S. Holdings v. Comm'r*, (Docket No. 14122-13) (Jan. 3, 2014), https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6178478.

19 If the IRS does not describe the "basis" for the adjustment in the statutory notice of deficiency, as required by IRC § 7522(a), the Tax Court has held that the burden of proof shifts to the IRS. *See Shea v. Comm'r*, 112 T.C. 183, 196 n.20 (1999), *nonacq.*, 2000-44 I.R.B. 430.

This case is significant because it answers the longstanding question about whether the APA requires a statutory notice of deficiency to provide a reasoned explanation. However, the Fourth Circuit's reasoning leaves the door open to the possibility that other IRS actions are subject to the reasoned explanation requirement of the APA, particularly if they are subject to more limited review, such as, for abuse of discretion.[20]

In *Summa Holdings v. Commissioner*, the United States Court of Appeals for the Sixth Circuit held that the IRS could not re-characterize a transaction under the substance-over-form doctrine because its form was its substance, even though its sole purpose was to reduce taxes.[21]

In 2002, the Benensons engaged in a multi-year scheme to transfer proceeds from the family-owned business, Summa Holdings, Inc. (Summa) to their sons' Roth Individual Retirement Accounts (IRAs). Investment earnings generally accumulate tax-free in IRAs, and in the case of Roth IRAs, a person can make tax-free withdrawals after attaining 59 ½ years of age.[22] But there are limits on how much an individual can contribute to a Roth IRA each year.[23] The scheme was designed to avoid these limits.

The scheme was also designed to reduce Summa's taxable income using a domestic international sales corporation (DISC). Congress created DISCs to subsidize exports. Commissions paid by the exporter to the DISC are deductible by the exporter and not taxable to the DISC.[24] As a result, they are not subject to corporate-level tax. Rather, commissions are taxable as dividends to the DISC's shareholders when distributed by the DISC, even if the shareholder is otherwise tax-exempt.[25]

To take advantage of these tax incentives, the sons' Roth IRAs formed a company that elected to be a DISC, and contributed the DISC stock to a holding company. Summa earned income from exports and paid the earnings to the DISC as commissions. The DISC distributed its commissions to the holding company. The holding company paid tax on the commissions and distributed the remaining proceeds to the Roth IRAs tax-free. Thus, the scheme avoided the Roth IRA contribution limits.

In 2004, the IRS issued Notice 2004-8, warning that schemes to avoid the Roth IRA contribution limits through the use of closely held corporations to make transfers at less than fair market value were "listed transactions," that it would challenge using the substance-over-form doctrine.[26] True to its word, in 2012, the IRS issued statutory notices of deficiency to Summa and the Benensons for tax year 2008. It determined that the commissions Summa paid to the DISC were, in substance, non-deductible dividends to Summa's shareholders, followed by contributions to the Roth IRAs. Accordingly, it proposed to assess the sons with excise tax on excess IRA contributions, and to assess Summa with additional income tax.

20 *See QinetiQ*, 845 F.3d at 561, n.6 (suggesting that unexplained agency actions may be invalid in "cases in which courts review agency action for abuse of discretion, rather than cases in which the tax court applies a *de novo* standard of review.").

21 *Summa Holdings, Inc. v. Comm'r*, 848 F.3d 779 (6th Cir. 2017), *rev'g* T.C. Memo. 2015-119.

22 IRC § 408A(d) (tax free withdrawals); IRC § 408(e)(1) (tax-exemption).

23 IRC §§ 408A(c)(2)-(3) (contribution limits). Excess contributions to a Roth IRA are subject to an annual excise tax. IRC § 4973.

24 The domestic international sales corporation (DISC) pays no tax on its commission income (up to $10,000,000). IRC §§ 991, 995(b)(1)(E). If the DISC does not distribute the commissions, its shareholders must pay annual interest on their shares of the deferred tax liability. IRC § 995(f).

25 IRC § 995(g).

26 Notice 2004-8, 2004-1 C.B. 333.

The taxpayers filed suit in the Tax Court. While acknowledging that there was no non-tax business purpose for any of the transactions, they argued that they had followed the law. The Tax Court agreed with the IRS. It said it was not disregarding the DISC, but merely re-characterizing the transaction to prevent abuse.[27]

The Sixth Circuit reversed, rejecting application of the substance-over-form doctrine. It reasoned that the taxpayers were using congressionally-designed tax incentives (*i.e.*, the DISC and IRA rules) that were based on form rather than substance. The court said the IRS was not merely disregarding artificial labels to recognize the economic substance of a transaction. It was substituting the Commissioner's artificial labels for the taxpayer's labels, explaining:

> It's one thing to permit the Commissioner to recharacterize the economic substance of a transaction — to honor the fiscal realities of what taxpayers have done over the form in which they have done it. But it's quite another to permit the Commissioner to recharacterize the meaning of statutes — to ignore their form, their words, in favor of his perception of their substance.[28]

The taxpayers had not used labels that did not equate with economic reality. The IRS's characterization did not capture economic reality any better than the taxpayers. The court worried: "[W]hat started as a tool to prevent taxpayers from placing labels on transactions to avoid tax consequences they don't like runs the risk of becoming a tool that allows the Commissioner to place labels on transactions to avoid textual consequences he doesn't like."[29]

The court observed that the IRS does not use the substance-over-form doctrine to reduce a taxpayer's liabilities in service of the broader purposes of the Code when a taxpayer's form does not meet the technical requirements. The IRS's approach made more sense before Congress decided to pursue a wide range of policy goals through the Code other than raising revenue, but today "[t]he Commissioner may not place *ad hoc* limits on them [tax incentives] by invoking a statutory purpose (maximizing revenue) that has little relevance to the text-driven function of these portions of the Code (minimizing revenue)."[30]

This case is significant because it illustrates the limits on the IRS's ability to use the substance-over-form doctrine to override the plain language of the tax code, even in cases where Congress created a loophole that it may not have intended.[31] These limits are particularly important in light of the relatively-new strict liability penalty that applies to transactions that lack economic substance.[32] This case also serves as a reminder that when a taxpayer is taking advantage of a tax incentive that is clearly provided by

27 *Summa Holdings*, T.C. Memo. 2015-119.

28 *Summa Holdings*, 848 F.3d at 785.

29 *Id.* at 787.

30 *Id.* at 789.

31 This decision is also consistent with the view that the business purpose doctrine is becoming a dead letter. *See, e.g.*, *Wells Fargo v. United States*, 2017–1 U.S. Tax Cas. (CCH) P50,235 (D. Minn. 2017) (concluding that a bank could deduct interest it paid on a loan even though it lacked any business purpose outside of the tax considerations).

32 IRC §§ 6662(b)(6) (20 percent penalty) and 6662(i) (40 percent penalty if not disclosed).

law, he or she does not need to have a non-tax business purpose for the form of the transaction to be respected for tax purposes.[33]

In *Mescalero Apache Tribe v. Commissioner*, the Tax Court held that an employer was entitled to discovery of information in the IRS's files concerning whether its workers paid their income taxes because the employer needed to defend against the IRS's assertion it was liable for their withholding taxes.[34]

After an audit of the Mescalero Apache Tribe (the Tribe), the IRS asserted that some of its workers were misclassified as independent contractors. Under IRC § 3402(a), an employer must withhold income taxes on the wages it pays to employees. Because the Tribe did not withhold on payments to the workers it classified as independent contractors, the IRS concluded that it was liable for their income tax withholding.[35]

Even if an employer fails to withhold, however, IRC § 3402(d) provides that the IRS cannot collect the withholding tax liability from the employer (but can collect penalties) if the workers have paid their income taxes. To take advantage of this exception, the Tribe obtained statements from many (but not all) of its workers on Form 4669, *Statement of Payments Received,* affirming that they paid their taxes. In litigation before the Tax Court, the Tribe sought discovery of the IRS's records to help establish that its workers had paid their taxes.

The IRS refused, arguing that it was barred from disclosing the workers' payment information because it is confidential "return information" under IRC § 6103. The Tribe countered that the exceptions in IRC § 6103(h)(4) authorize disclosure. IRC § 6103(h)(4)(C) permits disclosure in "judicial or administrative" proceedings pertaining to tax administration if the return information "directly relates" to a "transactional relationship" between a person who is a party to the proceeding and the taxpayer, and "directly affects" the resolution of an issue in the proceeding.

The court agreed with the Tribe. It concluded that (1) the relationship between an employer and its workers is transactional, (2) the Tribe was asking for information that directly relates to this relationship, and (3) whether the workers paid their taxes directly affects resolution of this case.

Next, the IRS argued that even if the workers' information could be disclosed, it was not discoverable because (1) the employer has the burden of proving its defense under IRC § 3402(d), and (2) allowing discovery would violate the rule that each party in civil litigation generally must bear the burden of financing his or her own suit. The Tax Court also rejected this argument.

The court reasoned that Tax Court Rule 70(b) says that relevant information is discoverable "regardless of the burden of proof involved." It also observed that IRC § 3402(d) says the employer's liability "shall not be collected from the employer," which at least "*implies* that the Commissioner should have some responsibility for reviewing his own records for the proof that the Tribe may not be liable for

33 However, IRC § 7701(o) states: "In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if — (A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction." Perhaps the economic substance doctrine is not "relevant" to tax incentives such as DISCs and individual retirement accounts (IRAs). For an argument that *Summa* should have been decided differently because the structure did not take advantage of the tax benefits of DISCs, see Vorris J. Blankenship, *Using DISCs to Avoid Roth IRA Limits: An Overlooked Fact in Summa*, 157 Tax Notes 973 (Nov. 13, 2017).

34 *Mescalero Apache Tribe v. Comm'r*, 148 T.C. No. 11 (2017).

35 *See* IRC § 3403.

withholding taxes."[36] For further support, the Tax Court cited a case from the Fifth Circuit where an employer was granted attorneys' fees because the IRS failed to search its own records for proof that a taxpayer did not owe withholding taxes before making a counter claim for them in litigation.[37]

The IRS did not cite Tax Court Rule 70(c), which limits discovery where it is unreasonably cumulative or unduly burdensome or if the information is more easily obtained from another source. However, the Tax Court said Rule 70(c) was inapplicable. It reasoned that the Tribe had "already exhausted its own ability to find its workers, and a request for return information for about only 70 payees is not particularly voluminous."[38] The IRS has downplayed the significance of this case by suggesting it only permits discovery of payment information in the Tax Court for the subset of workers that an employer cannot locate, and only after determining that it would not be overly burdensome for the IRS to obtain the information.[39]

This case is nonetheless significant because it establishes, for the first time, that employers can use the discovery process to defend against withholding tax liability in the Tax Court, at least after trying to obtain the information from their workers. Because IRC § 6103(h)(4) authorizes disclosure in "judicial or administrative" proceedings, this case also indicates that the IRS could help employers by providing them with tax payment information in similar cases at the "administrative" stage, such as in an audit or appeal. However, an attorney with the IRS Office of Chief Counsel has advised that the IRS is not required to do so.[40]

In addition, the decision is significant because it should prompt the IRS to search its databases to ensure it does not violate IRC § 3402(d) or taxpayer rights such as the *right to pay no more than the correct amount of tax*. If the IRS does not, the case may prompt employers to seek reimbursement for attorney fees incurred to defend against the IRS's attempt to collect amounts that a search of its records would have revealed could not be collected.

In *Whistleblower 21276-13W v. Commissioner*, the Tax Court held that criminal fines and civil forfeitures are included in the definition of "collected proceeds," which is used to compute whistleblower awards under the mandatory program.[41]

The petitioners filed Form 211, *Application for Award for Original Information*, with the IRS Whistleblower Office seeking mandatory awards authorized by IRC § 7623(b). As a result of the filing, a taxpayer pleaded guilty to a conspiracy to defraud the IRS (in violation of 18 U.S.C. § 371) by filing false returns and committing tax evasion. The IRS collected tax restitution, criminal fines, and civil forfeitures pursuant to 18 U.S.C. §§ 3571 and 981(a)(1)(A). The IRS agreed that the petitioners were entitled to a mandatory whistleblower award equal to 24 percent of the "collected proceeds" under IRC § 7623(b). However, it argued that criminal fines and civil forfeitures were not "collected proceeds" for purposes of computing the award.[42] The IRS's argument is consistent with Treas. Reg. § 301.7623-2(b),

36 *Mescalero Apache Tribe*, 148 T.C. No. 11 at n.6 (emphasis in the original).

37 *Id*. (citing *Jones v. United States*, 613 F.2d 1311 (5th Cir. 1980)).

38 *Id.* at n.7 (emphasis in the original).

39 Andrew Velarde & Matthew Madara, *Mescalero Not Expected to Open Floodgates for Return Disclosure*, 2017 TNT 93-5 (May 16, 2017). *See also* Chief Counsel Advice (CCA) 2017050511184404 (June 9, 2017).

40 *Id.*

41 *Whistleblower 21276-13W v. Comm'r*, 147 T.C. 121 (2016), *appeal docketed*, Docket No. 21276-13W (DC Cir. Apr. 21, 2017).

42 The IRS conceded that "the tax restitution payment qualified as collected proceeds (even though the restitution was made pursuant to 18 U.S.C. § 3556) because it was assessed as a tax and collected by the IRS under IRC § 6201(a)(4)." *Whistleblower 21276-13W*, 147 T.C. at 126 n.10.

which limits "collected proceeds" to "amounts collected under the provisions of title 26," but the regulation did not apply to this case.[43]

By way of background, the IRS has long had the authority to pay discretionary awards to whistleblowers under IRC § 7623(a) for the information it needed for: "(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the *internal revenue laws* or conniving at the same." (Emphasis added). IRC § 7623(a) states that these payments "shall be paid from the proceeds of amounts collected by reason of the information provided… ." In 2006, Congress created a mandatory awards program under IRC § 7623(b), which in certain circumstances requires the IRS to pay awards of between 15 and 30 percent of: "collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action."[44]

First, the IRS argued that criminal fines and civil forfeitures were not "collected proceeds" under IRC § 7623(b) because they were not assessed and collected under the "internal revenue laws," which it interpreted to mean Title 26. Second, it argued that if they were "collected proceeds," a conflict would be created between IRC § 7623(a), which allows the IRS to use them to pay whistleblowers, and other laws that earmark those funds for other purposes.[45] Finally, it argued that "collected proceeds" is limited to "penalties, interest, additions to tax, and additional amounts," which have specific meanings under Title 26.

The Tax Court held that the term "collected proceeds," as used in IRC § 7623(b), includes criminal fines and civil forfeitures under other titles. First, it reasoned that they can arise out of violations of "internal revenue laws" not found in Title 26. IRC § 7623(a) derives from legislation enacted in 1867.[46] It was amended in 1996 to clarify that awards could be paid for information leading to the detection of civil violations (not just criminal violations), and that the rewards would be paid out of the proceeds.[47] In 1867, Title 26 did not exist and the term "internal revenue laws" meant all revenue laws, including criminal laws. There are numerous instances of revenue laws that are not codified in Title 26.[48] Even today, IRC § 6531(8) refers to 18 U.S.C § 371 as an "internal revenue law."

Second, the Tax Court observed that only the discretionary award program under IRC § 7623(a) permits the IRS to pay whistleblowers out of what it collects. The mandatory award program under

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43 *Whistleblower 21276-13W*, 147 T.C. at 125 n.9 (the IRS "denied each petitioner's claim for an award on or about Aug. 13, 2013, and the parties agree that the regulations do not apply in these cases"); Treas. Reg. § 301.7623-1(f) ("This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.").

44 *Whistleblower 21276-13W*, 147 T.C. at 124 (citing the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. at 2958). One of the requirements to receive payment under the mandatory program is that "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000." IRC § 7623(b)(5)(B). But Congress did not tie this computation to collected proceeds, according to the court.

45 *Whistleblower 21276-13W*, 147 T.C. at 126 (citing 31 U.S.C. § 9705, which earmarks these amounts for the Department of the Treasury Forfeiture Fund).

46 *Id*. at 124 n. 8 (citing Act of Mar. 2, 1867, ch. 169 sec. 7, 14 Stat. 471, 473).

47 *Id*. (citing Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat. 1473 and H.R. Rept. No. 104-506, at 51 (1996)).

48 For example, relief from employment tax obligations is found in uncodified section 530 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. at 2885. Uncodified section 3463(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. at 767, requires the IRS to include on a notice of deficiency the last day on which the taxpayer may file a petition with the Tax Court. Even the law establishing the Whistleblower Office is not codified in Title 26. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, sec. 406(b), 120 Stat. at 2959-2960.

IRC § 7623(b) has no such provision. It simply measures the amount that the IRS must pay the whistleblower by reference to "collected proceeds." Thus, the court did not find a conflict.

Finally, the Tax Court observed that even if the phrase "penalties, interest, additions to tax, and additional amounts" has a special meaning, the definition of "collected proceeds" is not limited to these amounts because IRC § 7623(b) only says it "includes" them.[49] Under IRC § 7701(c) and various other authorities, "includes" does not mean "only includes." Thus, "collected proceeds" also includes amounts collected as a result of criminal fines and civil forfeitures.

This case is significant because it suggests that mandatory whistleblower awards under IRC § 7623(b) are not limited to a percentage of the "penalties, interest, additions to tax, and additional amounts" imposed under Title 26. The IRS must also pay whistleblowers a percentage of certain amounts collected under Title 31. Because the decision is based on the plain language of the statute, the more limited definition of collected proceeds provided by Treas. Reg. § 301.7623-2(b) may not be valid. Thus, this case suggests that collected proceeds may include penalties for failure to file Foreign Bank Account Reports (FBAR), as recommended by the National Taxpayer Advocate.[50] However, the court's reasoning suggests that "the proceeds of amounts collected" under IRC § 7623(a), the IRS's discretionary awards program, does not have the same meaning as "collected proceeds" under IRC § 7623(b) because it may not include amounts collected under Title 31.

The case is also significant to the extent it suggests that the IRS should be paying mandatory awards out of its appropriation.[51] If the IRS agreed, it would have an incentive to minimize mandatory whistleblower program awards.

In *Fleischer v. Commissioner*, the Tax Court held that the sole shareholder of an S corporation was liable for self-employment tax on income from the business.[52]

Mr. Fleischer, a licensed financial consultant, set up his business (called Fleischer Wealth Plan or FWP) as an S corporation. He was the president, secretary, treasurer and sole shareholder. Pursuant to an employment agreement, which he signed for both himself and FWP, FWP paid him a salary to represent FWP and conduct its business.

Mr. Fleischer signed contracts in his individual capacity to sell financial products for two financial service companies, Mass Mutual and Linsco/Private Ledger Financial Services (LPL). Mr. Fleisher's contracts generated commissions, which Mass Mutual and LPL reported to him on Forms 1099. He generally reported the commissions as nonpassive flow-through income on Schedule E, rather than as self-employment income on Schedule C. On audit, the IRS recharacterized the commissions as Mr.

49 The court found no conflict between this reasoning and its holding in *Whistleblower 22716-13W v. Commissioner*, 146 T.C. 84 (2016), wherein it held that foreign bank accounts report (FBAR) proceeds are *excluded* in determining whether the whistleblower meets the threshold for receiving a mandatory whistleblower award based on a determination that the "the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000," under IRC § 7623(b)(5)(B).

50 National Taxpayer Advocate 2015 Annual Report to Congress 419-25 (Legislative Recommendation: *Amend IRC §§ 7623 and 6103 to Provide Consistent Treatment of Recovered Foreign Account Tax Compliance Act (FATCA) and Report of Foreign Bank and Financial Accounts (FBAR) Penalties for Whistleblower Award Purposes*).

51 The IRS currently pays all awards out of collected proceeds. *See*, *e.g.*, Internal Revenue Manual (IRM) 25.2.2.13(1) (Aug. 7, 2015) ("Whistleblower awards are paid from collected proceeds").

52 *Fleischer v. Comm'r*, T.C. Memo. 2016-238.

Fleisher's earnings from self-employment, which were subject to self-employment taxes.[53] The Tax Court agreed with the IRS.

A service provider generally cannot avoid self-employment taxes by organizing a business as a wholly-owned partnership or limited liability company (LLC).[54] However, self-employment taxes generally do not apply if the service provider organizes his or her business as an S corporation.[55]

Although Mr. Fleisher organized FWP as an S corporation, the court concluded that he, and not FWP, should be taxed on the income because he was the one who "control[led] the earning of the income."[56] According to the court, income belongs to a corporation, rather than a service provider, only if (1) the service provider is an employee whom the corporation can "direct and control in a meaningful sense," and (2) the service recipient(s) sign(s) a "contract or similar indicium recognizing the corporation's controlling position."[57] Applying the second prong, the court found no indication that Mass Mutual or LPL recognized FWP's controlling position. The court did not reach the first prong of the test (*i.e.*, FWP's meaningful control of Mr. Fleisher).

This case serves as a reminder that when a tax result depends on the form of a transaction, it is particularly important for taxpayers to use the proper form. The case is significant because it highlights the need for clear and consistent rules about when self-employment taxes apply — clarity that becomes even more important as more workers become self-employed.[58]

In *Biggers v. IRS*, the U.S. District Court for the Middle District of Tennessee held that a tax debt shown on a late-filed tax return may be subject to discharge in bankruptcy, even if the late return is identical to the IRS's substitute for return, provided it represents a subjectively reasonable attempt to satisfy the law.[59]

After the Biggers failed to file timely federal tax returns for 2001-2004, the IRS filed substitute for returns (SFRs) assessing tax against Mr. Biggers. The Biggers said their returns had been delayed

53 For 2017, the self-employment tax rate is 12.4 percent for Social Security, 2.9 percent for Medicare, and an additional 0.9 percent tax applies to self-employment income in excess of $250,000 (if married filing jointly, $200,000 if single). IRC § 1401. Thus, the total self-employment tax burden can be as high as 16.2 percent before considering the deduction for one-half of the self-employment tax as permitted by IRC § 164(f).

54 Under IRC § 1402, a partner's distributive share of partnership income is included in self-employment income, but IRC § 1402(a)(13) provides an exception for a limited partner's distributive share of partnership income (other than guaranteed payments). However, IRC § 1402(a)(13) generally does not apply when the limited partner has management powers, particularly if his or her services generated the income. *See*, *e.g.*, *Renkemeyer, Campbell & Weaver, LLP v Comm'r*, 136 T.C. 137 (2011). Moreover, IRC § 1402(a)(13) generally does not apply to members of limited liability companies (LLC) because they are not limited partners and may have management powers. *See Riether v. United States*, 919 F. Supp. 2d 1140 (D. N.M. 2012). For a discussion of other relevant authorities, *see* CCA 2014-36049 (May 20, 2014).

55 *See* Rev. Rul. 59-221, 1959-1 C.B. 225. The IRS proposed regulations in 1997 that would have harmonized the treatment of service providers in Limited Liability Partnerships and LLCs, but they expired in 1998 after Congress imposed a temporary moratorium on finalizing them, as described in CCA 2014-36049 n.3 (May 20, 2014). However, the proposed rules did not apply to S corporations. For further discussion of this dichotomy, *see*, *e.g.*, Tony Nitti, *IRS: Partners' Share of LLC Income Is Subject to Self-Employment Tax*, Forbes (Sept. 10, 2014, 11:28 AM), http://www.forbes.com/sites/anthonynitti/2014/09/10/irs-partners-share-of-llc-income-is-subject-to-self-employment-tax/#42bf0e1676da.

56 *Fleischer*, T.C. Memo. 2016-238 at 10 (citing a two-part test set forth in *Johnson v. Comm'r*, 78 T.C. 882, 891 (1982)).

57 *Id*. (citing *Johnson*, 78 T.C. at 891; Treas. Reg. § 31.3121(d)-1(c)(2), and *Sargent v. Comm'r*, 929 F.2d 1252, 1256 (8th Cir. 1991)).

58 *See*, *e.g.*, *The Sharing Economy: A Taxing Experience for New Entrepreneurs: Hearing Before the H. Comm. on Small Business*, 114th Cong. (May 26, 2016) (statement of Nina E. Olson, National Taxpayer Advocate); Emilie Jackson *et. al.*, Treasury Department, Office of Tax Analysis, Working Paper 114, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage* (Jan. 2017).

59 *Biggers v. IRS*, 557 B.R. 589 (M.D. Tenn. 2016).

because their records were seized by a bank, they had moved 11 times, and had been deceived by a tax return preparation firm. In 2007, the Biggers filed joint returns for each of the years at issue. More than two years later, they filed for bankruptcy, seeking to discharge their tax debts.

A taxpayer may not discharge in bankruptcy tax liabilities "with respect to which a return … was not filed or given."[60] Whether a document is a return for tax purposes depends on whether it satisfies the *Beard* test, which requires that it be, among other things, an honest and reasonable attempt to satisfy the law.[61] In 2005, Congress attempted to clarify the bankruptcy discharge rules by amending 11 U.S.C. § 523(a) to include a so-called "hanging paragraph."[62] This paragraph defines a "return" as "a return that satisfies the requirements of applicable non-bankruptcy law (including applicable filing requirements)."

Some courts have suggested that a late-filed return that mirrors a SFR and, thus, serves no tax purpose could, nonetheless, be treated as a return under the (subjective) *Beard* test, if it is an "honest and reasonable attempt" to satisfy the law.[63] Others have suggested that a filing that mirrors an SFR could not be a return under the (objective) *Beard* test because it could not be an honest and reasonable attempt to satisfy the law.[64] Still others have held that such a filing could not be a return for purposes of the "hanging paragraph" because it could not satisfy the "applicable filing requirements."[65]

Applying the *Beard* test, the Bankruptcy Court held that the Biggers late-filed returns, which reflected amounts previously assessed by the IRS, were not returns. It reasoned that they could not be reasonable attempts to satisfy the law under *Beard* because they served no purpose (the objective test). Accordingly, the self-assessed liabilities reflected on them were non-dischargeable.

The district court agreed that the hanging paragraph did not displace the *Beard* test, but reversed and remanded. It observed that late-filed returns can serve a tax purpose because the IRS requires them to be filed before it will consider a taxpayer's offer in compromise.[66] Thus, even an objective version of the *Beard* test would not necessarily require the court to conclude the filings were not returns. However, it observed that the Tax Court generally describes the *Beard* test as requiring an inquiry into the filer's subjective intent. Thus, it remanded the case so that the Bankruptcy Court could make such an inquiry.

60 11 U.S.C. § 523(a)(1)(B)(i). Tax liabilities on a late return that was filed within two years of the bankruptcy petition are also exempt from discharge. 11 U.S.C. § 523(a)(1)(B)(ii).

61 *Beard v. Comm'r*, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986) (applying a test set forth in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934)).

62 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 714, 119 Stat. 23, 128 (2005) (modifying 11 U.S.C. § 523(a)).

63 *See In re Biggers*, 528 B.R. 870, 872 (Bankr. M.D. Tenn. 2015), *rev'd*, *Biggers*, 557 B.R. 589 (M.D. Tenn. 2016) (compiling cases). Some courts have recently concluded that a taxpayer does not make an honest and reasonable attempt to satisfy the law when his filing is significantly delinquent, particularly if there is no good reason for the delay. *See, e.g.*, *Giacchi v. United States*, 856 F.3d 244 (3d Cir. 2017); *In re Smith*, 828 F.3d 1094 (9th Cir. 2016). We cover *Biggers*, rather than *Smith* or *Giacchi* because *Biggers* discusses both the objective and subjective versions of the *Beard* test.

64 *United States v. Hindenlang*, 164 F.3d 1029 (6th Cir. 1999).

65 *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014). For a summary of *In re Mallo*, see National Taxpayer Advocate 2015 Annual Report to Congress 431, 437 (*Significant Cases*).

66 Treas. Reg. § 301.7122-1(d).

This case is significant because it shows that taxpayers who file returns that reflect amounts already assessed on SFRs may be subject to discharge in some jurisdictions but not in others. The National Taxpayer Advocate has recommended legislation that would establish a uniform rule.[67]

In *United States v. Bohanec*, the United States District Court for the Central District of California held that a taxpayer may be subject to the penalty for "willfully" failing to file a Foreign Bank Account Report (FBAR) even if the government only proves the failure was reckless by a preponderance of the evidence.[68]

Mr. and Mrs. Bohanec were naturalized citizens who ran a successful U.S. camera shop in the 1970s. In the early 1980s, they began to broker international camera sales, depositing their commissions into an offshore account at UBS. In the late 1980s, they closed the shop, but continued brokering international sales. In 2000, they also began selling cameras on eBay.

The Bohanecs' tax return for 1998 included Schedule B, which asks about foreign bank accounts and refers to the Foreign Bank Account Report (FBAR) filing requirement. Between 1998 and 2011, however, they did not file returns or FBARs. The Bohanecs would occasionally withdraw money from their UBS account and deposit it into bank accounts in Austria and Mexico.

In 2010, the Bohanecs applied to the IRS's offshore voluntary disclosure program (OVDP). As part of that process, they filed FBARs and tax returns for 2003-2008, which disclosed the UBS account. Because those filings did not disclose their accounts in Mexico or Austria, and omitted unreported income from internet sales, the IRS rejected their application and audited their returns.

In 2013, the IRS assessed additional taxes and penalties, including fraud penalties for 2003-2010. For 2007, the IRS also sought to impose a penalty for the Bohanecs' willful failure to report the UBS account on an FBAR.

The Bohanecs argued that to apply the penalty for willfully failing to file an FBAR, the IRS must show they were not just reckless but that they intentionally violated a known legal duty. They cited both the Supreme Court's decision in *Ratzlaf* and the Internal Revenue Manual (IRM).[69] They also asserted the government must prove willfulness by clear and convincing evidence, rather than a mere preponderance of the evidence, citing IRS Chief Counsel Advice (CCA) 2006-03026 (Jan. 30, 2006).

Government attorneys argued and the district court agreed that in the context of a civil FBAR penalty, willfulness includes merely reckless conduct, which the government only needs to establish by a preponderance of the evidence. The court discounted the IRM and CCA as non-precedential, and distinguished *Ratzlaf* as inapplicable to civil penalties.[70] It applied the preponderance standard

67 *See* National Taxpayer Advocate 2014 Annual Report to Congress 417-22 (Legislative Recommendation: *Clarify the Bankruptcy Law Relating to Obtaining a Discharge*).

68 *United States v. Bohanec*, 118 A.F.T.R.2d (RIA) 26757 (C.D. Cal. 2016).

69 *See Ratzlaf v. United States*, 510 U.S. 135 (1994) (holding that the government's showing that a defendant was aware of the reporting requirements and intentionally avoided them was insufficient to establish that he willfully violated the prohibition on structuring transactions to avoid the reporting requirements); IRM 4.26.16.4.5.3 (July 1, 2008).

70 The court cited *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007) for the proposition that in civil cases willfulness may include recklessness.

because it said the clear and convincing standard only applies in civil cases where particularly important individual interests or rights are at stake.[71]

The district court found that the Bohanecs were reasonably sophisticated because they successfully operated a camera business. The court also focused on the actions they took to conceal their foreign accounts, including: their incorrect OVDP submissions, their failure to tell anyone (including a preparer) other than their children about the UBS account, their failure to inform UBS of their home address, their failure to consult a lawyer or accountant about the UBS account, their failure to keep books, and their unconvincing assertion that they thought they did not have to report the UBS account because the money would be used for retirement.

This case is significant because it provides much-needed guidance about the facts that could lead a court to apply the FBAR penalty for willful violations. Some observers have noted, however, that the decision may make it more difficult for taxpayers to participate in the IRS's streamlined offshore filing compliance programs because those programs require taxpayers to certify that their violations were non-willful.[72] In addition, the case provides a reminder that government litigators and courts may ignore legal conclusions set forth in the IRM and CCAs. The National Taxpayer Advocate has urged the IRS to issue more authoritative guidance in this area.[73]

In *Steele v. United States*, the United States District Court for the District of Columbia held that the IRS does not have the authority to charge for preparer tax identification numbers (PTINs).[74]

The plaintiffs filed a class action suit challenging the validity of regulations requiring tax return preparers to pay fees for PTINs. Both parties moved for partial summary judgment.

Before 2010, anyone could prepare and file a tax return on behalf of someone else. In 2010, the government began to regulate return preparers, requiring among other things, that they must have a

71 The court did not discuss *Addington v. Texas*, 441 U.S. 418 (1979) or *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966), which suggest the clear and convincing standard is applicable in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing. Nor did it mention that the clear and convincing standard generally applies to civil tax fraud penalties under IRC §§ 6663 and 6701. For further discussion of this issue, see National Taxpayer Advocate 2017 Objectives Report to Congress 164, 171-76 (Area of Focus: *The IRS's Offshore Voluntary Disclosure (OVD)-Related Programs Have Improved, But Problems Remain*).

72 *See* Nathan Richman, *District Decision on FBAR Willfulness Standard Set for Appeal*, 2016 TNT 241-3 (Dec. 13, 2016). The IRS has defined willfulness for this purpose as "negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of law." IRS, *U.S. Taxpayers Residing in the United States* (Feb. 22, 2017), https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-in-the-united-states.

73 *See, e.g.*, National Taxpayer Advocate 2017 Objectives Report to Congress 164, 171-76 (Area of Focus: *The IRS's Offshore Voluntary Disclosure (OVD)-Related Programs Have Improved, But Problems Remain*).

74 *Steele v. United States*, 2017-1 U.S. Tax Cas. (CCH) P50, 238, 2017 U.S. Dist. LEXIS 84117 (D.D.C. 2017), *appeal docketed*, No. 1:14-cv-01523 (D.D.C., Sept. 6, 2017).

PTIN that they applied for and received after paying a user fee.[75] The IRS began to charge for the initial PTIN registration fee and for each annual renewal.[76]

In 2014, the United States Court of Appeals for the District of Columbia Circuit held in *Loving* that the Treasury Department lacked authority to regulate the conduct of registered tax return preparers.[77] Following *Loving*, the only remaining parts of the new regulatory scheme were the requirements to (1) obtain and use PTINs, and (2) pay PTIN fees.

IRC § 6109(d) authorizes the IRS to issue regulations requiring the exclusive use of PTINs. It provides that social security numbers (SSNs) "shall, *except as shall otherwise be specified under regulations of the Secretary*, be used as the identifying number for such individual for purposes of this title." (Emphasis added). The IRS's regulations justified the exclusive use of PTINs, explaining that a single number would, among other things, "enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients."[78] Thus, the United States District Court for the District of Columbia concluded that the IRS had provided a reasonable explanation of its decision to require the exclusive use of PTINs, and declined to set aside the requirement as arbitrary and capricious.

Next, the court turned to the IRS's authority to charge PTIN fees. Under the Independent Offices Appropriation Act of 1952 (IOAA), agencies may only establish a fee "for a service or thing of value provided by the agency."[79] The IOAA only permits agencies to charge for special benefits that are voluntarily requested and are not shared by the general public.[80] The IRS argued that in promulgating the user fee regulations, it had determined that a PTIN is a "service or thing of value" because "without a PTIN, a tax return preparer could not receive compensation for preparing" a return or claim for refund.[81] In related regulations, the IRS had also determined that PTINs would "help maintain the confidentiality of SSNs," which the IRS argued was also a valuable benefit.[82]

First, the court concluded that if every member of the public could obtain a PTIN, as they could after *Loving*, the IRS was not providing a special benefit that was not available to the general public. The court explained:

> Hypothetically, every member of the public could obtain a PTIN, which means that every member of the public would also get the supposed "benefit" …. There is therefore no special

75 *Furnishing Identifying Number of Tax Return Preparer*, T.D. 9501, 75 Fed. Reg. 60,309, 60,315 (Sept. 30, 2010); Treas. Reg. § 1.6109-2(d) ("Beginning after December 31, 2010, all tax return preparers must have a preparer tax identification number or other prescribed identifying number that was applied for and received at the time and in the manner, including the payment of a user fee, as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance… to obtain a preparer tax identification number or other prescribed identifying number, a tax return preparer must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer authorized to practice before the Internal Revenue Service under 31 U.S.C. 330 and the regulations thereunder."). The IRS also required individuals other than attorneys and Certified Public Accountants to pass a one-time competency exam and suitability check, and fulfill continuing education requirements. 31 C.F.R. §§ 10.4-10.6.

76 *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, T.D. 9503, 75 Fed. Reg. 60,316 (Sept. 30, 2010).

77 *Loving v. Comm'r*, 742 F.3d 1013 (D.C. Cir. 2014), *aff'g* 920 F. Supp. 2d 108 (D.D.C. 2013).

78 *Furnishing Identifying Number of Tax Return Preparer*, TD 9501, 75 FR 60309, 60314 (Sept. 30, 2010).

79 31 U.S.C. § 9701(b).

80 *See Nat'l Cable Television Assn. v. United States*, 415 U.S. 336 (1974).

81 *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, T.D. 9503, 75 Fed. Reg. 60,316, 60,317 (Sept. 30, 2010).

82 *Furnishing Identifying Number of Tax Return Preparer*, T.D. 9501, 75 Fed. Reg. 60,309, 60,310 (Sept. 30, 2010).

> benefit for certain individuals not available to the general public. It seems that if a benefit exists, it inures to the IRS, who, through the use of PTINs, may better identify and keep track of tax return preparers and the returns that they have prepared.[83]

The court acknowledged the IOAA permits agencies to charge a fee for services necessary to comply with valid licensing requirements and get a license.[84] However, it reasoned that such fees are only authorized if the agency is authorized to issue a valid license that not everyone can obtain.

The government argued that the fact that anyone may obtain a PTIN is irrelevant because anyone may enter a national park if they pay the fee. However, the court distinguished park entrance fees on the basis that those fees are specifically authorized by another statute (not the IOAA).[85] The fact that such specific authorization was necessary suggested that general entrance fees would not be authorized under the IOAA, according to the court.

The court acknowledged that the Eleventh Circuit Court of Appeals had upheld the initial PTIN fee in *Brannen,* and that a district court had followed *Brannen* to uphold the PTIN renewal fee in *Buckley*.[86] It distinguished *Brannen* on the basis that it was decided before the United States Court of Appeals for the District of Columbia rendered its decision in *Loving*, and disagreed with *Buckley's* conclusion that the outcome of *Loving* was irrelevant.

Finally, the court discounted the alleged benefit to PTIN applicants of being able to protect the confidentiality of their SSNs. It observed that the regulations did not indicate that SSNs were being inadvertently disclosed or that their confidentiality was at risk. Accordingly, it held that because PTINs are not a "service or thing of value," the IRS may not charge fees for issuing them and the regulations requiring payment of fees for PTINs are unlawful.

This case is significant to the extent it suggests the IOAA does not authorize the IRS to charge fees for fundamental government services that anyone can obtain by merely paying a fee.[87] It is unclear if the case goes that far, however, because under that rationale any SSN-masking benefit of PTINs, which anyone could obtain, should not have been relevant to the outcome. Nonetheless, the decision could prompt challenges to other fees for IRS services that anyone may obtain. The decision is also significant because the IRS may have to refund the PTIN fees that it has collected.[88] It began issuing PTINs without charge on June 21, 2017.[89]

83 *Steele*, 2017 U.S. Dist. LEXIS 84117, at *33.

84 *Id. at* *26-29 (citing *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. 1994); *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179 (D.C. Cir. 1996); *Elec. Indus Ass'n v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976)).

85 16 U.S.C. § 6802(a).

86 *See Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012); *Buckley v. United States*, 2013 U.S. Dist. LEXIS 184758 (N.D. Ga. 2013).

87 For a discussion of related issues, see, e.g., National Taxpayer Advocate 2015 Annual Report to Congress 14-22 (Most Serious Problem: *The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*); National Taxpayer Advocate Memo to Associate Chief Counsel (Procedure and Administration), *Comments on User Fees for Offers in Compromise* (Nov. 28, 2016), https://www.regulations.gov/document?D=IRS-2016-0038-0003.

88 *See, e.g.*, William Hoffman, *IRS Suspends PTIN Registrations and Renewals after Court Holding*, 2017 TNT 107-3 (June 6, 2017); William Hoffman, *Court Strikes Down IRS PTIN Fees; Agency Could Owe Millions*, 2017 TNT 106-3 (June 5, 2017).

89 *See* IRS, *IRS Reopening Preparer Tax Identification Number (PTIN) System* (June 21, 2017), https://www.irs.gov/tax-professionals/irs-reopening-preparer-tax-identification-number-ptin-system.

MLI #1

Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

SUMMARY

Internal Revenue Code (IRC) § 6662(b)(1) and (2) authorizes the IRS to impose a penalty if a taxpayer's negligence or disregard of rules or regulations causes an underpayment of tax required to be shown on a return, or if an underpayment exceeds a computational threshold called a substantial understatement, respectively. IRC § 6662(b) also authorizes the IRS to impose the accuracy-related penalty on an underpayment of tax in six other circumstances.[1]

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

The amount of an accuracy-related penalty equals 20 percent of the portion of the underpayment attributable to the taxpayer's negligence or disregard of rules or regulations, or to a substantial understatement.[3] An underpayment is the amount by which any tax imposed by the IRC exceeds the excess of:

> The sum of (A) the amount shown as the tax by the taxpayer on his return, plus (B) amounts not shown on the return but previously assessed (or collected without assessment), over the amount of rebates made.[4]

In computing the amount of underpayment for accuracy-related penalty purposes, Congress changed the law in 2015 to provide that the excess of refundable credits over the tax is taken into account as a negative

1 Internal Revenue Code (IRC) § 6662(b)(3) authorizes a penalty for any substantial valuation misstatement under chapter 1 (IRC §§ 1-1400U-3); IRC § 6662(b)(4) authorizes a penalty for any substantial overstatement of pension liabilities; IRC § 6662(b)(5) authorizes a penalty for any substantial estate or gift tax valuation understatement; IRC § 6662(b)(6) authorizes a penalty when the IRS disallows the tax benefits claimed by the taxpayer when the transaction lacks economic substance; IRC § 6662(b)(7) authorizes a penalty for any undisclosed foreign financial asset understatement; and IRC § 6662(b)(8) authorizes a penalty for any inconsistent estate basis. IRC § 6662(b)(8) was added by the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2004(c)(1), 129 Stat. 443, 456 (2015). We have chosen not to cover the IRC § 6662(b)(3)-(8) penalties in this report, as these penalties were not litigated nearly as often as IRC § 6662(b)(1) and 6662(b)(2) during the period we reviewed.

2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

3 IRC § 6662(b)(1) (negligence/disregard of rules or regulations); IRC § 6662(b)(2) (substantial understatement of income tax).

4 IRC § 6664(a).

amount.[5] Therefore, for returns filed after December 18, 2015, or for returns filed on or before that date for which the period of limitations on assessment under IRC § 6501 has not expired, a taxpayer can be subject to an IRC § 6662 underpayment penalty based on a refundable credit that reduces tax below zero.

The IRS may assess penalties under IRC § 6662(b)(1) and 6662(b)(2), but the total penalty rate generally cannot exceed 20 percent (*i.e.*, the penalties are not "stackable").[6] Generally, taxpayers are not subject to the accuracy-related penalty if they establish that they had reasonable cause for the underpayment and acted in good faith.[7]

Negligence

The IRS may impose the IRC § 6662(b)(1) negligence penalty if it concludes that a taxpayer's negligence or disregard of the rules or regulations caused the underpayment. A taxpayer will be subject to the negligence component of the penalty only on the portion of the underpayment attributable to negligence. If a taxpayer wrongly reports multiple sources of income, for example, some errors may be justifiable mistakes, while others might be the result of negligence; the penalty applies only to the latter.

Negligence is defined to include "any failure to make a reasonable attempt to comply with the provisions of this title, and the term 'disregard' includes any careless, reckless, or intentional disregard."[8] Negligence includes a failure to keep adequate books and records or to substantiate items that give rise to the underpayment.[9] Strong indicators of negligence include instances where a taxpayer failed to report income on a tax return that a payor reported on an information return,[10] as defined in IRC § 6724(d)(1),[11] or failed to make a reasonable attempt to ascertain the correctness of a deduction, credit, or exclusion.[12] The IRS can also consider various other factors in determining whether the taxpayer's actions were negligent.[13]

Substantial Understatement

Generally, an "understatement" is the difference between (1) the correct amount of tax and (2) the tax reported on the return, reduced by any rebate.[14] Understatements are further reduced by the portion

5 IRC § 6664(a). Prior to December 18, 2015, refundable credits could not reduce below zero the amount shown as tax by the taxpayer on a return. See *Rand v. Comm'r*, 141 T.C. 376 (2013). On December 18, 2015, Congress enacted a law that reversed the Tax Court's decision in *Rand* and amended IRC § 6664(a) to be consistent with the rule of IRC § 6211(b)(4). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title II, § 209, 129 Stat. 2242, 3084 (2015).

6 Treas. Reg. § 1.6662-2(c). The penalty rises to 40 percent if any portion of the underpayment is due to a gross valuation misstatement (IRC § 6662(h)(1); Treas. Reg. § 1.6662-5(a)), a nondisclosed noneconomic substance transaction (IRC § 6662(i)(1)), or an undisclosed foreign financial asset understatement (IRC § 6662(j)(3)).

7 IRC § 6664(c)(1).

8 IRC § 6662(c).

9 Treas. Reg. § 1.6662-3(b)(1).

10 Treas. Reg. § 1.6662-3(b)(1)(i). But see *Portillo v. Comm'r*, 928 F.2d 1128 (5th Cir. 1991), *rev'g in part*, *aff'g in part*, *remanding* T.C. Memo. 1990-68, which involved an assessment based solely on an information return submitted by a third party and held that the presumption of correctness does not apply to the IRS's deficiency assessment in a case involving unreported income if the IRS cannot present any evidence supporting the determination.

11 IRC § 6724(d)(1) defines an information return by cross-referencing various other sections of the IRC that require information returns (*e.g.*, IRC § 6724(d)(1)(A)(ii) cross-references IRC § 6042(a)(1) for reporting of dividend payments).

12 Treas. Reg. § 1.6662-3(b)(1)(ii).

13 These factors include the taxpayer's history of noncompliance; the taxpayer's failure to maintain adequate books and records; actions taken by the taxpayer to ensure the tax was correct; and whether the taxpayer had an adequate explanation for underreported income. Internal Revenue Manual (IRM) 4.10.6.2.1, *Negligence* (May 14, 1999). *See also* IRM 20.1.5.2.2, *Common Features of Accuracy-Related and Civil Fraud Penalties* (Dec. 13, 2016).

14 IRC § 6662(d)(2)(A)(i)-(ii).

attributable to (1) an item for which the taxpayer had substantial authority or (2) any item for which the taxpayer, in the return or an attached statement, adequately disclosed the relevant facts affecting the item's tax treatment and the taxpayer had a reasonable basis for the tax treatment.[15] For individuals, the understatement of tax is substantial if it exceeds the greater of $5,000 or ten percent of the tax that must be shown on the return for the taxable year.[16] For corporations (other than S corporations or personal holding companies), an understatement is substantial if it exceeds the lesser of ten percent of the tax required to be shown on the return for the taxable year (or, if greater, $10,000), or $10,000,000.[17]

For example, if the correct amount of tax is $10,000 and an individual taxpayer reported $6,000, the substantial underpayment penalty under IRC § 6662(b)(2) would not apply because although the $4,000 shortfall is more than ten percent of the correct tax, it is less than the fixed $5,000 threshold. Conversely, if the same individual reported a tax of $4,000, the substantial understatement penalty would apply because the $6,000 shortfall is more than $5,000, which is the greater of the two thresholds.

Reasonable Cause and Good Faith

The accuracy-related penalty does not apply to any portion of an underpayment where the taxpayer acted with reasonable cause and in good faith.[18] A reasonable cause determination takes into account all of the pertinent facts and circumstances.[19] Generally, the most important factor is the extent to which the taxpayer made an effort to determine the proper tax liability.[20] Reliance on a return preparer may constitute reasonable cause and good faith if the reliance was reasonable and the taxpayer acted in good faith.[21] *Neonatology Associates v. Commissioner* establishes the three-part test for reasonable reliance on a tax professional in accuracy-related penalty cases:

(1) The adviser was a competent professional who had sufficient expertise to justify reliance;

(2) The taxpayer provided necessary and accurate information to the adviser; and

(3) The taxpayer actually relied in good faith on the adviser's judgment.[22]

Reasonable Basis

An understatement of tax may be reduced by any portion of the understatement attributable to an item for which the tax treatment is adequately disclosed and supported by a reasonable basis.[23] This standard is met if the taxpayer's position reasonably relies on one or more authorities listed in Treas. Reg. § 1.6662-4(d)(3)(iii).[24] Applicable authority could include information such as sections of the IRC; proposed, temporary, or final regulations; revenue rulings and revenue procedures; tax treaties and

15 IRC § 6662(d)(2)(A)(i) - (ii). No reduction is permitted, however, for any item attributable to a tax shelter. *See* IRC § 6662(d)(2)(C)(i). If a return position is reasonably based on one or more of the authorities set forth in Treas. Reg. § 1.6662-4(d)(3)(iii), the return position will generally satisfy the reasonable basis standard. This may be true even if the return position does not satisfy the substantial authority standard found in Treas. Reg. § 1.6662-4(d)(2). *See* Treas. Reg. § 1.6662-3(b)(3).

16 IRC § 6662(d)(1)(A)(i)-(ii).

17 *Id.* S corporations and personal holding companies are subject to the same thresholds as individuals and all other non-C corporation taxpayers, found in IRC § 6662(d)(1)(A)(i)-(ii).

18 IRC § 6664(c)(1).

19 Treas. Reg. § 1.6664-4(b)(1).

20 *Id.*

21 Treas. Reg. § 1.6664-4(b).

22 115 T.C. 43, 99 (2000) (citations omitted), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

23 IRC § 6662(d)(2)(B)(ii)(I), (II).

24 Treas. Reg. § 1.6662-3(b)(3).

regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; and congressional intent as reflected in committee reports.[25]

Penalty Assessment and the Litigation Process

In general, the IRS proposes the accuracy-related penalty as part of its examination process[26] and through its Automated Underreporter (AUR) computer system.[27] Before a taxpayer receives a notice of deficiency, he or she generally has an opportunity to engage the IRS on the merits of the penalty.[28] Once the IRS concludes an accuracy-related penalty is warranted, it must follow deficiency procedures (*i.e.*, IRC §§ 6211-6213).[29] Thus, the IRS must send a notice of deficiency with the proposed adjustments and inform the taxpayer that he or she has 90 days to petition the United States Tax Court to challenge the assessment.[30] Alternatively, taxpayers may seek judicial review through refund litigation.[31] Under certain circumstances, a taxpayer can request an administrative review of IRS collection procedures (and the underlying liability) through a Collection Due Process hearing.[32]

IRC § 6751(b)(1) provides the general rule that no penalties may be assessed "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." However, IRC § 6751(b)(2)(B) provides an exception for penalties calculated automatically "through electronic means." The IRS interprets this exception as allowing it to use its AUR system to propose the

25 Treas. Reg. § 1.6662-4(d)(3)(iii).

26 IRM 4.10.6.2(1), *Recognizing Noncompliance* (May 14, 1999) ("assessment of penalties should be considered throughout the audit"). *See also* IRM 20.1.5.3, *Examination Penalty Assertion* (Dec. 13, 2016).

27 The Automated Underreporter (AUR) is an automated program that identifies discrepancies between the amounts that taxpayers reported on their returns and what payors reported via Form W-2, Form 1099, and other information returns. IRM 4.19.3.1, *Overview of IMF Automated Underreporter* (Aug. 26, 2016); IRM 4.19.3.16.6, *Accuracy-Related Penalty Due to Negligence or Disregard of Rules or Regulations (Negligence Disregard Penalty)* (May 19, 2017).

28 For example, when the IRS proposes to adjust a taxpayer's liability, including additions to tax such as the accuracy-related penalty, it typically sends a notice ("30-day letter") of proposed adjustments to the taxpayer. A taxpayer has 30 days to contest the proposed adjustments to the IRS Office of Appeals, during which time he or she may raise issues related to the deficiency, including any reasonable cause defense to a proposed penalty. If the issue is not resolved after the 30-day letter, the IRS sends a statutory notice of deficiency ("90-day letter") to the taxpayer. *See* IRS Pub. 5, *Your Appeal Rights and How to Prepare a Protest if You Don't Agree* (Jan. 1999); IRS Pub. 3498, *The Examination Process* (Nov. 2004). However, for some taxpayers, the IRS sends a "combo" letter that combines the initial contact letter and the 30-day letter, which confuses taxpayers who do not know whether they should continue working with exam, file an appeal, or both. *See* National Taxpayer Advocate 2011 Annual Report to Congress, vol. 2, 85-86.

29 IRC § 6665(a)(1).

30 IRC § 6213(a). A taxpayer has 150 days instead of 90 to petition the Tax Court if the notice of deficiency is addressed to a taxpayer outside of the United States.

31 Taxpayers may litigate an accuracy-related penalty by paying the tax liability (including the penalty) in full, filing a timely claim for refund, and then timely instituting a refund suit in the appropriate United States District Court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1); 28 U.S.C. § 1491; IRC §§ 7422(a); 6532(a)(1); *Flora v. United States*, 362 U.S. 145 (1960) (requiring full payment of tax liabilities as a prerequisite for jurisdiction over refund litigation).

32 IRC §§ 6320 and 6330 provide for due process hearings in which a taxpayer may raise a variety of issues, including the underlying liability, provided the taxpayer did not actually receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute such liability. IRC §§ 6320(c), 6330(c)(2)(B).

substantial understatement and negligence components of the accuracy-related penalty without supervisor review.[33]

Burden of Proof

In court proceedings involving individual taxpayers, the IRS bears the initial burden of production regarding the accuracy-related penalty.[34] The IRS must first present sufficient evidence to establish that the penalty was warranted.[35] The burden of proof then shifts to the taxpayer to establish any exception to the penalty, such as reasonable cause.[36] Because the reasonable basis standard is a higher standard to meet than reasonable cause, it is possible that a taxpayer may obtain relief from a penalty assessment by successfully arguing a reasonable cause defense, even if that defense does not satisfy the reasonable basis standard.[37]

ANALYSIS OF LITIGATED CASES

We identified 138 opinions issued between June 1, 2016 and May 31, 2017, where taxpayers litigated the negligence or disregard of rules or regulations or the substantial understatement components of the accuracy-related penalty. The IRS prevailed in full in 111 cases (80 percent), taxpayers prevailed in full in 22 cases (16 percent), and five cases (four percent) were split decisions. Table 1 in Appendix 3 provides a detailed list of these cases. In last year's Annual Report to Congress, we reported an uptick in the number of split decisions; however, during the period covered by this report, split decisions declined to below recent years' levels.[38]

Taxpayers appeared *pro se* (without representation) in 84 of the 138 cases (61 percent). *Pro se* taxpayers convinced the court to dismiss or reduce the penalty in only 17 percent of those 84 cases, which is slightly below the overall success rate for taxpayers challenging these penalties. In some cases, the court found taxpayers liable for the accuracy-related penalty but failed to clarify whether it was for negligence under IRC § 6662(b)(1) or a substantial understatement of tax under IRC § 6662(b)(2), or both. Regardless of the subsection at issue, the analysis of reasonable cause is generally the same. As such, we have combined our analyses of reasonable cause for the negligence and substantial understatement cases.

33 If a taxpayer responds to an AUR-proposed assessment, the IRS first involves its employees at that point to determine whether the penalty is appropriate. If the taxpayer does not respond timely to the notice, the computers automatically convert the proposed penalty to an assessment without managerial review. *See* National Taxpayer Advocate 2014 Annual Report to Congress 404-10 (Legislative Recommendation: *Managerial Approval: Amend IRC § 6751(b) to Require IRS Employees to Seek Managerial Approval Before Assessing the Accuracy-Related Penalty Attributable to Negligence under IRC § 6662(b)(1)*); National Taxpayer Advocate 2007 Annual Report to Congress 259 ("Although automation has allowed the IRS to more efficiently identify and determine when such underreporting occurs, the IRS's over-reliance on automated systems rather than personal contact has led to insufficient levels of customer service for taxpayers subject to AUR. It has also resulted in audit reconsideration and tax abatement rates that are significantly higher than those of all other IRS examination programs.").

34 IRC § 7491(c) provides that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title."

35 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001); IRC § 7491(c).

36 IRC § 7491(a). *See also* Tax Ct. R. 142(a).

37 Treas. Reg. § 1.6662-3(b)(3).

38 During the 2016 reporting period, 16 out of the 122 total cases (13 percent) were split decisions. National Taxpayer Advocate 2016 Annual Report to Congress 432. During the 2015 period, six cases (five percent of the total) were split and during the 2014 period, ten cases (seven percent of the total) were split. National Taxpayer Advocate 2015 Annual Report to Congress 450; National Taxpayer Advocate 2014 Annual Report to Congress 446.

Requirement for Managerial Approval Prior to Assessment of Penalties

There were two significant decisions during our reporting period regarding the IRC § 6751(b)(1) requirement to have a supervisor approve the penalties in writing prior to assessment.

Graev v. Commissioner[39]

The Graevs claimed a charitable deduction for the donation of a facade easement. A revenue agent disallowed the deduction and proposed penalties. The agent's manager approved a 40 percent gross valuation misstatement penalty under IRC § 6662(h). IRS Counsel subsequently recommended the IRS assert, in the alternative, the 20 percent accuracy-related penalty under IRC § 6662(a). The revenue agent revised the notice of deficiency to include both penalties, as recommended, but did not resubmit it for written supervisory approval. In litigation, the IRS conceded the 40 percent penalty, but continued to assert the 20 percent penalty.

In a motion for partial summary judgment, the Graevs argued that the IRS could not assess the 20 percent penalty because, among other things, it failed to comply with the IRC § 6751(b)(1) requirement for supervisory approval of the initial determination of assessment. The Graevs argued that the 20 percent penalty was not "determined" by the revenue agent and approved by his immediate supervisor, and the IRS Counsel's later "determination" was insufficient.[40]

The IRS made four counterarguments:

1. Because the IRS had not yet assessed the penalty, it is premature to consider whether it satisfied IRC § 6751(b).
2. The IRS Counsel attorney made the initial determination, was authorized to do so, and received approval in writing from his immediate supervisor.
3. Any perceived noncompliance with IRC § 6751(b) is harmless error because the Court's redetermination of the penalty will prevent improper penalty assessment.
4. Even if the penalty could not be assessed based on the notice of deficiency, it could still be assessed based on its being raised in the IRS's amendment to its answer, pursuant to IRC § 6214(a).

Focusing on the plain language of the statute, a majority of the U.S. Tax Court held that it was premature to conclude that the IRS had failed to comply with the supervisory approval requirement because the penalty had not yet been assessed. The written approval of the initial determination of the assessment could occur at any time before the assessment is made. In this case, the assessment could not happen until the Tax Court's decision became final and unappealable. The majority discounted the IRS's administrative procedures, which require supervisory approval to be documented in an examiner's workpapers, as non-binding. Further, the majority argued that the effective date provision of the statute, as well as the title of the section, focussed on assessment rather than an initial determination.

Three judges concurred with the result. They said the failure to obtain managerial approval did not prejudice the taxpayers because the penalties were appropriate and not used as a threat or bargaining chip. They also noted that the IRS's failure to follow its existing procedures could be challenged as an abuse of discretion in a collection action.

39 *Graev v. Comm'r*, 147 T.C. No. 16 (2016), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017).
40 *Id.*

Five judges dissented. According to the dissent, "[t]he fact that a rule is cast as a bar on 'assessment' does not preclude pre-assessment consideration of compliance with that rule."[41] The dissent compared the situation where a taxpayer challenges a deficiency on the grounds that assessment is barred due to the statute of limitations. In that situation, the Tax Court does not treat such a challenge as premature, even though an assessment has not occurred. The dissent held that part of the IRS's burden of production under IRC § 7491(c) in penalty deficiency cases is showing compliance with IRC § 6751(b). Moreover, the statute requires approval by a revenue agent's supervisor at a time when the supervisor still has the ability to approve or disapprove the penalty. Such approval would be meaningless once the taxpayer petitions the Tax Court because IRC § 6215(a) provides that the liability, as determined by the Tax Court, "shall be assessed," and IRC § 7803(b)(2)(D) provides that the Office of Chief Counsel, not examination, represents the IRS before the court. The dissent further argued that the majority's interpretation would fail to accomplish the purpose of the statute, which is to prevent penalties from being imposed inappropriately and being used as bargaining chips.

The IRS requested, and the Tax Court agreed, to vacate the *Graev* decision after the Second Circuit's decision in *Chai* (discussed immediately below) as *Graev* was appealable to the Second Circuit.[42]

Chai v. Commissioner[43]

In Chai, the United States Tax Court had previously found Mr. Chai owed self-employment tax and an accuracy-related penalty in connection with income he earned for his role in a tax shelter scheme.[44] After the Tax Court proceeding, Chai argued for the first time in a post-trial brief that the accuracy-related penalty did not apply because the IRS had not met its burden of production. IRC § 7491(c) provides that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title." The taxpayer argued that the IRS did not introduce evidence that a supervisor approved the revenue agent's initial determination to assert the penalty, as required by IRC § 6751(b)(1). The Tax Court declined to address this new argument because doing so after the trial would prejudice the IRS, as it could no longer introduce evidence that it had complied with IRC § 6751(b)(1).

On appeal before the United States Court of Appeals for the Second Circuit, the IRS first argued that the substantial understatement penalty was "a type" of penalty "automatically calculated through electronic means," and thus exempt from the supervisory approval requirement.[45] The Second Circuit observed that an IRS employee had actually determined (1) to assess the penalty, and (2) that the taxpayer did not have reasonable cause.[46] The Second Circuit found no evidence that the determination was or could have been made electronically through the AUR program, noting this was particularly the case for an IRC § 6662(b)(1) penalty, which is based on a taxpayer's negligence.[47]

41 *Graev v. Comm'r*, 147 T.C. No. 16 (2016) (Gustafson, J., dissenting), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017).

42 *Id. Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017).

43 *Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017).

44 *Chai v. Comm'r*, T.C. Memo. 2015-42.

45 IRC § 6751(b)(2)(B). The National Taxpayer Advocate has long opposed the IRS's expansive view of this exception. *See, e.g.*, National Taxpayer Advocate 2007 Annual Report to Congress 275 (Most Serious Problem: *The Accuracy-Related Penalty in the Automated Underreporter Units*); National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 16-18 (*A Framework for Reforming the Penalty Regime*).

46 *Chai*, 851 F.3d at 217.

47 *Id.*

While this appeal was pending, the Tax Court decided *Graev*, discussed above, and the IRS then adopted the argument that the issue was not ripe since no assessment had occurred.[48] The Second Circuit held that (1) IRC § 6751(b)(1) requires a supervisor to approve an IRS employee's penalty determination before the IRS first asserts penalties by issuing a notice of deficiency (or filing an answer or amended answer), and (2) the IRS has the burden to establish that it complied with IRC § 6751(b)(1) in deficiency cases under IRC § 7491(c).

First, the Second Circuit concluded that IRC § 6751(b)(1) was ambiguous because, quoting the dissent in *Graev*, "one cannot 'determine' an 'assessment.'"[49] Next, the Second Circuit considered the legislative history, which indicated the statute was intended to discourage IRS agents from threatening unjustified penalties in an effort to encourage taxpayers to settle. It found the Tax Court's review of penalty determinations does not prevent this problem because taxpayers can be pressured to settle before the Tax Court renders a decision. Further, once the Tax Court issues an opinion, the supervisor no longer has discretion to give or withhold approval of the penalty because it is final. For IRC § 6751(b)(1) to have any effect, supervisory approval must be obtained before the IRS issues a notice of deficiency (or asserts penalties in court).

The Second Circuit held the taxpayer's post-trial argument was timely. Because the supervisory approval requirement is an element of a penalty claim for which the IRS bears the burden of production, the IRS cannot establish a prima facie case for imposing a penalty unless it has established compliance with the approval requirement. The IRS could not have failed to meet its burden of production until it concluded with its presentation of evidence. Thus, the Tax Court should have considered the taxpayer's argument, even after the trial. It was not the taxpayer's obligation to alert the IRS to the elements of its claim. To hold otherwise would require taxpayers to move to dismiss each element of a claim before trial, just in case the IRS failed to make its case.[50]

Together, the *Graev* and *Chai* cases signal a split between a majority of the Tax Court's judges and the Second Circuit over: (1) when IRS employees must obtain supervisory approval of penalties, and (2) whether taxpayers may challenge noncompliance with this requirement in a deficiency proceeding before the Tax Court.[51]

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48 *Graev v. Comm'r*, 147 T.C. No. 16 (2016), *vacated* No. 30638-08 (T.C. Mar. 30, 2017). After the Second Circuit's decision in *Chai*, the IRS requested, and the Tax Court agreed, to vacate *Graev*, as it was appealable to the Second Circuit. *Chai,* 851 F.3d at 217.

49 *Chai*, 851 F.3d at 218-19.

50 The Second Circuit distinguished *Kaufman v. Comm'r*, 784 F.3d 56 (1st Cir. 2015), in which the First Circuit refused to consider the IRS's compliance with IRC § 6751(b) because the taxpayer raised the issue for the first time on appeal. *Chai*, 851 F.3d at 223. The Second Circuit observed that the taxpayer in *Chai* had raised the issue before the Tax Court. *Id*.

51 Under the *Golsen* rule, the Tax Court will generally follow a circuit court's precedent for cases appealable to that circuit court, but will follow its own precedent for cases appealable to other courts that have not addressed the issue. *See Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Because *Graev* was vacated, it is not precedential. But see the Tax Court's Order in *Zolghadr v. Comm'r*, T.C. Memo. 2017-49, No. 19241-14 (T.C. June 12, 2017) (recharacterizing and denying the taxpayer's motion requesting the court order the IRS to demonstrate compliance with IRC § 6751(b) because it was not timely and because the case was not appealable to the Second Circuit) ("For cases in which the appellate venue is a court of appeals other than the Second Circuit, the applicable Tax Court rule is that enunciated in *Graev v. Commissioner*, 147 T.C. No. 16 (2016) (slip. op. at *42 n. 25). Under that case, respondent has no burden of production to demonstrate compliance with section 6751(b)."). *See also* Keith Fogg, *Chai not Gaining Traction with Tax Court or IRS*, Procedurally Taxing, http://procedurallytaxing.com/chai-not-gaining-traction-with-tax-court-or-irs/ (June 22, 2017).

Reasonable and Good Faith Reliance on a Competent Tax Professional

In approximately a third of the IRC § 6662(b)(1) and (2) cases which TAS reviewed this year, the court discussed whether or not the taxpayer established reasonable cause based on reasonable reliance on a tax professional. The taxpayer prevailed in whole or in part in approximately 32 percent of these cases, which is noticeably higher than the 20 percent overall success rate for challenging section 6662(b)(1) and (2) penalties in the cases which TAS reviewed. This success rate for litigating reasonable reliance on a tax professional is inconsistent with an Internal Revenue Manual (IRM) instruction, which stated reliance on a tax professional generally did not qualify taxpayers for penalty relief because it did not demonstrate ordinary business care and prudence.[52] As a result of TAS's advocacy, the language was removed from the IRM in late 2016.[53]

Exelon v. Commissioner

In *Exelon*, the corporate taxpayer, Unicom Corporation, sought to defer recognition of gain on the sale of its fossil fuel power plants by engaging in an alleged like-kind exchange under IRC § 1031.[54] Unicom participated in six transactions that the IRS labeled as sale-in/lease-out (SILO), where tax-exempt governmental entities leased power stations to the taxpayer for a period longer than their useful life (qualifying the transaction as a sale), and the taxpayer then leased these stations back to the tax-exempt entities with an end-of-term fixed purchase option.[55] The taxpayer engaged numerous advisors in connection with these transactions to provide engineering and environmental analysis, appraisal of the replacement properties, financial and economic analysis, and legal and tax analysis. Winston & Strawn, LLP, the firm providing the legal and tax analysis, provided two opinion packages to the taxpayer totaling over 700 pages, stating that the transactions should be treated as valid like-kind exchanges under IRC § 1031. However, Winston & Strawn separately warned the taxpayer that the IRS had recently released guidance on lease-in/lease-out (LILO) transactions, and there was a risk the proposed transaction could be classified as a corporate tax shelter.

The U.S. Tax Court concluded that the transactions did not transfer the benefits and burdens of ownership to the taxpayers, leading to them being characterized as loans and not leases. As a result, Unicom exchanged power plants for interests in financial instruments, which does not meet the requirements for a like-kind exchange under IRC § 1031.

To determine whether Unicom was liable for the IRC § 6662(b)(1) penalty for negligence, the court applied the three-prong test from *Neonatology v. Commissioner*.[56] Unicom satisfied the first prong, requiring the advisor to be a competent professional with sufficient expertise, with the court noting there was no evidence of conflict of interest. The taxpayer also satisfied the second prong, requiring the

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52 IRM 4.19.3.16.6, *Accuracy-Related Penalty Due to Negligence or Disregard of Rules or Regulations (Negligence Disregard Penalty)* (Dec. 12, 2014) ("Generally, reasons such as forgetfulness, ignorance of the law, mistakes (*e.g.*, the taxpayer preparer forgot to include the income or thought the income was nontaxable) or reliance on Professional Tax Advice/Tax Preparation Software do not qualify for penalty relief because these actions do not demonstrate ordinary business care and prudence."). In contrast, IRM 20.1.5.6.4, *Reliance on Advice* (Dec. 13, 2016), provides a thorough explanation of what constitutes reasonable reliance on a return preparer. IRM chapter 4 pertains to IRS examination employees, and chapter 20 pertains to all employees who work with penalties.

53 IRM 4.19.3.16.6, *Accuracy-Related Penalty Due to Negligence or Disregard of Rules or Regulations (Negligence Disregard Penalty)* (Aug. 26, 2016). *See* TAS Internal Management Document (IMD) 2224 (Jan. 6, 2016).

54 147 T.C. No. 9 (2016), *appeal docketed*, No. 17-2964 (9th Cir. Sept. 22, 2017). *Exelon Corp.*, the petitioner in this case, was the successor by merger to Unicom and its consolidated subsidiaries.

55 For a detailed discussion of sale-in/lease out (SILO) transactions, see Robert W. Wood, Steven E. Hollingsworth, *SILOs and LILOs Demystified*, 129 Tax Notes 195 (Oct. 11, 2010).

56 115 T.C. 43 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

taxpayer to provide necessary and accurate information, because the parties did not dispute the advisor was closely involved in the transactions and knew all relevant facts.

However, the court concluded Unicom failed the third prong by not showing that it relied in good faith on the advisor's judgment. The court found that Unicom should have known that the tax-exempt entities were reasonably likely to exercise their cancellation/purchase options because they would not be able to return the power plants to Unicom under the return requirements without significant expense. It noted Winston & Strawn "interfered with the integrity and independence of the appraisal process by providing Deloitte [the firm providing the appraisal] with a list of conclusions it expected to see in the appraisals to be able to issue tax opinions at the 'will' and 'should' level."[57] Winston & Strawn's positive tax opinion ignored an obvious inconsistency between the power plant capacity requirements for returning the power plants to the taxpayer and the power plant capacity factor used in the appraisal. Because the taxpayer was a sophisticated power plant operator, it should have understood that the tax opinions, based on the appraisals, were flawed. Finally, the Tax Court noted that the taxpayer was apprised of the risk that the transactions would be classified as a corporate tax shelter, yet registered them with the IRS close to the time it entered into the transactions. Although Unicom paid significant due diligence and consulting fees, the court likened this to paying for an insurance policy against penalties.

Boree v. Commissioner[58]

In *Boree*, a former logger, Mr. Boree, established Glen Forest, LLC with a partner (who was later replaced by Mrs. Boree) to acquire and develop real property. Glen Forest acquired 1,892 acres, which it planned to develop into approximately 100 lots. However, beginning approximately two years after Glen Forest purchased the land, the County Board of Commissioners adopted some land-use restrictions that would require Glen Forest to pay approximately $11.4 million to pave internal and connecting roads to the development.[59] Glen Forest revised its development strategy to justify these costs by pursuing higher density development. Between 2002 and 2006, Glen Forest sold approximately 600 of the acres, and upon learning a successful developer was developing an adjacent property, Glen Forest sold the remainder of the property in 2007.

The United States Court of Appeals for the Eleventh Circuit upheld the Tax Court's determination of the taxpayers' liability, agreeing with the IRS that the taxpayers' income was ordinary income and not capital gains. However, the Eleventh Circuit reversed the Tax Court's determination that the Borees were liable for the IRC § 6662(b)(2) accuracy-related penalty. The Eleventh Circuit noted that the Tax Court did not elaborate on its finding that the taxpayers did not establish reasonable cause and good faith. The Eleventh Circuit found the taxpayers reasonably relied on professional tax advice because Mr. Boree was a former logger with no accounting experience, the return was prepared by a reputable accounting firm that the taxpayers had used since 1998, and Mrs. Boree personally provided the accountant with information and records she kept relating to all of the land transactions. Because the Borees were untrained in tax matters, it was reasonable for them to rely on their accountant, even though the accountant made the seemingly obvious error of claiming business expense deductions for the same activity for which she claimed capital gains.

57 *Exelon v. Comm'r*, 147 T.C. No. 9 (2016), *appeal docketed*, No. 17-2964 (9th Cir. Sept. 22, 2017).

58 837 F.3d 1093 (11th Cir. 2016), *rev'g* T.C. Memo. 2014-85.

59 *Boree*, 837 F.3d at 1096-97.

Tsehay v. Commissioner[60]

In *Tsehay*, the taxpayer was a custodian at a community college and did not speak English as his first language. During tax year 2013, the taxpayer and his wife were married and living together with their five children in a public housing apartment, and separated at some point in 2014. The taxpayer's 2013 return claimed dependency exemptions, the Earned Income Tax Credit (EITC), and the Child Tax Credit (CTC). Because the taxpayer was separated at the time he filed his 2013 return, he asked his preparer to file his return married filing separately, but the preparer erroneously filed the return as head of household.

The Tax Court found the taxpayer was eligible for dependency exemptions for the children, EITC, and CTC, but not head of household status because he was married during the 2013 tax year. However, the accuracy-related penalty was not appropriate because the taxpayer qualified for the reasonable cause and good faith exception to the accuracy-related penalty based on reasonable reliance on a return preparer. The court relied on the facts that "the [taxpayer] had a language barrier, sought and relied on professional advice, and was separated from his wife when he actually filed his return."[61]

Access to Tax Law Help

Larkin v. Commissioner[62]

The taxpayers (Mr. and Mrs. Larkin) challenged the IRS's statutory notices of deficiency for tax years 2003 through 2006. Mr. Larkin worked as a partner at a multinational law firm in the United Kingdom (U.K.) and operated a real estate business as a sole proprietor on the side. The U.S. Tax Court held, among other holdings, that the taxpayers were not entitled to various deductions related to Mr. Larkin's self-employment as a consultant and real estate developer; the taxpayers were liable for self-employment taxes related to the husband's partnership interest in the law firm; and the taxpayers were not entitled to the foreign tax credit to offset tax reported due for the four taxable years.

The Tax Court agreed with the IRS that the taxpayers were liable for the accuracy-related penalty and rejected the taxpayers' arguments for reasonable cause. Specifically, the taxpayers argued that their returns were complicated due to Mr. Larkin's work as a law firm partner and his real estate business. Mr. Larkin testified that he sought guidance from the IRS regarding how to prepare his returns and could not find a qualified person to help him. He also testified that the revenue officer with whom he met had specifically directed him on how to report the items related to the law firm, the real estate business, and the exclusion from income. He testified that he filed his returns on that basis.

However, the court was not convinced that the revenue officer had directed Mr. Larkin regarding how to file the returns, finding no notes, records, or other tangible evidence. The court also did not accept Mr. Larkin's testimony that he tried but failed to find a qualified professional with knowledge of U.S. and U.K. tax regimes to advise him. The court noted that the taxpayers had been residing abroad since 1999 and explained that the understatements of tax arose largely from a simple failure to substantiate items on their returns and report income of which they were aware.[63] Interestingly, the court did not rebut the taxpayers' arguments for reasonable cause based on the arguments themselves, but instead rebutted them based on the specific facts of the taxpayers' case, leaving open the possibility that reliance on IRS advice,

60 T.C. Memo. 2016-200.

61 *Id*.

62 T.C. Memo. 2017-54.

63 *Id*.

inaccessibility of a knowledgeable IRS employee or qualified professional, complexity of the tax law, and difficulties for taxpayers residing abroad could be used to argue reasonable cause.[64]

CONCLUSION

The accuracy-related penalty under IRC § 6662(b)(1) and (2) remains the number one most litigated tax issue, continuing a trend from the last four years. Two cases from this year have the potential for far-reaching effects in accuracy-related penalty cases, as well as in other penalty cases. *Chai* establishes for the first time that, at least in the Second Circuit, the IRS has the burden of producing evidence that it obtained supervisory approval of penalties in any case where the supervisory approval requirement applies. Although *Graev* was vacated, a Tax Court judge subsequently issued an order stating that for cases not appealable to the Second Circuit, *Graev* provided the rule for demonstrating compliance with IRC § 6751(b).[65] Thus, the split appears to remain between the majority of the Tax Court's judges and the Second Circuit over when IRS employees must obtain supervisory approval of penalties, and whether taxpayers may challenge noncompliance with this requirement in a deficiency proceeding before the Tax Court.

The potential for continuing controversy in this area highlights the need for Congress to clarify when an IRS manager should review and approve a penalty determination and the consequences of not obtaining such approval, as recommended by the National Taxpayer Advocate.[66] Although penalties calculated through electronic means are exempt from the requirement for supervisory approval, the *Chai* opinion casts doubt over whether the IRC § 6662(b)(1) penalty for negligence can be made electronically. This portion of the opinion supports the National Taxpayer Advocate's recommendation to require managerial approval for all accuracy-related penalties based on negligence. Requiring managerial approval in more cases could reduce the number of accuracy related penalties that are challenged and abated, which may have a positive effect on compliance. A 2013 TAS research study found that Schedule C filers receiving accuracy-related penalties by default assessment or who appealed the penalties actually had worse compliance for years thereafter.[67]

Taxpayers' success in establishing reasonable cause based on reasonable reliance on a tax professional may suggest the IRS needs better guidance regarding when such reliance is reasonable. The National Taxpayer Advocate is optimistic that TAS's success in removing an IRM instruction,[68] which stated reliance on a tax professional generally would not qualify a taxpayer for penalty relief, will lead to proper reasonable cause determinations in more cases and further the taxpayer's *right to a fair and just tax system*.

Although not a precedential decision, the *Larkin* opinion raises interesting arguments for reasonable cause based on the taxpayer being confused about how to report items, seeking guidance from the IRS on how to report items, allegedly relying on incorrect guidance from an IRS employee, and not being able to find a qualified person to assist him. Ultimately, the Tax Court was not persuaded that the taxpayer

64 For a discussion of the taxpayer service problems for taxpayers residing abroad, see National Taxpayer Advocate 2015 Annual Report to Congress 72-81 (Most Serious Problem: *International Taxpayer Service: The IRS's Strategy for Service on Demand Fails to Compensate for the Closure of International Tax Attaché Offices and Does Not Sufficiently Address the Unique Needs of International Taxpayers*).

65 *See* footnote 51, *supra*.

66 *See, e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 404-10 (Legislative Recommendation: *Amend IRC § 6751(b) to Require IRS Employees to Seek Managerial Approval Before Assessing the Accuracy-Related Penalty Attributable to Negligence under IRC § 6662(b)(1)*).

67 National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 1-14.

68 *See* notes 52 and 53, *supra*.

received guidance from an IRS employee and was unable to find a qualified professional, and that the understatements were the result of complex tax issues related to being employed abroad. However, this case raises the question whether declining taxpayer service for taxpayers abroad,[69] complexity of the tax code, and inability to find answers to tax law questions may give rise to a reasonable cause determination for some taxpayers challenging accuracy-related penalties.

69 *See*, *e.g.*, footnote 64, *supra*.

MLI #2 Trade or Business Expenses Under IRC § 162 and Related Sections

SUMMARY

The deductibility of trade or business expenses has long been among the ten Most Litigated Issues since the first edition of the National Taxpayer Advocate's Annual Report to Congress in 1998.[1] We identified 99 cases involving a trade or business expense issue that were litigated in federal courts between June 1, 2016, and May 31, 2017. The courts affirmed the IRS position in 65 of these cases, or about 66 percent, while taxpayers fully prevailed in only two cases, or about two percent of the cases. The remaining 32 cases, or about 32 percent, resulted in split decisions.

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Internal Revenue Code (IRC) § 162(a) permits a taxpayer to deduct ordinary and necessary trade or business expenses paid or incurred during the taxable year.[3] These expenses include:

- A reasonable allowance for salaries or other compensation for personal services actually rendered;
- Travel expenses while away from home in the pursuit of a trade or business; and
- Rentals or other payments for use of property in a trade or business.[4]

In addition to the general allowable expenses described above, IRC § 162 addresses deductible and nondeductible expenses incurred in carrying on a trade or business, and provides special rules for health insurance costs of self-employed individuals.[5]

The interaction of IRC § 162 with other code sections that explicitly limit or disallow deductions can be very complex. For example, the year in which the deduction for trade or business expenses can be taken

1 *See* National Taxpayer Advocate 1998-2016 Annual Reports to Congress.

2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a), 129 Stat. 2242, 3117 (2015) (codified at IRC § 7803(a)(3)).

3 The taxable year in which a business expense may be deducted depends on whether the taxpayer uses the cash or accrual method of accounting. IRC § 446.

4 IRC § 162(a)(1), (2), and (3).

5 *See*, *e.g.*, IRC § 162(c), (f), and (l). For example, nondeductible trade or business expenses include illegal bribes, kickbacks, fines, and penalties.

depends on when the cost was paid or incurred, the useful life of an asset on the date of acquisition, or when the business operation is terminated.[6]

Rules regarding the practical application of IRC § 162 have evolved largely from case law and administrative guidance over the years. The IRS, the Department of Treasury, Congress, and the courts continue to pose questions and provide legal guidance about whether a taxpayer is entitled to certain trade or business deductions. The litigated cases analyzed for this report illustrate both the ongoing nature of this process and the necessary analysis of facts and circumstances unique to each case. When a taxpayer seeks judicial review of the IRS's determination of a tax liability relating to the deductibility of a particular expense, the courts must often address a series of questions, including but not limited to, the ones discussed below.

What Is a Trade or Business Expense Under IRC § 162?

Although "trade or business" is a widely used term in the IRC, neither the Code nor the Treasury Regulations provide a definition.[7] The definition of a "trade or business" comes from common law, where the concepts have been developed and refined by the courts.[8] The Supreme Court has interpreted "trade or business" for purposes of IRC § 162 to mean an activity conducted with "continuity and regularity" and with the primary purpose of earning income or making a profit.[9]

What Is an Ordinary and Necessary Expense?

IRC § 162(a) requires a trade or business expense to be both "ordinary" and "necessary" in relation to the taxpayer's trade or business to be deductible. In *Welch v. Helvering,* the Supreme Court stated that the words "ordinary" and "necessary" have different meanings, both of which must be satisfied for the taxpayer to benefit from the deduction.[10] The Supreme Court describes an "ordinary" expense as customary or usual and of common or frequent occurrence in the taxpayer's trade or business.[11] The Court describes a "necessary" expense as one that is appropriate and helpful for the development of the business.[12]

Common law also requires that in addition to being ordinary and necessary, the amount of the expense must be reasonable for the expense to be deductible. In *Commissioner v. Lincoln Electric Co.,* the Court of Appeals for the Sixth Circuit held "the element of reasonableness is inherent in the phrase 'ordinary

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6 *See, e.g.*, IRC § 165 (deductibility of losses), IRC § 167 (deductibility of depreciation), and IRC § 183 (activities not engaged in for profit), and IRC § 1060 (special allocation rules for certain asset acquisitions, including the reporting of business asset sales when closing a business).

7 *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987). "The phrase 'trade or business' has been in section 162(a) and that section's predecessors for many years. Indeed, the phrase is common in the Code, for it appears in over 50 sections and 800 subsections and in hundreds of places in proposed and final income tax regulations… The concept thus has a well-known and almost constant presence on our tax-law terrain. Despite this, the Code has never contained a definition of the words 'trade or business' for general application, and no regulation has been issued expounding its meaning for all purposes. Neither has a broadly applicable authoritative judicial definition emerged."

8 Carol Duane Olson, *Toward a Neutral Definition of "Trade or Business" in the Internal Revenue Code*, 54 U. Cin. L. Rev. 1199 (1986).

9 *Groetzinger*, 480 U.S. at 35.

10 290 U.S. 111, 115 (1933) (suggesting an examination of "life in all its fullness" will provide an answer to the issue of whether an expense is ordinary and necessary).

11 *Deputy v. du Pont*, 308 U.S. 488, 495 (1940) (internal citations omitted).

12 *See Comm'r v. Heininger*, 320 U.S. 467, 471 (1943).

and necessary.' Clearly it was not the intention of Congress to automatically allow as deductions operating expenses incurred or paid by the taxpayer in an unlimited amount."[13]

Is the Expense a Currently Deductible Expense or a Capital Expenditure?

A currently deductible expense is an ordinary and necessary expense paid or incurred during the taxable year in the course of carrying on a trade or business.[14] No current deductions are allowed for the cost of acquisition, construction, improvement, or restoration of an asset expected to last more than one year.[15] Instead, those types of expenses are generally considered capital expenditures, which may be subject to depreciation, amortization, or depletion over the useful life of the property.[16]

Whether an expenditure is deductible under IRC § 162(a) or is a capital expenditure under IRC § 263 is a question of fact. Courts have adopted a case-by-case approach to applying principles of capitalization and deductibility.[17]

When Is an Expense Paid or Incurred During the Taxable Year, and What Proof Is There That the Expense Was Paid?

IRC § 162(a) requires an expense to be "paid or incurred during the taxable year" to be deductible. The IRC also requires taxpayers to maintain books and records that substantiate income, deductions, and credits, including adequate records to substantiate deductions claimed as trade or business expenses.[18] If a taxpayer cannot substantiate the exact amounts of deductions by documentary evidence (*e.g.*, invoice paid, paid bill, or canceled check) but can establish that he or she had some business expenditures, the courts may employ the *Cohan* rule to grant the taxpayer a reasonable amount of deductions.[19]

The Cohan Rule

The *Cohan* rule is one of "indulgence" established in 1930 by the Court of Appeals for the Second Circuit in *Cohan v. Commissioner*.[20] The court held that the taxpayer's business expense deductions were not adequately substantiated, but stated that "the [Tax Court] should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent."[21] In *Estate of Elkins v. Commissioner,* the Fifth Circuit described "the venerable lesson of Judge Learned Hand's opinion in *Cohan*: In essence, make as close an approximation as you can, but never use a zero."[22]

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13 176 F.2d 815, 817 (6th Cir. 1949), *cert. denied*, 338 U.S. 949 (1950).

14 IRC § 162(a).

15 IRC § 263. *See also INDOPCO, Inc. v. Comm'r*, 503 U.S. 79 (1992).

16 IRC § 167.

17 *See PNC Bancorp, Inc. v. Comm'r*, 212 F.3d 822 (3d Cir. 2000); *Norwest Corp. v. Comm'r*, 108 T.C. 265 (1997).

18 IRC § 6001. *See also* Treas. Reg. §§ 1.6001-1 and 1.446-1(a)(4).

19 *See Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930).

20 *Id.* George M. Cohan was an actor, playwright, and producer who spent large sums travelling and entertaining actors, employees, and critics. Although Cohan did not keep a record of his spending on travel and entertainment, he estimated that he incurred $55,000 in expenses over several years. The Board of Tax Appeals, now the Tax Court, disallowed these deductions in full based on Cohan's lack of supporting documentation. Nevertheless, on appeal, the Second Circuit concluded that Cohan's testimony established that legitimate deductible expenses had been incurred. As a result, the Second Circuit remanded the case back to the Board of Tax Appeals with instructions to estimate the amount of deductible expenses.

21 39 F.2d 540 (2d Cir. 1930) at 544, *aff'g and remanding* 11 B.T.A. 743 (1928).

22 767 F.3d 443, 449 n. 7 (5th Cir. 2014) (citing *Cohan*, 39 F.2d at 543-44), *rev'g* 140 T.C. 86 (2013).

The *Cohan* rule cannot be used in situations where IRC § 274(d) applies. IRC § 274(d) provides that unless a taxpayer complies with strict substantiation rules, no deductions are allowable for:

- Travel expenses;
- Entertainment, amusement, or recreation expenses;
- Gifts; and
- Certain "listed property."[23]

A taxpayer must substantiate a claimed IRC § 274(d) expense with adequate records or sufficient evidence to establish the amount, time, place, and business purpose.[24] A contemporaneous log is not explicitly required, but a statement not made at or near the time of the expenditure has the same degree of credibility only if the corroborative evidence has "a high degree of probative value."[25] In addition, entertainment expenses require proof of a business relationship to the taxpayer.[26]

Who Has the Burden of Proof in a Substantiation Case?

Generally, the taxpayer bears the burden of proving that he or she is entitled to the business expense deductions and the IRS's proposed determination of tax liability is incorrect.[27] IRC § 7491 (a) provides that the burden of proof shifts to the IRS when the taxpayer:

- Introduces credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's liability;
- Complies with the requirements to substantiate deductions;
- Maintains all records required under the Code; and
- Cooperates with reasonable requests by the IRS for witnesses, information, documents, meetings, and interviews.

ANALYSIS OF LITIGATED CASES

The deductibility of trade or business expenses has been one of the ten Most Litigated Issues since the first edition of the National Taxpayer Advocate's Annual Report to Congress in 1998.[28] This year, we reviewed 99 cases involving trade or business expenses that were litigated in federal courts from June 1, 2016, through May 31, 2017. The Table 2 listed in Appendix 3 contains a list of the respective issues in these cases. The figure below categorizes the main issues raised by taxpayers. Cases involving more than one issue are included in more than one category.

23 "Listed property" means any passenger automobile; any other property used as a means of transportation; any property of a type generally used for purposes of entertainment, recreation, or amusement; any computer or peripheral equipment (except when used exclusively at a regular business establishment and owned or leased by the person operating such establishment); and any other property specified by regulations. IRC § 280F(d)(4)(A) and (B).

24 Treas. Reg. § 1.274-5T(b). Ironically, if George M. Cohan brought his case today before the Tax Court, he would be unable to benefit from application of that rule because of the strict substantiation required by IRC § 274(d).

25 Treas. Reg. § 1.274-5T(c)(1); *Reynolds v. Comm'r*, 296 F.3d 607, 615-16 (7th Cir. 2002) (noting that keeping written records is not the only method to substantiate IRC § 274 expenses but "alternative methods are disfavored").

26 Treas. Reg. § 1.274-5T(b)(3)(v).

27 *See Welch v. Helvering*, 290 U.S. 111, 115 (1933) (citations omitted) and U.S. Tax Court Rules of Practice and Procedure, Rule 142(a).

28 *See* National Taxpayer Advocate 1998-2016 Annual Reports to Congress.

FIGURE 3.2.1, Trade or Business Expense Issues—Cases Reviewed[29]

Issue	Type of Taxpayer	
	Individual	Business
Substantiation of Expenses under IRC § 162, Including Application of the *Cohan* Rule	12	49
Substantiation of Expenses under IRC § 274(d)	5	34
Schedule A Unreimbursed Employee Expenses	15	11
Hobby losses, nondeductible under the provisions of either IRC §§ 183 or 162	0	14
Home Office under IRC § 280A	3	8
Net Operating Losses under IRC § 172	0	8
Personal Expenditures Disallowed under IRC § 262	7	18
Capitalization and cost recovery under IRC §§ 263, 263A, and 167	1	10
Illegal activities under IRC §§ 280E, 162(c), 162(f), and 162(g)	1	2
Economic Substance Doctrine	0	4

Taxpayers represented themselves (*pro se*) in 62 of the 99 cases (about 63 percent). Taxpayers were represented by counsel in 37 out of the 99 cases (about 37 percent). Of the 99 cases, the taxpayers prevailed in two cases in full, and in 32 cases in part. The IRS won in the remaining 65 cases. None of the *pro se* individual taxpayers prevailed in full.

As in previous years, individual taxpayers routinely claimed deductions for Schedule A unreimbursed employee expenses that were either related to personal rather than business activities or the taxpayer did not meet the burden of showing his or her employer would not reimburse these expenses.[30] Taxpayers also claimed travel, meals and entertainment expenses without understanding, or knowledge of, the substantiation requirements under IRC § 274(d).[31] Many *pro se* litigants were unable to meet substantiation requirements.[32]

Individual Taxpayers

While the majority of cases involving individual taxpayers (the term "individual" excludes sole proprietorships) were issued as either summary opinions or tax court memorandum decisions,[33] two noteworthy cases this reporting cycle are *Liljeberg v. Commissioner* from the Tax Court and

29 Multiple issues can appear within one case; therefore, these figures will not match the total case count.

30 *See, e.g., Humphrey v. Comm'r*, T.C. Memo. 2017-78; *Rangen v. Comm'r*, T.C. Memo. 2016-195.

31 *See Windam v. Comm'r*, T.C. Memo. 2017-68.

32 *See Ericson v. Comm'r*, T.C. Memo. 2016-107.

33 Tax Court decisions are categorized into three types: regular decisions, memorandum decisions, and small tax case ("S") decisions. The regular decisions of the Tax Court include cases which have some new or novel point of law, or in which there may not be general agreement, and therefore have the most legal significance. In contrast, memorandum decisions generally involve fact patterns within previously settled legal principles and therefore are not as legally significant. Finally, "S" case decisions (for disputes involving $50,000 or less where the taxpayer has elected Small Case status) are not appealable and, thus have no precedential value. *See also* IRC § 7463(b); U.S. Tax Court Rules of Practice and Procedure, Rules 170-175.

O'Connor v. Commissioner from the Tenth Circuit Court of Appeals.[34] *Liljeberg* was the only regular opinion of the Tax Court among the individual trade or business cases.[35]

In *Liljeberg*, three related cases were consolidated to determine whether nonresident foreign students enrolled in the State Department's Exchange Visitor Program (EVP) were permitted to take Schedule A unreimbursed employee expenses for travel, meal and entertainment costs.[36] The three students were from Finland, Russia, and Ireland and entered the United States (U.S.) on nonimmigrant "J visas" permitting them to work part-time jobs while studying as full-time students for up to four consecutive months. The students argued that they could deduct their travel, meal and entertainment expenses under IRC § 162(a)(2), which allows a taxpayer to deduct business expenses incurred while a taxpayer is "away from home" for business reasons.[37]

The Tax Court, however, ruled that the students were not away from home within the meaning of the statute. Such was the case because the students failed to show adequate ongoing business links to their respective home countries during their time in the U.S. Moreover, the Tax Court rejected the students' claims that their program contracts, visas, or other applicable laws contained any mandate that a home be maintained in the country of origin. As a result, the unreimbursed employee expenses at issue were disallowed.

In *O'Connor*, married taxpayers claimed Schedule A unreimbursed employee business expenses for travel, meals and entertainment, and other costs pertaining to the pursuit of the husband's U.S. law degree.[38] The taxpayers, appearing *pro se*, argued that the husband qualified under Treas. Reg. § 1.162-5 to deduct his legal education expenses because he had obtained his German law degree prior to his U.S. law degree. The husband argued that the German law degree satisfied the minimum educational requirements test of the Treasury Regulation because it qualified him to sit for the New York State Bar Exam in lieu of obtaining a U.S. legal education.[39] However, the Court of Appeals for the Tenth Circuit disagreed, holding that the husband instead had become qualified in a new trade or business by earning the U.S. law degree. The Tenth Circuit reiterated that the husband's German law degree did not automatically qualify him to practice law in the U.S. and further rejected the taxpayers' secondary argument that he was engaged in the legal profession through his project management work and a *qui tam* legal action.[40]

34 *See, e.g., Liljeberg v. Comm'r*, 148 T.C. No. 6 (2017), *appeal docketed*, No. 17-1204 (D.C. Cir. Sept. 12, 2017); *O'Connor v. Comm'r*, 653 F. App'x 633 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-155.

35 *Id.*

36 *Id.*

37 *See Barone v. Comm'r*, 85 T.C. 462, 465 (1985) (citations omitted), which states that for an expense to qualify under section 162(a)(2) it must (1) be ordinary and necessary, (2) have been incurred while the taxpayer was "away from home", and (3) have been incurred in the pursuit of a trade or business. The second element of whether the taxpayers were "away from home" was in dispute in *Liljeberg*.

38 *O'Connor*, 653 F. App'x at 633 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-155.

39 *See* Treas. Reg. § 1.162-5(b)(2)(i), "The first category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is required of him in order to meet the minimum educational requirements for qualification in his employment or other trade or business."

40 The False Claims Act (FCA) establishes liability for any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a). The FCA authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730. An action brought by a private person under § 3730(b) of the FCA is termed a *qui tam* suit. *Qui tam* is a writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed. Its name is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "[he] who sues in this matter for the king as well as for himself." Black's Law Dictionary (10th ed. 2014) (www.westlaw.com).

O'Connor is of particular significance because higher education degrees are frequently challenged by the IRS when taxpayers attempt to deduct these educational expenses as itemized deductions on Schedule A.[41] The courts use a facts and circumstances test to make these determinations. While taxpayers have had some success in deducting other higher education degrees, they have had difficulties proving that law degrees improve skills in a taxpayer's current profession, rather than qualifying them for a new profession.

Beyond substantiation, the business justification of claimed unreimbursed employee business deductions is consistently among the most common issues arising with respect to individual taxpayers.[42] In *Tanzi v. Commissioner*, married taxpayers were employed by Seminole State College.[43] The husband worked as a college professor while his wife worked as the campus librarian. On the taxpayers' 2011 joint return, they deducted Schedule A unreimbursed employee expenses such as home internet, cellular phone, computer equipment, books, and satellite television. The taxpayers argued that their respective jobs required them to continually pursue knowledge. The taxpayers were able to produce receipts for the majority of the items claimed, but the Tax Court disallowed all the expenses as personal expenditures under IRC § 262(a) for lack of business purpose. The Tax Court rejected the taxpayers' general assertion that the expenses deducted were ordinary and necessary under IRC § 162, because the expenses were not a condition of employment, not ordinary for a college professor, and appeared purely personal in nature.

Business Taxpayers

TAS reviewed 81 cases involving business taxpayers. In this context, business taxpayers fully prevailed in one case (approximately one percent), partially prevailed in 26 cases (approximately 32 percent), and the IRS was completely successful in the remaining cases (approximately 67 percent).

Of cases in which business taxpayers fully or partially prevailed, approximately 41 percent (11 of 27) involved taxpayers represented by counsel, while approximately 59 percent (16 of 27) involved *pro se* taxpayers. Of cases in which the IRS fully prevailed, approximately 39 percent (21 of 54) involved business taxpayers represented by counsel, while approximately 61 percent (33 of 54) involved *pro se* taxpayers. To the extent that *pro se* taxpayers were successful in court, these favorable outcomes stemmed mostly from their ability to provide records, testimony, and other credible evidence substantiating deductions in cases where such substantiation was in controversy.

As was the case for the individual taxpayers, substantiation of expenses was by far the most prevalent issue. In most such cases, courts denied business taxpayers' deductions for failure to substantiate.[44] However, courts did allow deductions for some expenses when business taxpayers were able to provide sufficient evidence in the form of records, receipts, or logs.[45] Courts occasionally applied the *Cohan* rule where the taxpayer presented sufficient documentation to prove an expense was incurred but had limited documentation of the precise amount.[46] As previously mentioned, however, IRC § 274(d) makes the *Cohan* rule unavailable in certain circumstances in which taxpayers are subject to heightened documentation requirements.

41 *O'Connor*, 653 F. App'x at 633 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-155.

42 *See, e.g.*, *Humphrey v. Comm'r*, T.C. Memo. 2017-78; *Rangen v. Comm'r*, T.C. Memo. 2016-195.

43 *Tanzi v. Comm'r*, T.C. Memo. 2016-148.

44 *See Ballard v. Comm'r*, T.C. Memo. 2017-57; *Brodmerkle v. Comm'r*, T.C. Memo. 2017-8.

45 *See Alexander v. Comm'r*, T.C. Memo. 2016-214 (rent expense partially substantiated through invoices and checking account statements).

46 *See Embroidery Express, LLC v. Comm'r*, T.C. Memo. 2016-136.

Probandt v. Commissioner, however, explored a narrow exception to this general rule.[47] In *Probandt*, the taxpayer successfully invoked the exceptional circumstances rule, which allows a reasonable reconstruction of records lost beyond the taxpayer's control.[48] The taxpayer was engaged in the business of securing exclusive rights to distribute Chinese products and deducted a number of Schedule C business expenses. Insofar as relevant to this discussion, the IRS disallowed deductions for travel, meals and entertainment expenses under IRC § 274(d). The taxpayer claimed that he maintained handwritten contemporaneous documentation in the form of spiral notebooks and day planners, which were lost in a Portland, Oregon storage unit subject to eminent domain while he was in China. As a result, the taxpayer argued that he was entitled to a reasonable reconstruction of these lost records under the exceptional circumstances rule.[49] The Tax Court agreed and, applying the *Cohan* rule, permitted the taxpayer to deduct 40 percent of the travel, meals and entertainment expenses at issue.

In another substantiation case, *Kilpatrick v. Commissioner*, the Tax Court addressed deductibility issues for a number of items, ranging from automobiles to office furnishings.[50] In *Kilpatrick*, the taxpayer was a certified public accountant who worked from home and sought to deduct various Schedule C business expenses.[51] In particular, the taxpayer claimed automobile expenses, which are covered by IRC § 274(d). Nevertheless, he failed to maintain a contemporaneous log; instead, the taxpayer relied on reconstructed calendars and online map services produced for his IRS audit to prove his business mileage.[52] Although the taxpayer also provided credible testimony that he used his car to distribute advertising materials, the Tax Court rejected the audit-related materials and found that there was insufficient evidence to corroborate the taxpayer's own statements.[53]

The taxpayer also sought to deduct room furnishings located in his home office. Based on the taxpayer's credible testimony, the Tax Court agreed that the furnishings were used for business purposes. Nevertheless, the Court made an independent determination that the office furnishings were antiques and had to be capitalized. Because these assets did not have a diminishing useful life, however, and appreciated in value, no deductions were allowed.[54]

The taxpayer's attempts to deduct a laptop computer were likewise unsuccessful. The Tax Court disallowed a capital expense deduction for the computer because the taxpayer failed to make the

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47 *Probandt v. Comm'r*, T.C. Memo. 2016-135.

48 *Id.*

49 The exceptional circumstances rule applies where, because of an unusual situation, taxpayers are unable to obtain evidence generally required to support their claimed deduction. In this case, they can be allowed to present the best secondary evidence available to establish the expenditures and their deductibility. *See* Treas. Reg. § 1.274-5T(c)(4), "Substantiation in exceptional circumstances." Treas. Reg. § 1.274-5T(c)(5), "Loss of records due to circumstances beyond control of the taxpayer."

50 *Kilpatrick v. Comm'r*, T.C. Memo. 2016-166.

51 *Id.*

52 *See* Treas. Reg. § 1.274-5T(c)(2)(ii).

53 IRC § 274(d) substantiation elements include 1) the amount of each expense related to the business use of the automobile; 2) the amount of business mileage for each business use of the automobile; 3) the total mileage (business and nonbusiness) of the automobile during the taxable year; 4) the date of each business use of the automobile; and 5) the business purpose of each business use of the automobile. Section 274(d) further states the taxpayer may substantiate these elements by 1) "adequate records" or 2) "sufficient evidence corroborating the taxpayer's own statement" (flush language).

54 "Prior versions of the Internal Revenue Code had been interpreted to preclude a depreciation deduction for an asset the value of which is not reduced by the passage of time or by use." *Kilpatrick*, T.C. Memo. 2016-166 (citing *Hawkins v. Comm'r*, 713 F.2d 347 (8th Cir. 1983), *aff'g* T.C. Memo. 1982-451).

required election on his return under IRC § 179(c).[55] Additionally, the Tax Court noted that the taxpayer admitted to personal use of the computer and was unable to substantiate the percentage of business use as specified by the IRC § 274(d) strict substantiation requirements.

Courts generally sustained IRS determinations that business expense deductions were not permissible (beyond the income reported) when an activity was not engaged in for-profit within the meaning of IRC § 183.[56] A unique example of this "hobby loss" analysis arose in the case of *Vest v. Commissioner*.[57] The taxpayer, a successful businessman, used his various partnerships to deduct more than six million dollars to investigate the mysterious events surrounding his father's unresolved 1946 homicide. When the IRS disallowed these deductions, the taxpayer argued that the expenses were incurred in his efforts to gather enough information to publish a profitable book or film script based on his father's homicide. The Tax Court examined the taxpayer's deductions using the nine-factor test of Treas. Reg. § 1.183-2(b).[58] The Tax Court determined that the taxpayer's losses were perpetual and substantial; that the taxpayer had no prior experience in professional writing; that the direction of the investigation was never altered in light of the losses incurred; that there was no business plan or budget for the ongoing activity; and that the taxpayer's personal motives were readily apparent. As a result, the taxpayer was unable to deduct any expenses in excess of income attributable to the activity, based on the limits articulated under IRC § 183 with respect to hobby losses.

Taxpayers likewise experienced challenges in establishing the business use of their home offices, a prerequisite to the deductibility of claimed expenses.[59] For example, in *Jackson v. Commissioner*, married taxpayers sold insurance products out of their recreational vehicle (RV) while attending RV rallies.[60] Affirming the Tax Court, the Ninth Circuit disallowed the taxpayers' Schedule C depreciation and interest deductions claimed with respect to the RV on the grounds that personal use of the RV had exceeded 14 days in both tax years.[61] On the other hand, one judge dissented, arguing that, in at least one year, the business use of the RV outweighed its personal use, and that a deduction should have been allowed because the RV was a prerequisite for the taxpayers to enter the rallies to conduct their business.

CONCLUSION

The existence and amount of allowable business expenses are highly fact-specific and are often open to interpretation. Deductions are based upon a complex interaction of multiple statutes and regulations, as well as case law. This circumstance perpetuates substantial controversy between the IRS and taxpayers regarding the scope and extent of properly claimed business deductions and creates some interpretative

55 IRC § 179(c) permits the taxpayer to make the requisite election on the taxpayer's return for the taxable year. *See, e.g.*, *Carmody v. Comm'r*, T.C. Memo. 2016-225; *Embroidery Express, LLC v. Comm'r*, T.C. Memo. 2016-136; *Hylton v. Comm'r*, T.C. Memo. 2016-234, *appeal docketed*, Nos. 17-1776 & 17-1777 (4th Cir. June 28, 2017).

56 *See, e.g.*, *Carmody v. Comm'r*, T.C. Memo. 2016-225; *Hylton v. Comm'r*, T.C. Memo. 2016-234, *appeal docketed*, Nos. 17-1776 & 17-1777 (4th Cir. June 28, 2017).

57 *Vest v. Comm'r*, T.C. Memo. 2016-187, *aff'd*, 690 F. App'x 210 (5th Cir. 2017).

58 Those factors are: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation.

59 *See Larkin v. Comm'r*, T.C. Memo. 2017-54; *Ibidunni v. Comm'r*, T.C. Memo. 2016-218.

60 *Jackson v. Comm'r*, 672 F. App'x 760 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-160.

61 IRC § 280A(d)(1)(A) precludes the deduction of a dwelling used as a personal residence, which is established by fact finding as to whether the taxpayer's personal use exceeds 14 days.

issues. As in prior years, a number of cases arose regarding the merits of claimed deductions for home office expenses, hobby losses, and business expenses that were held to be personal in nature.

Taxpayers continued to demonstrate confusion in a range of trade or business expense issues. For example, in a number of cases this year, taxpayers attempting to substantiate unreimbursed employee business expenses failed to produce the requisite employer reimbursement plans or to demonstrate knowledge of reimbursements allowed under those plans. Likewise, a number of taxpayers failed to meet general substantiation requirements or to comply with the heightened substantiation rules of IRC § 274(d).

Some taxpayers were successful in asserting the *Cohan* rule to obtain partial deductions. This common law doctrine allows taxpayers to deduct estimated expenses in cases where the expenses clearly existed but documentation showing the exact amount of the expenses is not readily available. The National Taxpayer Advocate believes the IRS Office of Appeals should expand the use of the *Cohan* rule in assessing hazards of litigation and in seeking to reach settlements with taxpayers.[62] The Examination process that often leads to Appeals, however, does not generally employ the *Cohan* rule and has adopted a more stringent document request policy to close cases and bypass Appeals in several instances.[63] If the IRS actively employed the *Cohan* rule during the Examination process, this interaction with taxpayers likely would bring about earlier resolution of many cases that currently are litigated. Further, it would serve as a mechanism for better educating taxpayers regarding the parameters of appropriate trade or business expenses and the manner in which they must be substantiated.

The IRS should continue to seek all possible means of communicating with taxpayers about these trade or business expense issues. Proactive education and outreach regarding trade or business expenses will also promote taxpayers' *rights to be informed* and *to challenge the IRS's position and be heard*. Nevertheless, the National Taxpayer Advocate has previously expressed concern that there are only 98 Small Business/Self-Employed (SB/SE) Outreach and Education employees for the roughly 62 million SB/SE taxpayers, and 14 states without any SB/SE Outreach and Education employees within their respective borders.[64] By addressing this concern and by helping taxpayers understand not only the legal requirements but also their rights, the IRS will encourage taxpayers to comply with their tax obligations and minimize the risk of litigation.

62 *See* National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

63 *Id.*

64 *See Hearing on IRS Reform: Perspectives from the National Taxpayer Advocate: Hearing on Tax Reform Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 115th Cong. 11 (2017) (statement of Nina E. Olson, National Taxpayer Advocate). *See also* 2016 National Taxpayer Advocate Annual Report to Congress 6-11 (Special Focus: *IRS Budget and Oversight: To fairly, effectively, and efficiently administer the tax system, the IRS must receive increased funding, but such funding should be tied to additional congressional oversight of IRS strategic and operational plans*).

MLI #3

Summons Enforcement Under IRC §§ 7602, 7604, and 7609

SUMMARY

Pursuant to Internal Revenue Code (IRC) § 7602, the IRS may examine any books, records, or other data relevant to an investigation of a civil or criminal tax liability.[1] To obtain this information, the IRS may serve a summons directly on the subject of the investigation or any third party who may possess relevant information.[2] If a person summoned under IRC § 7602 neglects or refuses to obey the summons; to produce books, papers, records, or other data; or to give testimony as required by the summons, the IRS may seek enforcement of the summons in a United States District Court.[3]

A person who has a summons served on him or her may contest its legality if the government petitions to enforce it.[4] Thus, summons enforcement cases are different from many other cases described in other Most Litigated Issues because often the government, rather than the taxpayer, initiates the litigation. If the IRS serves a summons on a third party, any person entitled to notice of the summons may challenge its legality by filing a motion to quash or by intervening in any proceeding regarding the summons.[5] Generally, the burden on the taxpayer to establish the illegality of the summons is heavy.[6] When challenging the summons' validity, the taxpayer generally must provide "some credible evidence" supporting an allegation of bad faith or improper purpose.[7] The taxpayer is entitled to a hearing to examine an IRS agent about his or her purpose for issuing a summons only when the taxpayer can point to specific facts or circumstances that plausibly raise an inference of bad faith.[8] Naked allegations of improper purpose are not enough, but because direct evidence of IRS's bad faith "is rarely if ever available," circumstantial evidence can suffice to meet that burden.[9]

TAS identified 89 federal cases decided between June 1, 2016, and May 31, 2017, involving IRS summons enforcement issues. The government was the initiating party in 65 cases, while the taxpayer was the initiating party in 24 cases. Overall, taxpayers fully prevailed in three cases, while three cases were split. The IRS prevailed in the remaining 83 cases.

1 Internal Revenue Code (IRC) § 7602(a)(1); Treas. Reg. § 301.7602-1.

2 IRC § 7602(a).

3 IRC § 7604(b).

4 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

5 IRC § 7609(b).

6 *U.S. v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978).

7 *U.S. v. Clarke*, 134 S. Ct. 2361, 2367 (2014), *vacating* 517 F. App'x 689 (11th Cir. 2013), *rev'g* 2012-2 U.S. Tax Cas. (CCH) ¶ 50,732 (S.D. Fla. 2012).

8 *Id.* (stating that "[t]he taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive").

9 *Id.* at 2367-68.

TAXPAYER RIGHTS IMPACTED[10]

- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

The IRS has broad authority under IRC § 7602 to issue a summons to examine a taxpayer's books and records or demand testimony under oath.[11] Further, the IRS may obtain information related to an investigation from a third party if, subject to the exceptions of IRC § 7609(c), it provides notice to the taxpayer or other person identified in the summons.[12] In limited circumstances, the IRS can issue a summons even if the name of the taxpayer under investigation is unknown, *i.e.*, a "John Doe" summons.[13] However, the IRS cannot issue a summons after referring the matter to the Department of Justice (DOJ).[14]

If the recipient fails to comply with a summons, the United States may commence an action under IRC § 7604 in the appropriate United States District Court to compel document production or testimony.[15] If the United States files a petition to enforce the summons, the taxpayer may contest the validity of the summons in that proceeding.[16] Also, if the summons is served upon a third party, any person entitled to notice may petition to quash the summons in an appropriate district court, and may intervene in any proceeding regarding the enforceability of the summons.[17]

Generally, a taxpayer or other person named in a third-party summons is entitled to notice.[18] However, the IRS does not have to provide notice in certain situations. For example, the IRS is not required to give notice if the summons is issued to aid in the collection of "an assessment made or judgment rendered against the person with respect to whose liability the summons is issued."[19] Congress created this exception because it recognized a difference between a summons issued to compute the taxpayer's taxable income and a summons issued after the IRS has assessed tax or obtained a judgment.

10 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

11 IRC § 7602(a). *See also LaMura v. U.S.*, 765 F.2d 974, 979 (11th Cir. 1985) (citing U.S. v. Bisceglia, 420 U.S. 141, 145-46 (1975)).

12 IRC § 7602(c). Those entitled to notice of a third-party summons (other than the person summoned) must be given notice of the summons within three days of the day on which the summons is served to the third party but no later than the 23rd day before the day fixed on the summons on which the records will be reviewed. IRC § 7609(a).

13 The court must approve a "John Doe" summons prior to issuance. In order for the court to approve the summons, the United States commences an *ex parte* proceeding. The United States must establish during the proceeding that its investigation relates to an ascertainable class of persons; it has a reasonable basis for the belief that these unknown taxpayers may have failed to comply with the tax laws; and it cannot obtain the information from another readily available source. IRC § 7609(f).

14 IRC § 7602(d). This restriction applies to "any summons, with respect to any person if a [DOJ] referral is in effect with respect to such person." IRC § 7602(d)(1).

15 IRC § 7604.

16 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

17 IRC § 7609(b). The petition to quash must be filed not later than the 20th day after the date on which the notice was served. IRC § 7609(b)(2)(A).

18 IRC § 7609(a)(1); Treas. Reg. § 301.7609-1(a)(1). *See, e.g., Cephas v. U.S.*, 112 A.F.T.R.2d (RIA) 6483 (D. Md. 2013).

19 IRC § 7609(c)(2)(D)(i). The exception also applies to the collection of a liability of "any transferee or fiduciary of any person referred to in clause (i)." IRC § 7609(c)(2)(D)(ii).

For example, the IRS does not have to give notice to the taxpayer or person named in the summons if it is attempting to determine whether the taxpayer has an account in a certain bank with sufficient funds to pay an assessed tax because such notice might seriously impede the IRS's ability to collect the tax.[20] Courts have interpreted this "aid in collection" exception to apply only if the taxpayer owns a legally identifiable interest in the account or other property for which records are summoned.[21] Additionally, the IRS is not required to give notice when, in connection with a criminal investigation, an IRS criminal investigator serves a summons on any person who is not the third-party record-keeper.[22]

Whether the taxpayer contests the summons in a motion to quash or in response to the United States' petition to enforce, the legal standard is the same.[23] In *United States v. Powell*, the Supreme Court set forth four threshold requirements (referred to as the *Powell* requirements) that must be satisfied to enforce an IRS summons:

1. The investigation must be conducted for a legitimate purpose;
2. The information sought must be relevant to that purpose;
3. The IRS must not already possess the information; and
4. All required administrative steps must have been taken.[24]

The IRS bears the initial burden of establishing that these requirements have been satisfied.[25] The government meets its burden by providing a sworn affidavit of the IRS agent who issued the summons declaring that each of the *Powell* requirements has been satisfied.[26] The burden then shifts to the person contesting the summons to demonstrate that the IRS did not meet the requirements or that enforcement of the summons would be an abuse of process.[27]

The taxpayer can show that enforcement of the summons would be an abuse of process if he or she can prove that the IRS issued the summons in bad faith.[28] In *United States v. Clarke*, the Supreme Court held that during a summons enforcement proceeding, a taxpayer has a right to conduct an examination of the responsible IRS officials about whether a summons was issued for an improper purpose only when the taxpayer "can point to specific facts or circumstances plausibly raising an inference of bad faith."[29] Blanket claims of improper purpose are not sufficient, but circumstantial evidence can be.[30]

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20 H.R. Rep. No. 94-658 at 310, *reprinted in* 1976 U.S.C.C.A.N. at 3206. *See also* S. Rep. No. 94-938, pt. 1, at 371, *reprinted in* 1976 U.S.C.C.A.N. at 3800-01 (containing essentially the same language).

21 *Ip v. U.S.*, 205 F.3d 1168, 1172-76 (9th Cir. 2000).

22 IRC § 7609(c)(2)(E). A third-party record-keeper is broadly defined and includes banks, consumer reporting agencies, persons extending credit by credit cards, brokers, attorneys, accountants, enrolled agents, and owners or developers of computer source code but only when the summons "seeks the production of the source or the program or the data to which the source relates." IRC § 7603(b)(2).

23 *Kamp v. U.S.*, 112 A.F.T.R.2d (RIA) 6630 (E.D. Cal. 2013).

24 *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964).

25 *Fortney v. U.S.*, 59 F.3d 117, 119-20 (9th Cir. 1995).

26 *U.S. v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

27 *Id.*

28 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

29 *U.S. v. Clarke*, 134 S. Ct. 2361, 2367 (2014), *vacating* 517 F. App'x 689 (11th Cir. 2013), *rev'g* 2012-2 U.S. Tax Cas. (CCH) ¶ 50,732 (S.D. Fla. 2012).

30 *Id.* at 2367-68.

A taxpayer may also allege that the information requested is protected by a constitutional, statutory, or common-law privilege, such as the:

- Fifth Amendment privilege against self-incrimination;
- Attorney-client privilege;[31]
- Tax practitioner privilege;[32] or
- Work product privilege.[33]

However, these privileges are limited. For example, courts reject blanket assertions of the Fifth Amendment,[34] but note that taxpayers may have valid Fifth Amendment claims regarding specific documents or testimony.[35] However, even if a taxpayer may assert the Fifth Amendment on behalf of him or herself, he or she cannot assert it on behalf of a business entity.[36]

Additionally, taxpayers cannot, on the basis of the Fifth Amendment privilege, withhold self-incriminatory evidence of a testimonial or communicative nature if the summoned documents fall within the "foregone conclusion" exception to the Fifth Amendment. The exception applies if the government establishes its independent knowledge of three elements:

1. The documents' existence;
2. The documents' authenticity; and
3. The possession or control of the documents by the person to whom the summons was issued.[37]

The attorney-client privilege protects "tax advice," but not tax return preparation materials.[38] The "tax shelter" exception limits the tax practitioner privilege and permits discovery of communications between a practitioner and client that promote participation in any tax shelter.[39] Thus, the tax practitioner privilege does not apply to any written communication between a federally authorized tax practitioner and "any person, any director, officer, employee, agent, or representative of the person, or any other person holding a capital or profits interest in the person" which is "in connection with the promotion of the direct or indirect participation of the person in any tax shelter."[40]

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31 The attorney-client privilege provides protection from discovery of information where: (1) legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication is related to this purpose, (4) made in confidence, (5) by the client, (6) and at the client's insistence protected, (7) from disclosure by the client or the legal advisor, (8) except where the privilege is waived. *U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing 8 John Henry Wigmore, Evidence In Trials At Common Law § 2292 (John T. McNaughten rev. 1961)).

32 IRC § 7525 extends the protection of the common law attorney-client privilege to federally authorized tax practitioners in federal tax matters. Criminal tax matters and communications regarding tax shelters are exceptions to the privilege. IRC § 7525(a)(2), (b). The interpretation of the tax practitioner privilege is based on the common law rules of attorney-client privilege. *U.S. v. BDO Seidman, LLP*, 337 F.3d 802, 810-12 (7th Cir. 2003).

33 The work product privilege protects against the discovery of documents and other tangible materials prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947).

34 *See, e.g.*, *U.S. v. McClintic*, 113 A.F.T.R.2d (RIA) 330 (D. Or. 2013).

35 *See, e.g.*, *U.S. v. Lawrence*, 113 A.F.T.R.2d (RIA) 1933 (S.D. Fla. 2014).

36 *Braswell v. U.S.*, 487 U.S. 99 (1988).

37 *U.S. v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010).

38 *U.S. v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

39 IRC § 7525(b). *See also Valero Energy Corp. v. U.S.*, 569 F.3d 626 (7th Cir. 2009).

40 IRC § 7525(b). A tax shelter is defined as "a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax." IRC § 6662(d)(2)(C)(ii).

In July 2016, the IRS issued final regulations providing that outside parties with whom the IRS or the Office of Chief Counsel contracts for services — such as economists, engineers, consultants, or attorneys — may receive books, papers, records, or other data summoned by the IRS and, in the presence of an IRS officer or employee, participate fully in the interview of a person who the IRS has summoned as a witness to provide testimony under oath.[41] However, in a significant recent development, the Department of the Treasury has recommended that the President consider revoking these regulations in part.[42] Noting that the regulations have generated substantial public attention and criticism and expressing concern that the IRS's use of outside attorneys creates a risk that the government will lose control of its own investigation, Treasury stated that it and the IRS are considering a prospectively effective amendment that would prohibit outside attorneys from participating in an IRS exam, including a summons interview.[43] However, the amendment would continue to allow outside subject matter experts, such economists or engineers, to participate in summons proceedings as the IRS may have a compelling need to use such experts and they do not present the same risks as outside attorneys.

ANALYSIS OF LITIGATED CASES

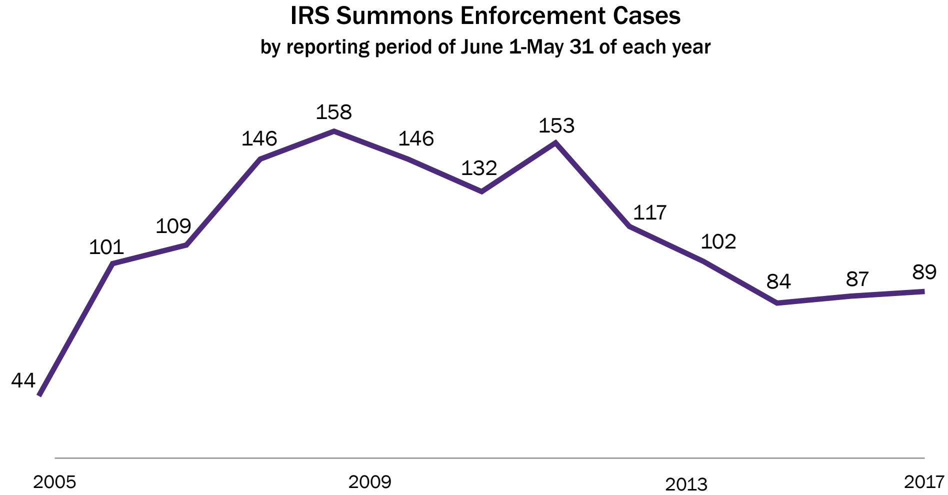
Summons enforcement has been a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress every year since 2005, when TAS identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. The number of cases peaked at 158 for the reporting period ending on May 31, 2009, but had steadily declined, except for a one-year increase for the year ending May 31, 2012, as shown in Figure 3.3.1. This year, the number of summons enforcement cases rose slightly, as TAS identified 89 cases for the reporting period ending on May 31, 2017, an increase from the 87 cases TAS identified during last year's reporting period. A detailed list of these cases appears in Table 3 of Appendix 3.

41 *See* Treas. Reg. § 301.7602-1(b)(3). As we noted in our 2015 Annual Report, the IRS issued temporary regulations on this topic in June 2014. *See* Temp. Treas. Reg. § 301.7602-1T(b)(3); National Taxpayer Advocate 2015 Annual Report to Congress 470-71. We also discussed these regulations and summons enforcement litigation involving the IRS's use of an outside law firm in an audit of Microsoft Corporation's transfer pricing arrangements in our 2016 Annual Report to Congress. *See* National Taxpayer Advocate 2016 Annual Report to Congress 463.

42 *See* U.S. Department of the Treasury, *Second Report to the President on Identifying and Reducing Tax Regulatory Burdens* 4-5 (Oct. 2017).

43 The Treasury recommendation mentioned concerns expressed by the court in the *Microsoft* summons litigation, which we discussed in our 2016 Annual Report. *See* National Taxpayer Advocate 2016 Annual Report to Congress 463. We briefly discuss recent developments in the *Microsoft* litigation below.

FIGURE 3.3.1



Of the 89 cases TAS reviewed this year, the IRS prevailed in full in 83, a 93 percent success rate, which is a slight increase from the IRS's 91 percent success rate during the 2016 reporting period.[44] Taxpayers had representation in 25 cases (28 percent) and appeared *pro se* (*i.e.*, on their own behalf) in the remaining 64. This is a notable drop in the percentage of represented taxpayers as 44 percent of taxpayers were represented during the 2016 reporting period.[45] This year's percentage of represented taxpayers is a return close to the percentage TAS observed in the 2015 reporting period, where 27 percent of taxpayers had representation.[46] Seventy-three cases involved individual taxpayers, while the remaining 16 involved business taxpayers, including sole proprietorships.[47] Cases generally involved one of the following themes.

Petitions to Enforce and *Powell* Requirements

The United States petitioned to enforce a summons in 64 cases and successfully met its burden under *Powell* in all 64 cases.[48] An example of an unsuccessful *Powell* challenge by a taxpayer can be found in *United States v. Clower*.[49] In *Clower*, the taxpayer, a real estate appraiser specializing in conservation easements, appealed a Georgia district court order enforcing a summons to the Unites States Court of

44 *See* National Taxpayer Advocate 2016 Annual Report to Congress 459.

45 *Id*.

46 *See* National Taxpayer Advocate 2015 Annual Report to Congress 471.

47 There were cases in which the IRS issued summons for investigations into both the individual taxpayer and his or her business. For the purposes of this Most Litigated Issue, TAS placed these cases into the business taxpayer category.

48 *See*, *e.g.*, *U.S. v. Gibson*, 117 A.F.T.R.2d (RIA) 2037 (W.D. Mo. 2016), *adopting* 117 A.F.T.R.2d (RIA) 2035 (W.D. Mo. 2016); *U.S. v. McConnell*, 119 A.F.T.R.2d (RIA) 942 (N.D. Ga. 2017), *adopting* 119 A.F.T.R.2d (RIA) 939 (N.D. Ga. 2017); *U.S. v. Siripane*, 119 A.F.T.R.2d (RIA) 1407 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1062 (E.D. Cal. 2017). As mentioned above, the government initiated summons litigation in 65 cases during the current reporting period. The government petitioned to enforce a summons in 64 of these cases. In one case, *In re Tax Liabs. of Doe*, 118 A.F.T.R.2d (RIA) 6780 (N.D. Cal. 2016), the government filed an *ex parte* petition with the court for leave to serve a "John Doe" summons. As discussed both above and below, "John Doe" summonses have special statutory requirements and differ from regular summons enforcement proceedings.

49 *U.S. v. Clower*, 666 F. App'x 869 (11th Cir. 2016), *aff'g* 117 A.F.T.R.2d (RIA) 1446 (N.D. Ga. 2016).

Appeals for the Eleventh Circuit.[50] The IRS was investigating the taxpayer's preparation of conservation easement appraisals and requested various documents and files to determine whether the taxpayer was liable for civil penalties under the IRC. After the taxpayer raised concerns about the scope of the request, the government indicated that it was only seeking appraisal documentation relating to conservation easements, and the district court enforced the summons.[51]

On appeal, the court examined the district court's application of the *Powell* requirements for clear error. First, with respect to the legitimate purpose *Powell* requirement, the court found that the IRS's summons was issued as part of an investigation into whether the taxpayer owed tax penalties relating to his preparation of conservation easement appraisals. The court dismissed the taxpayer's argument that the IRS's investigation had no legitimate purpose as it requested land appraisals prepared by the taxpayer that were not ultimately filed with the IRS by the taxpayer's clients. The court noted that the focus of the IRS investigation was on the taxpayer and not his clients. In addition, the court stated that the IRS has broad summons power and, contrary to the taxpayer's contention, is not limited to only investigating filed tax returns.[52]

Second, with respect to the *Powell* requirement that the material sought by the IRS be relevant to its investigation, the court noted that the government's burden of demonstrating relevance is "slight." The court then stated that the district court had properly determined that the information requested by the government in the summons was relevant to its investigation of the taxpayer. It pointed out that the district court had properly limited the summons to appraisal documentation relating to conservation easements and, with this limitation, all items listed in the summons were relevant to the IRS's investigation of the taxpayer.[53]

Third, with respect to the *Powell* requirement that the information sought by the IRS is not already in its possession, the court stated that while the IRS might have in its possession the tax returns and accompanying forms actually filed by the taxpayer's clients, it did not have the taxpayer's original appraisal reports or unfiled versions of the forms that he signed. The court stated that the fact that there is some redundancy between these documents is not a bar to the enforcement of the summons. In addition, the court noted that the taxpayer's files contained information that was not in the IRS's possession and would be relevant to its investigation. Finally, with respect to the *Powell* requirement that the IRS follow all necessary administrative steps, the court stated that it was unclear from the taxpayer's brief whether he was challenging this factor and thus it did not address this issue. Therefore, the court affirmed the district court's enforcement of the summons.[54]

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50 As described in the court's opinion, a conservation easement restricts the development and use of real property to achieve certain conservation or preservation goals. Assuming the conservation easement contribution meets the statutory requirements, the property owner may claim a charitable contribution deduction on his or her tax return. For a detailed discussion of conservation easements, see Most Litigated Issue: *Charitable Contribution Deductions Under Internal Revenue Code (IRC) § 170*, *infra*.

51 *U.S. v. Clower*, 666 F. App'x 869, 871-2 (11th Cir. 2016), *aff'g* 117 A.F.T.R.2d (RIA) 1446 (N.D. Ga. 2016).

52 *Id.* at 873-4. The court also dismissed two other arguments the taxpayer made regarding the legitimate purpose of the IRS's investigation as they were not raised at the district court level and were therefore deemed waived.

53 *Id.* at 874.

54 *Id.* at 874-5.

Petitions to Quash and Lack of Subject Matter Jurisdiction

Taxpayers petitioned to quash an IRS summons to a third party in 24 instances;[55] however, in many of these cases, courts dismissed the petitions for lack of jurisdiction on procedural or notice grounds. For example, a district court dismissed a taxpayer's petition to quash a summons issued to the taxpayer's bank because the summons was issued to aid in the collection of a tax and the taxpayer therefore had no recourse under IRC § 7609.[56]

In *Presley v. United States*, the taxpayers, comprised of individuals, a law firm, and a family limited partnership, sought to quash three IRS third-party summonses issued to their bank as part of examinations into their 2014 tax liabilities.[57] The taxpayers opposed the bank producing records regarding the law firm's client trust and escrow accounts and argued that under Florida law, the clients of the law firm, whose financial information might be contained in the records requested by the IRS, had a reasonable expectation of privacy in those records.[58]

The court noted that the summonses complied with federal law, as they were narrowly drawn to meet the *Powell* requirements and, if the *Powell* requirements were met, the summonses did not violate the Fourth Amendment's reasonable expectation of privacy. Also, the court pointed out that both the taxpayers and the clients of the law firm lacked standing to raise a Fourth Amendment argument as they did not have a reasonable expectation of privacy in records maintained by a third-party bank. Finally, the court stated that although Florida law recognized a reasonable expectation of privacy in records held by a third-party bank, under the Supremacy Clause of the U.S. Constitution, federal summons law preempted any state laws that conflict with it. Therefore, the court granted the government's motion to dismiss the taxpayers' petition to quash. The taxpayers have appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit.[59]

Privileges

As in past years, taxpayers attempted to invoke various privileges, including Fifth Amendment, attorney-client, or other privileges in response to an IRS summons. In two cases, taxpayers successfully invoked Fifth Amendment privilege claims for certain requested documents or testimony.[60] In two other cases, the United States Court of Appeals for the Second Circuit vacated and remanded rulings from district courts due to Fifth Amendment privilege claims.[61]

In *United States v. Micro Cap KY Insurance Company*, the government sought to enforce an IRS summons issued to two captive insurance companies ("taxpayers") that were set up, after consultation

55 In some instances, the taxpayer made the motion to quash in its answer to the government's petition to enforce.

56 *Harrison v. U.S. Comm'r*, 2017 U.S. Dist. LEXIS 9742 (S.D. Tex. 2017), *adopting* 119 A.F.T.R.2d (RIA) 593 (S.D. Tex. 2016). Under IRC § 7609(c)(2)(D)(i), the IRS is not required to provide notice to the taxpayer and the taxpayer therefore has no right to quash the summons if the summons is issued to aid in the collection of the taxpayer's liability.

57 *Presley v. U.S.*, 119 A.F.T.R.2d (RIA) 313 (S.D. Fla. 2017), *appeal docketed*, No. 17-10182 (11th Cir. Jan. 11, 2017).

58 *Id*.

59 *Id*.

60 *See U.S. v. Azarian*, 118 A.F.T.R.2d (RIA) 5526 (D. Minn. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5523 (D. Minn. 2016), *appeal dismissed*, No. 17-1954 (8th Cir. May 23, 2017) (parties stipulated to dismissal); *U.S. v. Ukazim*, 118 A.F.T.R.2d (RIA) 6502 (S.D. Fla. 2016), *appeal dismissed*, No. 16-16859 (11th Cir. Nov. 28, 2016) (case dismissed after government's motion for dismissal).

61 *U.S. v. Fridman*, 665 F. App'x 94 (2d Cir. 2016), *vacating and remanding* 118 A.F.T.R.2d (RIA) 6890 (S.D.N.Y. 2015); *U.S. v. Greenfield*, 831 F.3d 106 (2d Cir. 2016), *vacating and remanding* 118 A.F.T.R.2d (RIA) 5309 (S.D.N.Y. 2015), *motion to dismiss case*, No. 14-mc-00350 (S.D.N.Y. Oct. 27, 2016) (government abandoned pursuit of summons enforcement action), *order to dismiss*, No. 14-mc-00350 (S.D.N.Y. Oct. 28, 2016).

with attorneys, by two doctors who co-owned dermatology businesses.[62] The IRS was investigating the tax liabilities of the taxpayers and requested various documents. The taxpayers provided most of the summoned documents but withheld a series of email communications between the doctors and their attorneys, claiming that they were subject to the attorney-client privilege. The government then petitioned the court to compel the taxpayers to produce the emails.[63]

As is common in summons enforcement cases, this case was initially assigned to a magistrate judge,[64] who found that the taxpayers had properly invoked the attorney-client privilege as the emails primarily involved the legal advice of counsel. The magistrate judge also found that each taxpayer had not waived the privilege by sharing the information in question with the doctor who formed the other captive insurance company as the doctors had jointly hired their attorneys to assist with captive insurance company formation and management and had a "clear commonality of interests." Therefore, the magistrate judge issued a report and recommendation that the government's petition to enforce the summons be denied.[65]

The government objected to the magistrate judge's report and recommendation, and raised a new argument that the taxpayers had waived their attorney-client privilege by filing a Tax Court petition against the IRS. Specifically, the government claimed this waiver of attorney-client privilege because the taxpayers had asserted in the Tax Court proceeding that they had a "reasonable cause" defense in relying on counsel for the tax positions they took in the years at issue.[66]

The district court found that the government had waived its argument that the taxpayers had waived their attorney-client privilege because, although it knew of the Tax Court proceeding at the time the magistrate judge heard the summons enforcement case, it did not timely raise this argument before the magistrate judge. In addition, the court found that even if it were to consider the government's argument on the merits it would still not prevail.[67]

The court noted that although a taxpayer's invocation of a reasonable cause defense could result in a waiver of the attorney-client privilege in Tax Court, it did not automatically lead to a disclosure of privileged documents. Rather, the assertion of the defense provides the IRS with a basis to request that the Tax Court compel a taxpayer to produce documents that were subject to the attorney-client privilege, but a taxpayer could avoid having to disclose privileged documents by withdrawing the reasonable cause defense. The court stated that the government had not yet made such a request in the taxpayers' Tax

62 *U.S. v. Micro Cap KY Ins. Co.*, 246 F. Supp. 3d 1194 (E.D. Ky. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1279 (E.D. Ky. 2017), *motion to dismiss case*, No. 17-5611 (6th Cir. June 6, 2017) (government decided not to pursue appeal), *appeal dismissed*, No. 17-5611 (6th Cir. June 7, 2017). As we noted in our 2016 Annual Report, a captive insurance structure is where a business sets up an insurance company to protect against certain risks. While this may be structured with legitimate tax benefits, there are situations where it can be abused. *See* National Taxpayer Advocate 2016 Annual Report to Congress 460; *see also* IRS, *IRS Warns of Abusive Tax Shelters on 2017 "Dirty Dozen" List of Tax Scams* (Feb. 17, 2017), https://www.irs.gov/newsroom/irs-warns-of-abusive-tax-shelters-on-2017-dirty-dozen-list-of-tax-scams; IRS Notice 2016-66, 2016-47 I.R.B. 745, *Transaction of Interest — Section 831(b) Micro-Captive Transactions* (Nov. 21, 2016), *modified by*, IRS Notice 2017-8, 2017-3 I.R.B. 423, *Transaction of Interest — Section 831(b) Micro-Captive Transactions* (Jan. 17, 2017).

63 *U.S. v. Micro Cap KY Ins. Co.*, 246 F. Supp. 3d 1194, 1195-6 (E.D. Ky. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1279 (E.D. Ky. 2017), *motion to dismiss case*, No. 17-5611 (6th Cir. June 6, 2017) (government decided not to pursue appeal), *appeal dismissed*, No. 17-5611 (6th Cir. June 7, 2017).

64 *See* 28 U.S.C. § 636(b).

65 *U.S. v. Micro Cap KY Ins. Co.*, 246 F. Supp. 3d 1194, 1196 (E.D. Ky. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1279 (E.D. Ky. 2017), *motion to dismiss case*, No. 17-5611 (6th Cir. June 6, 2017) (government decided not to pursue appeal), *appeal dismissed*, No. 17-5611 (6th Cir. June 7, 2017).

66 *Id*.

67 *Id*.

Court proceeding, and even if it had, it was not certain that the taxpayers would ultimately have to disclose the privileged documents. Expressing concern that the government was requesting disclosure of attorney-client privileged documents in district court based on what it predicted would happen in Tax Court, the court declined to order such a disclosure. Therefore, the court adopted the magistrate judge's report and recommendation to deny enforcement of the IRS summons and overruled the government's objection. The government initially appealed this decision to the United States Court of Appeals for the Sixth Circuit but subsequently decided not to pursue the appeal.[68]

Finally, as we noted in our 2015 and 2016 Annual Reports, Microsoft Corporation had obtained an evidentiary hearing in a summons enforcement case where the IRS used an outside law firm to assist in an audit of the company.[69] However, the IRS was ultimately successful in having the summons enforced.[70] The *Microsoft* litigation continued during the current reporting period as the corporation withheld some summoned documents from the IRS, asserting the tax practitioner, work-product, and attorney-client privileges. In May 2017, the court ordered *in camera* review for some of these documents to determine whether they are protected by these privileges and held, to the extent that they contained legal advice, that certain documents were protected by the attorney-client privilege and *in camera* review of them was not necessary.[71]

Civil Contempt

A taxpayer who "neglects or refuses to obey" an IRS summons may be held in civil contempt.[72] In five cases this year, taxpayers were held in civil contempt for failing to comply with a court order enforcing an IRS summons.[73] In *United States v. Chabot*, which we discussed last year in the privilege context, a district court found the taxpayer in contempt for failing to comply with a summons enforcement order, a finding which was affirmed by the United States Court of Appeals for the Third Circuit.[74] Overall, contempt proceedings accounted for approximately six percent of all summons-related cases. Unless the taxpayers complied with the court order, they were subject to arrest[75] or fines.[76]

68 *U.S. v. Micro Cap KY Ins. Co.*, 246 F. Supp. 3d 1194, 1197-8 (E.D. Ky. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1279 (E.D. Ky. 2017), *motion to dismiss case*, No. 17-5611 (6th Cir. June 6, 2017) (government decided not to pursue appeal), *appeal dismissed*, No. 17-5611 (6th Cir. June 7, 2017).

69 *See* National Taxpayer Advocate 2016 Annual Report to Congress 463; National Taxpayer Advocate 2015 Annual Report to Congress 471.

70 *See U.S. v. Microsoft Corp.*, 154 F. Supp. 3d 1134 (W.D. Wash 2015).

71 *See U.S. v. Microsoft Corp.*, 119 A.F.T.R.2d (RIA) 1724 (W.D. Wash. 2017).

72 IRC § 7604(b).

73 *See U.S. v. Belcik*, 118 A.F.T.R.2d (RIA) 5129 (M.D. Fla. 2016), *interlocutory appeal dismissed*, 2017 U.S. App. LEXIS 20091 (11th Cir. 2017) (court dismissed appeal due to taxpayer's fugitive status); *U.S. v. Lonnen*, 118 A.F.T.R.2d (RIA) 5431 (M.D.N.C. 2016); *U.S. v. Pfeifer*, 117 A.F.T.R.2d (RIA) 2106 (S.D. Ill. 2016); *U.S. v. Chabot*, 119 A.F.T.R.2d (RIA) 1179 (D.N.J. 2016), *aff'd*, 681 F. App'x 134 (3d Cir. 2017), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017); *U.S. v. Chabot*, 681 F. App'x 134 (3d Cir. 2017), *aff'g* 119 A.F.T.R.2d (RIA) 1180 (D.N.J. 2016), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017).

74 *U.S. v. Chabot*, 681 F. App'x 134 (3d Cir. 2017), *aff'g* 119 A.F.T.R.2d (RIA) 1180 (D.N.J. 2016), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017); *See* National Taxpayer Advocate 2016 Annual Report to Congress 461.

75 *U.S. v. Pfeifer*, 117 A.F.T.R.2d (RIA) 2106 (S.D. Ill. 2016).

76 *U.S. v. Chabot*, 119 A.F.T.R.2d (RIA) 1180 (D.N.J. 2016) (court imposed fine due to taxpayer's contempt), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017).

Virtual Currency and "John Doe" Summons

The IRS has taken the position that virtual currency, such as Bitcoin, is considered property for tax purposes and therefore general tax principles apply to transactions involving such currency.[77] In *In re Tax Liabilities of Doe*, the government filed an *ex parte* petition in a California district court for leave to serve a "John Doe" summons on Coinbase Inc., a virtual currency exchange company, seeking information about the company's customers.[78] The court found that the IRS had met the three "John Doe" summons requirements under IRC § 7609(f): its investigation related to an ascertainable group or class of persons; it had a reasonable basis for believing that this group or class of persons may have failed to comply with the tax laws; and it could not obtain the information it sought from another readily available source. Therefore, the court permitted the IRS to serve the summons on Coinbase.[79]

CONCLUSION

The IRS may issue a summons to obtain information to determine whether a tax return is correct or if a return should have been filed to ascertain a taxpayer's tax liability or to collect a liability.[80] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide that information voluntarily.

Summons enforcement continues to be a significant source of litigation and the number of litigated cases rose slightly from last year. The IRS also continues to be successful in the vast majority of summons enforcement litigation. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements.

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77 *See* IRS Notice 2014-21, 2014-16 I.R.B. 938, *IRS Virtual Currency Guidance* (Mar. 26, 2014); IRS Pub. 525, *Taxable and Nontaxable Income* 4 (Jan. 2017). In her 2013 Annual Report to Congress, the National Taxpayer Advocate recommended that the IRS issue guidance to assist users of digital currency. *See* National Taxpayer Advocate 2013 Annual Report to Congress 249-55 (Most Serious Problem: *DIGITAL CURRENCY: The IRS Should Issue Guidance to Assist Users of Digital Currency*).

78 *In re Tax Liabs. of Doe*, 118 A.F.T.R.2d (RIA) 6780 (N.D. Cal. 2016). As discussed earlier, under IRC § 7609(f), a district court must approve a "John Doe" summons prior to issuance. This proceeding is conducted *ex parte*. *See* IRC § 7609(h)(2).

79 *Id*. In a subsequent proceeding after the close of our reporting period, the court granted a motion by a "John Doe" to intervene and challenge the government's attempt to enforce the summons. *See U.S. v. Coinbase, Inc.*, 120 A.F.T.R.2d (RIA) 5239 (N.D. Cal. 2017).

80 IRC § 7602(a).

MLI #4 Appeals from Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

SUMMARY

The IRS Restructuring and Reform Act of 1998 (RRA 98)[1] created Collection Due Process (CDP) hearings to provide taxpayers with an independent review by the IRS Office of Appeals (Appeals) of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. In other words, a CDP hearing gives taxpayers an opportunity for a meaningful hearing before the IRS issues its first levy or immediately after it files its first NFTL with respect to a particular tax liability. At the hearing, the taxpayer has the statutory right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability.[2]

Taxpayers have the right to judicial review of Appeals' determinations if they timely request the CDP hearing and timely petition the United States Tax Court.[3] Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.[4]

Since 2001, CDP has been one of the federal tax issues most frequently litigated in the federal courts and analyzed in the National Taxpayer Advocate's Annual Reports to Congress. The trend continues this year, with our review of litigated issues finding 85 opinions on CDP cases during the review period of June 1, 2016 through May 31, 2017, which is a decrease of 14 percent since last year's report.[5] Taxpayers prevailed in full in four of these cases (nearly five percent) and, in part, in three others (nearly four percent). The eight percent success rate (rounded) for the taxpayers is lower than last year's success rate of 16 percent, which was one of the highest success rates since the inception of CDP hearings. Of the seven opinions where taxpayers prevailed in whole or in part, four taxpayers appeared *pro se*[6] and three were represented.

The cases discussed below demonstrate that CDP hearings serve an important role in providing taxpayers with a venue to raise legitimate issues before the IRS deprives the taxpayer of property. Many of these decisions shed light on substantive and procedural issues.

CDP hearings are particularly valuable because they provide taxpayers with an enforceable remedy with respect to several rights articulated in the Taxpayer Bill of Rights (TBOR), which was adopted by the IRS in 2014 and was subsequently incorporated in the Internal Revenue Code (IRC) in response

1 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

2 Internal Revenue Code (IRC) §§ 6320(c) (lien) and 6330(c) (levy). IRC § 6320(c) generally requires Appeals to follow the levy hearing procedures under IRC § 6330 for the conduct of the lien hearing, the review requirements, and the balancing test.

3 IRC § 6330(d) (setting forth the time requirements for obtaining judicial review of Appeals' determination); IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B) (setting forth the time requirements for requesting a Collection Due Process (CDP) hearing for lien and levy matters, respectively).

4 IRC § 6330(e)(1) provides that generally, levy actions are suspended during the CDP process (along with a corresponding suspension in the running of the limitations period for collecting the tax). However, IRC § 6330(e)(2) allows the IRS to resume levy actions upon a determination by the Tax Court of "good cause," if the underlying tax liability is not at issue.

5 For a list of all cases reviewed, see Table 4 in Appendix 3, *infra*.

6 *Pro se* means "[f]or oneself; on one's own behalf; without a lawyer." *Pro Se*, Black's Law Dictionary (10th ed. 2014).

to the National Taxpayer Advocate's recommendations.[7] In particular, by providing an opportunity for a taxpayer to challenge the underlying liability and raise alternatives to the collection action, the CDP hearing enables the taxpayer's *right to challenge the IRS's position and be heard*. If the taxpayer does not agree with Appeals' determination, he or she may file a petition in Tax Court, which furthers the taxpayer's *right to appeal an IRS decision in an independent forum*. Lastly, since the Appeals Officer (AO) must consider whether the IRS's proposed collection action balances the overall need for efficient collection of taxes with the legitimate concern that the IRS's collection actions are no more intrusive than necessary, the CDP hearing protects a taxpayer's *right to privacy while also ensuring the taxpayer's right to a fair and just tax system*.

TAXPAYER RIGHTS IMPACTED[8]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Current law provides taxpayers an opportunity for independent review of an NFTL filed by the IRS or of a proposed levy action.[9] As discussed above, the purpose of CDP rights is to give taxpayers adequate notice of IRS collection activity and a meaningful hearing before the IRS deprives the taxpayer of property.[10] The hearing allows taxpayers to raise issues related to collection of the liability, including:

- The appropriateness of collection actions;[11]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;[12]
- Appropriate spousal defenses;[13]
- The existence or amount of the underlying tax liability, but only if the taxpayer did not receive a statutory notice of deficiency or have another opportunity to dispute the liability;[14] and

7 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

8 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

9 IRC §§ 6320 and 6330. *See* RRA 98, Pub. L. No. 105-206, § 3401, 112 Stat. 685 (1998).

10 Prior to RRA 98, the U.S. Supreme Court had held that a post-deprivation hearing was sufficient to satisfy due process concerns in the tax collection arena. *See U.S. v. Nat'l Bank of Commerce*, 472 U.S. 713, 726-31 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

11 IRC § 6330(c)(2)(A)(ii).

12 IRC § 6330(c)(2)(A)(iii).

13 IRC § 6330(c)(2)(A)(i).

14 IRC § 6330(c)(2)(B).

- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.[15]

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.[16]

PROCEDURAL COLLECTION DUE PROCESS (CDP) REQUIREMENTS

The IRS must provide a CDP notice to the taxpayer after filing the first NFTL and generally before its first intended levy for the particular tax and tax period.[17] The IRS must provide the notice not more than five business days after the day of filing the NFTL, or at least 30 days before the day of the proposed levy.[18]

If the IRS files a lien, the CDP lien notice must inform the taxpayer of the right to request a CDP hearing within a 30-day period, which begins on the day after the end of the five-business day period after the filing of the NFTL.[19] In the case of a proposed levy, the CDP levy notice must inform the taxpayer of the right to request a hearing within the 30-day period beginning on the day after the date of the CDP notice.[20]

Requesting a Collection Due Process (CDP) Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing within the applicable period.[21] The Code and regulations require taxpayers to provide their reasons for requesting a hearing.[22] Failure to provide the basis may result in denial of a face-to-face hearing.[23] Taxpayers who fail to timely request a CDP hearing will be afforded an "equivalent hearing,"

15 IRC § 6330(c)(2)(A); Treas. Reg. §§ 301.6320-1(e) and 301.6330-1(e).

16 IRC § 6330(c)(4).

17 IRC § 6330(f) permits the IRS to levy without first giving a taxpayer a CDP notice in the following situations: the collection of tax is in jeopardy, a levy was served on a state to collect a state tax refund, the levy is a disqualified employment tax levy, or the levy was served on a federal contractor. A disqualified employment tax levy is any levy to collect employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a CDP hearing with respect to unpaid employment taxes arising in the most recent two-year period before the beginning of the taxable period with respect to which the levy is served. IRC § 6330(h)(1). A federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a federal contractor. IRC § 6330(h)(2). Under IRC § 6330(f), the IRS must still provide the opportunity for a CDP hearing "within a reasonable period of time after the levy."

18 IRC §§ 6320(a)(2) or 6330(a)(2). The CDP notice can be provided to the taxpayer in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail (return receipt requested, for the CDP levy notice) to the taxpayer's last known address.

19 IRC § 6320(a)(3)(B); Treas. Reg. § 301.6320-1(b)(1).

20 *Id.*

21 IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B); Treas. Reg. §§ 301.6320-1(c)(2), Question and Answer (Q&A) (C)(1)(ii) and 301.6330-1(c)(2), Q&A (C)(1)(ii).

22 Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C)(1)(ii) and 301.6330-1(c)(2), Q&A (C)(1)(ii).

23 IRC §§ 6320(b)(1) and 6330(b)(1); Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C)(1); 301.6330-1(c)(2), Q&A (C)(1); 301.6320-1(d)(2), Q&A (D)(8); and 301.6330-1(d)(2), Q&A (D)(8). The regulations require the IRS to provide the taxpayer an opportunity to "cure" any defect in a timely filed hearing request, including providing a reason for the hearing. Form 12153 includes space for the taxpayer to identify collection alternatives that he or she wants Appeals to consider, as well as examples of common reasons for requesting a hearing. *See* IRS Form 12153, *Requests for Collection Due Process or Equivalent Hearing* (Dec. 2013). For a detailed discussion of the Appeals policy, under which the default rule became telephone conferences, with in-person conferences only being available in cases meeting certain criteria and where the Appeals Team Manager approved, see Most Serious Problem: *Appeals: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*, *supra*. *See also* Internal Revenue Manual (IRM) 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016).

which is similar to a CDP hearing but lacks judicial review.[24] Taxpayers must request an equivalent hearing within the one-year period beginning the day after the five-business day period following the filing of the NFTL, or in levy cases, within the one-year period beginning the day after the date of the CDP notice.[25]

Conduct of a Collection Due Process (CDP) Hearing

The IRS generally will suspend the levy action throughout a CDP hearing involving a notice of intent to levy. However, the requirement to suspend a levy action is inapplicable in certain circumstances where the IRS is not required to provide a CDP hearing prior to the levy and is only required to provide the CDP hearing within a reasonable time after the levy.[26] These circumstances occur when the IRS determines that:

- The collection of tax is in jeopardy;
- The collection resulted from a levy on a state tax refund;
- The IRS has served a disqualified employment tax levy; or
- The IRS has served a federal contractor levy.[27]

The IRS also suspends levy action throughout any judicial review of Appeals' determination, unless the IRS obtains an order from the court permitting levy on the grounds that the underlying tax liability is not at issue, and the IRS can demonstrate good cause to resume collection activity.[28]

CDP hearings are informal. When a taxpayer requests a hearing with respect to both a lien and a proposed levy, Appeals will attempt to conduct one hearing.[29] Courts have determined that a CDP hearing need not be face-to-face but can take place by telephone or correspondence,[30] and Appeals will typically conduct the hearing by telephone unless the taxpayer requests a face-to-face conference.[31] The

24 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I6) and 301.6330-1(i)(2), Q&A (I6); *Business Integration Servs., Inc. v. Comm'r*, T.C. Memo. 2012-342 at 6-7; *Moorhouse v. Comm'r*, 116 T.C. 263 (2001). A taxpayer can request an Equivalent Hearing by checking a box on Form 12153, *Requests for Collection Due Process or Equivalent Hearing*, by making a written request, or by confirming that he or she wants the untimely CDP hearing request to be treated as an Equivalent Hearing when notified by Collection of an untimely CDP hearing request. IRM 5.19.8.4.3, *Equivalent Hearing (EH) Requests and Timeliness of EH Requests* (Nov. 1, 2007).

25 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I7) and 301.6330-1(i)(2), Q&A (I7).

26 *See, e.g.*, *Dorn v. Comm'r*, 119 T.C. 356 (2002); *Zapara v. Comm'r*, 124 T.C. 223 (2005); *Bibby v. Comm'r*, T.C. Memo. 2013-281.

27 IRC § 6330(e)(1) provides the general rule for suspending collection activity. IRC § 6330(f) provides that if collection of the tax is deemed in jeopardy, the collection resulted from a levy on a state tax refund, or the IRS served a disqualified employment tax levy or a federal contractor levy, IRC § 6330 does not apply, except to provide the opportunity for a CDP hearing within a reasonable time after the levy. *See Clark v. Comm'r*, 125 T.C. 108, 110 (2005) (*citing Dorn v. Comm'r*, 119 T.C. 356 (2002)).

28 IRC §§ 6330(e)(1) and (e)(2).

29 IRC § 6320(b)(4).

30 *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the Appeals Officer (AO) constituted a hearing as provided in IRC § 6320(b)). Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(6), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(6), Q&A (D)(8).

31 Under the recently adopted IRM 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016) the default rule became telephone conferences, with in-person conferences only being available in cases meeting certain criteria and where the Appeals Team Manager approved. Appeals recently announced that it would issue guidance to employees "informing them that Appeals will return to allowing taxpayers to have in-person Appeals conferences in field cases. However, the policy change is limited to field offices, which leaves the low income taxpayer and much of the middle class without access to in-person conferences. For a more detailed discussion of the Appeals policy of generally limiting in-person conferences, see Most Serious Problem: *Appeals: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*, *supra*.

CDP regulations state that taxpayers who provide non-frivolous reasons for opposing the IRS collection action will generally be offered but not guaranteed face-to-face conferences.[32] Taxpayers making frivolous arguments are not entitled to face-to-face conferences.[33] A taxpayer will not be granted a face-to-face conference concerning a collection alternative, such as an IA or OIC, unless other taxpayers would be eligible for the alternative under similar circumstances.[34] For example, the IRS will not grant a face-to-face conference to a taxpayer who proposes an OIC as the only issue to be addressed but failed to file all required returns and is therefore ineligible for an offer. Appeals may, however, at its discretion, grant a face-to-face conference to explain the eligibility requirements for a collection alternative.[35]

The CDP hearing is to be held by an impartial officer from Appeals, who is barred from engaging in *ex parte*[36] communications with IRS employees about the substance of the case and who has had "no prior involvement."[37] In addition to addressing the issues raised by the taxpayer, the AO must verify that the IRS has met the requirements of all applicable laws and administrative procedures.[38] An integral component of the CDP analysis is the balancing test, which requires the IRS AO to weigh the issues raised by the taxpayer and determine whether the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection be "no more intrusive than necessary."[39] The balancing test is central to a CDP hearing because it instills a notion of fairness into the process from the perspective of the taxpayer.[40]

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. IRC § 6330(g) provides that the IRS may disregard any portion of a hearing request based on a position the IRS

32 Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(7) and 301.6330-1(d)(2), Q&A (D)(7).

33 Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(8).

34 *Id*.

35 *Id*.

36 *Ex parte* means "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest." *Ex parte*, Black's Law Dictionary (10th ed. 2014).

37 IRC §§ 6320(b)(1), 6320(b)(3), 6330(b)(1), and 6330(b)(3). *See also* Rev. Proc. 2012-18, 2012-1 C.B. 455. *See, e.g.*, *Industrial Investors v. Comm'r*, T.C. Memo. 2007-93; *Moore v. Comm'r*, T.C. Memo. 2006-171, *action on dec*., 2007-2 (Feb. 27, 2007); *Cox v. Comm'r*, 514 F.3d 1119, 1124-28 (10th Cir. 2008), action on dec., 2009-22 (June 1, 2009). Effective October 2016, Appeals implemented a number of changes to its conference procedures. Among other things, the IRM allows Hearing Officers to invite Counsel and/or Compliance to participate in Appeals conferences regardless of whether taxpayers agree or object to their inclusion. IRM 8.6.1.4.4, *Participation in Conferences by IRS Employees* (Oct. 1, 2016). For a detailed discussion of the impact of this policy change on the Appeals' effectiveness in resolving cases with taxpayers and taxpayers' perceptions of the Appeals independence, see Most Serious Problem: *Appeals: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*, *supra*.

38 IRC § 6330(c)(1); *Hoyle v. Comm'r*, 131 T.C. 197 (2008); *Talbot v. Comm'r*, T.C. Memo. 2016-191 (2016).

39 IRC § 6330(c)(3)(C); IRM 8.22.4.2.2, *Summary of CDP Process* (Sept. 25, 2014). *See also* H.R. Rep. No. 105-599, at 263 (1998). For simplicity, we use the term "proposed collection action" referring to both the actions taken and proposed. IRC § 6330 requires the IRS to notify the taxpayer of the right to request a CDP hearing not less than 30 days before issuing the first levy to collect a tax. Pursuant to IRC § 6320, the taxpayer is notified of the right to request a CDP hearing within five business days after the first NFTL for a tax period that is filed. Thus, Treasury Regulations under IRC § 6320 require a Hearing Officer to consider "[w]hether the continued existence of the filed [NFTL] represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary." *See* Treas. Reg. § 301.6320-1(e)(3), Q&A (E)(1)(vi). Similarly, a levy action can be taken before a hearing in the following situations: collection of the tax was in jeopardy; levy on a state to collect a federal tax liability from a state tax refund; disqualified employment tax levies; or a federal contractor levy. *See* IRC § 6330(f); IRM 8.22.4.2.2, *Summary of CDP Process* (Sept. 25, 2014).

40 *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*). *See also* Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, 63 Tax Law. 227 (2010).

has identified as frivolous or that reflects a desire to delay or impede the administration of tax laws.[41] Similarly, IRC § 6330(c)(4) provides that a taxpayer cannot raise an issue if it is based on a position identified as frivolous or reflects a desire to delay or impede tax administration.

IRC § 6702(b) allows the IRS to impose a penalty for a specified frivolous submission, including a frivolous CDP hearing request.[42] A request is subject to a penalty if any part of it "(i) is based on a position which the Secretary has identified as frivolous … or (ii) reflects a desire to delay or impede the administration of Federal tax laws."[43] A taxpayer can timely petition the Tax Court to review an Appeals decision if Appeals determined that a request for an administrative hearing was based entirely on a frivolous position under IRC § 6702(b)(2)(A) and issued a notice stating that Appeals will disregard the request.[44] An Appeals letter disregarding a CDP hearing request is a determination that confers jurisdiction under IRC § 6330(d)(1), because it authorizes the IRS to proceed with the disputed collection action.[45] The IRS Office of Chief Counsel disagreed with the Tax Court precedent in *Thornberry* and is maintaining the position that the Tax Court lacks jurisdiction to review a petition resulting from the denial of a frivolous hearing request under § 6330(g).[46]

In *Ryskamp v. Commissioner*, the D.C. Circuit upheld the Tax Court's precedent in *Thornberry* that the IRS's disregard of a taxpayer's CDP hearing request as frivolous under IRC § 6330(g) is subject to judicial review, and affirmed the Tax Court's holding that the IRS abused its discretion in rejecting a taxpayer's request for a hearing by sending boilerplate rejection letters that do not articulate the grounds of the frivolousness determination.[47] While the IRS Office of Chief Counsel disagrees with *Ryskamp* on both issues, Counsel has modified its litigating guidelines as follows:

- Counsel will no longer file a motion to dismiss to contest the Tax Court's threshold jurisdiction to evaluate whether a CDP hearing was properly denied under IRC § 6330(g);
- Counsel will request a remand to Appeals where a hearing was improperly denied;
- Where a hearing was properly denied, instead of filing a motion to remand so Appeals can more fully explain the reasons for rejecting the taxpayer's arguments as frivolous, Counsel will file an appropriate motion with the Court to resolve the case through a dismissal or summary judgment; and

41 IRC § 6330(g). IRC § 6330(g) is effective for submissions made and issues raised after the date on which the IRS first prescribed a list of frivolous positions. Notice 2007-30, 2007-1 C.B. 833, which was published on or about April 2, 2007, provided the first published list of frivolous positions. Notice 2010-33, 2010-17 C.B. 609, contains the current list.

42 The frivolous submission penalty applies to the following submissions: CDP hearing requests under IRC §§ 6320 and 6330, offer in compromise (OIC) under IRC § 7122, installment agreements (IAs) under IRC § 6159, and applications for a Taxpayer Assistance order (TAO) under IRC § 7811.

43 IRC § 6702(b)(2)(A). Before asserting the penalty, the IRS must notify the taxpayer that it has determined that the taxpayer filed a frivolous hearing request. The taxpayer has 30 days to withdraw the submission to avoid the penalty. IRC § 6702(b)(3).

44 *See Thornberry v. Comm'r*, 136 T.C. 356, 367 (2011). The D.C. Appeals Court upheld *Thornberry* in *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015) *cert. denied*, 136 S.Ct. 834 (2016). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 489 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

45 *Thornberry v. Comm'r*, 136 T.C. 356, 364 (2011).

46 *See* IRS Chief Counsel Notice CC-2016-008, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016).

47 *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 834 (2016). For a further discussion of *Ryskamp*, *see* Issues Litigated, *infra*.

- Counsel will also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order.[48]

Judicial Review of a Collection Due Process (CDP) Hearing

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.[49] The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.[50] An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present any evidence regarding that issue after being given a reasonable opportunity.[51] The Tax Court, however, may remand a case back to Appeals for more fact finding when the taxpayer's factual circumstances have materially changed between the hearing and the trial.[52] When the case is remanded, the Tax Court retains jurisdiction.[53] The resulting hearing on remand provides the parties with an opportunity to complete the initial hearing while preserving the taxpayer's right to receive judicial review of the ultimate administrative determination.[54]

Where the validity of the underlying tax liability is properly at issue in the hearing, the court will review the amount of the tax liability on a *de novo*[55] basis.[56] Where the Tax Court is reviewing the appropriateness of the collection action or subsidiary factual and legal findings, the Court will review these determinations under an abuse of discretion standard.[57]

The regulations distinguish between liabilities that are subject to deficiency procedures and those that are not. For liabilities subject to deficiency procedures, an opportunity for a post-examination conference with the IRS Office of Appeals does not bar the taxpayer (in appropriate circumstances) from contesting his liability in a later CDP proceeding.[58] On the other hand, where a liability is not subject to deficiency procedures, "[a]n opportunity to dispute the underlying liability includes a prior opportunity

48 IRS Chief Counsel Notice CC-2016-008, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016). In the 2014 Annual Report to Congress, the National Taxpayer Advocate expressed concerns about the Office of Appeals not giving proper attention to the CDP balancing test, especially to legitimate concerns of taxpayers regarding the intrusiveness of the proposed collection action, and often using *pro forma* statements that the balancing test has been conducted. *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

49 IRC § 6330(d)(1).

50 *Giamelli v. Comm'r*, 129 T.C. 107 (2007).

51 Treas. Reg. §§ 301.6320-1(f)(2), Q&A (F)(3); 301.6330-1(f)(2), Q&A (F)(3).

52 *Churchill v. Comm'r*, T.C. Memo. 2011-182; see also IRS Chief Counsel Notice CC-2013-002, *Remands to Appeals in CDP Cases When There Is a Post-Determination Change in Circumstances* (Nov. 30, 2012), which provides Counsel attorneys with instructions on when a remand based on changed circumstances might be appropriate; *but see Kehoe v. Comm'r*, T.C. Memo. 2013-63 (taxpayer's eligibility to make withdrawals from his IRA without the threat of penalty does not amount to a material change in circumstances such that remand would be appropriate).

53 *See, e.g., Pomeroy v. Comm'r*, T.C. Memo. 2013-26 at 20.

54 *Wadleigh v. Comm'r*, 134 T.C. 280, 299 (2010).

55 *De novo* means "anew." *De Novo*, Black's Law Dictionary (10th ed. 2014).

56 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. REP. No. 105-599, at 266. *See also* IRS Chief Counsel Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* (May 5, 2014).

57 *See, e.g., Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006); *Dalton v. Comm'r*, 682 F.3d 149 (1st Cir. 2012).

58 *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2.

for a conference with Appeals that was offered either before or after the assessment of the liability."[59] For example, an IRC § 6707A penalty[60] is an assessable penalty not subject to deficiency procedures.

In March 2017, in *Bitter v. Commissioner*,[61] the Tax Court further reiterated that a taxpayer is entitled to challenge his underlying liability for a § 6707A penalty only if the taxpayer did not have a prior opportunity to dispute it. A "prior opportunity" was found to include a prior opportunity for a conference with Appeals. The *Bitter* determination was a culmination of similar developments in the past year's circuit court decisions on the same issue, including the Fourth Circuit decision *Iames v. Commissioner*,[62] the Tenth Circuit decision in *Keller Tank Serv. II v. Commissioner*,[63] and the Seventh Circuit decision in *Our Country Home Enterprises, Inc. v. Commissioner*.[64]

Appellate Venue From Decisions of the Tax Court

IRC § 7482(b)(1)(G) specifies that CDP cases are appealable to the circuit of the taxpayer's legal residence (if the taxpayer is an individual) or the taxpayer's principal place of business, office, or agency (if the taxpayer is not an individual). This provision applies only to cases filed after December 18, 2015, but it should not be construed to create any inference regarding cases filed before that date.[65]

For cases filed before December 18, 2015, the correct venue for appeals from the Tax Court generally was the D.C. Circuit Court unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC §§ 7482(b)(2) or (b)(3) applied. For instance, IRC § 7482(b)(1)(A) provides that in cases where a taxpayer other than a corporation seeks redetermination of a tax liability, venue for review by the United States Court of Appeals lies with the Court of Appeals for the circuit based upon the taxpayer's legal residence.[66] Pursuant to IRC § 7482(b)(2), the taxpayer and the IRS may stipulate the venue for an appeal in writing. In *Byers v. Commissioner*, the D.C. Circuit held that it would not transfer cases in non-liability CDP cases unless both parties stipulate to the transfer.[67] However, the

59 *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2.

60 IRC § 6707A provides a monetary penalty for the failure to include a reportable transaction required to be disclosed under IRC § 6011.

61 *Bitter v. Comm'r*, T.C. Memo. 2017-46.

62 *See Iames v. Comm'r.*, 850 F.3d 160 (4th Cir. 2017).

63 *See Keller Tank Serv. II, Inc. v. Comm'r.*, 854 F.3d 1178 (10th Cir. 2017).

64 *See Our Country Home Enterprises, Inc. v. Commr.*, 855 F.3d 773 (7th Cir. 2017).

65 Pub. L. No. 114-113, Div. Q, Title IV, § 423(a), (b) (2015). *See also* IRS Chief Counsel Notice CC-2016-006, *Path Act Legislative Amendments: Appellate Venue for CDP and Innocent Spouse Cases, Tax Court Jurisdiction and S-Case Status for Interest Abatement Cases, and Applicability of Federal Rules of Evidence the Tax Court* (Feb. 1, 2016). For cases filed before that date, the guidance in IRS Chief Counsel Notice CC-2015-006, *Venue for Appeals from Decisions of the Tax Court* (June 30, 2015) applies.

66 IRC § 7482(b)(1) also provides that the proper venue lies with the court of appeals for the circuit in which the taxpayer is located: in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the corporation, or if it has no principal place of business or principal office or agency in any judicial circuit, then the office to which was made the return of the tax in respect of which the liability arises; in the case of a person seeking a declaratory decision under IRC § 7476, the principal place of business or principal office or agency of the employer; in the case of an organization seeking a declaratory decision under IRC § 7428, the principal office or agency of the organization; in the case of a petition under IRC §§ 6226, 6228(a), 6247, or 6252, the principal place of business of the partnership; and in the case of a taxpayer under section IRC § 6234(c), (i) the legal residence of the taxpayer if the taxpayer is not a corporation, and (ii) the place or office applicable under subparagraph (B) if the taxpayer is a corporation.

67 740 F.3d 668 (D.C. Cir. 2014). For a more detailed discussion of the *Byers* case see National Taxpayer Advocate 2014 Annual Report to Congress 477-94 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

Court acknowledged that in some CDP cases involving both challenges to the tax liability and collection issues, the venue presumably would be in the appropriate regional circuit.[68]

It has been the longstanding practice of taxpayers and the IRS to appeal CDP, innocent spouse, and interest abatement cases to the circuit of the taxpayer's legal residence, principal place of business, or principal office or agency. The Tax Court has also followed this approach. Under the rule established in *Golsen v. Commissioner*,[69] the Tax Court follows the precedent of the circuit court to which the parties have the right to appeal regardless of whether the taxpayer's tax liability was at issue. In 2014, to address the uncertainty and confusion among taxpayers and practitioners caused by the *Byers* decision, the National Taxpayer Advocate recommended that Congress amend IRC § 7482 to provide that the proper venue to seek review of a Tax Court decision in all collection due process cases lies with the federal court of appeals for the circuit in which the taxpayer resides.[70] Congress made this precise legislative change.[71]

ANALYSIS OF PUBLISHED OPINIONS

We identified and reviewed 85 CDP court opinions, a 14 percent decrease from the 99 published opinions in last year's report. From 2003 to 2010, the average number of published opinions was approximately 185. Since 2011, the average number of published opinions has dropped by about half, to 93. We analyzed potential factors that could have affected CDP litigation. First, we looked at the number of CDP notices the IRS issued to taxpayers, either in relation to a notice of federal tax lien (NFTL) or a levy. The number of CDP notices increased from 2003, peaking in 2012 at just over 2,778,000, and then began to decrease. By 2017, the number of notices had decreased by 56 percent from 2012. Second, we determined the number of CDP hearing requests has generally followed the same trend.[72] In 2011, the number of CDP hearing requests peaked at 36,755, up from 10,889 requests in 2003. However, between 2011 and 2017, the number of hearing requests has declined 29 percent. Finally, the number of Tax Court petitions also grew from 2003 to 2012, peaking at 1,963, and then started falling in 2012. From 2012 to 2017, petitions dropped by 25 percent. These trends are depicted in Figure 3.4.1, Collection Due Process (CDP) Notices, Hearing Requests, Petitions, and Litigation and Figure 3.4.2, Supporting Data for Figure 3.4.1 below.

68 740 F.3d at 676. The Court noted that it had "no occasion to decide … whether a taxpayer who is seeking review of a CDP decision on a collection method may file in a court of appeals other than the D.C. Circuit if the parties have not stipulated to venue in another circuit." *Id*. at 677.

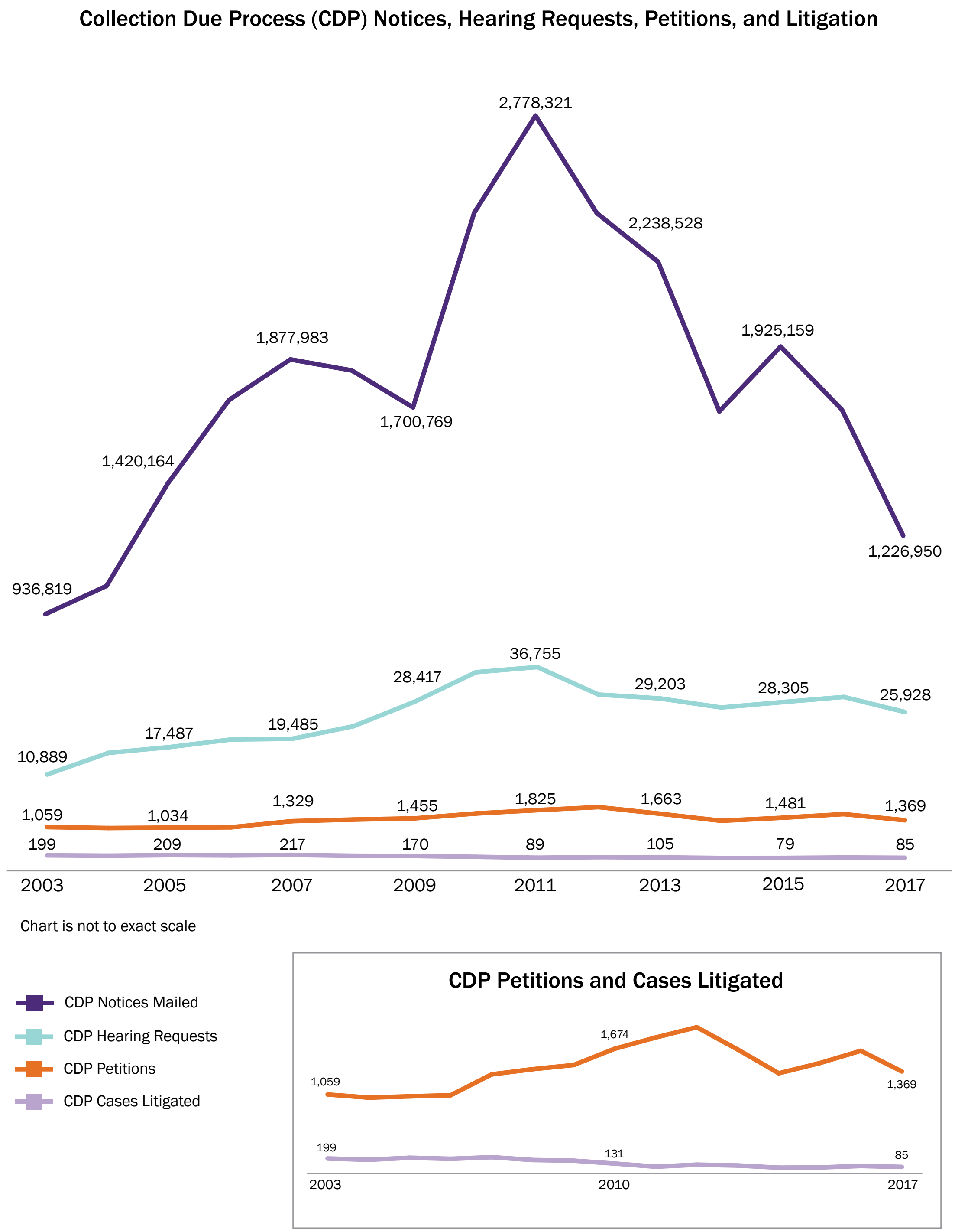
69 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

70 *See* National Taxpayer Advocate 2014 Annual Report to Congress 387-91 (Legislative Recommendation: *Appellate Venue in Non-Liability CDP Cases: Amend IRC § 7482 to Provide That the Proper Venue to Seek Review of a Tax Court Decision in All Collection Due Process Cases Lies with the Federal Court of Appeals for the Circuit in Which the Taxpayer Resides*).

71 *See* Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub.L. No. 114-113, Div. Q, Title IV, § 423(b).

72 IRC §§ 6320 and 6330 provide a taxpayer the right to a hearing if a request is made within a 30-day period.

FIGURE 3.4.1[73]



73 This figure depicts the number of CDP notices, hearing requests, and petitions, as well as the number of CDP cases litigated from FY 2003 through FY 2017. The number of CDP notices, hearings, and petitions is from the Individual Master File.

FIGURE 3.4.2, Supporting Data for Figure 3.4.1

Year	CDP Notices Mailed	CDP Hearing Requests	CDP Petitions	CDP Cases Litigated
2003	936,819	10,889	1,059	199
2004	1,041,278	16,087	1,017	182
2005	1,420,164	17,487	1,034	209
2006	1,728,433	19,305	1,049	195
2007	1,877,983	19,485	1,329	217
2008	1,837,284	22,501	1,399	179
2009	1,700,769	28,417	1,455	170
2010	2,420,018	35,512	1,674	131
2011	2,778,321	36,755	1,825	89
2012	2,418,533	30,125	1,963	116
2013	2,238,528	29,203	1,663	105
2014	1,685,977	27,019	1,344	76
2015	1,925,159	28,305	1,481	79
2016	1,692,573	29,557	1,646	99
2017	1,226,950	25,928	1,369	85

The decline in notices, hearing requests, and petitions may be attributed, in part, to a series of operational changes in fiscal years (FYs) 2011 and 2012. These changes were in response to concerns from the National Taxpayer Advocate and the Internal Revenue Service Advisory Council (IRSAC), and are collectively known as the "Fresh Start" initiative.[74] The "Fresh Start" initiative has resulted in fewer NFTL filings during the past few years and a higher number of accepted OICs than in 2011 and 2012.[75] During FY 2017, thousands of financially struggling taxpayers have successfully obtained lien withdrawals to help regain their financial viability.[76] These factors likely had a positive impact on many taxpayers and revenue collection. Fewer NFTL filings has a direct impact on the number of CDP notices issued to taxpayers, which in turn influence the number of CDP hearing requests and subsequent petitions to review IRS CDP determinations in Tax Court.

We acknowledge that there may be some additional reasons for the general decline in the number of litigated CDP cases. The IRS has experienced significant budget and staff reductions since 2011, which likely had an impact on the number of enforced collection action it took. The decline in litigated cases in years after 2010 may also be due to taxpayers litigating many issues of first impression in the years immediately following the enactment of IRC §§ 6320 and 6330, which have been resolved by the courts.

74 IRS, *IRS Fresh Start Program Helps Taxpayers Who Owe the IRS* (Apr. 17, 2013), https://www.irs.gov/newsroom/irs-fresh-start-program-helps-taxpayers-who-owe-the-irs (last visited Dec. 5, 2017).

75 For instance, in FY 2017, the IRS filed about 57 percent fewer NFTLs than in FY 2011, including a corresponding 62 percent reduction in liens filed by the Automated Collection System (ACS). In FY 2011, the IRS filed 1,042,230 liens. *See* IRS, Collection Activity Report 5000-23 (Oct. 11, 2011). In FY 2017, the IRS filed 446,378 liens. *See* IRS, Collection Activity Report 5000-25 (Oct. 4, 2017). We also note that the IRS has accepted 29 percent more OICs than during FY 2011, and that the actual number of accepted offers has almost doubled when compared to FY 2010, with FY 2017 having an acceptance rate of 38.1 percent. *See* IRS, Collection Activity Report 5000-108 (Oct. 5, 2010); IRS, Collection Activity Report 5000-108 (Oct. 5, 2011); IRS, Collection Activity Report 5000-108 (Oct. 2, 2017).

76 *See* IRS, Collection Activity Report 5000-25 (Oct. 4, 2017).

The 85 opinions identified this year do not reflect the full number of CDP cases because the court does not issue an opinion in all cases.[77] Some are resolved through settlements, and in other cases, taxpayers do not pursue litigation after filing a petition with the court. The Tax Court also disposes of some cases by issuing unpublished orders.[78] Table 4 in Appendix 3 provides a detailed list of the published CDP opinions, including specific information about the issues, the types of taxpayers involved, and the outcomes of the cases.

Litigation Success Rate

Taxpayers prevailed in full in four of the 85 published opinions issued during the year ending May 31, 2017 (nearly five percent). Taxpayers prevailed in part in three other cases (approximately four percent). Of the published opinions in which the courts found for the taxpayer, in whole or in part, the taxpayers appeared *pro se* in four cases and were represented in three cases. The IRS prevailed fully in 78 cases (approximately 92 percent) of the published opinions, an increase from the 84 percent last year.[79] The eight percent success rate[80] for the taxpayer is a decrease from the previous year's 16 percent success rate, one of the highest success rates since the inception of CDP hearings.

FIGURE 3.4.3, Success Rates In Collection Due Process (CDP) Opinions Identified[81]

Court Decision	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Decided for IRS	95%	89%	90%	92%	90%	92%	89%	92%	86%	84%	89%	82%	84%	92%
Decided for Taxpayer	3%	8%	8%	5%	8%	4%	10%	3%	7%	8%	7%	14%	10%	5%
Split Decision	2%	3%	2%	3%	2%	4%	2%	3%	6%	9%	4%	4%	6%	4%
Neither	n/a	n/a	n/a	<1%	n/a	n/a	n/a	1%	<1%	n/a	n/a	n/a	n/a	n/a

Issues Litigated

The cases discussed below are those the National Taxpayer Advocate considers significant or noteworthy. Their outcomes can provide important information to Congress, the IRS, and taxpayers about the rules and operation of CDP hearings. All of the cases offer the IRS an opportunity to improve the CDP process and collection practices in both application and execution.

77 *See* U.S. Tax Court, Orders Search, https://www.ustaxcourt.gov/InternetOrders/OrdersSearch.aspx.

78 Prior to Oct. 17, 2006, the taxpayer could also petition the federal district court if the Tax Court did not have jurisdiction over the underlying tax liability (*e.g.*, if the matter involved an employment tax liability).

79 National Taxpayer Advocate 2015 Annual Report to Congress 489 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC § 6320 and 6330*).

80 The success rate includes decisions for the taxpayer as well as split decisions.

81 Total percentages may not add to 100 percent, as a result of rounding.

First Rock Baptist Church Child Development Center v. Commissioner

In *First Rock Baptist Church Child Development Center*,[82] the IRS issued a *Notice of Federal Tax Lien (NFTL) and Your Right to a Hearing Under IRC 6320* to the First Rock Baptist Church Child Development Center.[83] The Center had become delinquent in its employment tax liabilities for ten calendar quarters during tax years (TYs) 2007 through 2010. In 2012, the IRS attempted to collect these unpaid liabilities by mailing a NFTL to the correct address with the correct taxpayer identification number (TIN). However, the notice incorrectly showed the addressee as "First Rock Baptist Church," a separately incorporated church with which the Center was affiliated. The Center and the Church timely requested a CDP hearing and jointly filed a timely petition, chiefly contending that the NFTL should be withdrawn. Upon the Commissioner's motion, the case was remanded to the IRS Office of Appeals.

On remand, the settlement officer (SO) determined that the lien documentation was ambiguous and that lien withdrawal was appropriate. The SO determined further that the Center's request for an IA could not be granted because the Center was not in compliance with its ongoing tax return filing obligations. As such, the SO issued a supplemental notice of determination that contained the Center's correct address and TIN but again incorrectly displayed the addressee as the Church. In response, the Center then sought to dispute its underlying tax liabilities and the rejection of its proposed IA.

The Tax Court held that it had jurisdiction to review the SO's determination to the extent the SO denied relief requested by the Center for which the notice of determination was issued and which was the subject of the IRS collection action. The Court further held that it did not have jurisdiction over the Church because the Church was not the subject of IRS collection action and never received a notice of determination.

The Court also held that the case was not moot because, notwithstanding the withdrawal of the NFTL, there remained a live case or controversy between the Center and the IRS concerning the correctness of the SO's determination. On the other hand, the Court held that it could not consider the Center's challenge to its underlying tax liabilities because the Center did not raise that challenge at the original or supplemental CDP hearing. According to the Tax Court, the SO did not abuse his discretion in denying the Center's request for an IA because the Center at that time was not in compliance with its ongoing tax return filing obligations.

This case is significant because it gave the Tax Court the opportunity to clarify which types of taxpayers the Tax Court holds jurisdiction over in a CDP case and the circumstances in which a CDP case becomes moot. Additionally, this case emphasizes the importance in raising all relevant issues at the administrative hearing, if the taxpayer desires judicial review of those issues.

Weiss v. Commissioner

In *Weiss v. Commissioner*, the taxpayer sought review, pursuant to IRC § 6330(d)(1), of the IRS's determination to uphold a notice of intent to levy.[84] The IRS served the levy notice on the taxpayer, Mr. Weiss, in an effort to collect his unpaid Federal income tax liabilities for TYs 1986, 1987, 1988, 1989, 1990, and 1991.

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82 *First Rock Baptist Church Child Development Center v. Comm'r*, 148 T.C. No. 17 (2017).

83 The notice is contained in Letter 3172 – *Notice of Federal Tax Lien Filing and Your Rights to a Hearing under IRC 6320* and notifies the taxpayer the IRS filed a notice of tax lien for unpaid taxes.

84 *Weiss v. Comm'r*, 147 T.C. 179 (2016).

The Revenue Officer (RO) attempted to hand-deliver the levy notice during a field call on February 11, 2009, but was deterred by Mr. Weiss's dog. Two days later, the RO mailed the levy notice by certified mail to the Mr. Weiss's last known address. In doing so, the RO did not generate a new levy notice dated February 13 and enclosed in the envelope the original levy notice dated February 11. Mr. Weiss received the levy notice on February 17, then completed Form 12153 requesting a CDP hearing for the tax years at issue and mailed it to the RO on either March 13 or 14. The RO received Mr. Weiss's Form 12153 on March 16, a Monday.

During the CDP hearing, Mr. Weiss argued that the period of limitations on collection of his tax liabilities had expired. Mr. Weiss asserted he had intentionally filed his request for a CDP hearing one day late, such that he was entitled only to an "equivalent hearing," which would not have suspended the period of limitations on collection. The RO contended that Weiss' request for a CDP hearing was in fact timely because it was filed within 30 days of the date on which the IRS mailed him the levy notice.

The Court found that the RO had looked at appropriate underlying evidence and agreed with the RO's determination as to the date of the mailing. The Court held that the time period for making a CDP request runs from the date the IRS mails the notice and not from the date of the notice. This case clarified for taxpayers that when there is a mismatch between a letter date and a mailing date, the 30-day period prescribed by IRC § 6330(a)(2) and (3)(B) is calculated by reference to the date of mailing.

Several cases discussed below ruled on what constitutes a "prior opportunity to dispute a liability."

Keller Tank Serv. II, Inc. v. Commissioner

In *Keller Tank Serv. II, Inc.*, the Court of Appeals for the Tenth Circuit upheld the Tax Court's determination of a "prior opportunity to dispute a liability."[85] The Tax Court, in turn, upheld the IRS determination of this phrase in the CDP regulations.

The relevant issue in *Keller* was whether a taxpayer can challenge an assessable tax penalty[86] in a CDP hearing after having previously challenged it in a hearing with the IRS Office of Appeals. The Court of Appeals for the Tenth Circuit held that (1) after protesting a tax penalty at the Appeals, a taxpayer was not permitted to raise the same issue in a CDP hearing; (2) IRC § 6330(c)(2)(B) precluded a taxpayer from challenging the liability at a CDP hearing when the taxpayer was afforded, but failed to take advantage of, a prior opportunity to dispute the liability, and when the Tax Court received an appeal from the CDP hearing, its review was limited to issues that were properly raised during the CDP hearing; and (3) the regulation was entitled to Chevron deference[87] because 6330(c)(2)(B)'s reference to "opportunity to dispute" was ambiguous, and the regulation was a reasonable interpretation of this provision.

Keller participated in an employee benefit plan called the Sterling Benefit Plan ("Plan"), but did not report its participation on its tax return. Because Keller did not report its participation, the IRS alleged

85 *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017).

86 The taxpayer was assessed an IRC § 6707A penalty for the failure to report a listed transaction.

87 "Chevron deference" is an important principle in administrative law, established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). The case raised the issue of how courts should treat agency interpretations of statutes that mandated that agency to take some action. The Supreme Court held that courts should defer to agency interpretations of such statutes unless they are unreasonable.

Keller's failure to report violated IRC § 6707A.[88] The IRS also claimed that Keller took improper deductions on its income tax returns related to its participation in the Plan, resulting in a deficiency. As a result, Keller faced two parallel proceedings in which the IRS sought (1) a penalty under IRC § 6707A for Keller's failure to report its participation in the Plan, which the IRS considers a listed transaction ("penalty proceeding"); and (2) the income tax deficiency from and resulting penalty for Keller's alleged improper deduction of payments to the Plan ("deficiency proceeding"). This case concerned the first penalty proceeding and Keller's efforts to challenge its liability for the IRC § 6707A penalty.

The IRS sent Keller a final notice of its intent to levy and of Keller's right to a CDP hearing under IRC § 6330. Keller requested a CDP hearing, arguing the penalty was assessed without the opportunity to protest the determination of the underlying transaction. Keller's request was granted, and Keller participated in a phone conference during which Keller's counsel was informed that Keller was precluded from challenging its liability because Appeals had reviewed and sustained the liability. The IRS sent Keller a Notice of Determination, which specified that Keller's only arguments at the CDP hearing attempted to dispute its liability for the penalty despite the fact that Keller was unable to raise the liability within the hearing. Keller filed a petition with the Tax Court to challenge its liability for the penalty.

The Tax Court granted summary judgment to the IRS on June 16, 2015, determining that Keller had been precluded from challenging its underlying liability because Keller was afforded a prior opportunity to dispute its liability in its hearing before the IRS Office of Appeals. Keller then timely appealed the Tax Court's order to the Court of Appeals for the Tenth Circuit. The Court of Appeals applied the two-step Chevron test and concluded, as the Tax Court did in the past, that IRC § 6330(c)(2)(B)'s reference to a prior "opportunity to dispute" is ambiguous and that Treasury Regulation § 301.6330-1 is a reasonable interpretation of IRC § 6330(c)(2)(B). Thus, the decision of the Tax Court was affirmed.

Keller removes any opportunity for some taxpayers to obtain judicial review of an IRC § 6707A penalty determination by the IRS before paying the penalty and suing for a refund in district court or in the Court of Federal Claims under IRC § 7422. Those who cannot afford to pay are effectively denied any judicial review of the IRS's penalty determination.[89]

This case is an important precedent demonstrating what would be considered a "prior opportunity" for a conference with Appeals in a non-deficiency context that would preclude the taxpayer from challenging the underlying liability in a subsequent CDP hearing. The court's insistence in *Keller* that the Tax Court is unavailable as a prepayment forum to challenge asserted impositions of the IRC § 6707A penalty undoubtedly will be of continued significance.

88 The IRC § 6707A penalty is an assessable penalty and is not subject to a deficiency proceeding. The taxpayer would have to pay the penalty and file a suit for refund in a federal district court or the Court of Federal Claims.

89 Notably, there is no indication that Congress intended that IRC § 6707A penalties would not be subject to judicial review in a pre-payment forum. For further discussion of this issue, see, *e.g.*, Elliot Pisem, *Tax Court Decisions on Section 6707A Penalty Deny Prepayment Forum and Extend Statute of Limitations* (Mar. 1, 2010), http://www.robertsandholland.com/siteFiles/News/542article.pdf. The National Taxpayer Advocate has highlighted the unfair and extreme results this penalty can produce and has recommended changes. *See, e.g.*, National Taxpayer Advocate 2008 Annual Report to Congress, vol. 2, 21-24; National Taxpayer Advocate 2008 Annual Report to Congress 419, 422. Congress subsequently revised the penalty to be 75 percent of the decrease in tax resulting from the transaction, except that it could not be less than $5,000 for individuals or $10,000 for entities, or more than $100,000 for individuals or $200,000 for entities. *See* Small Business Jobs Act of 2010, Pub. L. No. 111-240, Title II, §2041(a), 124 Stat. 2506, 2560 (2010). The IRS cited the National Taxpayer Advocate's Annual Report to Congress in its regulations implementing these changes. *See* Internal Revenue Bulletin: 2015-37, *Notice of Proposed Rulemaking Reportable Transactions Penalties under Section 6707A* (Sep. 14, 2015).

Iames v. Commissioner

The Court of Appeals for the Fourth Circuit, in *Iames v. Commissioner*,[90] reached the same conclusion as the Court of Appeals for the Tenth Circuit did in *Keller Tank Serv. II, Inc. v. Commissioner* in validating the Treasury regulation as a reasonable interpretation of the statute. The taxpayer, Mr. Iames, unsuccessfully challenged his liability in a preassessment hearing before Appeals, and then later sought to raise the same issue before the same administrative unit in his collection due process (CDP) hearing. The IRS Office of Appeals concluded that IRC § 6330 prohibited him from disputing his liability a second time, and the Tax Court agreed.

The court held that Mr. Iames was afforded a meaningful opportunity to challenge the imposition and amount of the reporting penalty[91] at the preassessment hearing before the Office of Appeals. The court determined that this was sufficient under IRC § 6330(c)(2)(B). The court also held that IRC § 6330(c)(4) barred the taxpayer from challenging his liability in the CDP context. Therefore, the court concluded that the IRS was entitled to judgment as a matter of law, and the court affirmed the Tax Court's judgment. Judge Wilkinson's decision not only supported the position of the IRS based on IRC § 6330(c)(2)(B), but also the government's secondary argument under IRC § 6330(c)(4) which the Circuit Court of Appeals for the 10th Circuit did not reach in *Keller*.[92]

This case is noteworthy, albeit reaching the same conclusion about what constitutes a "prior opportunity to dispute a liability," because it solidifies the interpretation of IRC § 6330(c)(2)(B) in the regulations.[93]

Bitter v. Commissioner

In *Bitter v. Commissioner*,[94] Mr. Bitter sought review, pursuant to IRC § 6330(d)(1), of the determination by the IRS to uphold a notice of intent to levy. For TYs 2004, 2005, and 2006, the IRS assessed penalties under IRC § 6707A for failure to disclose his participation in a reportable transaction on his tax returns. In an effort to collect these unpaid liabilities, the IRS on July 3, 2014, sent Mr. Bitter a *Letter 1058*, *Notice of Intent to Levy and Your Right to a Hearing*. Mr. Bitter timely requested a CDP hearing.

Before the CDP hearing, Mr. Bitter's representative submitted a letter stating that Mr. Bitter wished to administratively contest the penalties in the hearing and urged that the penalties be abated in whole or in part. By doing so, he was repeating the arguments he had advanced at the prior Appeals conference. The sole issue for decision was whether Mr. Bitter was barred from raising at the CDP hearing his liability for these penalties because he had been provided and availed himself of, a prior opportunity to challenge the penalties at an earlier conference with Appeals.

A taxpayer may raise a CDP challenge to the existence or amount of his underlying tax liability only if he did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. As discussed above, in determining whether the taxpayer had

90 *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017) (finding the regulation to be a straightforward interpretation of section 6330(c)(2)(B)).

91 The IRS assessed the IRC § 6707A penalty against the taxpayer.

92 IRC § 6330(c)(2)(B) concerns liability challenges that a taxpayer had a chance to raise while IRC § 6330(c)(4) applies to all issues that were actually disputed.

93 Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2.

94 *Bitter v. Comm'r*, T.C. Memo. 2017-46.

a prior opportunity to dispute his liability, the regulations distinguish between liabilities that are subject to deficiency procedures and those that are not.[95]

As assessable penalties, IRC § 6707A penalties are not subject to deficiency procedures.[96] Notwithstanding the absence of a notice of deficiency, a taxpayer may be able to dispute his liability for such penalties, without paying them first by resisting IRS collection efforts through the CDP process and then seeking review by the Tax Court. A taxpayer is entitled to challenge his underlying liability for IRC § 6707A only if he did not have a prior opportunity to dispute it. For these purposes, a prior opportunity includes "a prior opportunity for a conference with Appeals."[97] However, there are certain issues and cases where Appeals may defer action or decline to settle.[98]

Bitter is a noteworthy case because it takes recent developments in circuit courts and consolidates them into a clarifying Tax Court opinion on CDP cases involving IRC § 6707A penalties. Citing the two recent and relevant Fourth and Tenth Circuit decisions *Iames v. Commissioner*[99] and *Keller Tank Servs. II, Inc. v. Commissioner*[100] on the same issue, the Tax Court sustained the validity of this regulation even though the taxpayer had no right to judicial review of the prior Appeals' determination. The SO concluded that Bitter could not challenge his liability for the penalties because Mr. Bitter had had a prior opportunity to do so, an opportunity of which he had taken advantage by filing his July 2012 protest with the IRS Office of Appeals. The Tax Court agreed with the IRS and sustained the proposed collection action.

CONCLUSION

CDP hearings provide instrumental protections for taxpayers to meaningfully address the appropriateness of IRS collection actions. Given the important safeguard that CDP hearings offer taxpayers, it is unsurprising that CDP remains one of the most frequently litigated issues. The cases discussed this year were important for a variety of reasons.

The cases affirmed important protections for taxpayers, substantiated the Tax Court's test for abuse of discretion, and addressed procedural issues.

95 Although the statute does not define the term, "opportunity to dispute," the IRS has interpreted it to include "a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability." Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2. The National Taxpayer Advocate is concerned about the rule's harmful effect on low income taxpayers. *See, e.g.*, Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, 63 Tax Law. 227 (2010), https://www.americanbar.org/content/dam/aba/publishing/tax_lawyer/633/2_Olson.authcheckdam.pdf. The National Taxpayer Advocate maintained "I remain unconvinced that there is no constitutionally protected interest in a pre-deprivation hearing in tax administration today, given that increasing automation heightens the risk that the government will make an erroneous determination and in light of the expansion of the tax filing population since *Bull v. United States*, or even *Bob Jones University v. Simon*, to include very low income taxpayers who do not have the means to challenge government error in post-deprivation hearings." *Id*. at 233, n. 24.

96 An assessable penalty must be paid upon notice and demand and assessed and collected in the same manner as taxes. For further discussion about the distinction between assessable and non-assessable penalties, see Toni Robinson and Mary Ferrari, *Congress Eases a Penalty, but Squanders Reform Opportunity*, 2011 TNT 13-7 (Jan. 17, 2011).

97 Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330-1(e)(3), Q&A-E2.

98 *See, e.g.*, IRM 8.1.1.2.1, *Some Exceptions to Appeals Authority*, (Feb. 10, 2012); IRM 8.1.1.3.1, *No Appeals Conference or Concession on Certain Arguments*, (Feb. 10, 2012).

99 *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017).

100 *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017).

The *First Rock Baptist Church Child Development Center* decision illustrates the importance of the taxpayer's *right to be informed* and *right to a fair and just tax system*.[101] The opinion provided the Tax Court the chance to clarify procedural issues regarding CDP hearings by holding that it does not have jurisdiction over those that were not the subject of an IRS collection action and that withdrawing the NFTL does not render the case moot as there still exists an underlying live case or controversy. Additionally, this case highlights the importance of taxpayers raising all relevant issues at the administrative hearing, assuming the taxpayer would like judicial review of those issues. With these clarifications, taxpayers are provided with a better opportunity and understanding of the procedure dictating CDP hearings.

The *Weiss* decision illustrates the importance of the taxpayer's *right to be informed*, *right to challenge the IRS's position and be heard,* and *right to a fair and just tax system*.[102] The decision once again clarifies for taxpayers that the time period for making a CDP request runs from the date the IRS mails the notice and not from the date of the notice. While the case's holding is not necessarily surprising, the Tax Court takes the opportunity to clarify what taxpayers should expect when the date on the CDP notice is earlier than the date on which the letter was mailed.[103]

In a series of decisions, several Circuit Courts of Appeals and the Tax Court addressed the issue of a prior opportunity to challenge the liabilities as applicable to assessable penalties, such as a IRC § 6707A penalty.[104] It is important to note that in all cases the courts upheld the relevant Treasury regulation and held that a prior opportunity to contest an assessable penalty with the IRS Office of Appeals precludes the taxpayers from challenging the liability during a subsequent CDP hearing.

This line of cases shows the problems with strict liability and assessable penalties. What makes the IRC § 6707A strict liability penalty particularly troubling is that in the absence of Tax Court jurisdiction in a deficiency proceeding, there is almost a total lack of judicial oversight in imposing the penalty. If taxpayers cannot afford to make these payments, they may not be able to obtain judicial review of the issues at all. These decisions are crucial to taxpayers' *right to be informed, right to challenge the IRS's position and be heard,* and *right to a fair and just tax system*.

In sum, the CDP hearing is a powerful tool for taxpayers. However, there is much room for improvement. Genuine two-way communication, rather than the IRS resorting to telephonic conferences and boilerplate letters, is crucial to a fair and just tax system. Until IRC § 6707A penalties can be litigated in Tax Court, taxpayers must raise all relevant issues at the administrative hearing, if the taxpayer wants judicial review of those issues. When taxpayers provide full documentation and develop a complete and comprehensive administrative record, they have a better chance of prevailing on Appeal and during judicial review. However, restricting the ability of taxpayers in obtaining face-to-face conferences reduces Appeals' effectiveness and runs counter to its mission of achieving fair and equitable negotiated settlements. Appeals can reduce litigation in this area by making a commitment to deliver

101 *First Rock Baptist Church Child Development Center v. Comm'r*, 148 T.C. No. 17 (2017).

102 *Weiss v. Comm'r*, 147 T.C. 179 (2016).

103 The National Taxpayer Advocate is concerned the Tax Court's position on this issue perpetuates an IRS practice that creates confusion for many taxpayers. Accordingly, the National Taxpayer Advocate is proposing a legislative recommendation to mitigate this harm. *See* Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions and Provide That a Petition Filed by Such Specified Date Will Be Treated as Timely*, *supra*.

104 *See Our Country Home Enterprises, Inc. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017); *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017); and *Bitter v. Comm'r*, T.C. Memo. 2017-46.

substantive determinations in CDP cases, to provide reasonable justifications for any actions that could be considered abuses of discretion, and to take better account of all facts and circumstances.

Weiss demonstrated that taxpayers may face unfair treatment in dealing with mailing dates in the CDP regime. The onus is on taxpayers, and not the IRS, to keep track of when the 30-day period begins, namely, the requirement in § 6330(a)(2) and (3)(B) that the taxpayer petition the Tax Court within 30 days of the IRS notice of levy. Because the Tax Court has held that the critical date is the date the notice of determination is mailed rather than when the letter is dated, taxpayers and practitioners are well-advised to be cognizant of these nuances and use opportunities to challenge these results. After the *Our Country Home*, *Keller*, *Iames*, and *Bitter* opinions, taxpayers are now on notice of what to expect if they want to litigate the merits of an IRC § 6707A penalty in a CDP case. The Tax Court has clarified that a preassessment hearing before the Office of Appeals will be considered a "prior opportunity to dispute a liability." Taxpayers will indeed continue to argue that the regulation goes too far by preventing taxpayers, who can only obtain review from Appeals, from raising the merits of the underlying liability in a CDP case. As a strict liability penalty, the IRC § 6707A penalty does not have a reasonable cause provision to allow the IRS to rescind the penalty for taxpayers who mistakenly fail to file a transaction later deemed a listed transaction. Even if a court determines that the underlying transaction is not abusive, the penalty still applies. As these and other inequities are revealed, and the CDP rules continue to evolve, taxpayers are urged to stay abreast of changes within the CDP regime.

MLI #5 Gross Income Under IRC § 61 and Related Sections

SUMMARY

When preparing tax returns, taxpayers must complete the crucial calculation of gross income for the taxable year to determine the tax they must pay. Gross income has been among the Most Litigated Issues in each of the National Taxpayer Advocate's Annual Reports to Congress.[1] For this report, we reviewed 85 cases decided between June 1, 2016, and May 31, 2017. The majority of cases involved taxpayers failing to report items of income, including some specifically mentioned in Internal Revenue Code (IRC) § 61 such as wages,[2] interest,[3] dividends,[4] and annuities.[5]

TAXPAYER RIGHTS IMPACTED[6]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

IRC § 61 broadly defines gross income as "all income from whatever source derived."[7] The U.S. Supreme Court has defined gross income as any accession to wealth.[8] The concept of "gross income" is to be broadly construed, while exclusions from income are to be narrowly construed.[9] However, over time, Congress has carved out numerous exceptions and exclusions from this broad definition of gross income, and has based other elements of tax law on the definition.[10]

The Commissioner of Internal Revenue may identify particular items of unreported income or reconstruct a taxpayer's gross income using methods such as the bank deposits method.[11] After

1 *See*, *e.g.*, National Taxpayer Advocate 2016 Annual Report to Congress 65-73; National Taxpayer Advocate 2015 Annual Report to Congress 476-80.

2 Internal Revenue Code (IRC) § 61(a)(1). *See*, *e.g.*, *Barrion v. Comm'r*, T.C. Memo. 2016-153.

3 IRC § 61(a)(4). *See*, *e.g.*, *Kupersmit v. Comm'r*, T.C. Memo. 2016-202, *appeal dismissed*, No. 17-1486 (3d Cir. May 24, 2017).

4 IRC § 61(a)(7). *See*, *e.g.*, *Austin v. Comm'r*, T.C. Memo. 2017-69.

5 IRC § 61(a)(9). *See*, *e.g.*, *Harrell v. Comm'r*, T.C. Memo. 2017-76.

6 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

7 IRC § 61(a).

8 *Comm'r v. Glenshaw Glass*, 348 U.S. 426, 431 (1955) (interpreting § 22 of the Internal Revenue Code of 1939, the predecessor to IRC § 61).

9 *See Comm'r v. Schleier*, 515 U.S. 323, 327-28 (citations omitted) (1995); *Taggi v. U.S.*, 35 F.3d 93, 95 (citations omitted) (2d Cir. 1994).

10 *See*, *e.g.*, IRC §§ 104 (compensation for injuries or sickness); 105 (amounts received under accident and health plans); 108 (income from discharge of indebtedness); 6501 (limits on assessment and collection, determination of "substantial omission" from gross income).

11 IRC § 6001. *See*, *e.g.*, *DiLeo v. Comm'r*, 96 T.C. 858, 867 (1991).

determining a tax deficiency, the IRS issues a statutory notice of deficiency.[12] If the taxpayer challenges the deficiency, the Commissioner's notice is entitled to a presumption of correctness; the taxpayer bears the burden of proving that the determination is erroneous or inaccurate.[13] Taxpayers who seek an exclusion from gross income must demonstrate eligibility for the exclusion and bring themselves "within the clear scope of the exclusion."[14]

ANALYSIS OF LITIGATED CASES

In the 85 opinions involving gross income issued by the federal courts and reviewed for this report, gross income issues most often fell into two categories: (1) what is included in gross income under IRC § 61, and (2) what can be excluded under other statutory provisions. A detailed list of the cases appears in Table 5 of Appendix 3.

In 28 cases (about 33 percent), taxpayers were represented, while the rest were *pro se* (without counsel). Eight of the 28 taxpayers who had representation (almost 29 percent) prevailed in full or in part in their cases, whereas *pro se* taxpayers prevailed in part in ten cases. Overall, taxpayers prevailed in full or in part in 18 of 85 cases (about 21 percent).

Drawing on the full list in Table 5 of Appendix 3, we have chosen to discuss cases involving damage awards, Individual Retirement Account (IRA) distributions, and discharge of indebtedness, which were among the most common issues.

Damage Awards

Taxation of damage awards continues to generate litigation. This year, taxpayers in at least seven cases (about eight percent of those reviewed) challenged the inclusion of damage awards in their gross income, but no taxpayers prevailed in these cases.[15]

IRC § 104(a)(2) specifies that damage awards and settlement proceeds[16] are taxable as gross income unless the award was received "on account of personal physical injuries or physical sickness."[17] Congress added the "physical injuries or physical sickness" requirement in 1996;[18] until then, the word "physical" did not appear in the statute. The legislative history of the 1996 amendments to IRC § 104(a)(2) provides that "[i]f an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness… [but] emotional distress is not considered a physical injury or physical sickness."[19] Thus, damage awards for emotional distress are not considered as received on

12 IRC § 6212. *See also* Internal Revenue Manual (IRM) 4.8.9.2, *Notice of Deficiency Definition* (Aug. 11, 2016).

13 *See* IRC § 7491(a) (burden shifts only where the taxpayer produces credible evidence contradicting the Commissioner's determination and satisfies other requirements). *See also Welch v. Helvering*, 290 U.S. 111, 115 (1933) (citations omitted).

14 *Dobra v. Comm'r*, 111 T.C. 339, 349 n.16 (citation omitted) (1998).

15 *See, e.g.*, *Bates v. Comm'r*, T.C. Memo. 2017-72.

16 *See* Treas. Reg. § 1.104-1(c) (damages received, for purposes of IRC § 104(a)(2), means amounts received "through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution").

17 IRC § 104(a)(2).

18 Pub. L. No. 104-188, § 1605(a), 110 Stat. 1755, 1838 (1996).

19 H.R. Rep. No. 104-586, at 143-44 (1996) (Conf. Rep.).

account of physical injury or physical sickness, even if the emotional distress results in "insomnia, headaches, [or] stomach disorders."[20]

To justify exclusion from income under IRC § 104, the taxpayer must show settlement proceeds are in lieu of damages for physical injury or sickness.[21] In *George v. Commissioner*, the taxpayer filed a complaint against his former employer and coworkers.[22] He sought damages under various civil rights laws and human rights laws, both state and federal. He alleged in his complaint that he suffered "psychological and physical harms" and sought compensatory damages, punitive damages, and liquidated damages. He also claimed that he was constructively fired from his employer due to the continued alleged harassment by his coworkers because of his national origin.

The taxpayer and his former employer entered into a settlement agreement. The taxpayer agreed to release all claims against his former employer and coworkers in exchange for $45,000.[23] The settlement agreement did not mention any injury or physical harm the taxpayer suffered. The insurance company issued the taxpayer a 1099-MISC, *Miscellaneous Income*. The taxpayer did not report the income and argued it was excludible under IRC § 104(a)(2). The IRS issued a timely notice of deficiency.

The court looked at the nature of the claim settled, by the terms of the settlement agreement, to determine for what the settlement payment compensated the taxpayer.[24] The Tax Court stated that it is crucial to determine the intent of the payor in making the settlement payment, which can be determined by taking into account all the facts and circumstances, including the amount paid, that led to the settlement.[25] The court found that while the taxpayer had alleged psychological and physical harm in his complaint, he had not done so with any specificity and in fact made his claims under various civil and human rights statutes. The Tax Court then looked to the actual settlement agreement, which made no mention of physical sickness or injury and did not allocate any portion of the payment to such. While the court acknowledged that the situation that gave rise to the claim likely caused emotional distress, emotional distress does not qualify a payment for exclusion and the clear terms of the settlement indicated no intent to compensate for physical sickness or injury. The Tax Court found for the IRS.[26]

As illustrated by continuing litigation of the characterization of settlement damages, the question of when damage awards can be excluded from gross income continues to confuse taxpayers. The National Taxpayer Advocate remains concerned that taxpayers continue to disagree with the IRS's and courts' interpretation that mental illness equates to emotional distress, as opposed to physical sickness or injury. At least three taxpayers in this reporting cycle argued that settlement awards for emotional distress should be excluded from gross income.[27] In the same way that a physical injury or sickness may have mental or emotional side effects, many mental illnesses manifest themselves as physical symptoms. For instance, many people who have severe depression experience the following physical symptoms: stomachaches, indigestion, constant headaches, tightness in the chest, difficulty

20 H.R. Rep. No. 104-737, at 301 (1996) (Conf. Rep.). Note, however, that IRC § 104(a)(2) excludes from income damages, up to the cost of medical treatment for which a deduction under IRC § 213 was allowed for any prior taxable year, for mental or emotional distress causing physical injury.

21 *See*, *e.g.*, *Green v. Comm'r*, 507 F.3d 857 (5th Cir. 2007), *aff'g* T.C. Memo. 2005-250.

22 T.C. Memo. 2016-156.

23 *Id*.

24 *Id*.

25 *Id.* (quotation omitted).

26 *Id*.

27 *See Bates v. Comm'r*, T.C. Memo. 2017-72; *Tishkoff v. Comm'r*, T.C. Summ. Op. 2016-65; *Mojarro v. Comm'r*, 689 F. App'x 518 (9th Cir. 2017), *aff'g* No. 1492-14 (T.C. May 7, 2015).

breathing, and fatigue.[28] Physical symptoms occur in other mental disorders, such as Post-Traumatic Stress Disorder (PTSD), which affects people who have experienced a traumatic event, such as mugging, rape, torture, being kidnapped or held captive, child abuse, car accidents, train wrecks, plane crashes, bombings, natural or human-caused disasters, or military combat.[29] Current research shows that the experience of trauma can cause neurochemical changes in the brain that create a vulnerability to hypertension and atherosclerotic heart disease, abnormalities in thyroid and other hormone functions, and increased susceptibility to infections and immunologic disorders that are associated with PTSD.[30] The interpretation that mental illness equates to emotional distress seems particularly outdated when considering the medical advancements in understanding the physical cause and symptoms of mental illness.[31]

IRA Distributions

IRC § 61(a) defines gross income as "all income from whatever source derived, including (but not limited to)… (9) Annuities; … and (11) Pensions."[32] IRC § 408(d)(1) governs the tax treatment of distributions from individual retirement accounts (IRAs), and provides that they are generally included in gross income as amounts received as an annuity under IRC § 72. Similarly, IRC § 402(a) provides that an amount distributed to any employees' trust described in section 401(a), which is tax-exempt under section 501(a), shall be taxable to the distributee under IRC § 72.

Taxpayers in at least 18 cases argued that portions of their IRA distributions, pensions, retirement accounts, or annuity payments were excluded from gross income, prevailing in part in one case[33] and in full in another case.[34] Taxpayers in at least one case challenged the taxability of the distributions, arguing the "rollover provision" under § 408(d) applied.[35] The "rollover provision" generally excludes from gross income IRA distributions that are transferred into an eligible retirement account within 60 days of receipt.[36] Taxpayers are limited, however, under IRC § 408(d)(3)(B) to one nontaxable rollover per year.[37]

In the case of *Trimmer v. Commissioner*, the taxpayers (married filing jointly) prevailed in full on the issue of whether distributions had to be rolled over within 60 days of receipt in order to be a nontaxable

28 National Institute of Mental Health, *Signs and Symptoms of Depression*, https://www.nimh.nih.gov/health/topics/depression/index.shtml (last visited Aug. 14, 2017).

29 National Institute of Mental Health, *Post-Traumatic Stress Disorder*, http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last visited Aug. 14, 2017).

30 *See* U.S. Department of Veterans Affairs, *National Center for PTSD*, http://www.ptsd.va.gov/professional/co-occurring/ptsd-physical-health.asp (last visited Aug. 14, 2017).

31 National Taxpayer Advocate 2009 Annual Report to Congress 351-56 (Legislative Recommendation: *Exclude Settlement Payments for Mental Anguish, Emotional Distress, and Pain and Suffering from Gross Income*). The National Taxpayer Advocate recommended that Congress amend IRC §104(a)(2) to exclude from gross income payments received as settlement for mental anguish, emotional distress, and pain and suffering. Such change was recommended because mental anguish, emotional distress, and pain and suffering can be caused by a physical condition in the body and can cause physical symptoms. Over the past few years, doctors and researchers have made significant advances in identifying changes that occur in the brain when a person is plagued with mental illness.

32 IRC § 61(a).

33 *See Harrell v. Comm'r*, T.C. Memo. 2017-76.

34 *See Trimmer v. Comm'r*, 148 T.C. No. 14 (2017).

35 *See Skog v. Comm'r*, T.C. Memo. 2016-210.

36 IRC § 408(d)(3)(A)(i), (ii); *Schoof v. Comm'r*, 110 T.C. 1, 7 (1998). *See also* IRC § 402(c)(3), which contains an analogous 60-day rollover period for transfers of distributions from an employees' trust.

37 IRC § 408(d)(3)(B).

rollover.[38] Mr. Trimmer retired after 20 years of service with the New York Police Department (NYPD). After his retirement, he was supposed to begin a job as a private security guard; however, the job fell through. He could not find another job or return to the NYPD because its policy prohibits the rehiring of retired police officers. Shortly thereafter, Mr. Timmer fell into a debilitating depression and ceased to manage any of his affairs. During this time, his pension issued him two distributions on May 27 and June 10, 2011. He left the checks sitting on his dresser for two months before even depositing them, and did not touch the money after depositing it. When, after much prodding by Mrs. Trimmer, he went to his tax return preparer to prepare his tax return, the preparer informed him that he needed to place the pension distributions into an IRA. The taxpayers reported two distributions nontaxable on their 2011 tax return filed on March 29, 2012, and acting on advice of the tax return preparer, rolled over the funds earlier deposited to a new IRA on April 16, 2012.

The IRS issued a timely Notice CP 2000, *Proposed Changes to Your 2011 Form 1040,* asserting that the taxpayers had failed to report $100,700 from the two IRA distributions. Mr. Trimmer timely filed a protest explaining his depression, detailing his actions upon learning he needed to rollover the funds, and requesting that the IRS waive the penalty because it would amount to several years of salary for his family and cause extreme hardship. The IRS responded via two letters. The first letter issued on June 3, 2014 stated that the taxpayers "don't need to do anything else for now. We will contact you again within 60 days to let you know what action we are taking." Three days later, on June 6, 2014, the IRS issued another letter summarily denying the requested relief, without addressing the availability of a hardship waiver, seeking additional information, or responding to the circumstances detailed in the taxpayer's request. The IRS then issued a statutory notice of deficiency. The taxpayers filed suit and alleged that Mr. Trimmer qualified for a hardship waiver of the 60-day rollover requirement under IRC § 402(c)(3)(B).[39]

The IRS asserted that the taxpayers did not properly request relief due to hardship under the applicable revenue procedure.[40] Additionally, the IRS argued:

- That it had made no final administrative determination regarding the request for relief,
- That even if a final determination had been made, it was not subject to judicial review, and
- That there was no abuse of discretion in the denial because the taxpayers failed to establish that Mr. Trimmer had been incapable of completing the rollovers timely.[41]

The court considered the IRS's argument that the taxpayers failed to comport with the requirements of Revenue Procedure 2003-16 by not requesting and paying for a private letter ruling to determine whether a hardship exception from the 60-day rollover requirement existed. The court did not find any prohibition in the IRC or in the revenue procedure that would not permit an examiner from considering a hardship waiver during the exam. Further, the court was not persuaded by the IRS's argument that no final determination had been made on the hardship request. Instead, the court stated that Mr. Trimmer's letter had resulted in the IRS summarily denying his request on legal grounds, "without

38 148 T.C. No. 14 (2017). This case was litigated by student attorneys and the Director of a Low Income Taxpayer Clinic (LITC). For more information on the LITC program, which is administered by TAS, see IRC § 7526; IRS Pub. 3319, *Low Income Taxpayer Clinics Grant Application Package and Guidelines*, and IRS Pub. 5066, *Low Income Taxpayer Clinics Program Report*. *See also* https://www.irs.gov/advocate/low-income-taxpayer-clinics.

39 The IRS may waive the 60-day requirement "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." IRC § 402(c)(3)(B).

40 Rev. Proc. 2003–16, 2003–1 C.B. 359.

41 *Trimmer v. Comm'r*, 148 T.C. No. 14 (2017).

even acknowledging the specific facts and circumstances spelled out in Mr. Trimmer's letter." Thus, the court concluded the IRS's insistence on the taxpayers to respond yet again to the denial letter if they disagreed would be "an empty gesture or mere boilerplate." Next, the court rejected the IRS's assertion that the court did not have jurisdiction to review the administrative denial of a hardship waiver. The court found that the denial of the hardship waiver went to the merits of the deficiency determination which initially conferred jurisdiction on the court. Finally, the court found that by denying the taxpayers' initial request for a hardship waiver the IRS had abused its discretionary authority. The court concluded that the IRS proceeded based on "an incomplete understanding of the pertinent statutory provisions, failed to address or even acknowledge any of the facts and circumstances Mr. Trimmer set forth in his letter."

After considering the objections of the IRS to the taxpayers' claims, the court turned to the merits of the taxpayers' request for a hardship waiver of the 60-day requirement. The court focused on the phrase "against equity or good conscience" in IRC § 402(c)(3)(B). After considering the statutory meaning of the phrase, the court turned to the four factors enumerated in the relevant revenue procedure and determined one factor was irrelevant, two favored the taxpayers, and the final factor, after considering the evidence presented, also turned in favor of the taxpayers.[42] The court thus found it would be against equity or good conscience to deny the taxpayers' hardship waiver request.

In light of current IRS guidance, which no longer requires taxpayers who meet certain conditions to pursue a private letter ruling and instead allows taxpayers to self-certify that they meet the requirements for a hardship waiver, the Trimmers would never have ended up in court to pursue a hardship waiver.[43] A taxpayer is now allowed to self-certify (subject to verification on audit) that he or she is eligible for a waiver of the 60-day requirement instead of seeking a costly private letter ruling.[44] The current revenue procedure provides 11 reasons for missing the deadline that are eligible for self-certification. It also provides a model letter that may be used for the self-certification. The National Taxpayer Advocate applauds the IRS for this change, which promotes taxpayers' *right to a fair and just tax system*. While we anticipate this new revenue procedure will eventually result in less litigation, cases that resulted from the previous regime are still working their way through the courts. We also remain deeply concerned that, as the Tax Court observed, IRS and counsel employees knew so little about the relevant law and thus forced this and other taxpayers to litigate, thereby exacerbating the hardship.

Discharge of Indebtedness

We reviewed nine cases in which taxpayers disputed the IRS's determination that a discharge of indebtedness was taxable income, a 125 percent increase over last year's analysis.[45] Taxpayers prevailed in full in two of these cases.[46] Generally, a taxpayer must include income from discharge of indebtedness when calculating gross income,[47] but in certain circumstances cancellation of indebtedness income may be excluded. In this regard, IRC § 108(a) provides that a taxpayer may exclude, subject to limitations,

42 Rev. Proc. 2003-16. The court determined factor one, an error on the part of the financial institution was inapplicable, factor three, the use of the funds distributed, and factor four, the time elapsed since the distribution occurred, were favorable to the taxpayers. The second factor, the inability to complete the rollover due to a disability, required a more thorough analysis; however, after hearing from the expert witness, the court determined that factor also weighed in favor of the taxpayers.

43 *See* Rev. Proc. 2016-47, 2016-37 I.R.B. 346, modifying Rev. Proc. 2003-16, 2003-4 I.R.B. 359.

44 *Id*.

45 National Taxpayer Advocate 2016 Annual Report to Congress 470.

46 *See Newman v. Comm'r*, T.C. Memo. 2016-125; *Schieber v. Comm'r*, T.C. Memo. 2017-32.

47 IRC § 61(a)(12).

income from the discharge of indebtedness if the discharge occurs in a title 11 bankruptcy case, when the taxpayer is insolvent, or if the indebtedness is qualified farm or business real estate debt or qualified principal residence indebtedness, or if the indebtedness is qualified principal residence indebtedness discharged before January 1, 2017, or subject to an arrangement that is entered into and evidenced in writing before January 1, 2017.[48] The creditor may issue a Form 1099-C, *Cancellation of Debt*, to the taxpayer for canceled debts of $600 or more.[49] If a creditor has discharged a debt the taxpayer owes, the taxpayer must include the discharged amount in gross income, even if it is less than $600 or a Form 1099-C is not received, unless one of the exceptions in IRC § 108(a) applies. The issuance of a Form 1099-C is not dispositive of whether or when the debt is actually discharged.[50] A debt is deemed to have been discharged, and a Form 1099-C is required, if and only if, an “identifiable event” has occurred.[51] If a Form 1099-C serves as the basis for the determination of a deficiency, IRC § 6201(d) may apply to shift the burden of production to the IRS. Section 6201(d) provides that in any court proceeding, if a taxpayer asserts a reasonable dispute with respect to the income reported on an information return and the taxpayer has fully cooperated with the IRS, then the IRS has the burden of producing reasonable and probative information in addition to the information return. The burden of proof is on the taxpayer to show that any of the exceptions in IRC § 108(a) apply.[52]

In one case we reviewed, the taxpayer prevailed in full under the insolvency exception in IRC § 108(a)(1)(B). In the case of *Newman v. Commissioner*, the taxpayer opened a checking account at a new bank and deposited a check for $8,500 drawn on an account he owned at another bank.[53] He then withdrew $8,000 from the new account; however, the initial deposit check never cleared, so the account was overdrawn. The bank closed the account in 2008 and in 2011 issued the taxpayer a Form 1099-C, *Cancellation of Debt*.[54]

The IRS issued a notice of deficiency for the discharge of indebtedness income, and the taxpayer timely petitioned the Tax Court for redetermination of the deficiency. After the Tax Court determined that the taxpayer had received cancellation of debt income, the court turned to the question of whether the taxpayer was insolvent, and to what extent, at the time the debt was discharged.[55] The court found that at the time of the discharge, the taxpayer had assets totaling $35,500, and debts totaling $50,000. Therefore, the taxpayer was insolvent by $14,500, the total of his debt minus his assets, and could therefore exclude the entire $7,875 of discharge of indebtedness income from his 2011 income.[56]

48 IRC § 108(a)(1)(A)-(E).

49 IRS, *Instructions for Form 1099-A and 1099-C Acquisition or Abandonment of Secured Property and Cancellation of Debt*, https://www.irs.gov/pub/irs-pdf/i1099ac.pdf (Sept. 27, 2017).

50 *Kleber v. Comm’r*, T.C. Memo. 2011-233 (citation omitted).

51 *See* Treas. Reg. § 1.6050P-1(a)(1). Note that the IRS has issued final regulations which eliminate the 36-month testing period for information returns required to be filed, and payee statements required to be furnished, after December 31, 2016. 81 Fed. Reg. 78908 (Nov. 10, 2016). *See also* National Taxpayer Advocate 2010 Annual Report to Congress 383-86 (Legislative Recommendation: *Remove the 36-Month “Testing Period” that May Trigger Cancellation of Debt Reporting*).

52 U.S. Tax Court Rules of Practice and Procedure, Rule 142(a).

53 T.C. Memo. 2016-125.

54 *Id*.

55 *Id*.

56 *Id*.

CONCLUSION

Taxpayers litigate many of the same gross income issues every year due to the complex nature of what constitutes gross income. As the definition is very broad and the courts broadly interpret accession to wealth as gross income, most cases were decided in favor of the IRS and exclusions from gross income continued to be narrowly interpreted.

Overall, litigation of items of gross income increased this year, from 81 cases in the 2016 reporting cycle to 85, an almost five percent increase.[57] Additionally, the number of cases litigated in our common issue areas also increased. The number of cases involving the tax treatment of settlements and awards increased after remaining steady or decreasing, from four in 2016 to seven this year; thus, it clearly remains a perennial area of confusion for taxpayers.[58] The National Taxpayer Advocate has previously recommended a legislative change that would clarify the tax treatment of court awards and settlements by permitting taxpayers to exclude any payments received as a settlement or judgment for mental anguish, emotional distress, or pain and suffering.[59]

Discharge of indebtedness cases made up about 11 percent of cases, compared to only five percent of cases in 2016.[60] Finally, cases involving the tax treatment of distributions from IRAs, pensions, and annuities made up a larger percentage of overall cases this year, at 21 percent of cases compared to about 15 percent in 2016.[61] Litigation in the area of IRA rollovers is expected to decrease under the current revenue procedure allowing taxpayers to self-certify that they qualify for an exception to the 60-day rollover requirement.

57 National Taxpayer Advocate 2016 Annual Report to Congress 465.

58 National Taxpayer Advocate 2016 Annual Report to Congress 467.

59 National Taxpayer Advocate Annual 2009 Report to Congress 351-56 (Legislative Recommendation: *Exclude Settlement Payments for Mental Anguish, Emotional Distress, and Pain and Suffering from Gross Income*).

60 National Taxpayer Advocate 2016 Annual Report to Congress 470.

61 *Id*. at 469.

MLI #6 Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown As Tax on Return Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654

SUMMARY

We reviewed 60 decisions issued by federal courts from June 1, 2016, to May 31, 2017, regarding the additions to tax for:

i. Failure to file a tax return by the due date under Internal Revenue Code (IRC) § 6651(a)(1);

ii. Failure to pay an amount shown on a tax return under IRC § 6651(a)(2);

iii. Failure to pay installments of the estimated tax under IRC § 6654; or

iv. Some combination of the three.[1]

The phrase "addition to tax" is commonly referred to as a penalty, so we will refer to these additions to tax as the failure to file penalty, the failure to pay penalty, and the estimated tax penalty. Eight cases involved the imposition of the estimated tax penalty in conjunction with the failure to file and failure to pay penalties; six cases involved the estimated tax penalty and either the failure to file penalty or the failure to pay penalty; 46 cases involved the failure to file or failure to pay penalties without the estimated tax penalty; there were no cases involving the estimated tax penalty as the only issue.

A taxpayer can avoid the failure to file and failure to pay penalties by demonstrating the failure is due to reasonable cause and not willful neglect.[2] The estimated tax penalty is imposed unless the taxpayer falls within one of the statutory exceptions.[3] Taxpayers were unable to avoid a penalty in 57 of the 60 cases.

TAXPAYER RIGHTS IMPACTED[4]

- *The Right to a Fair and Just Tax System*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*

PRESENT LAW

Under IRC § 6651(a)(1), a taxpayer who fails to file a return on or before the due date (including extensions of time for filing) will be subject to a penalty of five percent of the tax due (minus any credit the taxpayer is entitled to receive and payments made by the due date) for each month or partial month the return is late. This penalty will accrue up to a maximum of 25 percent, unless the failure is due to

1 Internal Revenue Code (IRC) § 6651(a)(3) imposes an addition to tax if the tax required to be shown on a return, but which is not shown, is not paid within 21 calendar days from the date of notice and demand for payment. We did not identify any cases where this addition to tax was at issue, so we have not included any analysis.

2 IRC § 6651(a)(1), (a)(2).

3 IRC § 6654(e).

4 *See* Taxpayer Bill of Rights (TBOR), https://TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a), 129 Stat. 2242, 3117 (2015) (codified at IRC § 7803(a)(3)).

reasonable cause and not willful neglect.[5] For the taxpayer to avoid the penalty by showing there was a reasonable cause, the taxpayer must have exercised ordinary business care and prudence.[6] The failure to file penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.[7]

When an income tax return is filed more than 60 days after the due date (including extensions), the penalty shall not be less than the lesser of two amounts — 100 percent of the tax required to be shown on the return that the taxpayer didn't pay on time, or a specific dollar amount, which is adjusted annually for inflation.[8] The specific dollar amounts are as follows:

- $210 for returns due on or after 1/1/2018;
- $205 for returns due between 1/1/2016 and 12/31/2017;
- $135 for returns due between 1/1/2009 and 12/31/2015; and
- $100 for returns due before 1/1/2009.

The failure to pay penalty, IRC § 6651(a)(2), applies to a taxpayer who fails to pay an amount shown or required to be shown as tax on the return. The penalty accrues at a rate of half a percent (0.5 percent) per month on the unpaid balance for as long as it remains unpaid, up to a maximum of 25 percent of the amount due.[9] When the IRS imposes both the failure to file and failure to pay penalties for the same month, it reduces the failure to file penalty by the amount of the failure to pay penalty (0.5 percent for each month).[10] The taxpayer can avoid the penalty by establishing the failure was due to reasonable cause; in other words, the taxpayer must have exercised ordinary business care and prudence but nonetheless was unable to pay by the due date, or that paying on the due date would have caused undue hardship.[11] The failure to pay penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.[12]

Courts will consider "all the facts and circumstances of the taxpayer's financial situation" to determine whether the taxpayer exercised ordinary business care and prudence.[13] In addition, "consideration will be given to the nature of the tax which the taxpayer has failed to pay."[14]

IRC § 6654 imposes a penalty on any underpayment of estimated tax by an individual or by certain estates or trusts.[15] The law requires four installments per tax year, each generally 25 percent of the

5 IRC § 6651(a)(1), (b)(1). The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f).

6 Treas. Reg. § 301.6651-1(c)(1).

7 IRC § 6651(a)(1).

8 IRC § 6651(a). Rev. Proc. 2016-55, 2016-45 I.R.B. 707, contains the most recent inflation amount.

9 IRC § 6651(a)(2). Note that if the taxpayer timely files the tax return (including extensions) but an installment agreement is in place, the penalty will continue accruing at the lower rate of 0.25 percent rather than 0.5 percent of the tax shown. IRC § 6651(h).

10 IRC § 6651(c)(1). When both the failure to file and failure to pay penalties are accruing simultaneously, the failure to file will max out at 22.5 percent and the failure to pay will max out at 2.5 percent, thereby abiding by the 25 percent maximum limitation.

11 Treas. Reg. § 301.6651-1(c)(1). Even when a taxpayer shows undue hardship, the regulations require proof of the exercise of ordinary business care and prudence.

12 IRC § 6651(a)(2).

13 Treas. Reg. § 301.6651-1(c)(1). *See, e.g.*, *East Wind Indus. v. U.S.*, 196 F.3d 499, 507 (3d Cir. 1999).

14 Treas. Reg. § 301.6651-1(c)(2).

15 IRC § 6654(a), (l).

required annual payment.[16] The required annual payment is generally the lesser of 90 percent of the tax shown on the return for the current tax year or 100 percent of the tax for the previous tax year.[17]

The amount of the penalty is determined by applying:

- The underpayment rate established under IRC § 6621;
- To the amount of the underpayment;
- For the period of the underpayment.[18]

The amount of the underpayment is the excess of the required payment over the amount paid by the due date. To avoid the penalty, the taxpayer has the burden of proving that one of the following exceptions applies:

- The tax due (after taking into account any federal income tax withheld) is less than $1,000;[19]
- The preceding tax year was a full 12 months, the taxpayer had no liability for the preceding tax year, and the taxpayer was a U.S. citizen or resident throughout the preceding tax year;[20]
- The IRS determines that because of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience;[21] or
- The taxpayer retired after reaching age 62, or became disabled, in the tax year for which estimated payments were required, or in the tax year preceding that year, and the underpayment was due to reasonable cause and not willful neglect.[22]

In any court proceeding, the IRS has the burden of producing sufficient evidence that it imposed the failure to file, failure to pay, or estimated tax penalties appropriately.[23]

ANALYSIS OF LITIGATED CASES

We analyzed 60 opinions issued between June 1, 2016, and May 31, 2017, where the failure to file penalty, failure to pay penalty, or estimated tax penalty was in dispute. All but eight of these cases were either litigated in the United States Tax Court, or an appeal of a Tax Court decision. A detailed list appears in Table 6 in Appendix 3. Twenty-eight cases involved individual taxpayers and 32 involved businesses (including individuals engaged in self-employment or partnerships).

Of the 39 cases in which taxpayers appeared *pro se* (without counsel), the outcomes generally favored the IRS. In six cases, the court granted partial relief to taxpayers, and in the other 33 the taxpayers did not prevail. Taxpayers represented by counsel fared slightly better; of the 21 cases in which taxpayers had

16 IRC § 6654(c)(1), (d)(1)(A).

17 IRC § 6654(d)(1)(B). If the adjusted gross income shown on the return of the individual for the preceding taxable year exceeds $150,000, the required annual payment increases to an amount 110 percent of the tax shown on the return of the individual for the preceding taxable year (if preceding tax year was 2002 or after). IRC § 6654(d)(1)(C)(i).

18 IRC § 6654(a).

19 IRC § 6654(e)(1).

20 IRC § 6654(e)(2).

21 IRC § 6654(e)(3)(A).

22 IRC § 6654(e)(3)(B).

23 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001) (applying IRC § 7491(c)). An exception to this rule relieves the IRS of this burden where the taxpayer's petition fails to state a claim for relief from the penalty (and therefore is deemed to concede the penalty). *Funk v. Comm'r*, 123 T.C. 213, 218 (2004).

representation, taxpayers prevailed in full in three cases, in part in three cases, and were denied relief in the remaining 15.

Failure to File Penalty

In 51 out of the 55 cases reviewed where the failure to file penalty was at issue, the taxpayers could not prove that the failures to file were due to reasonable cause.[24] Taxpayers provided reasons such as physical injury or mental illness and reliance on an agent as a basis for reasonable cause. Circumstances suggesting reasonable cause are typically outside the taxpayer's control.[25]

Physical Injury or Mental Illness Defense

A physical injury or mental illness may provide a basis for a taxpayer to establish reasonable cause for not filing, if the condition impacted the taxpayer to such a degree that he or she could not file a tax return on time. When determining whether the condition establishes reasonable cause, the court analyzes how the taxpayer conducted his or her business affairs during the illness.

In *Brodmerkle v. Commissioner*, the taxpayers testified that they both suffered from various medical conditions during the years in which the IRS assessed failure to file penalties.[26] The court found that "while these medical conditions have been compounded and exacerbated over the years, they did not at the time prevent [the taxpayers] from timely filing their 2007 and 2008 tax returns."[27] Since the taxpayers were unable to persuade the court that their failure to file was due to a reasonable cause, the Tax Court determined the taxpayers were liable for the additions to tax under section 6651(a)(1) for tax years 2007 and 2008.

In *Leslie v. Commissioner*, the taxpayer argued that she had reasonable cause for failing to file her tax return because of her ongoing psychological problems.[28] The taxpayer suffered from bouts of depression as the result of a recent divorce, was diagnosed with several serious mental disorders, and was subsequently the victim of an African diamond scam. The court acknowledged that the applicable standard was difficult to meet, requiring that the taxpayer show that her mental illness and depression "rendered [her] incapable of exercising ordinary business care and prudence during the period in which the failure to file continued."[29] During the same period, the taxpayer supported herself with the income from eight rental properties which required her active management. Since the taxpayer's mental illness did not render her incapable of managing the rental properties, the court found that she was able to "carry on normal activities" and thus did not excuse the late filing.[30]

In contrast, the court in *Rogers v. Commissioner* found that given her dire circumstances, the taxpayer exercised ordinary business care and prudence despite failing to file a tax return in 2009.[31] Prior to 2009, she correctly handled her filing and payment obligations. In 2007, the taxpayer lost her apartment in a fire and received an insurance settlement in 2009 for less than full value, which entitled her to claim

24 Taxpayers avoided the failure to file penalty by proving reasonable cause in three cases, and in one case by proving the IRS granted an automatic six-month extension of the filing deadline. *See* IRC § 6081.

25 *McMahan v. Comm'r*, 114 F.3d 366, 369 (2d Cir. 1997) (citation omitted), *aff'g* T.C. Memo. 1995–547.

26 *Brodmerkle v. Comm'r*, T.C. Memo. 2017-8.

27 *Id*.

28 *Leslie v. Comm'r*, T.C. Memo. 2016-171, *appeal docketed*, No. 17-70450 (9th Cir. Feb. 14, 2017).

29 *Id*. (quoting *Wilkinson v. Comm'r*, T.C. Memo. 1997-410).

30 *Id*., *appeal docketed*, No. 17-70450 (9th Cir. Feb. 14, 2017).

31 *Rogers v. Comm'r*, T.C. Memo. 2016-152.

a casualty loss for the amount not compensated by insurance. The taxpayer misunderstood the casualty loss rules, and believed the loss should be taken in 2009 (the year of the settlement), when it should have been taken in 2007 (the year of the loss).[32] The taxpayer testified that at the time, she believed that since the amount of the casualty loss (over $150,000) was greater than her annual income, she was relieved of her need to file a return in 2009. Following the 2007 fire, the taxpayer was unable to return to her apartment and did not resume the business she had been operating from there. She was forced to live in conditions she found to be dehumanizing at a Young Women's Christian Association. She suffered bouts of depression, and in 2009 fell from a subway platform and sustained a skull fracture. During her hospitalization, she was subject to continuous monitoring and psychiatric examinations. After considering the facts and circumstances surrounding the taxpayer's failure to file her 2009 tax return, the court determined that the taxpayer exercised ordinary business care and prudence under challenging conditions and that her error did not constitute a conscious, intentional failure to file.[33]

Reliance on Agent Defense

When a taxpayer relies on an agent to fulfill a known filing requirement, it does not relieve the taxpayer of the responsibility. Taxpayers have a non-delegable duty to file a tax return on time.[34] In order for reliance on an agent to rise to the standard of reasonable cause for failing to fulfill the filing requirement, the reliance must be reasonable given the facts and circumstances.[35] In other words, merely hiring a tax professional (*e.g.,* accountant or lawyer) to handle tax filing is not enough to establish that the taxpayer used ordinary business care and prudence if there are facts that indicate otherwise.

In *Specht v. United States*, the court considered whether mere good-faith reliance on an agent constitutes reasonable cause.[36] The original action was brought by two co-fiduciaries on behalf of the estate of Virginia L. Esher, which had paid over one million dollars (more than eight percent of the estate's total value) in penalties and interest for its failure to timely file its tax return and pay its tax liability pursuant to IRC § 6651(a)(1) and (2), and filed a claim for refund of the funds in the district court. After the district court granted the government's motion for summary judgment, the executor appealed. The executor of the estate was an unsophisticated seventy-three year old woman, with no formal education beyond high school, and no experience serving as an executor. Witnessing the decedent's will was her first time visiting an attorney's office. After Ms. Esher's passing, the executor hired the very same attorney to represent the estate. The attorney had over fifty years experience in estate planning. The executor relied heavily on the attorney to handle liquidation of assets and compliance with state and federal tax responsibilities. Unbeknownst to the executor, the attorney was suffering from brain cancer and her competency was deteriorating. On several occasions, the executor received written notices indicating the attorney had failed to fulfill filing responsibilities related to the estate. The executor made multiple inquiries to the attorney and "blindly relied" on the attorney's assurances that the filing would be completed on time. Despite receiving multiple warnings regarding the attorney's deficient performance, the executor failed to take any steps to replace her until more than a year after the estate tax return filing deadline. Relying on several well-established precedents, including *Boyle*, the court reaffirmed that that "the duties to file a tax return and pay taxes are non-delegable and mere good-faith

32 IRC § 165(a); Treas. Reg. § 1.165-1(d)(2)(ii), (iii).

33 After applying similar reasonable cause analysis, the court also concluded that the taxpayer was not liable for the failure to pay penalty for tax year 2009.

34 *U.S. v. Boyle*, 469 U.S. 241 (1985). The Court noted that "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met." *Id*. at 252.

35 *See Estate of Hake v. U.S.*, 119 A.F.T.R.2d (RIA) 727 (M.D. Pa. 2017), *appeal docketed*, No. 17-2010 (3d Cir. 2017).

36 *Specht v. U.S.*, 661 F. App'x 357 (6th Cir. 2016), *aff'g* 115 A.F.T.R.2d (RIA) 357 (S.D. Ohio 2015).

reliance does not constitute reasonable cause."[37] The court found "it was the [taxpayer's] complete reliance on an unreliable agent, rather than circumstances beyond her control, that caused the late filing."[38] The executor's dependence on an unreliable agent fell short of ordinary business care and prudence in carrying out the non-delegable duties to pay and file taxes for the estate. Thus, the Court of Appeals for the Sixth Circuit affirmed the district court's summary judgment for the government.

In *Estate of Hake v. United States*, the court considered good-faith reliance on an agent and reached a different conclusion.[39] Co-executors of their late mother's estate paid the taxes before the due date, but filed the estate's return nearly six months late, resulting in more than $215,000 in failure to file penalties and interest. The executors were inexperienced in tax law and hired a law firm to assist them with several duties related to the estate, including tax filing responsibilities and resolving intra-family disputes regarding valuation of estate assets. After advising the executors to seek additional time to resolve the valuation issues, the law firm told the executors that they had been granted a one-year extension to file the estate return and a one-year extension to pay the taxes. That advice was wrong. While the IRS did grant the extension requests, a filing extension is limited to six months.[40] The executors relied on the advice of their attorneys and filed on the one-year extension deadline, which resulted in the IRS assessing a failure-to-file penalty for the six-month period after the expiration of the extension.[41] Prior to bringing the refund suit in the district court, the executors pursued an appeal with the IRS for abatement of the penalty and exhausted all of their administrative remedies. The district court applied the Supreme Court's standard from *Boyle,* and interpreted the *Boyle* holding in light of the Third Circuit's ruling in *Estate of Thouron v. United States*.[42] The Supreme Court in *Boyle* recognized a split of authority in the circuit courts in cases where the taxpayer relied on erroneous advice of counsel, but declined to address the issue.[43] The Third Circuit read *Thouron* to have identified three distinct categories of late-filing cases:

i. Taxpayers who delegate the task of filing a return to an agent, only to have the agent file the return late or not at all;

ii. Taxpayers who file a return after the actual due date, in reliance on the advice of an accountant or attorney, but within the time that the taxpayer's lawyer or accountant advised the taxpayer was available; and

iii. Taxpayers who reasonably rely on the advice of an accountant or attorney on a matter of tax law (*e.g.,* that it was unnecessary to file a return).

The court distinguished the facts of *Boyle* and *Estate of Hake* in terms of exercising ordinary business care and prudence, commenting that *Boyle* fell within the first category of late-filing cases, whereas the taxpayers in *Estate of Hake* fell squarely within the second. The court granted their claim for refund, finding that the executors reasonably relied on the (albeit erroneous) advice of their counsel and used ordinary business care and prudence. The ruling highlighted that reliance on expert advice can be

37 *Specht*, 661 F. App'x at 363. *See, e.g., U.S. v. Boyle*, 469 U.S. 241 (1985); *Valen Mfg. Co. v. U.S.*, 90 F.3d 1190 (6th Cir. 1996).

38 *Specht*, 661 F. App'x at 362.

39 *Estate of Hake v. U.S.*, 119 A.F.T.R.2d (RIA) 727 (M.D. Pa. 2017), *appeal docketed*, No. 17-2010 (3d Cir. 2017).

40 Treas. Reg. § 20.6081-1.

41 *Estate of Hake v. U.S.*, 119 A.F.T.R.2d (RIA) 727 (M.D. Pa. 2017), *appeal docketed*, No. 17-2010 (3d Cir. 2017).

42 *Estate of Thouron v. U.S.*, 752 F.3d 311, 314 (3d Cir. 2014). The district court in *Estate of Hake* applied the ruling in *Estate of Thouron* because an appeal lies with the U.S. Court of Appeals for the Third Circuit.

43 *Boyle*, 469 U.S. at 251 n. 9 ("We need not and do not address ourselves to this issue.") (citations omitted).

objectively reasonable, but the court noted the narrow scope of its ruling. The IRS has appealed this decision to the Court of Appeals for the Third Circuit.[44]

Failure to Pay an Amount Shown Penalty

The failure to pay penalty is based on the amount shown on the tax return. If the taxpayer did not file a tax return, the IRS can only assess the IRC § 6651(a)(2) penalty if it has introduced a Substitute for Return (SFR) that satisfies the requirements of IRC § 6020(b). During litigation involving an SFR, if the IRS cannot produce the SFR, it fails to meet its burden of production under IRC § 7491 and the taxpayer can avoid a failure to pay penalty.[45]

As with the failure to file penalty, raising a reasonable cause defense to the failure to pay penalty requires that the taxpayer show that he or she exercised ordinary business care and prudence in providing for payment of tax liabilities but nevertheless was either unable to timely pay the tax or would suffer undue hardship if the payment was made on time.[46] Unsurprisingly, taxpayers often use medical illness or reliance on an agent as the basis for establishing reasonable cause to avoid the failure to pay penalty under IRC § 6651(a)(2) as they do for the failure to file penalty under IRC § 6651(a)(1).

In *Franklin v. Commissioner*, the taxpayer did not file a return in 2009 and 2010.[47] The taxpayer received income from a variety of sources including S corporations, IRA distributions, interest, and dividends. The IRS successfully assessed a failure to file penalty against the taxpayer, but the IRS did not introduce into evidence any SFRs and was only able to produce evidence of the taxpayer's non-payment. The court found that the Forms 4340, *Certificate of Assessments, Payments, and Other Specified Matters*, for 2009 and 2010, which the IRS introduced into evidence, were insufficient, even though each form stated "substitute for return" and listed a corresponding date. Because the transcripts did not establish that the SFRs met the requirements of IRC § 6020(b) the court held that the IRS did not satisfy its burden of production under § 7491(c). As a result, the taxpayer was not liable for the addition to tax for failure to pay for either tax year.

In *United States v. Jim*, the taxpayer was a member of the Miccosukee Tribe of Indians and received quarterly distribution payments, based on the number of members in her household, from the net gaming revenue of various casinos and bingo halls owned by the Tribe. The taxpayer claimed the Tribe's former attorney, the Tribe's chairman, and the Business Council advised her that the distributions she received were excludable from federal taxation as general welfare benefits and she was not required to file a tax return for 2001.[48] The IRS concluded that the distributions were taxable under the Indian Gaming Regulatory Act.[49] At the summary judgment stage, the court ruled that the distribution payments were indeed taxable income; however the court determined there were genuine issues of material dispute, including whether the taxpayer was liable for penalties for failure to file and failure to pay, and therefore the case proceeded to a bench trial. The taxpayer then gave contradictory testimony at her deposition by stating she "just completely forgot to file that year," and the Tribe's former attorney testified he did not advise the Tribe members not to file their tax returns. The court held that this

44 *Estate of Hake v. U.S.*, 119 A.F.T.R.2d (RIA) 727 (M.D. Pa. 2017), *appeal docketed*, No. 17-2010 (3d Cir. 2017).

45 *See Wheeler v. Comm'r*, 127 T.C. 200, 210 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008).

46 *See* Treas. Reg. § 301.6651–1(c)(1).

47 *Franklin v. Comm'r*, T.C. Memo. 2016-207.

48 *U.S. v. Jim*, 118 A.F.T.R.2d (RIA) 6360 (S.D. Fla. 2016), *judgment entered by* 2016 U.S. Dist. LEXIS 114118 (S.D. Fla. 2016), *appeal docketed*, No. 16-17109 (11th Cir. Nov. 15, 2016). The United States brought an action in district court to reduce Ms. Jim's tax liabilities to judgment. *See* IRC §§ 7401, 7402.

49 25 U.S.C. § 2701.

was not a situation where the taxpayer relied on a "sincere, albeit erroneous belief" propagated by her advisors that her tribal distributions were not subject to federal income tax. Because the taxpayer was unable to prove reasonable cause, the court held her liable for the failure to pay penalty.

In *Kimdun, Inc. v. United States*, a corporate taxpayer argued that, because it was the victim of embezzlement by a payroll service provider (PSP) (or the PSP's bank), it should not be liable for failure to pay the amount shown on the corporation's tax return.[50] Early in 2009, the taxpayer learned that its payroll tax deposits had been embezzled and that it was possible the owner of taxpayer's PSP had embezzled the funds. Despite this revelation, the taxpayer continued to use the PSP through the third quarter of 2012. The IRS alleged that the taxpayer was delinquent on paying its taxes from multiple quarters throughout 2008 to 2011. The taxpayer asserted that it reasonably relied on its PSP to discharge their duties, but instead, the PSP or its bank absconded with taxpayer's timely submitted federal tax deposits.[51]

In December 2013, the taxpayer filed a claim for refund and request for abatement for each alleged delinquent quarter, claiming that once the funds left the taxpayer's account, it had no control or ability to ensure that the PSP made the required payments. The taxpayer further alleged that a taxpayer "who entrusts the payroll tax deposit function to a hitherto reputable payroll service should not be required to second-guess the company or anticipate that funds will be stolen from it."[52] The court disagreed, holding that the taxpayer cited no authority in support of the assertion that reliance on a third-party agent may constitute reasonable cause for failure to pay.[53] Therefore, the court found that the taxpayer's reliance on the PSP to discharge its duties to pay its federal taxes does not constitute reasonable cause.

Estimated Tax Penalty

Courts routinely found taxpayers liable for the IRC § 6654 estimated tax penalty when the IRS proved the taxpayer:

i. Had a tax liability;

ii. Had no withholding credits;

iii. Made no estimated tax payments for that year; and

iv. Offered no evidence to refute the IRS.

The IRS has the burden under IRC § 7491(c) to produce evidence that IRC § 6654(d)(1)(B) requires an annual payment from the taxpayer.

50 *Kimdun, Inc. v. U.S.*, 202 F. Supp. 3d 1136 (C.D. Cal. 2016).

51 For a detailed discussion of payroll service provider embezzlement, see National Taxpayer Advocate 2012 Annual Report to Congress 426-44 (Most Serious Problem: *Early Intervention, Offers in Compromise, and Proactive Outreach Can Help Victims of Failed Payroll Service Providers and Increase Employment Tax Compliance*). For the fourth consecutive year, Congress enacted legislation that incorporates two of the National Taxpayer Advocate's past recommendations. Section 106 of the Consolidated Appropriations Act, 2017 requires the IRS to: 1) issue dual address change notices related to an employer making employment tax payments (with one notice sent to both the employer's former and new address); and 2) give special consideration to an offer in compromise (OIC) request from a victim of fraud or bankruptcy by a third-party payroll tax return preparer. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Division E, § 106, 131 Stat. 135, 334 (2017).

52 *Kimdun, Inc.*, 202 F. Supp. 3d at 1139.

53 *Id.* at 1144.

In *Blair v. Commissioner*, the taxpayer received income via wages, dividends, and a distribution from a retirement plan for the 2010 tax year.[54] The taxpayer disputed the deficiencies the IRS imposed, raising several frivolous arguments, including challenging the constitutionality of the IRC and claiming that the IRS lacked jurisdiction over him. To meet its burden of production under IRC § 7491(c), the IRS had to show that the taxpayer had a "required annual payment" as defined in IRC § 6654(d)(1)(B). This burden requires the IRS to produce evidence that allows the court to determine the amount of the required annual payment. To determine the amount of the taxpayer's required annual payment for 2010, the court needed to know whether the taxpayer filed a return for the preceding tax year and if so, the amount of the "tax shown" on that return. Therefore, it was required that the IRS produce evidence that the taxpayer filed a tax return for 2009, and if so, the amount of "tax shown" on that return. In this case, the IRS was unable to meet its burden of production. Without this evidence, the court was unable to determine the "required annual payment" and thus found the taxpayer not liable for the estimated tax penalty.[55]

CONCLUSION

Taxpayers prevailed in full in only three of 60 (five percent) of the failure to file, failure to pay, and estimated tax penalty cases analyzed in this report. Nine taxpayers prevailed in part (15 percent) of the failure to file, failure to pay, and estimated tax penalty cases, meaning the IRS won 80 percent of the cases. The number of cases in this category rose by more than 30 percent from last year, and the portion of cases where the taxpayer received at least some relief rose substantially from 11 percent to 18 percent.

It is critical that IRS employees thoroughly analyze all facts and circumstances of a case when assessing reasonable cause claims rather than solely relying on the Reasonable Cause Assistant (RCA) software,[56] which is designed to help IRS employees make fair and consistent abatement determinations.[57] The RCA program allows IRS employees to override the results in certain circumstances, but employees must understand the definition of reasonable cause to apply the override.[58] Thus, a close review by an employee is essential to ensure that the failure to file penalty or the failure to pay penalty is imposed appropriately. Additionally, as previously recommended by the National Taxpayer Advocate, Congress should amend IRC § 6404 to authorize the Secretary of the Treasury to grant a one-time abatement of the failure to file penalty (IRC § 6651(a)(1)) and failure to pay penalty (IRC § 6651(a)(2)) for first time filers and taxpayers with a consistent history of compliance, where no countervailing factors are present.[59] To promote voluntary compliance and to uphold a taxpayer's *right to a fair and just tax system* and the *right to pay no more than the correct amount of tax*, the facts of taxpayers' individual cases must be carefully considered.

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54 *Blair v. Comm'r*, T.C. Memo. 2016-215.

55 *See* IRC § 6654(d)(1)(B).

56 The Reasonable Cause Assistant (RCA) can only consider failure to file or failure to pay penalties for certain individual tax returns.

57 National Taxpayer Advocate 2010 Annual Report to Congress 198 (Most Serious Problem: *The IRS's Over-Reliance on Its "Reasonable Cause Assistant" Leads to Inaccurate Penalty Abatement Determinations*). *See also* IRS, *Reasonable Cause Assistant (RCA) Usability Test Final Report Summary* 4 (May 28, 2010). The test showed that employees using the RCA determined penalty abatement requests correctly in only 45 percent of the cases. An even more disturbing finding was that all of the employees in the study believed they were making correct legal determinations based on reasonable cause.

58 Internal Revenue Manual 20.1.1.3.6.10(3) (Nov. 25, 2011) ("[F]air and consistent application of penalties requires employees to make a final penalty relief determination consistent with the RCA conclusion … [U]nderstanding that the individual facts and circumstances vary for each case and that there may be unique facts and circumstances in certain cases that RCA cannot consider, an 'override (abort)' function is available in RCA.")

59 National Taxpayer Advocate 2001 Annual Report to Congress 188.

MLI #7 Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

SUMMARY

Internal Revenue Code (IRC) § 7403 authorizes the United States to file a civil action in U.S. District Court against a taxpayer who has refused or neglected to pay any tax, to enforce a federal tax lien, or to subject any of the delinquent taxpayer's property to the payment of tax. Therefore, lien enforcement cases are different from cases described in other Most Litigated Issues because it is always the government, rather than the taxpayer, initiating the litigation. We identified 60 opinions issued between June 1, 2016, and May 31, 2017 that involved civil actions to enforce liens under IRC § 7403.[1] The IRS prevailed in 58 of these cases, a taxpayer prevailed in one case, and one case resulted in a split decision.

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Privacy*
- *The Right to Finality*
- *The Right to Appeal the IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

IRC § 7403 authorizes the United States to enforce a federal tax lien with respect to a taxpayer's delinquent tax liability or to subject any property, right, title, or interest in property of the delinquent taxpayer to the payment of a liability, by initiating a civil action against the taxpayer in the appropriate United States District Court.[3] When the United States files a complaint in the United States District Court to enforce a lien under IRC § 7403, it is required to name all parties having liens on or otherwise claiming interest in the relevant property as parties to the action.[4] The law of the state where the property is located determines the nature of a taxpayer's legal interest in the property.[5] However, once it is determined that the taxpayer has an interest under state law in the property, federal law controls whether the property is exempt from attachment of the lien.[6]

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1 In our 2016 Annual Report to Congress, we identified 32 cases involving civil actions to enforce tax liens under Internal Revenue Code (IRC) § 7403. *See* National Taxpayer Advocate 2016 Annual Report to Congress 491. As we identified more lien enforcement cases this year than in the 2016 Annual Report, we revisited our case search criteria used to identify cases for this Most Litigated Issue and employed a more expansive search methodology using broader search terms to account for the fact that United States District Courts, which under IRC § 7403(a) have exclusive jurisdiction over lien enforcement actions, often do not cite to IRC § 7403 in case opinions. As a result, we identified a total of 50 lien enforcement cases for the 2016 reporting period. However, this increase in cases would not have materially changed the ranking of that Most Litigated Issue in the 2016 Annual Report to Congress.

2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

3 IRC § 7403(a); Treas. Reg. § 301.7403-1(a).

4 IRC § 7403(b).

5 *U.S. v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985).

6 *U.S. v. Rodgers*, 461 U.S. 677, 683 (1983).

IRC § 7403(c) directs the court to "finally determine the merits of all claims to and liens upon the property," and if the United States proves a claim or interest, the court may order an officer of the court to sell the property and distribute the proceeds in accordance with the court's findings with respect to the interests of the parties, including the United States' claim for the delinquent tax liability.[7] Ordering the sale of a taxpayer's property is a powerful collection tool and directly affects any parties who have an interest in the property subject to sale. Based on the Supreme Court case *United States v. Rodgers*, however, the court is not required to authorize a forced sale and may exercise limited equitable discretion. Under *Rodgers*, when a forced sale involves the interests of a third party who does not have a federal tax debt, the court should consider the following four factors when determining whether the property should be sold:

1. The extent to which the government's financial interests would be prejudiced if they were relegated to a forced sale of the partial interest of the delinquent taxpayer;
2. Whether the innocent third party with a separate interest in the property, in the normal course of events, has a legally recognized expectation that the property would not be subject to a forced sale by the delinquent taxpayer or taxpayer's creditors;
3. The likely prejudice to the third party in personal dislocation costs and inadequate compensation; and
4. The relative character and value of the non-liable and liable interests held in the property.[8]

In cases where the United States holds a first priority lien, it may offer bids at the sale of the foreclosed property, up to an amount equal to the amount of the lien, plus selling expenses.[9] If a foreclosure action is initiated by another creditor, then IRC § 7403(c) authorizes the United States to intervene in the action to assert any lien on the property that is the subject of such action.[10]

If the case was initiated in a state court, the United States may remove the case to a U.S. District Court.[11] However, if the foreclosure action is adjudicated under state court proceedings, federal tax liens that are junior to other creditors may be effectively removed, even if the United States is not a party to the proceeding.[12] While the action is pending, the court may appoint a receiver empowered in equity to preserve and operate the property prior to the sale, upon the government's certification that it is in the public interest.[13]

For the Department of Justice (DOJ) to file the foreclosure suit, the IRS must first request that DOJ take such action.[14] The Internal Revenue Manual (IRM) provides procedures with respect to what actions the IRS must take before requesting that the DOJ commence a foreclosure proceeding.[15] With respect to a recommendation to foreclose on a taxpayer's principal residence, there are special procedures

7 IRC § 7403(c).

8 *Rodgers*, 461 U.S. at 709-11.

9 IRC § 7403(c).

10 However, if the application of the United States to intervene is denied, the adjudication will have no effect upon the federal tax lien on the property. IRC § 7424. Under 28 U.S.C. § 2410, the United States may be named a party in any civil action or suit in any district court, or in any state court having jurisdiction of the subject matter.

11 28 U.S.C. § 1444.

12 *U.S. v. Brosnan*, 363 U.S. 237 (1960).

13 IRC §§ 7403(d) and 7402(a).

14 IRC § 7401. The IRS prepares a suit recommendation package, and then the IRS Office of Chief Counsel reviews it, and if it agrees sends a letter to the Department of Justice (DOJ) asking the DOJ to commence the litigation. Chief Counsel Directives Manual, 34.6.1.1.1, *Steps Prior to Litigation* (Oct. 7, 2015).

15 Internal Revenue Manual (IRM) 5.17.4.8, *Foreclosure of Federal Tax Lien* (Aug. 1, 2010).

that the IRS must follow before initiating a referral to DOJ.[16] The IRM instructs the IRS to refer a case to DOJ to pursue a suit to foreclose only when there are no reasonable administrative remedies and hardship issues. Under IRM procedures, the IRS is required to take the following actions and describe the results in a suit recommendation narrative that accompanies the referral:

- Attempt to personally contact the taxpayer and inform them that a suit to foreclose the tax lien on the principal residence is the next planned action;
- Attempt to identify the occupants of the principal residence;
- Attempt to discuss administrative remedies with the taxpayer such as an offer in compromise (including Effective Tax Administration offer or an offer with consideration of special circumstances), when appropriate;
- Advise the taxpayer about TAS, provide Form 911, *Request for Taxpayer Advocate Assistance (and Application for Taxpayer Assistance Order)*, and explain its provisions;[17] and
- Include a summary statement in the case history, along with the information on the taxpayer and the occupants of the principal residence, including children.[18]

ANALYSIS OF LITIGATED CASES

We reviewed 60 opinions issued between June 1, 2016, and May 31, 2017, that involved civil actions to enforce federal tax liens. Table 7 in Appendix 3 contains a detailed list of those cases. Half of taxpayers (30 out of 60) in these cases appeared *pro se* while the other half were represented. Taxpayers with representation received relief in one case while another case resulted in a split decision. No *pro se* taxpayers obtained relief.

Foreclosure of Tax Liens Where Non-Liable Taxpayer Had Interest in Property

In *United States v. Cardaci*, the United States Court of Appeals for the Third Circuit considered an appeal by both the government and the taxpayers of a decision from the United States District Court for the District of New Jersey.[19] The district court, in a decision discussed in our 2015 Annual Report to Congress, considered the *Rodgers* factors and concluded that because she possessed an 86 percent property interest, it would be inequitable to Mrs. Cardaci (the non-liable spouse) for the government

16 IRM 5.17.4.8.2.5, *Lien Foreclosure on a Principal Residence* (Jan. 8, 2016). In 2012, TAS issued an Advocacy Proposal to the IRS recommending that the IRS consider the negative impact on the taxpayer of a suit to foreclose on a principal residence prior to forwarding the case to the DOJ. TAS, *Memorandum for Director, Collection Policy* (Aug. 20, 2012). The National Taxpayer Advocate followed this Advocacy Proposal with a legislative recommendation that Congress amend IRC § 7403 to require that the IRS, before recommending that DOJ file a suit to foreclose, first determine whether the taxpayer's other property or rights to property, if sold, are insufficient to pay the amount due, and that the foreclosure and sale of the residence will not create an economic hardship due to the financial condition of the taxpayer. National Taxpayer Advocate 2012 Annual Report to Congress 537-43 (Legislative Recommendation: *Amend IRC § 7403 to Provide Taxpayer Protections Before Lien Foreclosure Suits on Principal Residences*). Following this recommendation, TAS worked closely with the IRS to develop an Internal Guidance Memorandum (IGM) to address the issues raised by the National Taxpayer Advocate. Prior to the release of the IGM in 2013, the IRM provisions relating to referring cases under IRC § 6334(e)(1) required the IRS to consider who is living in the residence in determining whether referral to DOJ was appropriate but the procedures under IRC § 7403 did not.

17 If the taxpayer indicates that the planned foreclosure of the principal residence would create a hardship, the Revenue Officer (RO) will assist the taxpayer with the preparation of Form 911 and forward the form to the local TAS office if the RO cannot or will not provide the requested relief.

18 IRM 5.17.4.8.2.5, *Lien Foreclosure on a Principal Residence* (Jan. 8, 2016).

19 *U.S. v. Cardaci*, 856 F.3d 267 (3d Cir. 2017) *aff'g in part, vacating in part, and remanding* 114 A.F.T.R.2d (RIA) 6744 (D.N.J. 2014).

to force a sale of Mr. and Mrs. Cardaci's jointly-owned marital home.[20] Instead, the court calculated a monthly rental value of the home and ordered Mr. Cardaci (the liable taxpayer) to make monthly rent payments of half the rental value to the government.

On appeal, the Third Circuit first considered the Cardaci's argument that the district court lacked the authority to consider the sale of the couple's home owned as tenants by the entirety. The appellate court dismissed this argument for two reasons. First, it found that the New Jersey statute which the Cardaci's claimed protected their home from a foreclosure sale did not apply to them as they had purchased their home ten years before it took effect. Second, and more fundamentally, the court noted that regardless of the New Jersey statute, federal law controlled the enforcement of federal tax liens. The court cited the *Rodgers* case and pointed out that state law exemptions are "swept aside" by the Supremacy Clause of the Constitution. Therefore, the court found that the district court had properly held that the Cardaci's home was considered property subject to the federal tax lien statute.[21]

The appellate court then addressed the government's claim that the district court abused its discretion by not ordering the sale of the Cardaci's home. The court found that the district court had indeed erred in its *Rodgers* analysis but declined the government's request to reweigh the *Rodgers* factors and make a final decision. Instead, the Third Circuit vacated and remanded the case to the district court to recalculate the Cardaci's property interests and to reconsider the *Rodgers* factors. The court also provided "observations" regarding the *Rodgers* factors to assist the district court.[22]

With respect to the first *Rodgers* factor, the prejudice to the government resulting from a partial sale, the court noted that the district court was mistaken in determining that the government would collect more taxes from receiving rental payments from Mr. Cardaci than it would from a foreclosure sale of the couple's property. Instead, the district court needed to focus on determining whether the government would be adequately compensated by a partial sale of Mr. Cardaci's interest in the property or whether a sale of the couple's entire property was necessary. The court noted that because there is no real market for partial interest in marital property held as tenants by the entirety due to a buyer of this interest becoming a tenant in common with the remaining spouse, this factor weighed in favor of a forced sale of the Cardaci's home.[23]

With respect to the second *Rodgers* factor, the non-liable party's legally recognized expectation that the property would not be subject to a forced sale by the delinquent taxpayer or taxpayer's creditors, the court stated that this factor requires examination of state law property protections. The court stated, as mentioned above, that the New Jersey statute upon which the district court relied did not apply to the Cardaci's property because they purchased it ten years before the law took effect. The court noted that it was unclear whether New Jersey law favored a forced sale of the property and ordered the district court to consider applicable New Jersey law to determine Mrs. Cardaci's legally recognized expectations.[24]

With respect to the third *Rodgers* factor, the likely prejudice to the third party in personal dislocation costs and inadequate compensation, the court agreed with the district court that Mrs. Cardaci did not face any special dislocation costs. However, it criticized the district court for failing to consider under

20 *See* National Taxpayer Advocate 2015 Annual Report to Congress 511.

21 *U.S. v. Cardaci*, 856 F.3d 267, 273-4 (3d Cir. 2017) *aff'g in part, vacating in part, and remanding* 114 A.F.T.R.2d (RIA) 6744 (D.N.J. 2014).

22 *Id.* at 274.

23 *Id.* at 275.

24 *Id.* at 275-6.

compensation that a forced sale might cause to Mrs. Cardaci. In particular, the court took issue with the district court's method of calculation of the Cardaci's respective interests in their home. The court stated that the district court needed to use joint-life actuarial tables to calculate both Mr. and Mrs. Cardaci's various interests (including their concurrent interest in the present value and varying interests in life estate and survivorship rights) in their property. The court also stated that if the district court employs this calculation method and finds that Mrs. Cardaci would be undercompensated, then that is an important fact to consider.[25]

With respect to the fourth *Rodgers* factor, the relative character and value of the non-liable and liable interests in the property, the court noted that because the Cardaci's own approximately equivalent interests in the property, this factor appeared neutral. However, it stated that the district court would be in a better position to consider this fourth factor once it recalculated the Cardaci's respective interests in the property using the joint-life actuarial tables.[26]

Finally, the court noted that the Supreme Court cautioned in *Rodgers* that the four equitable factors are not an exclusive list and there may be other equitable factors present. The court brushed aside the government's claim that the district court improperly considered whether a forced sale of the property would adversely impact the Cardaci's son, daughter-in-law, and their three children, who lived with them. The court left it to the district court to decide how these interests should be considered.[27]

Preservation of Federal Tax Lien Against Subsequent Purchasers of Property

Under IRC § 7425, if the government has properly filed a notice of federal tax lien against a taxpayer and is not joined as a party to, or given notice of, a judicial sale of property to which the lien attached, then the federal tax lien remains attached to the property even after subsequent sales. In *United States v. Aikens*, the government sought to enforce federal tax liens on property formerly owned by the taxpayer.[28] The taxpayer had incurred tax liabilities for several years and the IRS had properly recorded notice of its tax liens for these liabilities in 2007, 2008, and 2010. The taxpayer had acquired title to the real property in question in 1998, and thus, the liens attached to the real property.[29]

In 2013, J.P. Morgan Chase initiated a sheriff's foreclosure sale on the property without giving notice to the IRS. Pursuant to the sale, the property was conveyed to Citi Investments, LLC, which then sold it to an unrelated individual a year later.[30]

The court noted that under IRC § 6321, the government has a lien against all property, whether real or personal, of a delinquent taxpayer. In addition, under IRC § 6322, the tax lien begins at the time of assessment and continues until the liability is satisfied or becomes unenforceable due to the lapse of time. Finally, and critical to this case, the court pointed out that under IRC § 7425, the government's tax lien is not extinguished by a property sale unless the government is joined as a party to the sale or given proper notice.[31]

25 *U.S. v. Cardaci*, 856 F.3d 267, 276-9 (3d Cir. 2017) *aff'g in part, vacating in part, and remanding* 114 A.F.T.R.2d (RIA) 6744 (D.N.J. 2014).

26 *Id.* at 279-80.

27 *Id.* at 280.

28 *U.S. v. Aikens*, 118 A.F.T.R.2d (RIA) 6369 (E.D. Mich. 2016).

29 *Id.*

30 *Id.*

31 *Id.*

The court reviewed the chronology of the case and found that the taxpayer held title to the property while he incurred the tax liabilities and when the IRS recorded its tax liens. The court also found that the IRS had not received notice of the 2013 foreclosure sale, thereby triggering the statutory protection of tax liens against all subsequent purchasers under IRC § 7425. Therefore, the court held that the government's tax lien was not extinguished by the sale of the property, and the government was entitled to enforce the lien against the property even though it was sold to a third party who may not have been aware of the lien.[32]

Foreclosure of Tax Liens Against Property Held by a Taxpayer's Nominee or Alter Ego

The number of opinions that involved foreclosure of federal tax liens against property titled in the name of a taxpayer's nominee or alter ego showed a slight increase over last year, with 15 cases in 2017, compared to 13 in 2016. A nominee is one "who holds bare legal title to property for the benefit of another."[33] Courts typically look at the following factors to assess whether an entity is a nominee of a taxpayer:

- The nominee paid no or inadequate consideration;
- The property was placed in the name of the nominee in anticipation of the tax debt or litigation while the transferor retained control;
- There is a close relationship between the transferor and the nominee;
- The parties to the transfer failed to record the conveyance;
- The transferor retained possession (or control); and
- The transferor continues to enjoy the benefits of property.[34]

In *United States v. Wilson*, the government sought to collect tax liabilities from the taxpayer by enforcing tax liens against two pieces of property, one in Holly, Michigan and the other in Carleton, Michigan.[35] Both properties were held by partnerships,[36] and the government, seeking summary judgment, argued that these partnerships were mere nominees of the taxpayer.

With respect to the Holly, Michigan property, the court analyzed the six factors described above to determine whether it was held by a nominee of the taxpayer. First, the court noted that the taxpayer testified that he quit claimed the property to a family limited partnership for no consideration. Second, the taxpayer transferred the property less than six months after the IRS raided his home and businesses and would have known that he would face litigation or liability for his unpaid taxes. Third, the court found that there was a close relationship between the taxpayer and the nominee as both he and his mother owned a partnership interest in the nominee entity. Upon his mother's passing, a trust bearing her name became owner of her partnership interest. The taxpayer and his wife served as trustees, and the taxpayer was designated as beneficiary of the trust.[37] The court found that these first three factors weighed in favor of the government.

32 *U.S. v. Aikens*, 118 A.F.T.R.2d (RIA) 6369 (E.D. Mich. 2016).

33 *Nominee*, Black's Law Dictionary (10th ed. 2014). *See also U.S. v. Beeman*, 108 A.F.T.R.2d (RIA) 5074 (W.D. Penn. 2011).

34 *See, e.g., U.S. v. Sanders*, 118 A.F.T.R.2d (RIA) 6219 (S.D. Ill. 2016), *aff'd* 676 F. App'x 599 (7th Cir. 2017). *See also Nassar Family Irrevocable Trust v. U.S.*, 118 A.F.T.R.2d (RIA) 6007 (S.D.N.Y. 2016), *aff'd*, 2017 WL 4708170 (2d Cir. 2017).

35 *U.S. v. Wilson*, 117 A.F.T.R.2d (RIA) 2002 (E.D. Mich. 2016).

36 The taxpayer, his wife, and his mother-in-law retained life estates in the Carleton property when transferring title to the partnership. *Id*.

37 *Id*.

Fourth, the court stated that the taxpayer recorded the conveyance of the property to the partnership, which would have weighed slightly in favor of the taxpayer. However, the court discounted this factor as it found that the fifth and sixth factors demonstrated that the property was indeed held by a nominee. The court noted that the taxpayer retained possession of the property and continued to enjoy the benefits of it, as the taxpayer and his wife lived there rent-free since 1998. Therefore, based on all these factors, the court found that the partnership holding title to the Holly, Michigan property was the taxpayer's nominee and granted the government's motion for summary judgement to enforce the tax lien against the Holly, Michigan property.[38]

With respect to the Carleton, Michigan property, the court again analyzed the six factors to determine whether it was held by a nominee of the taxpayer. However, the court noted that these factors did not favor the government as strongly as they did with respect to the Holly, Michigan property. The court pointed out that the Carleton, Michigan property was owned by the taxpayer's in-laws since the 1960s. In 2001, they transferred the property to the taxpayer and his wife by quit claim deed but the taxpayer's mother-in-law retains a life estate in the property.[39]

The court then discussed the six nominee factors. First, it noted that the taxpayer transferred the property to a family limited partnership for no consideration. Second, he transferred the property in 2005, after the IRS had assessed taxes against him. However, the court noted that the between two and five-year gap between these assessments, which occurred between 2000 and 2003 and the transfer of property to the partnership in 2005, did not support a close connection between the lawsuit or liability and the purpose of the transfer. In addition, the court pointed out that some of the taxpayer's liabilities were assessed in 2000, which is prior to the 2001 transfer of the property from the taxpayer's in-laws to the taxpayer and his wife. The court stated that if there was an intent to shield the property from the tax liabilities then the taxpayer's in-laws could have opted not to transfer it. Therefore, it found this factor neutral.[40]

Third, the court noted that the alleged nominee partnership only had two partners, the taxpayer and his wife. Therefore, the court found that there was a close relationship between the taxpayer and the nominee and this weighed in favor of the government. Fourth, the court noted that the property transfer to the partnership was recorded, which weighed in favor of the taxpayer. Finally, the court found that the fifth and sixth factors also weighed in favor of the taxpayer. The court pointed out that the taxpayer did not live at the property and aside from a one percent interest in the partnership holding the property, there was no evidence that the taxpayer retained possession or exercised control over the property. The court also found no evidence that the taxpayer received a benefit from the property. After considering these factors, the court found that there were genuine issues of fact as to whether the partnership was a nominee of the taxpayer. Therefore, the court denied the government's motion for summary judgment to enforce the lien against the Carleton, Michigan property.[41]

38 *U.S. v. Wilson*, 117 A.F.T.R.2d (RIA) 2002 (E.D. Mich. 2016). The court also performed a *Rodgers* analysis and determined that it was not appropriate to exercise its discretion to prevent the sale of the property.

39 *Id*.

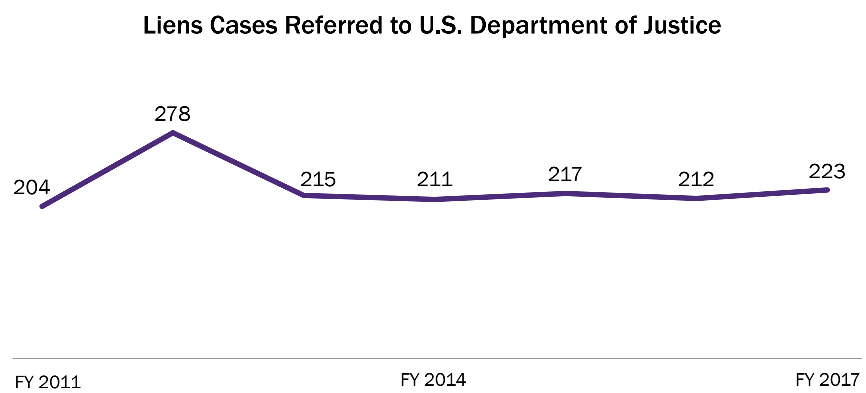
40 *Id*.

41 *Id*.

CONCLUSION

Lien enforcement cases continue to be a consistent source of litigation between the government and taxpayers. After peaking at 278 cases in 2012, the number of IRS lien enforcement referrals to the DOJ decreased to 215 in fiscal year (FY) 2013, and slightly fluctuated thereafter, with 211 cases referred in FY 2014, 217 cases referred in FY 2015, and 212 cases referred in FY 2016.[42] In FY 2017, this number increased slightly (by approximately five percent) to 223 cases, as shown in Figure 3.7.1.[43]

FIGURE 3.7.1



The National Taxpayer Advocate anticipates the updated IRM will have a positive effect on taxpayer rights in future years, as the IRS refers fewer suits to foreclose tax liens on taxpayers undergoing a hardship or in situations where there are reasonable alternatives.[44] The National Taxpayer Advocate continues to urge Congress to adopt her 2012 recommendation to codify the approach used in the IRM so it cannot be reversed administratively.[45]

To address taxpayer burden and enhance the taxpayer *rights to privacy*, *to a fair and just tax system*, and *to appeal the IRS's decision in an independent forum*, the National Taxpayer Advocate has also recommended that Congress amend IRC §§ 6320 and 6330 to extend Collection Due Process rights to "affected third parties," known as nominees, alter egos, and transferees, who hold legal title to property subject to IRS collection actions.[46] Nominee cases represented 25 percent (15 out of 60) of lien cases seen in this reporting period.

42 National Taxpayer Advocate 2016 Annual Report to Congress 496 (Fiscal Year (FY) 2010 to FY 2016).

43 DOJ Tax Division, *Suits to Foreclose Tax Lien – Summary by Fiscal Year of Case Receipt* (Oct. 2017).

44 *See* IRM 5.17.4.8.2.5, *Lien Foreclosure on a Principal Residence* (Jan. 8, 2016).

45 National Taxpayer Advocate 2012 Annual Report to Congress 537-43 (Legislative Recommendation: *Amend IRC § 7403 to Provide Taxpayer Protections Before Lien Foreclosure Suits on Principal Residences*).

46 National Taxpayer Advocate 2012 Annual Report to Congress 544-52 (Legislative Recommendation: *Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions*).

MLI #8

Charitable Contribution Deductions Under IRC § 170

SUMMARY

Subject to certain limitations, taxpayers can take deductions from their adjusted gross incomes (AGIs) for contributions of cash or other property to or for the use of charitable organizations.[1] To take a charitable deduction, taxpayers must contribute to a qualifying organization[2] and substantiate contributions of $250 or more.[3] Litigation generally occurred in this reporting cycle in the following three areas:

- Substantiation of the charitable contribution;
- Valuation of the charitable contribution; and
- Requirements for a qualified conservation easement.

TAS identified and reviewed 28 cases decided between June 1, 2016, and May 31, 2017, with charitable deductions as a contested issue. The IRS prevailed in 20 cases, taxpayers prevailed in two cases, and the remaining six cases resulted in split decisions. Taxpayers represented themselves (appearing *pro se*) in 14 of the 28 cases (50 percent). In *pro se* cases, no taxpayers prevailed in full, the IRS prevailed in 11 cases, and three cases resulted in split decisions.

TAXPAYER RIGHTS IMPACTED[4]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Charitable contributions made within the taxable year are generally deductible by taxpayers, but in the case of individual taxpayers, a taxpayer must itemize deductions from income on his or her income tax return in order to deduct the contribution.[5] Transfers to charitable organizations are deductible only if they are contributions or gifts,[6] not payments for goods or services.[7] A contribution or gift

1 Internal Revenue Code (IRC) § 170.

2 To claim a charitable contribution deduction, a taxpayer must establish that he or she made a gift to a qualified entity organized and operated exclusively for an exempt purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual. IRC § 170(c)(2).

3 IRC § 170(f)(8)(A).

4 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

5 IRC §§ 63(d) and (e), 161, and 170(a).

6 The Supreme Court of the United States has defined "gift" as a transfer proceeding from a "detached and disinterested generosity." *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960).

7 *See also* Treas. Reg. § 1.170A-1(g) (no deduction for contribution of services).

will be allowed as a deduction under IRC § 170 only if it is made "to" or "for the use of" a qualifying organization.[8]

For individuals, charitable contribution deductions are generally limited to 50 percent of the taxpayer's contribution base (AGI computed without regard to any net operating loss carryback to the taxable year under IRC § 172).[9] However, subject to certain limitations, individual taxpayers can carry forward unused charitable contributions in excess of the 50 percent contribution base for up to five years.[10] Corporate charitable deductions are generally limited to ten percent of the taxpayer's taxable income and are also available for carryforward for up to five years, subject to limitation.[11] Taxpayers cannot deduct services that they offer to charitable organizations; however, incidental expenditures incurred while serving a charitable organization and not reimbursed, may constitute a deductible contribution.[12]

Substantiation

For cash contributions, taxpayers must maintain receipts from the charitable organization, copies of cancelled checks, or other reliable records showing the name of the organization, the date, and the amount contributed.[13] Deductions for single charitable contributions of $250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.[14]

The donor is generally required to obtain the contemporaneous written acknowledgment no later than the date he or she files the return for the year in which the contribution is made, and it must include:

- The name of the organization;
- The amount of cash contribution;
- A description (but not the value) of non-cash contribution;
- A statement that no goods or services were provided by the organization in return for the contribution, if that was the case;
- A description and good faith estimate of the value of goods or services, if any, that an organization provided in return for the contribution; and
- A statement that goods or services, if any, that an organization provided in return for the contribution consisted entirely of intangible religious benefits, if that was the case.[15]

For each contribution of property other than money, taxpayers generally must maintain a receipt showing the name of the recipient, the date and location of the contribution, and a description of the property.[16] When taxpayers contribute property other than money, the amount of the allowable deduction is the fair market value of the property at the time of the contribution.[17] This general rule

8 IRC § 170(c).

9 IRC §§ 170(b)(1)(A) and (G).

10 IRC § 170(d)(1).

11 IRC § 170(b)(2) and (d)(2).

12 Treas. Reg. § 1.170A-1(g). Meal expenditures in conjunction with offering services to qualifying organizations are not deductible unless the expenditures are away from the taxpayer's home. *Id*. Likewise, travel expenses associated with contributions are not deductible if there is a significant element of personal pleasure involved with the travel. IRC § 170(j).

13 Treas. Reg. § 1.170A-13(a)(1).

14 IRC § 170(f)(8). *See also* Treas. Reg. § 1.170A-13(f).

15 IRS Pub. 1771, *Charitable Contributions Substantiation and Disclosure Requirements* (Rev. 3-2016).

16 Treas. Reg. §§ 1.170A-13(b)(1)(i) to (iii).

17 Treas. Reg. § 1.170A-1(c)(1).

is subject to certain exceptions that in some cases limit the deduction to the taxpayer's cost basis in the property.[18] For claimed contributions exceeding $5,000, the taxpayer must obtain a qualified appraisal prepared by a qualified appraiser.[19]

ANALYSIS OF LITIGATED CASES

TAS reviewed 28 decisions entered between June 1, 2016, and May 31, 2017, involving charitable contribution deductions claimed by taxpayers. Table 8 in Appendix 3 contains a detailed list of those cases. Of the 28 cases, the most common issues were: substantiation (or lack thereof) of the claimed contribution (25 cases), valuation of the property contributed (four cases), and contribution of an easement (five cases).[20]

Substantiation

Twenty-five cases involved the substantiation of deductions for charitable contributions. When determining whether a claimed charitable contribution deduction is adequately substantiated, courts tend to follow a strict interpretation of IRC § 170. As noted earlier, deductions for single charitable contributions of $250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.[21]

In *15 West 17th Street LLC v. Commissioner*, the taxpayer, a limited liability company, purchased a property in New York City in 2005 for $10 million.[22] The taxpayer initially intended to demolish one of the buildings on the property that had historic significance. However, in 2007, after lobbying from a historic preservation society, the building was placed on the National Register of Historic Places, and thus became a certified historic structure within the meaning of IRC § 170(h)(4)(C)(i). Later in 2007, the taxpayer executed a historic preservation deed of easement in favor of the Trust for Architectural Easements ("Trust"), a IRC § 501(c)(3) organization and "qualified organization" under § 170(h)(3), thereby contributing the easement to the Trust for federal tax purposes in 2007.

In 2008, the Trust sent a letter to the taxpayer acknowledging receipt of the easement, but critical to this case, the letter did not state whether the Trust had provided any goods or services to the taxpayer or otherwise given anything of value in exchange for the easement donation.[23] Also in 2008, the taxpayer obtained an appraisal that the property it purchased for $10 million in 2005 had a fair market value of $69,230,000 before contribution of the easement and was worth only $4,740,000 after the easement contribution, a $64,490,000 decline in value. When the taxpayer filed its 2007 tax return in 2008, it deducted $64,490,000, the purported value of the easement, as a charitable contribution to the Trust. The taxpayer also included with its return an appraisal report, the letter of acknowledgement from the Trust, and Form 8283, *Noncash Charitable Contributions*, executed by the appraiser and a representative

18 Treas. Reg. § 1.170A-1(c)(1). Note that the deduction is reduced for certain contributions of ordinary income and capital gain property. *See* IRC § 170(e).

19 IRC § 170(f)(11)(C). "Qualified appraisal" and "qualified appraiser" are defined in IRC §§ 170(f)(11)(E)(i) and (ii), respectively.

20 Cases addressing more than one described issue are counted for each issue. For example, cases addressing the valuation of easements are counted once as a valuation issue case and again as a conservation easement issue case. As a result, the breakdown of case issues above will not add up to the total number of cases reviewed by TAS.

21 IRC § 170(f)(8). *See also* Treas. Reg. § 1.170A-13(f).

22 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016).

23 *Id.*

from the Trust.[24] When the Trust filed its 2007 tax return in 2008, it did not report the receipt of the charitable contribution from the taxpayer nor whether it had provided any goods or services to the LLC in exchange for the easement.

The IRS subsequently selected the taxpayer's 2007 tax return for examination and in 2011, disallowed the charitable contribution deduction taken for the easement contribution because the taxpayer had not met the noncash charitable contribution requirements of IRC § 170 and the related regulations.[25] In 2011, the taxpayer petitioned the Tax Court to challenge the IRS's disallowance of the charitable contribution deduction. In 2014, while this litigation was pending, the Trust amended its 2007 tax return to indicate that it had received the easement contribution from the taxpayer in 2007 and provided no goods or services to the taxpayer in exchange for the easement contribution.

The court noted that the IRC § 170(f)(8)(A) requirement that taxpayers obtain a contemporaneous written acknowledgment (CWA) for charitable contributions of $250 or more is a strict one, and that in the absence of such an acknowledgment, no deduction is allowed.[26] It also pointed out that "the doctrine of substantial compliance does not apply to excuse failure to obtain a CWA meeting the statutory requirements."[27]

The court then examined the CWA requirement under IRC § 170(f)(8). It first noted that IRC § 170(f)(8)(B) provides that a CWA must contain three pieces of information: the amount of cash and a description (but not value) of any property other than cash contributed, whether the donee organizations provided any goods or services, in whole or in part, in consideration for the property contributed, and a description and good faith estimate of the value of these goods or services. It then noted that under IRC § 170(f)(8)(C), an acknowledgement qualifies as contemporaneous only if the donee provides it to the taxpayer on or before the date the taxpayer files a return for the taxable year in which the contribution was made or the due date (including extensions) for filing the return. Finally, the court stated that under IRC § 170(f)(8)(D), the CWA requirement under IRC § 170(f)(8)(A) "shall not apply to a contribution if the donee organization files a return, on such form and in accordance with such regulations as the Secretary [IRS] may prescribe, which includes the information described in subparagraph (B) with respect to the contribution."[28]

In deciding whether the Trust's filing of an amended return in 2014 invoked the donee reporting protections of IRC § 170(f)(8)(D) and made the CWA requirement of IRC § 170(f)(8)(A) inapplicable, the court examined the legislative history of IRC § 170(f)(8), Treasury Department ("Treasury") regulations promulgated under IRC § 170(f)(8) (which did not implement donee reporting under IRC § 170(f)(8)(D)), and proposed donee reporting Treasury regulations issued in 2015 that were ultimately withdrawn in early 2016.[29]

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24 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016).

25 The IRS made an alternative determination that the value of the easement contributed was substantially less than the $64,490,000 the taxpayer claimed on its return.

26 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016).

27 *Id.*, citing *French v. Comm'r*, T.C. Memo. 2016-53. The Tax Court has described the doctrine of substantial compliance as "a narrow equitable doctrine that courts may apply to avoid hardship where a party establishes that the party intended to comply with a provision, did everything reasonably possible to comply with the provision, but did not comply with the provision because of a failure to meet the provision's specific requirements." *See Samueli v. Comm'r*, 132 T.C. 336, 345 (2009).

28 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016).

29 *See* IRS, *Withdrawal of Notice of Proposed Rulemaking*, FR Doc. 2016-189 (Jan. 8, 2016). We discussed these withdrawn regulations in our 2016 Annual Report. *See* National Taxpayer Advocate 2016 Annual Report to Congress 501 (Most Litigated Issue: *Charitable Deductions Under IRC § 170*).

The court then rejected the taxpayer's claim that it did not require a CWA from the Trust because the Trust had filed an information return, which the taxpayer claimed satisfied the donee reporting mentioned in IRC § 170(f)(8)(D). The taxpayer argued that the "regulations" mentioned in this section referred to Treas. Reg. § 1.6033-2, which requires charities to file an annual information return. The court rejected this argument, noting that these regulations had been in existence for over twenty years when Congress enacted IRC § 170(f)(8), and if Congress had intended IRC § 170(f)(8)(D) to refer to these regulations, it would not have used the language "in accordance with such regulations as the Secretary may prescribe." Rather, this language referred to future regulations that the IRS may issue.[30]

The court then analyzed how to address a situation where an IRC provision authorizes the Secretary to promulgate regulations, but Treasury has not done so, and whether the statute is "self-executing" in the absence of regulations. The court distinguished between delegations for mandatory rulemaking (*i.e.*, where Congress orders Treasury to issue regulations, for example by using the word "shall" in the statute) and delegations for permissive rulemaking (*i.e.*, Congress left the decision to issue regulations to Treasury's discretion, for example by using the word "may" in the statute). In delegations for mandatory rulemaking, the court noted that courts have frequently held taxpayer-friendly IRC provisions to be self-executing.[31]

However, in the delegations for permissive rulemaking context, the court noted that neither it nor the taxpayer had identified a single case where a court held that an IRC provision is self-executing in the absence of regulations. The court stated the legislative history of IRC § 170(f)(8) indicated that while Congress left open the possibility of donee reporting under IRC § 170(f)(8)(D), it recognized potential policy concerns, and thus did not intend the statute to be self-executing in the absence of regulations. The court further noted these policy concerns materialized in the 38,000 comments Treasury received, most of which were negative and raised issues such as donor privacy, in response to the proposed IRC § 170(f)(8)(D) regulations it issued in 2015. As a result, the IRS decided to withdraw these proposed donee reporting regulations.[32]

Therefore, the court held that IRC § 170(f)(8)(D) sets forth a discretionary grant of rulemaking authority which permits, but does not require, the IRS to issue donee reporting regulations, and found this provision not self-executing in the absence of regulations. The taxpayer was therefore required to obtain a CWA from the Trust under IRC § 170(f)(8)(A). Because it did not do so, it was not entitled to a charitable contribution deduction.[33]

Value of the Property Contributed

In *Cave Buttes, L.L.C. v. Commissioner*, the taxpayer, a limited liability company, purchased an 11-acre property that overlooked downtown Phoenix as well as a dam owned by the Maricopa County Flood Control District ("District").[34] After the District put up various obstacles concerning access to and development of the property, the taxpayer decided to sell the property to the District for a reduced price

30 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016).

31 *Id.*

32 *Id.* See IRS, *Withdrawal of Notice of Proposed Rulemaking*, FR Doc. 2016-189 (Jan. 8, 2016).

33 *15 West 17th Street LLC v. Comm'r*, 147 T.C. No. 19 (2016). Generally, the opinion of the Tax Court trial judge becomes the opinion of the court, unless the Chief Judge refers the case for review by all of the Tax Court judges, which was done in this case. As a result of the review, two Tax Court judges wrote dissenting opinions that they would have allowed the taxpayer's charitable contribution deduction based on the Trust's filing of an amended information return in 2014.

34 *Cave Buttes, L.L.C. v. Comm'r*, 147 T.C. No. 10 (2016).

of $735,000 (which was based on an appraisal obtained by the District) and claim the remaining value of the property as a charitable deduction on its tax return.

The taxpayer obtained two appraisals for the property, one for $1.5 million and another for $2 million, but chose to use the lower one to report the value of the property on its 2007 tax return. In 2010, the IRS determined that the taxpayer had failed to satisfy the substantiation and qualified appraisal requirements of IRC § 170 for a charitable contribution. The IRS also determined that the taxpayer had not demonstrated that the property was worth $1.5 million and therefore was not entitled to claim a charitable contribution in excess of $735,000, the amount of the District's appraisal of the property.[35] The taxpayer petitioned the Tax Court and hired another appraiser, who determined the fair market value of the property to be $2.167 million.[36]

After finding that the taxpayer obtained a qualified appraisal and therefore met the requirements of IRC § 170, the court addressed the issue of the fair market value of the property. The court noted that both the IRS and the taxpayer used a comparable sales approach to estimating the value of the property and agreed that the highest and best use of the property was for residential development. However, the parties disagreed as to whether residential development was financially feasible.

The court first focused on the issue of access to the property. The court found, contrary to the IRS's position, that the taxpayer had access to the property in a variety of ways, including both express and implied easements. The court also examined the appraisal reports of the taxpayer and the IRS. The court was persuaded by the report of the taxpayer's third appraiser (who appraised the property at trial for $2.167 million) and agreed that his use of comparables and adjustments (both upward and downward) made to fair market value for factors such as time of sale, location, views, access, hillside location, and size were reasonable and appropriate. The court did not find persuasive the appraisal report of the IRS's expert, who valued the property at $505,800, and noted that flaws in his comparables as well as his claim that the property lacked access produced a valuation that was unreasonably low. Therefore, the court adopted the appraisal report of the taxpayer's appraiser and held the property's value to be $2.167 million. The taxpayer was thereby able to claim a larger charitable contribution deduction than what it had originally claimed on its return.[37]

Qualified Conservation Contribution

For a gift to constitute a qualified contribution under IRC § 170, the donor must possess a transferrable interest in the property and intend to irrevocably relinquish all rights, title, and interest to the property without any expectation of some benefit in return.[38] Taxpayers generally are not permitted to deduct gifts of property consisting of less than the taxpayer's entire interest in that property.[39] Nevertheless, taxpayers may deduct the value of a contribution of a partial interest in property that constitutes a "qualified conservation contribution,"[40] also known as a conservation easement. A contribution will constitute a qualified conservation contribution only if it is of a "qualified real property interest" made

35 The IRS also asserted an accuracy-related gross valuation misstatement penalty under IRC § 6662(h).

36 *Cave Buttes, L.L.C. v. Comm'r*, 147 T.C. No. 10 (2016).

37 *Id*.

38 IRC § 170(f)(3).

39 *Id*.

40 IRC §§ 170(b)(1)(E) and (f)(3)(B)(iii).

to a "qualified organization" "exclusively for conservation purposes."[41] All three conditions must be satisfied for the donation to be deemed a "qualified conservation contribution."

In *McGrady v. Commissioner*, the taxpayers participated in a complex conservation plan in Bucks County, Pennsylvania.[42] As part of this plan they made two separate gifts, a donation of qualified conservation easement on their 25-acre homestead property to the township in which they lived and a donation of a fee simple interest in a 20-acre undeveloped parcel of land adjacent to this property to a tax-exempt conservation organization. In addition, the taxpayers agreed to buy back from the tax-exempt conservation organization a 37-acre undeveloped parcel of land for $485,000 to provide sufficient funding for the conservation plan to succeed. The taxpayers reported the gifts of real property as noncash charitable contributions on their 2007 federal income tax return and claimed a charitable contribution deduction for 2007. Because of limitations on charitable contribution deductions in a given year, the taxpayer claimed carryover charitable contribution deductions for 2008 through 2011 tax returns.[43] The IRS audited the taxpayers' returns for these years and disallowed all claimed charitable contribution deductions for the two gifts, asserting that the taxpayers lacked donative intent for their contributions.[44] The taxpayers petitioned the Tax Court to challenge the IRS's disallowance of these deductions.

The court noted that if a taxpayer engages in a transaction with a charity that is a *quid pro quo* exchange (*i.e.*, if the taxpayer receives property or services equal in value to his donation), then there is no contribution or gift within the meaning of IRC § 170. The court also pointed out that if a taxpayer intends to donate property to a charitable recipient but will not do so unless he receives a specific benefit, then such a transfer of property does not qualify for a charitable contribution deduction under IRC § 170.[45]

The court evaluated each transfer independently and found that the taxpayers' donation of a fee simple interest in the undeveloped parcel of land to the tax-exempt organization was an outright gift that they could not take back, was not conditioned on the taxpayers receiving any return benefit, and the taxpayers in fact did not receive any return benefit from the tax-exempt organization. Similarly, with respect to the conservation easement on their homestead property that the taxpayers donated to the township in which they lived, the court found that the taxpayers made this gift "with no strings attached."[46]

The court rejected the IRS's claim that the taxpayers controlled the negotiations with the tax-exempt organization and township and used them to their benefit. The court found that it was necessary for the taxpayers to be heavily involved in the negotiations as they owned the two properties and held an option to purchase a third one that was part of the conservation plan. The court found no evidence that the taxpayers had the ability to manipulate the negotiations or that the other parties involved made meaningful concessions to them.[47]

41 IRC § 170(h)(1)(A)-(C).

42 *McGrady v. Comm'r*, T.C. Memo. 2016-233.

43 *See* IRC § 170(d)(1).

44 *McGrady v. Comm'r*, T.C. Memo. 2016-233. The IRS also claimed that the taxpayers failed to satisfy various reporting requirements, overvalued the donated property, and received return benefits in exchange for their gifts.

45 *Id.*

46 *Id*.

47 *Id*.

The court also dismissed the IRS's claim that the taxpayers' purchase or "buy-back" of a parcel of land surrounding their property as part of the conservation plan was valuable to them because it protected them on all sides from residential development. The court found that this parcel of land was already protected from residential development by a conservation subdivision plan as well as prior placement of conservation easements over the parcel. Therefore, the court found that the taxpayers' only reason for purchasing the parcel of land was to supply the cash necessary to close the conservation plan deal and that the taxpayers probably overpaid for this parcel.

Finally, in further examining whether the taxpayers had the requisite donative intent and if there was a *quid pro quo*, the court noted that the taxpayers, like any taxpayer who places a conservation easement over his or her property (or when a neighbor places a conservation easement over a neighboring property), might benefit by having natural landscapes as opposed to viewing suburban activities. However, it found that any benefit the taxpayers received from the conservation easements put into place as part of the conservation plan was incidental to that of the township and tax-exempt organization, which set up the plan to accomplish their charitable purposes of conserving rural and agricultural land. Therefore, the court held that the taxpayers possessed the requisite donative intent and permitted charitable contribution deductions for their gifts.[48]

The court also found that the taxpayers satisfied their various reporting requirements. However, the court's decision was split as it found for the IRS with respect to certain issues. Specifically, the court found that the fair market value of the gifts was lower than that claimed by the taxpayers and therefore reduced the amount of the charitable contribution deduction. Finally, the court found that the taxpayers received a return benefit of an easement that provided access to their property and reduced their charitable contribution deduction by the value of this easement.[49]

CONCLUSION

IRC § 170 and the accompanying Treasury Regulations provide detailed requirements with which taxpayers must strictly comply. The statutory and regulatory requirements to qualify for a deduction become more stringent as deductions increase in size. Most of the charitable contribution cases reviewed this year addressed issues regarding substantiation of contributions, while several cases discussed the value of the contributed property and the complex rules governing the donation of a conservation easement.

Due to the complex nature of the rules and regulations surrounding charitable contributions, it is likely that litigation will continue in this area of the law and we will continue to see this topic as a most litigated issue. Taxpayers must carefully follow all aspects of the relevant laws and regulations when attempting to make a charitable contribution. Particularly, taxpayers must pay attention to the strict requirements for substantiation of a charitable contribution and to the elements of donating a qualified conservation easement.

48 *McGrady v. Comm'r*, T.C. Memo. 2016-233.

49 *Id.*

MLI #9 Family Status Issues Under IRC §§ 2, 24, 32, and 151

SUMMARY

Because family status issues center on interrelated exemptions, credits, and filing statuses claimed on federal tax returns, cases litigated in this area often involve multiple issues with similar factual determinations. This report combines the following issues into a single "family status" category:

- Head of household filing status;[1]
- Child Tax Credit (CTC);[2]
- Earned Income Tax Credit (EITC);[3] and
- Dependency exemption.[4]

We reviewed 24 federal court opinions issued between June 1, 2016, and May 31, 2017. Many of these opinions cover multiple family status issues, with the determination of one often affecting others. For example, a denial of the dependency exemption will lead to the summary denial of the CTC and may impact eligibility for head of household filing status. In tax year (TY) 2015, over 21 million taxpayers filed as head of household, nearly 28 million received the EITC, and almost 50 million sought some form of dependency exemption.[5]

TAXPAYER RIGHTS IMPACTED[6]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

1 Internal Revenue Code (IRC) § 2(b).

2 IRC § 24.

3 IRC § 32.

4 IRC § 151(c).

5 IRS, Compliance Data Warehouse (CDW) *Individual Returns Transaction File (IRTF) tax year 2015* (Nov. 28, 2017). Taxpayers with a married filing joint filing status were counted as one taxpayer.

6 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

PRESENT LAW

Uniform Definition of Qualifying Child

In the Working Families Tax Relief Act of 2004, Congress created a uniform definition of child in IRC § 152(c) of the Code.[7] Beginning in TY 2005, the Code defines the term "dependent" as a qualifying child or a qualifying relative.[8] The single definition of qualifying child, with certain modifications, applies for purposes of claiming the EITC, the CTC, a dependency exemption, and head of household filing status.[9]

Qualifying Child

An individual must meet five tests in order to be a qualifying child under IRC § 152(c): relationship,[10] age,[11] residency,[12] support,[13] and no joint return filed with the individual's spouse.[14] If an individual meets the definition of a qualifying child for more than one taxpayer, IRC § 152(c)(4) establishes tiebreaker rules to determine which taxpayer may claim the child.[15]

To be a qualifying relative of a taxpayer, an individual must: (A) bear a certain relationship to the taxpayer, (B) have gross income for the calendar year that is less than the exemption amount (as defined in IRC § 151(d)), and (C) receive over one-half of his or her support for the calendar year from the

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7 The National Taxpayer Advocate recommended the creation of a uniform definition of a qualifying child in a previous report to Congress. *See* 2001 National Taxpayer Advocate Annual Report to Congress 78-81.

8 IRC § 152(a). If an individual does not meet the definition of a qualifying child under § 152(c), he or she may meet the definition of a qualifying relative under IRC § 152(d).

9 For a full discussion of the National Taxpayer Advocate's concerns about the complexity of claiming the Earned Income Tax Credit (EITC) and other family status issues, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

10 An individual meets the relationship test to be a qualifying child if the individual is a child of the taxpayer or a descendant of a child of the taxpayer or a brother, sister, stepbrother or stepsister of the taxpayer or a descendant of such a relative, IRC § 152(c)(2). The term "child" means an individual who is a son, daughter, stepson, or stepdaughter of the taxpayer or an eligible foster child of the taxpayer. IRC § 152(f)(1)(A). A child legally adopted by a taxpayer or a child lawfully placed with a taxpayer for legal adoption is treated as a child of the taxpayer by blood. IRC § 152(f)(1)(B). An eligible foster child means an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction. IRC § 152(f)(1)(C). The terms "brother" and "sister" include a half-brother or a half-sister. IRC § 152(f)(4).

11 To meet the age requirement, to be a qualifying child, an individual must be under the age of 19 at the end of the year, under the age of 24 at the end of the year and a "student," as defined in IRC § 152(f)(2), or any age if "permanently and totally disabled," as defined in IRC § 22(e)(3). IRC § 152(c)(3).

12 To meet the residency requirement to be a qualifying child, an individual must have the same principal place of abode as the taxpayer for more than half of the taxable year. IRC § 152(c)((1)(B). See, however, IRC § 152(e) for a special rule for a child of parents who are divorced or separated or who live apart and IRC § 152(f)(6) for rules on the treatment of missing children. See also the regulations under section 152 for rules on temporary absences, children who were placed with the taxpayer in foster care or for adoption during the taxable year, or children who were born or died during the taxable year.

13 To meet the support test to be a qualifying child, an individual must not have provided more than one-half of his or her own support for the calendar year in which the taxable year of the taxpayer begins. IRC § 152(c)(1)(D).

14 The individual must not have filed a joint return with the individual's spouse for the taxable year in question. IRC § 152(c)(1)(E).

15 The taxpayer who claims the qualifying child is entitled to the dependency exemption for the child, head of household filing status, the Child Tax Credit (CTC), the EITC and the Child and Dependent Care Credit (unless the special rule in § 152(e) applies and assuming all other eligibility requirements are met). Under the tiebreaker rules, if only one of the taxpayers claiming a child is the child's parent, then the child will be treated as the qualifying child of the parent. IRC § 152(c)(4)(A)(i). If both taxpayers claiming a child are the child's parents, then the child will be treated as the qualifying child of the parent with whom the child resided for the longest period during the taxable year. IRC § 152(c)(4)(B)(i). If the child lived with both parents for the same amount of time during the taxable year, then the child will be treated as the qualifying child of the parent with the highest adjusted gross income. IRC § 152(c)(4)(B)(ii). If neither of the taxpayers claiming a child is the child's parent, then the child is treated as the qualifying child of the taxpayer with the highest adjusted gross income for the taxable year. IRC § 152(c)(4)(A)(ii).

taxpayer.[16] In addition, the individual cannot be a qualifying child of the taxpayer or of "any other taxpayer" for the taxable year.[17] A qualifying relative may include an individual who has the same principal place of abode as the taxpayer for the taxable year and who is a member of the taxpayer's household.[18]

Earned Income Tax Credit (EITC) — IRC § 32

The EITC entitles certain working low income taxpayers to claim a refundable credit of up to $6,269 for 2016.[19] The EITC may be available to taxpayers either with or without a qualifying child. Certain limitations apply to the EITC related to residency,[20] filing status,[21] certain foreign benefits,[22] and status as a qualifying child of another taxpayer.[23] The taxpayer must have a Social Security number valid for employment in the United States,[24] earned income,[25] and limited amounts of certain types of income.[26] Taxpayers wishing to claim the EITC without a qualifying child must meet additional eligibility requirements, including an age requirement of being at least age 25 but under age 65.[27] To be considered a qualifying child for the EITC, an individual must meet the definition of a qualifying child in IRC § 152(c),[28] he or she must be unmarried at the end of the taxable year (unless the taxpayer is entitled to a deduction under IRC § 151 (or would be so entitled but for IRC § 152(e)) for the married individual),[29] and his or her principal place of abode must be in the United States with the taxpayer for more than half of the taxable year.[30]

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16 IRC § 152(d)(1)(A)-(C). The relationship between the qualifying relative and the taxpayer must meet one of the relationships set forth in IRC § 152(d)(2).

17 IRC § 152(d)(1)(D).

18 IRC § 152(d)(2)(H).

19 IRC § 32. The maximum amount of the credit is available to a taxpayer with three or more qualifying children. For tax years beginning in 2016, the maximum credit available for a taxpayer with one qualifying child is $3,373, with two qualifying children is $5,572, and with no qualifying children is $506. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. The actual amount of the EITC varies depending on the earned income of the taxpayer.

20 A taxpayer is not eligible for the EITC if he or she is a nonresident alien for any portion of the taxable year, unless the taxpayer files a joint return with a spouse who is a United States citizen or resident alien. IRC § 32(c)(1)(D).

21 A taxpayer is not eligible for the EITC if he or she files married filing separately. IRC § 32(d).

22 A taxpayer is not eligible for the EITC if he or she claims a foreign earned income exclusion or deducts or excludes a foreign housing cost amount. IRC § 32(c)(1)(C).

23 A taxpayer is not eligible for the EITC if he or she is the qualifying child of another taxpayer. IRC § 32(c)(1)(B).

24 A taxpayer cannot claim the EITC if he or she does not have a Social Security number valid for employment. IRC § 32(c)(1)(E) and (m).

25 A taxpayer cannot claim the EITC unless he or she has earned income. IRC § 32(a).

26 A taxpayer's earned income, adjusted gross income, and investment income must all be within limits established annually. IRC § 32(a)(2), (i), and (j).

27 A taxpayer is not eligible to claim the EITC without a qualifying child unless the taxpayer's principal place of abode is in the United States for more than half of the taxable year, the taxpayer is at least age 25 but under age 65 at the close of the taxable year, and the taxpayer does not qualify as a dependent of another taxpayer for whom a deduction is allowable under IRC § 151 for the taxable year. IRC § 32(c)(1)(A)(ii).

28 IRC § 32(c)(3)(A). For purposes of the EITC, a qualifying child under IRC § 152(c) is determined without applying IRC § 152(c)(1)(D) (support test for a qualifying child) and IRC § 152(e) (special rule for a child of parents who are divorced or separated or who live apart).

29 IRC § 32(c)(3)(B).

30 IRC § 32(c)(3)(C). For the National Taxpayer Advocate's recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

Child Tax Credit (CTC) — IRC § 24

The CTC entitles a taxpayer to claim a credit of up to $1,000 for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the tax year (with an exception for certain noncitizens).[31] The amount of the credit is applied to any taxes due and, in some instances, is refundable (known as the Additional Child Tax Credit, or ACTC).[32]

Dependency Exemption — IRC § 151

The dependency exemption entitles a taxpayer to claim an additional exemption for each dependent who is a qualifying child or qualifying relative of the taxpayer, as defined in IRC § 152. A qualifying child must be under the age of 19 at the close of the taxable year, under 24 and a full-time student, or be permanently or totally disabled.[33]

Head of Household — IRC § 2(b)

Head of household filing status entitles a taxpayer to a larger standard deduction and a more favorable tax rate than a taxpayer filing single or married filing separately.[34] To qualify as a head of household, a taxpayer must be unmarried or "considered unmarried" at the end of the taxable year.[35] For more than half of the taxable year, a taxpayer must maintain, as the taxpayer's home, a household that is the principal place of abode of a qualifying child (as defined in IRC § 152(c), determined without applying IRC § 152(e))[36] or a qualifying relative (as defined under IRC § 152(d) without applying §152(d)(2)(H) or § 152(d)(3)), for whom the taxpayer may claim a dependency exemption under IRC § 151.[37] Additionally, the taxpayer may qualify for head of household filing status if he or she maintains for the taxable year a household that is the principal place of abode of the taxpayer's mother or father for whom the taxpayer may claim a dependency exemption under IRC § 151.[38]

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31 IRC § 24(a) and (c). The amount of the CTC is reduced (but not below zero) by $50 for each $1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount ($110,000 in the case of a joint return, $75,000 in the case of a taxpayer who is not married, and $55,000 in the case of a married taxpayer filing separately). IRC § 24(b)(1) and (2).

32 IRC § 24(d). For the National Taxpayer Advocate's recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

33 IRC § 151(c)(1), and IRC § 152(a), (c), and (d). For tax year 2016, the dependency exemption amount is $4,050. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. For the National Taxpayer Advocate's recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

34 For tax year 2016, the standard deduction for head of household is $9,300. Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

35 IRC § 2(b). A taxpayer whose spouse died during the taxable year is considered married for that year. IRC § 2(b)(2)(C). A taxpayer is not considered as married if he or she is legally separated from his or her spouse under a decree of divorce or separate maintenance or if his or her spouse is a nonresident alien at any time during the taxable year. IRC § 2(b)(2)(A) and (B). A taxpayer is also considered unmarried if he or she is treated as unmarried under the provisions of IRC § 7703. IRC § 2(c). For a recommendation to modify and expand the definition of not married to include a taxpayer separated from his or her spouse under the terms of a written separation agreement on the last day of the calendar year, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

36 IRC § 2(b)(1)(A)(i), which also contains specific rules for married children.

37 IRC § 2(b)(1)(A)(ii). A taxpayer is considered as maintaining a household if the taxpayer provides over half of the cost of maintaining the household for the taxable year. IRC § 2(b).

38 IRC § 2(b)(1)(B). For the National Taxpayer Advocate's recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

ANALYSIS OF LITIGATED CASES

Family Status Issues appears in the top ten most litigated issues for the first time since 2010.[39] We identified 24 opinions issued under the four IRC sections that we discuss in this narrative. Half of the litigated cases were small Tax Court cases.[40] Most cases involve factual disputes between the IRS and the taxpayer(s), not novel issues of law.[41] A detailed list of the cases appears in Table 9 of Appendix 3.

In five cases (about 21 percent), taxpayers were represented, while the rest were *pro se* (without counsel). One taxpayer with representation prevailed in full, whereas *pro se* taxpayers prevailed in full or in part in four cases. Overall, taxpayers prevailed in full or in part in five of 24 cases (about 21 percent). The fact-specific nature of cases involving these code sections, in addition to the complicated and intertwined rules for these provisions, suggest that taxpayers could benefit from the assistance of counsel.[42] Many of the taxpayers involved in these cases may have qualified for assistance from a Low Income Taxpayer Clinic (LITC).[43]

Head of Household Filing Status — IRC § 2(b)

We reviewed ten cases involving head of household filing status.[44] The taxpayer prevailed on this issue in only one case.[45] In *Binns vs. Commissioner*, the IRS denied the taxpayer's entitlement to head of household filing status, his claim of his minor child and the minor child's mother as dependents, the EITC, and the ACTC in the statutory notice of deficiency.[46] Under Tax Court Rule 142(a), the taxpayer had the burden of proving entitlement to head of household filing status to the court.[47] The taxpayer resided for part of the tax year in question with his child and the child's mother, to whom he was not married. He was unable to reside with the child and the child's mother for the rest of the year due to his incarceration, which the court construed as a temporary absence due to special circumstances and did not preclude the taxpayer from meeting the residency test under IRC § 152(c)((1)(B).[48] Prior to his incarceration, he prepaid six months of rent for the apartment they shared and set up a bank account with funds to be used for the support of his child and the child's mother. During this time, the child's mother did not work and there were no childcare expenses. Because the court found that the taxpayer maintained a household and provided more than one-half of the household's expenses during the year in question, he was entitled to head of household filing status.[49]

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39 2010 National Taxpayer Advocate Annual Report to Congress.

40 In certain tax disputes involving $50,000 or less, taxpayers may elect to have their case conducted under the simplified small tax case procedures. Trials in small tax cases are generally less formal and result in a speedier disposition. However, decisions in these cases cannot be appealed or cited as precedent. *See* IRC § 7463.

41 The cases analyzed in this section often involve multiple family status issues. Therefore, a single case might be listed and analyzed in multiple family status categories, though there are only 24 cases discussed.

42 For a discussion of the benefits of obtaining counsel during an EITC audit, see 2007 National Taxpayer Advocate Annual Report to Congress vol. 2, 94-117.

43 For more information on the LITC program, which is administered by TAS, see IRC § 7526; IRS Pub. 3319 (Apr. 2017). *See also* https://www.irs.gov/advocate/low-income-taxpayer-clinics.

44 *See, e.g.*, *Cappel v. Comm'r*, T.C. Memo. 2016-150. Although *Brown v. Comm'r*, T.C. Summ. Op. 2017-24 and *Moss v. Comm'r*, T.C. Memo. 2017-30 involve filing status issues, these cases do not address head of household status and are not included for the purposes of this count.

45 *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

46 This case does not have precedential value and is being used for illustration.

47 *See* Tax Court Rule 142(a) ("The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent."); *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79 (1992).

48 Treas. Reg. § 1.152-1(b).

49 *Binns v. Comm'r*, T.C. Summ. Op. 2016-90. The taxpayer was also entitled to the child tax credit and the EITC.

Child Tax Credit (CTC)

We reviewed 14 cases involving the child tax credit, of which ten taxpayers appeared *pro se*. Four taxpayers prevailed on this issue; three[50] appeared *pro se* and one[51] was represented. To receive the CTC, the taxpayer must be able to claim the child as a dependent on his or her tax return, and the child must meet the requirements of IRC § 152(c).[52] In *Tsehay v. Commissioner*, the court found the taxpayer was entitled to the CTC for TY 2013.[53] The taxpayer in this case had claimed the CTC for his four minor children, which the IRS denied due to a child support order showing the taxpayer as the non-custodial parent. However, the support order was for 2015, and the tax year at issue was 2013. Because the court found credible the taxpayer's testimony that he and his wife were not separated in 2013 and lived in the same apartment, the taxpayer was entitled to the CTC for that year for all four minor children.[54]

In contrast, in *Polsky v. United States*, the court found that the taxpayers were not entitled to the CTC for their daughter.[55] The Polskys are parents of a permanently disabled child. On their 2010 and 2011 tax returns, the taxpayers claimed the CTC for their daughter, which the IRS disallowed due to the child being over age 17. On appeal, the taxpayers argued that IRC § 152(c)(3)(B) controls, not the age of 17 listed under IRC § 24. IRC § 24(c)(1) states that a qualifying child must meet the requirements of IRC § 152(c) and be under the age of 17. IRC § 152(c)(3)(B) provides that a person meets the age requirements for the purposes of a qualifying child under IRC § 152(c)(3)(A) if at any time during the year the person was permanently and totally disabled. The Polskys thus argued that as their daughter was permanently and totally disabled in the years at question and is therefore a qualifying child under IRC § 152(c), she is also a qualifying child for the purposes of IRC § 24. The court agreed with the rationale of the lower court's decision that IRC § 24 incorporates the basic requirements of IRC § 152(c) and adds the additional age limitation of 17 for the purposes of the CTC. The exception under IRC § 152(c)(3)(B) for permanently and totally disabled individuals is intended to allow taxpayers such as the Polskys to continue to claim the individual as a dependent so long as their daughter remains permanently and totally disabled and meets the other requirements under IRC § 152(c). Thus, the court held that the taxpayers were not entitled to the CTC for the years at issue.[56]

Earned Income Tax Credit (EITC)[57]

We reviewed ten cases where the EITC was at issue. Three taxpayers were represented, two[58] taxpayers who appeared *pro se* prevailed, and one[59] represented taxpayer succeeded. In *Lopez v. Commissioner*,[60] the court found that the taxpayer was entitled to the EITC for both tax years at issue.[61] The taxpayer

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50 *See Tsehay v. Comm'r*, T.C. Memo. 2016-200, *McCutcheon-Cox v. Comm'r*, T.C. Summ. Op. 2017-20, *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

51 *See Lopez v. Comm'r*, T.C. Summ. Op. 2017-16.

52 *Sheikh v. Comm'r*, T.C. Memo. 2010-33.

53 T.C. Memo. 2016-200.

54 *Id.*

55 844 F.3d 170 (3d Cir. 2016).

56 *Id.*

57 The EITC is a complex area of law and most low income taxpayers require specialized assistance in order to claim the credit successfully. National Taxpayer Advocate 2015 Annual Report to Congress 240-47. *See also* National Taxpayer Advocate 2008 Annual Report to Congress 243; National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 94 (*IRS Earned Income Credit Audits – A Challenge to Taxpayers*).

58 *See Tsehay v. Comm'r*, T.C. Memo. 2016-200, *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

59 *See Lopez v. Comm'r*, T.C. Summ. Op. 2017-16.

60 *Id.*

61 This case does not have precedential value and is being used for illustration.

lived in a rented apartment in New York City with her two minor daughters and provided cosmetology services out of her home to her friends and neighbors. The taxpayer did not have a bank account, did not maintain any business records, and received all payments in cash. The taxpayer timely filed her tax returns reporting on a Schedule C the income from her cosmetology business and additional 1099-MISC, *Miscellaneous Income*. The IRS adjusted the taxpayer's income by removing all Schedule C income and, as a result, disallowed the EITC and barred the taxpayer from claiming the EITC for certain future years. The taxpayer submitted written notarized statements from her clients attesting to the fact that the taxpayer provided cosmetology services to them, for which they paid her, during the years at issue. The court found these statements credible, and while the court reduced the total of the taxpayer's income from her business, it allowed the EITC.[62]

In contrast, in *Skaggs v. Commissioner*, the court found that the taxpayer was not entitled to the EITC.[63] Mr. Skaggs filed his income tax return for TY 2015 and claimed the EITC. The IRS issued a statutory notice of deficiency disallowing the claimed EITC due to Mr. Skaggs being incarcerated and earning the income at a penal institution. Under IRC § 32(c)(2)(B)(iv), the income used to qualify for the EITC cannot be earned for services provided while the taxpayer is an inmate at a penal institution. The taxpayer earned his reported income while at a state security hospital for mentally ill inmates and those committed by the state to custody. The taxpayer argued that he was a patient, not an inmate, and thus entitled to the EITC. The court used the plain language definition of inmate and penal institution and determined that under the laws of Kansas, the hospital is a penal institution and Mr. Skaggs's transfer there was recorded as an "inter-facility" transfer from the prison in which he was previously confined, not a release from custody or his prison sentence. As a result, the court determined that the taxpayer was not entitled to the EITC, as his income was earned while providing services in a penal institution of which he was an inmate.[64]

Dependency Exemption – IRC § 151

We reviewed 18 cases involving the dependency exemption, the most common of the family status issues in this reporting cycle. Taxpayers prevailed in full or in part in only three cases and all three were *pro se*.[65] Taxpayers experienced issues related to the requirements under IRC § 152(e) for the use of Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, or an equivalent document.[66] Taxpayers also attempted to claim children or other persons where the individual claimed was not a qualifying child or a qualifying relative.[67]

In one case, *Smyth v. Commissioner*, even the court acknowledged that the outcome seemed unfair to the taxpayer, but the court had to follow the law.[68] The taxpayer, a certified nursing assistant in Texas, provided a home and all of the support for her adult son, his wife, and her two grandchildren for the tax

62 *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16. For a discussion of the National Taxpayer Advocate's concerns regarding the application of the EITC two-year ban, see 2013 National Taxpayer Advocate Annual Report to Congress 103-15; 311-15.

63 148 T.C. No. 15 (2017).

64 *Id.*

65 *See Binns v. Comm'r*, T.C. Summ. Op. 2016-90, *McCutcheon-Cox v. Comm'r*, T.C. Summ. Op. 2017-20, *Tsehay v. Comm'r*, T.C. Memo. 2016-200.

66 The final regulations under IRC § 152(e), effective for taxable years beginning after July 2, 2008, require that a release of claim to dependency exemption for a child be on Form 8332 or be a "document executed for the sole purpose of serving as a written declaration" that the custodial parent will not claim a dependency exception for a child in a specific year or specific years. IRC § 152(e)(2). *See, e.g.*, *Cappel v. Comm'r*, T.C. Memo. 2016-150.

67 *See, e.g.*, *Rivas v. Comm'r*, T.C. Memo. 2016-158.

68 *Smyth v. Comm'r*, T.C. Memo. 2017-29.

year at question. Her son told her that she should claim the grandchildren as dependents, as he and his wife did not intend to file a return and she should get back some money that she had spent providing for their care. Thus, the taxpayer filed her return and claimed the two children for dependency exemptions, the CTC, the EITC, and head of household filing status. Unfortunately, before she filed her return, "[her] unemployed son had already claimed the children on his tax return, gotten a check from the government, and cashed it to spend on drugs," without letting the taxpayer know.[69] The IRS denied the taxpayer's claims.

At trial, the taxpayer argued that her son filed an amended return in which he did not claim the children. However, that return was presented to IRS counsel two weeks before trial. Amended returns must be filed with the proper service center or with a person designated to receive returns by the IRS. Counsel, as the court has previously found, is not designated to receive returns for filing.[70] Thus, even if the son intended to amend his original return, submitting the return to IRS counsel did not qualify as filing an amended return. Since the children were claimed on an original return by the children's parents, the taxpayer could not also claim the children on her return, even if the children met the definition of being her qualifying children as well.[71] As a result, the court found the taxpayer was not entitled to claim the children. The court was very sympathetic to the taxpayer, as she had provided all of the support not just for the children but for the parents as well and had been told by her son to claim the children. Additionally, the court noted that it did not think that it was intended for money to support children to go to someone who spent it all on drugs, but the court was bound by the law. The court further expressed the hope that someone who could address this problem would take notice of the opinion.[72]

CONCLUSION

While family status has not been a most litigated issue since 2010, the National Taxpayer Advocate has continued to express concern regarding the complexity of the laws surrounding these IRC provisions. In her 2016 Annual Report to Congress, the National Taxpayer Advocate again recommended legislative changes to help simplify the family status provisions to help taxpayers and protect taxpayer rights.[73]

The National Taxpayer Advocate and others have long expressed concerns about the complexity of the family status provisions and the burden imposed on taxpayers attempting to comply as they file their returns.[74] While the National Taxpayer Advocate has identified areas where the IRS can improve

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69 *Smyth v. Comm'r*, T.C. Memo. 2017-29.

70 *Quarterman v. Comm'r*, T.C. Memo. 2004–241.

71 IRC § 152(c)(4)(A).

72 *Smyth v. Comm'r*, T.C. Memo. 2017-29.

73 2016 National Taxpayer Advocate Annual Report to Congress 326-57 (Legislative Recommendation: Tax Reform: *Restructure the Earned Income Tax Credit and Related Family Status Provisions to Improve Compliance and Minimize Taxpayer Burden*).

74 *See, e.g.*, National Taxpayer Advocate 2005 Annual Report to Congress, 397-406; National Taxpayer Advocate 2008 Annual Report to Congress, 363-369; National Taxpayer Advocate 2012 Annual Report to Congress, 508-512; Steve Holt, *The Role of the IRS as a Social Benefits Administrator, American Enterprise Institute* (July 2016), https://www.aei.org/publication/the-role-of-the-irs-as-a-social-benefit-administrator/; Elaine Maag, *A Redesigned Earned Income Tax Credit Could Encourage Work By Childless Adults*, Tax Policy Center (TPC), (May 2015) http://www.taxpolicycenter.org/taxvox/redesigned-earned-income-tax-credit-could-encourage-work-childless-adults; The President's Advisory Panel on Federal Tax Reform, *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* (November 2005); Adam Carasso, Jeffrey Rohaly, and C. Eugene Steuerle, *A Unified Children's Tax Credit*, National Tax Association Proceedings (May 15, 2005), http://www.urban.org/uploadedPDF/1000790.pdf; Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Sized Adjustment to the Minimum Wage*, 57 Tax Law Rev. 301 (Spring 2004); Max B. Sawicky, Robert Cherry and Robert Denk, *The Next Tax Reform: Advancing Benefits for Children, Economic Policy Institute* (2002).

its administration of the family status provisions, significant legislative change is necessary to reduce complexity and minimize taxpayer burden.

MLI #10 Relief from Joint and Several Liability Under IRC § 6015

SUMMARY

A married person can elect to file a federal income tax return separately from his or her spouse, or both spouses can choose to file jointly on one return. Filing a joint return establishes joint and several liability for the spouses, for the full amount of any deficiency or tax due.[1]

Accordingly, the IRS can collect the entire amount due on the joint return from either spouse, without regard to the respective tax liabilities each would have accrued if they filed separately.[2]

Internal Revenue Code (IRC) § 6015 provides three ways for a taxpayer to obtain partial or full relief from an IRS debt resulting from a return filed jointly with a spouse or ex-spouse. Section 6015(b) provides complete relief for deficiencies arising from a jointly filed return. Section 6015(c) provides limited relief from a joint liability for spouses who are divorced, separated, widowed, or not living together, by allocating the liability between the spouses. If relief is unavailable under IRC § 6015(b) or (c), subsection (f) provides a third opportunity for "equitable" relief from both deficiencies and underpayments.

There were 24 federal opinions identified involving relief under IRC § 6015 that were issued between June 1, 2016, and May 31, 2017. The IRS prevailed in 16 of the cases and the taxpayers prevailed in eight of the cases. Significant issues that arose this year include whether the U.S. Tax Court has exclusive jurisdiction under IRC § 6015(e) and whether the period of limitations prescribed in IRC § 6015(e)(1)(A) is jurisdictional. Additionally, the Tax Court applied the seven-factor test from Revenue Procedure 2013-34 to determine whether the taxpayer should be granted equitable relief under IRC § 6015(f).

TAXPAYER RIGHTS IMPACTED[3]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

1 Internal Revenue Code (IRC) § 6013(d)(3). We use the terms "deficiency" and "understatement" interchangeably for purposes of this discussion and the case table in Appendix 3, even though IRC § 6015(b)(1)(D) and IRC § 6015(f) expressly use the term "deficiency" and IRC § 6015(b)(1)(B) refers to an "understatement of tax."

2 The National Taxpayer Advocate, in the 2005 Annual Report to Congress, proposed legislation that would eliminate joint and several liability for joint filers. *See* National Taxpayer Advocate 2005 Annual Report to Congress 407.

3 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the IRC. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

PRESENT LAW

Innocent Spouse Relief Applicable to All Joint Filers Under IRC § 6015(b)

IRC § 6015(b) provides that a requesting spouse shall be partially or fully relieved from joint and several liability, pursuant to procedures established by the Secretary, if the requesting spouse can demonstrate that:

1. A joint return was filed;
2. There was an understatement of tax attributable to erroneous items of the nonrequesting spouse;[4]
3. Upon signing the return, the requesting spouse did not know or have reason to know of the understatement;
4. Taking into account all the facts and circumstances, it is inequitable to hold the requesting spouse liable; and
5. The requesting spouse elected relief within two years after the IRS began collection activities against him or her.[5]

A requesting spouse is eligible for a refund under subsection (b) provided the requesting spouse made the payment and the requirements of IRC § 6511 have been met.[6]

Allocation of Liability Between Spouses Under IRC § 6015(c)

IRC § 6015(c) provides that the requesting spouse shall be relieved from liability for deficiencies allocable to the nonrequesting spouse, pursuant to procedures established by the Secretary. To obtain relief under this section, the requesting spouse must demonstrate that:

1. A joint return was filed;
2. At the time relief was elected, the joint filers were unmarried, legally separated, widowed, or had not lived in the same household for the 12 months immediately preceding the election; and
3. The election was made within two years after the IRS began collection activities against the requesting spouse.

Relief under IRC § 6015(c) allocates to each joint filer their respective portion of the deficiency, as calculated under the allocation provisions of IRC § 6015(d). Regardless of how the deficiency is calculated under IRC § 6015(d), IRC § 6015(c) does not provide an opportunity for either of the joint filers to obtain a credit or a refund, only to avoid liability.[7] A taxpayer is ineligible for relief under IRC § 6015(c) if the IRS demonstrates that, at the time he or she signed the return, the taxpayer

4 An erroneous item is any income, deduction, credit, or basis that is omitted from or incorrectly reported on the joint return. See Treas. Reg. § 1.6015-1(h)(4).

5 Not all actions that involve collection will trigger the two-year period of limitations. Under the regulations, only the following four events constitute "collection activity" that will start the two-year period: (1) an IRC § 6330 notice; (2) an offset of an overpayment of the requesting spouse against the joint income tax liability under IRC § 6402; (3) the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; and (4) the filing of a claim by the United States to collect the joint tax liability in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Treas. Reg. § 1.6015-5(b)(2).

6 IRC § 6015(g)(1). Generally, a taxpayer must request a refund within three years from the date his or her return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a).

7 IRC § 6015(g)(3).

requesting relief had "actual knowledge" of any item giving rise to the deficiency.[8] Relief is also unavailable for amounts attributable to fraud, fraudulent schemes, or certain transfers of disqualified assets.[9]

Equitable Relief Under IRC § 6015(f)

IRC § 6015(f) provides that the Secretary may relieve a taxpayer from liability for both deficiencies and underpayments[10] where the taxpayer demonstrates that:

1. Relief under IRC § 6015(b) or (c) is unavailable; and
2. Taking into account all the facts and circumstances, it would be inequitable to hold the taxpayer liable for the underpayment or deficiency.

To obtain complete relief under IRC § 6015(b) or allocation under subsection (c) a person must make the request within two years of the beginning of IRS collection actions against that person.[11] IRS considers requests for equitable relief under IRC § 6015(f) without regard to when the first collection activity was taken.[12]

Prior to July 2011, the IRS interpreted § 6015(f) to impose a two-year time limit on requests for equitable relief.[13] In 2009, the Tax Court, in *Lantz v. Commissioner*, held the regulation imposing the two-year limit invalid.[14] The IRS appealed *Lantz* and similar decisions, and three courts of appeals overturned the Tax Court and upheld the validity of the two-year limit.[15] This created an unusual situation where the Tax Court ruled in accordance with its reasoning in *Lantz*, where permitted, and ruled in accordance with the courts of appeals' rulings where bound to do so.[16] The National Taxpayer Advocate consistently advocated for removal of the two-year rule that prevented taxpayers from obtaining equitable relief.[17] In July 2011, the IRS changed its position and now considers requests for

8 IRC § 6015(c)(3)(C).

9 IRC § 6015(c)(4), (d)(3)(C).

10 An underpayment of tax occurs when the tax is properly shown on the return but is not paid. *Washington v. Comm'r*, 120 T.C. 137, 158-59 (2003).

11 IRC § 6015(b)(1)(E), (c)(3)(B).

12 Notice 2011-70, 2011-2 C.B. 135 (July 25, 2011), http://www.irs.gov/pub/irs-drop/n-11-70.pdf. The change in position applies to requests submitted after July 25, 2011.

13 Treas. Reg. § 1.6015-5(b)(1).

14 132 T.C. 131 (2009).

15 *Manella v. Comm'r*, 631 F.3d 115 (3d Cir. 2011), *rev'g and remanding* 132 T.C. 196 (2009); *Jones v. Comm'r*, 642 F.3d 459 (4th Cir. 2011), *rev'g and remanding* T.C. Docket No. 17359-08 (May 28, 2010); *Lantz v. Comm'r*, 607 F.3d 479 (7th Cir. 2010), *rev'g and remanding* 132 T.C. 131 (2009).

16 Adhering to the rule in *Goldsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), that the Tax Court will defer to a Court of Appeals decision which is squarely on point where appeal from the Tax Court decision lies to that Court of Appeal, the Tax Court continued to hold the regulation invalid in cases appealable to other circuits. *See, e.g.*, *Young v. Comm'r*, T.C. Docket No. 12718-09 (May 12, 2011); *Pullins v. Comm'r*, 136 T.C. 432 (2011); *Stephenson v. Comm'r*, T.C. Memo. 2011-16; *Hall v. Comm'r*, 135 T.C. 374, *appeal dismissed* (6th Cir. Aug. 2, 2011); *Buckner v. Comm'r*, T.C. Docket No. 12153-09, *appeal dismissed* (6th Cir. July 27, 2011); *Carlile v. Comm'r*, T.C. Docket No. 11567-09, *appeal dismissed* (9th Cir. Dec. 8, 2010); *Payne v. Comm'r*, T.C. Docket No. 10768-09, *appeal dismissed* (9th Cir. July 25, 2011); *Coulter v. Comm'r*, T.C. Docket No. 1003-09, *appeal dismissed* (2d Cir. Aug. 4, 2011).

17 National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); vol. 2, 1-12 (*Unlimit Innocent Spouse Equitable Relief*); National Taxpayer Advocate 2006 Annual Report to Congress 540 (Legislative Recommendation: *Eliminate the Two-Year Limitation Period for Taxpayers Seeking Equitable Relief under IRC § 6015 or 66*).

equitable relief under IRC § 6015(f) without regard to when the first collection activity was taken.[18] The IRS proposed regulations to codify the change in the two-year rule on August 13, 2013.[19] Taxpayers are now able to file requests for equitable relief within the period of limitation on collection in IRC § 6502[20] or, for any credit or refund of tax, within the period of limitation in IRC § 6511.[21]

Factors Guiding IRS Discretion in Equitable Relief Cases

Revenue Procedure 2013-34 provides a nonexclusive list of factors that the IRS considers when determining whether equitable relief is appropriate.[22] Factors include:

- Marital status;
- Economic hardship;
- Knowledge or reason to know of the understatement or underpayment, including abuse by the nonrequesting spouse;
- Legal obligation to pay the outstanding tax liability;
- Significant benefit from the understatement or underpayment;
- Good-faith effort to comply with income tax laws; and
- Mental or physical health.[23]

Rights of the Nonrequesting Spouse

In matters where a claim for relief is made under IRC § 6015, the parties who filed the joint return are generally referred to as the requesting spouse and the "nonrequesting spouse," respectively. IRC § 6015 provides that the nonrequesting spouse must be notified and given an opportunity to participate in any administrative proceedings concerning a claim under IRC § 6015.[24] If full or partial relief is granted to the requesting spouse, the nonrequesting spouse can file a protest and receive an administrative

18 Notice 2011-70, 2011-2 C.B. 135 (July 25, 2011), http://www.irs.gov/pub/irs-drop/n-11-70.pdf. The notice provides transitional rules and applies to requests submitted on or after July 25, 2011. The notice also states that pending litigation will be managed consistently with the removal of the two-year rule. *See also* CC-Notice 2011-017 (July 25, 2011) (providing direction for Chief Counsel attorneys handling cases docketed with the Tax Court that involve the two-year deadline).

19 Notice 2011-70, 2011-2 C.B. 135 (July 25, 2011), http://www.irs.gov/pub/irs-drop/n-11-70.pdf. The change in position applies to requests submitted after July 25, 2011. A notice of proposed rulemaking removing the two-year rule was published in the Federal Register (78 Fed. Reg. 49242) on Aug. 13, 2013, and the IRS adopted guidance implementing removal of the two-year rule on Sept. 13, 2013. *See* Rev. Proc. 2013-34, 2013-43 I.R.B. 397. As of the date of this report, the IRS has not promulgated a final regulation.

20 The statutory period of limitations on collection is generally ten years after the date the tax is assessed. IRC § 6502(a). However, a variety of statutory provisions may extend or suspend the collection period. For example, if a court proceeding to collect the tax is brought, such as a suit to reduce a tax liability to judgment, the period of limitations on collection is extended. Therefore, the period of limitations on collection could exceed ten years, and a claim for innocent spouse relief would be valid at any point during that time.

21 Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. However, taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2). Senator Cardin and Representative Becerra introduced companion bills that include the National Taxpayer Advocate's recommendation to codify the removal of the two-year rule that prevented taxpayers from obtaining equitable relief. S. 2333, 114th Cong. (2015) and H.R. 4128, 114th Cong. (2015).

22 Rev. Proc. 2013-34, 2013-43 I.R.B. 397. Rev. Proc. 2013-34 superseded Rev. Proc. 2003-61, 2003-2 C.B. 296.

23 *Id.* at 400-03.

24 IRC § 6015(h)(2).

conference in the IRS Appeals function.[25] The nonrequesting spouse may not petition the Tax Court to appeal the IRS's administrative determination regarding IRC § 6015 relief.[26] However, the requesting spouse may petition the Tax Court for review of the IRS's administrative determination regarding IRC § 6015 relief, and in those situations, the nonrequesting spouse must receive notice of the Tax Court proceeding and has an unconditional right to intervene in the proceeding to dispute or support the requesting spouse's claim for relief.[27] An intervening spouse has no standing to appeal the Tax Court's decision to the United States Courts of Appeals.[28]

Judicial Review

Taxpayers seeking relief under IRC § 6015 generally file Form 8857, *Request for Innocent Spouse Relief*.[29] After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part. The taxpayer has 90 days from the date the IRS mails the notice to file a petition with the Tax Court.[30] The Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction in "stand alone" cases to review IRC § 6015(f) determinations, even where no deficiency has been asserted.[31]

ANALYSIS OF LITIGATED CASES

There were 24 opinions issued between June 1, 2016, and May 31, 2017. The Tax Court issued the majority of the opinions (21 opinions, or 88 percent). The IRS prevailed in full in 16 cases (67 percent) and the requesting spouse prevailed in eight cases (33 percent). Taxpayers had representation in nine cases (37.5 percent), and appeared *pro se* (*i.e.,* they represented themselves) in the remaining 15 cases (62.5 percent). *Pro se* taxpayers prevailed in full in five cases (one-third). The nonrequesting spouse intervened in nine cases (38 percent). In cases where the nonrequesting spouse intervened, the IRS prevailed in six cases (67 percent), and the requesting taxpayer prevailed in three cases (33 percent).

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25 Rev. Proc. 2003-19, 2003-5 C.B. 371.

26 *Maier v. Comm'r*, 119 T.C. 267 (2002), *aff'd*, 360 F.3d 361 (2d Cir. 2004) (holding that there are no provisions in IRC § 6015 that allow the nonrequesting spouse to petition the Tax Court from a notice of determination).

27 *Van Arsdalen v. Comm'r*, 123 T.C. 135 (2004).

28 *Baranowicz v. Comm'r*, 432 F.3d 972 (9th Cir. 2005).

29 See IRS Form 8857, *Request for Innocent Spouse Relief, Instructions* (Sept. 2010).

30 IRC § 6015(e)(1)(A)(ii). Several courts of appeal have held that the ninety-day deadline in § 6015(e)(1)(A) is a jurisdictional requirement and the Tax Court lacks jurisdiction to hear untimely petitions for innocent spouse relief, regardless of whether equitable considerations supporting the extension of the prescribed time period exist. *See Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017); *Rubel v. Comm'r*, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016); *Calvo v. Comm'r*, 117 A.F.T.R.2d (RIA) 2246 (D.C. Cir. 2017). *See also* Legislative Recommendation: *Make Time Limits for Petitioning Tax Court and Bringing Suit in Other Federal Courts Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify that Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency is Not a Decision on the Merits*, *infra*. The Tax Court recently discussed whether 6015(e)(1)(A) is jurisdictional in *Vu v. Comm'r*, T.C. Summ. Op. 2016-75, and *Nauflett v. Comm'r*, No. 17-1986 (T.C. Aug. 9, 2016) (Order of Dismissal for Lack of Jurisdiction).

31 Pub. L. No. 109-432, Div. C, § 408(a), (c), 120 Stat. 2922, 3061-62 (2006). Prior to amendment, IRC § 6015(e) provided for Tax Court review of determinations under IRC 6015(b) or (c), but it was not clear that the Tax Court had jurisdiction to review requests for relief made only under IRC § 6015(f) when no deficiency had been asserted. The 2006 amendment followed the National Taxpayer Advocate's recommendation that IRC § 6015(e) be amended to clarify that taxpayers have the right to petition the Tax Court for review of determinations made only under IRC § 6015(f). See National Taxpayer Advocate 2001 Annual Report to Congress 159-65 (Key Legislative Recommendation: *Joint and Several Liability Final Determination Rights*). The filing of a Tax Court petition in response to the final notice of determination or after the IRC § 6015 claim is pending for six months is often referred to as a "stand alone" proceeding, because jurisdiction is predicated on IRC § 6015(e) and not deficiency jurisdiction under IRC § 6213.

Procedural Issues

Of the 24 cases identified, five involved procedural issues. In several cases, whether the court had jurisdiction over petitions for equitable relief filed under section 6015 was at issue. Depending on the forum where the issue is litigated, the interests of the IRS may be represented by the Department of Justice (DOJ), Tax Division, or the IRS Office of Chief Counsel. The IRS Office of Chief Counsel generally represents the Commissioner of Internal Revenue in Tax Court litigation.[32] The DOJ is responsible for conducting all federal tax litigation in the federal bankruptcy, district, and appellate courts, and in state courts.[33] This dual representation sometimes creates inconsistent positions taken in litigation. The DOJ successfully argued against allowing taxpayers to raise IRC § 6015 relief as an affirmative defense in refund, collection and some bankruptcy cases, which is inconsistent with the IRS Office of Chief Counsel's position.[34] The Bankruptcy Court in *In re Pendergraft* determined whether the court's subject matter jurisdiction extended to innocent spouse relief requests under IRC § 6015.[35] The taxpayer petitioned the Bankruptcy Court to determine the validity of the IRS's lien on her homestead, and requested section 6015 innocent spouse relief. The IRS (represented by DOJ Tax) challenged the Bankruptcy Court's subject matter jurisdiction, pointing to the language of IRC § 6015(e) in support of the position that review was only available in the Tax Court.[36] The Bankruptcy Court rejected the IRS's argument, reading the wording of Section 6015(e) that permits taxpayers to seek "any other remedy provided by law" as validating the subject matter jurisdiction it had to determine innocent spouse claims.[37] However, the court stopped short of ruling on the innocent spouse claim, interpreting Section 6015(f) as granting initial subject matter jurisdiction to the Secretary of Treasury. The court ruled that in order for the bankruptcy court to provide review of an innocent spouse claim, the taxpayer must first follow the procedures prescribed in Section 6015(f) and file a Form 8857, *Request for Innocent Spouse Relief* with the IRS and wait until the IRS makes a determination, or until six months pass after making the request without the IRS issuing a determination.[38]

In her 2013 Annual Report to Congress, the National Taxpayer Advocate stated that nothing in the language of IRC § 6015 gives the Tax Court exclusive jurisdiction to determine innocent spouse claims.[39] Instead, the language of IRC § 6015(e) permits a taxpayer to petition the Tax Court for relief "in addition to any other remedy provided by law."[40] The view taken by the bankruptcy court in

32 Attorneys from the IRS Office of the Chief Counsel also may be appointed as Special Assistant United States Attorneys (SAUSAs) to handle certain tax-related bankruptcy litigation.

33 *See* 28 C.F.R. § 0.70.

34 *See*, *e.g.*, *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (2012); *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (2007); *U.S. v. Feda*, 97 A.F.T.R.2d 1985 (2006); *In re Mikels*, 524 B.R. 805, 807 (Bankr. S.D. Ind. 2015). However, the IRS Office of Chief Counsel supports permitting taxpayers to raise a IRC § 6015 claim in those contexts, and there has been a long-standing disagreement on this point between the DOJ Tax Division and the IRS Office of Chief Counsel.

35 *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017).

36 *Id.* The IRS cited to multiple cases in support of its argument that the Tax Court has exclusive jurisdiction over innocent spouse claims. *See*, *e.g.*, *U.S. v. LeBeau*, 109 AFTR 2d (RIA) 1369 (S.D. Cal. 2012) (district court jurisdiction to decide an innocent spouse issue only exists when the taxpayer files a refund suit while an innocent spouse petition is pending with the Tax Court); *U.S. v. Boynton*, 99 AFTR 2d (RIA) 2007 (S.D. Cal. 2007) ("It is difficult to believe that Congress would have created a situation fraught with possibilities for inconsistent judgments and contrary to basic principles of judicial economy with the phrase, '[i]n addition to any other remedy provided by law.'"); *In re French*, 86 AFTR 2d (RIA) (Bankr. N.D. Ohio 2000) (bankruptcy court to be an improper forum for innocent spouse determinations).

37 *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017). This is consistent with the National Taxpayer Advocate's position that nothing in the language of IRC § 6015 confers exclusive jurisdiction on the Tax Court for innocent spouse claims. *See* National Taxpayer Advocate 2013 Annual Report to Congress 408-19.

38 *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017).

39 National Taxpayer Advocate 2013 Annual Report to Congress 408-19.

40 IRC § 6015(e).

this case is consistent with the National Taxpayer Advocate's longstanding position detailed in several legislative recommendations she made to clarify this issue.[41]

The Court of Appeals for the Third Circuit in *Rubel v. Commissioner*[42] also interpreted the language of IRC § 6015(e) to determine whether the Tax Court had jurisdiction to review an IRS determination denying innocent spouse relief if the petition was filed after the ninety-day deadline prescribed by IRC § 6015(e)(1)(A). After the taxpayer missed the window statutorily prescribed for seeking Tax Court review of the IRS's unfavorable determination of her request for innocent spouse relief, the taxpayer petitioned the court to consider her claim on equitable grounds. The Court of Appeals for the Third Circuit recognized the Tax Court's jurisdiction in a plain language reading of the statute, but unless the IRS has failed to issue a notice a determination, the Tax Court's jurisdiction does not extend to petitions filed outside the 90-day timeframe regardless of equitable considerations supporting the extension of the prescribed time period. The Court of Appeals upheld the Tax Court's decision to dismiss the case.[43]

Relief on the Merits

Nineteen cases were decided on the merits and taxpayers received full relief in eight of those cases. Whether the spouse requesting relief had knowledge that there was a deficiency or that the nonrequesting spouse would not pay the tax owed on the return was a factor in 16 of the 19 decisions, including seven of the eight decisions where taxpayers received full relief.[44] In eight of the 19 cases, the nonrequesting spouse intervened to oppose relief. Of these eight cases, the IRS prevailed in five cases, and the requesting spouse prevailed in three.

In *Okorog v. Commissioner*, the taxpayer claimed she was a victim of significant spousal abuse, and that her husband tightly controlled all aspects of finance within their marriage.[45] She sought relief from a joint liability under the innocent spouse provisions of IRC § 6015(f).[46] The taxpayer claimed that her husband routinely kept her in the dark regarding financial matters and did not allow her to review any tax return documents prior to filing.[47] She asserted that she did not recall ever signing a tax return. The taxpayer's husband intervened to oppose her claim for innocent spouse relief, and disputed the validity of the returns.[48]

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41 The National Taxpayer Advocate has recommended that Congress address this issue in three Annual Reports to Congress. National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); National Taxpayer Advocate 2009 Annual Report to Congress 378 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*); National Taxpayer Advocate 2007 Annual Report to Congress 549 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*).

42 *Rubel v. Comm'r*, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016).

43 On July 5, 2017, which is outside of the reporting period for this annual report, the Circuit Court of Appeals for the Second Circuit reached the identical conclusion that the period of limitations in IRC § 6015(e)(1)(A) is jurisdictional and cited *Rubel*. *See Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017).

44 All three methods of relief under IRC § 6015 contain a knowledge element. Knowledge may be actual or constructive, and the absence of knowledge weighs in favor of relief. *See* IRC §§ 6015(b)(1)(C), 6015(c)(3)(C); Rev. Proc. 2003-61, 2003-2 C.B. 296 §§ 4.02(1)(b) and 4.03(2)(a)(iii); see *also* Notice 2012-8, §§ 4.02(3) and 4.03(2)(c), 2012-4 C.B. 309.

45 *Okorogu v. Comm'r*, T.C. Memo. 2017-53.

46 *Id*.

47 *Id*.

48 *Id*.

The court in *Okorog* applied the "tacit consent rule" to determine by inference whether the taxpayer had acquiesced to the validity of the joint returns her husband filed, despite the fact that she may have failed to sign the return.[49] The court described the tacit consent rule to be "an extension of the presumption of correctness that generally attaches to the Commissioner's determinations… ."[50] The court found that although the taxpayer had no knowledge of the validity of the returns, she nonetheless tacitly consented.[51] However, the taxpayer established that she suffered from constant emotional and physical abuse. The court ruled that her husband's opposition was simply vindictive and granted her claim for innocent spouse relief.[52]

In *Canty v. Commissioner*, the taxpayer sought relief from joint and several liability for deficiencies, penalties, and interest arising from tax returns she filed jointly with her husband in 2010 and 2011. During 2010 and 2011, the taxpayer's husband was self-employed in a solo law practice, and he prepared and filed a Schedule C with their joint return that erroneously reported several items related to the accounting of his law practice. Beginning in 2008, the taxpayer worked at the Nuclear Regulatory Commission (NRC) as a financial management analyst and the court noted she was still an employee of the NRC when the opinion was issued. After receiving a notice of deficiency from the IRS for the 2010 and 2011 tax years, the taxpayer mailed the IRS a Form 8857, *Request for Innocent Spouse Relief*, claiming that she was not involved in the operation of her husband's business, they did not have a joint account, and managed their finances separately. Therefore, she had no way to determine the accuracy of the numbers reported on the tax returns.[53] After the IRS issued a final determination denying her request for relief from joint and several liability, the taxpayer petitioned the Tax Court for review of the IRS's determination.

The requirements for innocent spouse relief are conjunctive, meaning if the spouse requesting relief fails to meet any one of the elements, it precludes relief. The taxpayer remained married to her husband at the time she submitted her claim for relief, meaning relief was unavailable through IRC § 6015(c). The court applied the relevant factors when determining whether the taxpayer was entitled to relief under IRC § 6015(b) or (f). Section 6015(b)(1)(c) provides that in order to obtain relief, the taxpayer must prove that she did not know or have reason to know of the understatements when she signed the return. Applying a reasonable person standard, the court held that the taxpayer failed to meet the knowledge element. Although she may not have reviewed the returns prior to signing them, she was not forced to sign the returns under duress, threat of harm, or coercion, and had no mental or physical health problems which prevented her from understanding the tax returns.[54] The court noted that she held a bachelor's degree in economics, a master's degree in business and public administration. A basic review of the tax returns would have revealed an "obvious error,"[55] and her husband did not attempt to conceal financial or tax information from her. Therefore, the court determined that she was not entitled to relief under IRC § 6015(b).

Finally, the court in *Canty* applied the seven-factor test from Revenue Procedure 2013-34 to determine whether the taxpayer should be granted equitable relief under IRC § 6015(f). The court held that the knowledge and good-faith elements weighed against granting relief, and determined the remaining five

49 See *Harris v. Comm'r*, T.C. Memo. 1961-324.
50 *Okorogu v. Comm'r*, T.C. Memo. 2017-53.
51 *Id*.
52 *Id*.
53 *Canty v. Comm'r*, T.C. Memo. 2016-169.
54 *Id*.
55 *Id*.

factors to be neutral. The court ruled that denying innocent spouse relief would not be inequitable to the taxpayer, and ruled in favor of the IRS.[56]

In *Taft v. Commissioner*, the taxpayer sought a refund of $1,570 from her 2012 return filing. The IRS offset the funds to satisfy a liability arising from unreported taxable dividends her husband failed to include on a 2010 jointly filed return. The couple divorced in 2013 after the taxpayer discovered in late 2011 that her husband was carrying on an extramarital affair.[57] To finance his affair in secret, her husband liquidated marital assets without her knowledge and instructed their longtime accountant to electronically file their joint 2010 return without the taxpayer's approval or review. Shortly after the divorce became final, she filed her 2012 tax return, showing an overpayment of over $5,000. The IRS offset a portion of this return to the joint tax liability resulting from her husband's unreported dividend income in 2010.[58] She filed IRS Form 8857, *Request for Innocent Spouse Relief*, requesting that the IRS relieve her of the liability resulting from the unreported dividends and that the IRS refund her money that was credited to that liability. The IRS determined that she qualified for relief from joint and several liability in the form of an allocation under Section 6015(c), but denied her relief under 6015(b).[59] Because the taxpayer was granted relief under section 6015(c), the IRS did not determine whether the taxpayer was entitled to relief under section 6015(f). In other words, the IRS was willing to relieve her of the joint liability, but refused to refund any funds that had been applied to the liability. In order to receive a refund, she would have to prove eligibility under Section 6015(b) or (f).[60] She then sought review of the IRS's determination in the Tax Court.

To determine whether the taxpayer was eligible for relief under Section 6015(b), the court applied a four-factor test[61] to determine whether the taxpayer knew or had reason to know of the dividends that gave rise to the understatement of tax. The court looked to:

1. The requesting spouse's level of education;
2. The requesting spouse's involvement in the family's business and financial affairs;
3. The presence of expenditures that appear lavish or unusual when compared to the family's past levels of income, standard of living, and spending patterns; and
4. The culpable spouse's evasiveness and deceit concerning the couple's finances.

The court noted that the following facts weighed in favor of granting her relief:

1. The taxpayer held an associate's degree in nursing, worked as a registered nurse, and lacked sufficient accounting or tax knowledge;
2. At the time of filing, she and her husband maintained separate bank accounts which the other could not access;
3. She did not engage in lavish or unusual expenditures; and

56 *Canty v. Comm'r*, T.C. Memo. 2016-169.
57 *Taft v. Comm'r*, T.C. Memo. 2017-66.
58 *Id*.
59 The IRS considers relief under IRC § 6015(b) before § 6015(c) and if relief is denied in full or in part under subsection (b), the IRS then considers relief under subsection (c) for the denied amounts. Internal Revenue Manual (IRM) 25.15.3.7.7(2), *IRC 6015(b) Determination* (Dec. 12, 2016).
60 *Taft v. Comm'r*, T.C. Memo. 2017-66.
61 *See Stevens v. Comm'r*, 872 F.2d 1499, 1505 (11th Cir. 1989).

4. Her husband engaged in a deceitful practice in order to prevent her from discovering the unreported dividends.[62]

These factors, when taken into account, adequately established that the taxpayer did not have reason to know of any understatement.[63] The court further held that, because of the extent of her husband's deceitfulness, it would be inequitable to hold the taxpayer liable for any deficiencies, given that Taxpayer did not receive any significant benefit from the understatement.[64] Therefore, the court determined that the taxpayer was entitled to innocent spouse relief under Section 6015(b). As the court determined that relief was available under Section 6015(b), it did not address whether she was entitled to relief under Section 6015(f).[65]

CONCLUSION

The overall number of cases litigating innocent spouse issues stayed constant from the last time it made the list of most litigated issues in 2015. Jurisdiction over innocent spouse relief continued to be a commonly litigated issue.

Some courts have held that the Tax Court has exclusive jurisdiction over innocent spouse claims, even though the plain wording of the statute permits a taxpayer to petition the Tax Court "in addition to any other remedy provided by law;" other courts have recognized that taxpayers may raise innocent spouse as an affirmative defense in a district court or bankruptcy court action, provided there is separate basis for jurisdiction (*e.g.*, refund claim, bankruptcy, etc.).[66] In one case discussed in this narrative, the bankruptcy court ruled that it had jurisdiction over such a claim.[67] Greater clarity in the statutory language would likely reduce litigation over jurisdiction and provide taxpayers additional forums in which to pursue their claims. For this reason, the National Taxpayer Advocate has made three legislative recommendations to address this issue and reiterates her position that taxpayers should be able to raise innocent spouse relief as a defense in collection actions, and the IRS Office of Chief Counsel supports those recommendations.[68]

The IRS is struggling to handle its workload while available resources continue to dwindle. As we continue to see the IRS move cases into litigation where the taxpayer prevails, it is unclear why these cases are not further developed at the administrative level. The IRS Innocent Spouse unit that processes

62 *Taft v. Comm'r*, T.C. Memo. 2017-66.

63 *Id*.

64 *Id*.

65 *Id*. The Taxpayer alternatively argued that she is entitled to relief under IRC § 6015(f), and that the Tax Court should invalidate Treas. Reg. § 1.6015-4(b), which bars refunds when the liability is paid. As the court determined that that relief was available under IRC §6015(b), it never reached the validity of the regulations argument.

66 IRC § 6015(e)(1)(A). The Department of Justice, Tax Division, has successfully argued that a taxpayer cannot raise innocent spouse as an affirmative defense in a district court or bankruptcy court action on jurisdictional grounds and prevailed in a number of cases. *See, e.g.*, *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (2012); *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (2007); *U.S. v. Feda*, 97 A.F.T.R.2d 1985 (2006); *In re Mikels*, 524 B.R. 805, 807 (Bankr. S.D. Ind. 2015).

67 *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017).

68 The National Taxpayer Advocate has recommended that Congress address this problem in three Annual Reports to Congress. National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); National Taxpayer Advocate 2009 Annual Report to Congress 378 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*); National Taxpayer Advocate 2007 Annual Report to Congress 549 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*).

IRC § 6015 claims should award relief whenever it is appropriate rather than denying relief whenever possible. When the Innocent Spouse Unit grants a taxpayer's innocent spouse relief without the need for litigation, the IRS attorneys, Appeals Officers, and other high graded employees would have more time to devote to resolving complex issues. Given courts' disagreement about jurisdiction and the ability of the requesting spouse to voluntarily withdraw such request without being penalized, we anticipate more litigation of requests for innocent spouse relief in the future.

The restrictive interpretation of IRC § 6015(e) adopted by some courts limits taxpayers' ability to seek innocent spouse relief in bankruptcy and district courts, infringing on taxpayers' *rights to challenge the IRS's position and be heard*, *to pay no more than the correct amount of tax*, *to appeal an IRS decision in an independent forum*, and *to a fair and just tax system*.[69]

69 In situations where the taxpayer is unable to pay the tax, these rights are not respected. In situations where a taxpayer is already before the district court or the bankruptcy court on a separate action, being forced to litigate in another forum creates an undue burden. To address these issues, the National Taxpayer Advocate is proposing a legislative change to apply various equitable provisions to the filing date of court petitions. *See* Legislative Recommendation: *Make Time Limits for Petitioning Tax Court and Bringing Suit in Other Federal Courts Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, infra*.

TAS Case Advocacy

OFFICE OF THE TAXPAYER ADVOCATE

Under Internal Revenue Code (IRC) § 7803(c)(2)(A), the Office of the Taxpayer Advocate, known as the Taxpayer Advocate Service (TAS) and led by the National Taxpayer Advocate, has four principal functions:

- Assist taxpayers in resolving problems with the IRS;
- Identify areas in which taxpayers are experiencing problems with the IRS;
- Propose changes in the administrative practices of the IRS to mitigate problems taxpayers are experiencing with the IRS; and
- Identify potential legislative changes that may be appropriate to mitigate such problems.

The first function described in the statute relates to TAS's case advocacy, which involves assisting taxpayers with their cases by protecting taxpayer rights and reducing taxpayer burden.[1] This section of the report discusses how TAS fulfills its mission to assist taxpayers with their specific issues and concerns involving IRS systems and procedures.

TAS's other three functions involve identifying and proposing changes to systemic problems affecting taxpayers. TAS employees advocate systemically by:

- Identifying IRS procedures that adversely affect taxpayer rights or create taxpayer burden; and
- Recommending solutions, either administrative or legislative, to improve tax administration.[2]

TAS serves as the voice of the taxpayer within the IRS by providing the taxpayer's view on IRS policies, procedures, or programs. While systemic advocacy is the responsibility of everyone in TAS, primary oversight of systemic advocacy efforts belongs to the Office of Systemic Advocacy and the National Taxpayer Advocate's attorney advisors. Additionally, TAS administers the Low Income Taxpayer Clinic (LITC) grant program[3] and oversees the Taxpayer Advocacy Panel (TAP).[4]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Taxpayers and practitioners can use the Systemic Advocacy Management System (SAMS) to submit systemic issues to TAS at www.taxpayeradvocate.irs.gov/SAMS.

3 The Low Income Taxpayer Clinic (LITC) program provides matching grants of up to $100,000 per year to qualifying organizations to operate clinics that represent low income taxpayers in disputes with the IRS and educate taxpayers for whom English is a second language about their taxpayer rights and responsibilities. LITCs provide services to eligible taxpayers for free or for no more than a nominal fee. *See* IRC § 7526 (2012).

4 The Taxpayer Advocacy Panel (TAP) is a Federal Advisory Committee established by the Department of the Treasury to provide a taxpayer perspective on improving IRS service to taxpayers. TAS provides oversight and support to the TAP program. The Federal Advisory Committee Act (5 U.S.C. App'x (1972)) prescribes standards for establishing advisory committees when those committees will furnish advice, ideas, and opinions to the federal government. *See also* 41 C.F.R. Part 102-3 (2001).

TAS CASE RECEIPT CRITERIA

Taxpayers typically seek TAS assistance with specific issues when:

- They have experienced a tax problem that causes financial difficulty;
- They have been unable to resolve their issues directly with the IRS through normal channels; or
- An IRS action or inaction has caused or will cause them to suffer a long-term adverse impact, including a violation of taxpayer rights.

TAS accepts cases in four categories: economic burden, systemic burden, best interest of the taxpayer, and public policy. See Figure 4.1.1, TAS Case Acceptance Criteria.

FIGURE 4.1.1

TAS Case Acceptance Criteria

As an independent organization within the IRS, TAS helps taxpayers resolve problems with the IRS and recommends changes to prevent future problems. TAS fulfills its statutory mission by working with taxpayers to resolve problems with the IRS.[1] TAS case acceptance criteria fall into four main categories.

Economic Burden	**Cases involving a financial difficulty to the taxpayer; an IRS action or inaction has caused or will cause negative financial consequences or have a long-term adverse impact on the taxpayer**
Criteria 1	The taxpayer is experiencing economic harm or is about to suffer economic harm.
Criteria 2	The taxpayer is facing an immediate threat of adverse action.
Criteria 3	The taxpayer will incur significant costs if relief is not granted (including fees for professional representation).
Criteria 4	The taxpayer will suffer irreparable injury or long-term adverse impact if relief is not granted.
Systemic Burden	**Cases in which an IRS process, system, or procedure has failed to operate as intended, and as a result the IRS has failed to timely respond to or resolve a taxpayer issue[2]**
Criteria 5	The taxpayer has experienced a delay of more than 30 days to resolve a tax account problem.
Criteria 6	The taxpayer has not received a response or resolution to the problem or inquiry by the date promised.
Criteria 7	A system or procedure has either failed to operate as intended, or failed to resolve the taxpayer's problem or dispute within the IRS.
Best Interest of the Taxpayer	**TAS acceptance of these cases will help ensure that taxpayers receive fair and equitable treatment and that their rights as taxpayers are protected.[3]**
Criteria 8	The manner in which the tax laws are being administered raises considerations of equity, or have impaired or will impair the taxpayer's rights.
Public Policy	**TAS acceptance of cases under this category will be determined by the National Taxpayer Advocate and will generally be based on a unique set of circumstances warranting assistance to certain taxpayers.[4]**
Criteria 9	The National Taxpayer Advocate determines compelling public policy warrants assistance to an individual or group of taxpayers.

1 Internal Revenue Code (IRC) § 7803(c)(2)(A)(i).

2 TAS changed its case acceptance criteria to generally stop accepting certain systemic burden issues. *See* IRM 13.1.7.3(d) (Feb. 4, 2015).

3 *See* IRM 13.1.7.2.3 (Feb. 4, 2015).

4 *See* Interim Guidance Memorandum (IGM) TAS-0317-008, *Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy* (Mar. 22, 2017).

In many of the economic burden cases, time is critical. If the IRS does not act quickly (*e.g.*, to remove a levy or release a lien), the taxpayer will experience additional economic harm.[5] Systemic burden cases include situations where an IRS process, system, or procedure has failed to resolve the taxpayer's issue.[6] Best interest of the taxpayer (Criteria 8) includes violations of the Taxpayer Bill of Rights (TBOR).[7] With respect to public policy cases (Criteria 9), the National Taxpayer Advocate has the sole authority to determine which issues are included in this criterion and will designate them by memorandum.[8] In fiscal year (FY) 2017, the National Taxpayer Advocate designated Criteria 9 cases to include private debt collection, passport revocation, denial, or limitation, exempt organization revocations due to failure to file a return, and Congressional referred cases that do not fit into any other category.

REFINING TAS'S CASE ADVOCACY OPERATIONS

TAS has implemented multiple strategies to focus on effectively advocating for taxpayers.

TAS Initiative to Expand Local Offices in Underserved Communities

Because populations shift over time and different taxpayer issues emerge, TAS periodically evaluates the placement of its local offices by considering case receipts and demographic information to identify locations either where more or less personnel is required in existing offices, or where TAS does not currently have a local office but a need for a physical location exists. As the IRS moves away from having a local presence, it becomes even more important that all taxpayers have access to a local TAS office.[9]

In FY 2018, TAS is opening new offices in Charlotte, North Carolina; El Paso, Texas; and Tallahassee, Florida.[10] TAS will continue to explore opening additional offices in FY 2018 and beyond as resources allow to ensure we are meeting the needs of taxpayers. We are accomplishing this expansion without increasing staffing levels through attrition and voluntary transfers from existing offices, and competitive announcements.

Routing Cases Based on Zip Code

Traditionally, when a case comes into TAS, it remains in the office where it was created, regardless of where the taxpayer lives. After piloting a zip code routing process that would allow us to transfer cases to the geographic area where the taxpayer is located, TAS was able to fully implement this initiative beginning in October 2017. This new workload management tool is the primary method to determine where new, non-congressional cases will be worked.[11] The process is flexible and can be adjusted as staffing patterns and case receipts change. Every effort is made to align taxpayers with a TAS office

5 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.1, *TAS Case Criteria 1-4, Economic Burden* (Feb. 4, 2015).

6 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.2, *TAS Case Criteria 5-7, Systemic Burden* (Feb. 4, 2015).

7 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.3, *TAS Case Criteria 8, Best Interest of the Taxpayer* (Feb. 4, 2015). *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

8 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.4, *TAS Case Criteria 9, TAS Public Policy* (Feb. 4, 2015). *See* IGM TAS-13-0317-008, *Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy* (Mar. 22, 2017).

9 *See* National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*), *supra*.

10 *NTA Announces New Offices to Help Advocate More Effectively for Underserved Populations*, (Aug. 16, 2017), https://tasis.ds.irsnet.gov/Pages/Articles/A-message-from-the-NTA.aspx (on file with TAS). In fiscal year (FY) 2016, TAS opened new offices in San Diego, California and St. Petersburg, Florida. *See* National Taxpayer Advocate 2016 Annual Report to Congress 518.

11 Cases from a congressional office will continue to be routed to the home state of the congressional office.

in their home state. The new process will provide a more effective and even distribution of cases and ensure a local advocate is providing timely assistance to taxpayers.

Community Outreach and Problem Solving Days

TAS outreach is critical in building relationships with our partners and taxpayers. Local Taxpayer Advocates (LTAs) are responsible for informing local communities and internal stakeholders about TAS and its mission to advocate on behalf of taxpayers. TAS outreach activities are focused on raising awareness of emerging tax law issues, identifying local initiatives, developing and maintaining congressional relationships, reaching external audiences, and educating IRS employees on taxpayer rights. LTAs completed 4,736 outreach events during FY 2017.[12]

In November 2017, TAS began Problem Solving Day (PSD) events as a part of its Outreach Program.[13] LTAs work with local partners to host community events, at which taxpayers can meet and discuss tax issues with TAS group managers, lead case advocates, case advocates, and technical advisors. These meetings often result in TAS opening a case to assist taxpayers in resolving problems with the IRS. For example, the National Taxpayer Advocate, in conjunction with the Manhattan and Brooklyn Local Taxpayer Advocate offices, participated in the Jones Day event. At the event, TAS held a PSD to assist practitioners with tax problems they were unable to resolve with the IRS. Additionally, the Las Vegas, Nevada TAS office participated in the Latino Tax Fest. During this event, TAS resolved 16 cases on site and opened three additional cases which could not be immediately resolved. In addition, TAS conducted one-on-one consultations with various individuals who brought their IRS notices to the event. During FY 2017, LTA offices held a total of 91 PSD events, at which employees assisted 1,270 taxpayers and opened 223 TAS cases.[14] TAS will continue conducting PSD events in the coming year.

Empathy in Action

To effectively serve taxpayers, the TAS workforce must be empathetic. Empathy requires employees to understand how a taxpayer's emotions may impact the taxpayer's behavior, and to know how to make connections with taxpayers to build mutual trust and respect. By recognizing the signs of distress and demonstrating compassion for various taxpayers and groups, case advocates can take appropriate actions to help taxpayers with their unique needs.

In seeking to understand the population it serves, TAS is ensuring that LTAs and their staff are best equipped to handle the challenges facing various taxpayers and groups. TAS created the Empathy in Action initiative to promote the practice of empathy throughout the organization. While TAS employees excel in being empathetic with taxpayers, senior leaders are continuing to help TAS employees develop empathetic techniques. These techniques include understanding of self and self-awareness, being cognizant of the feelings and emotions of other people, engaging in active listening, practicing open-mindedness, not passing judgment on taxpayers, and exhibiting emotional intelligence, when advocating for taxpayers. This initiative began with a TAS-wide Day of Empathy on November 15, 2017, where local TAS offices planned activities that will help employees focus on the practice of empathy throughout the year.

12 TAS, *National Outreach Events Breakdown* (2017) (on file with TAS).

13 See National Taxpayer Advocate FY 2018 Objectives Report to Congress 106 (Efforts to Improve Taxpayer Advocacy: *Problem Solving Days Outreach Events Support the Back to Basics Initiative of TAS*).

14 TAS, *Completed Problem Solving Events Summary* (2017) (on file with TAS).

Case Resolution Program at the FY 2017 IRS Nationwide Tax Forums

The Case Resolution Program (CRP), coordinated by TAS, is staffed with employees from TAS and the IRS. The purpose of the CRP is to resolve client cases presented by practitioners at each Tax Forum.

Several practitioners indicated they come to the IRS Nationwide Tax Forums solely to have their complex cases resolved and that obtaining Continuing Professional Education (CPE) credits was secondary. They state that working face-to-face with the employees allows them to properly present their case.

In 2017, the CRP assisted with a total of 851 cases, only four of which could not be resolved at the event and were accepted into TAS for further casework.[15] The top six issues that practitioners needed assistance with were:

- Penalties;
- Audit Reconsiderations;
- Processing Amended Returns;
- Account Notices/Inquiries;
- Exam Issues; and
- Identity (ID) Theft.[16]

The cases seen in the CRP vary in complexity. Some cases are resolved with the practitioner receiving detailed instructions on how to proceed in working with the IRS since the taxpayer had not responded to the IRS. In many instances, the practitioner had tried to work with the IRS and was unable to get resolution. These cases, such as adjustments made to tax accounts (done on-site by Wage and Investment (W&I) employees), information coordination to the proper IRS department, and work with offsite IRS employees to resolve issues, were resolved by the interviewer at the CRP. Practitioners are very satisfied with the outcome of their cases.[17] Over 52 percent of all cases received during the CRP were resolved by TAS, as depicted below.

FIGURE 4.1.2, Case Resolution Program Cases Resolved in FY 2017[18]

Business Operating Division Assigned Case	Total Cases Resolved	Percentage of Total
TAS	443	52.3%
Small Business and Self-Employed (SB/SE)	247	29.2%
W&I	157	18.5%
Appeals	0	0%
Total Cases	**847**	**100%**

15 Data obtained from TAMIS (Oct. 1, 2017).

16 *Id.*

17 Email to TAS Analyst (Nov. 28, 2017, 12:36 EST) (on file with TAS) (discussing how practitioners made statements expressing their satisfaction).

18 Data obtained from TAMIS (Oct. 1, 2017).

Taxpayer Digital Communication (TDC)

In April 2017, TAS began participating in a Taxpayer Digital Communication (TDC) pilot project that introduces a communication alternative in which taxpayers and case advocates can communicate and share documents via a secure web-based portal. TAS started conducting the pilot in Cleveland, Ohio; Dallas, Texas; Nashville, Tennessee; and New Orleans, Louisiana. The pilot was open to unrepresented taxpayers with issues involving the Earned Income Tax Credit (EITC) or levies.[19]

Under the pilot project, case advocates invited eligible taxpayers to participate during the first telephone or letter contact. When a taxpayer agreed to participate in the TDC pilot, the case advocate accessed the electronic webmail application and sent the taxpayer a welcome message. Taxpayers then went through an authentication process to secure permission to access the system. If taxpayers were successful with authentication, they could then communicate within the system, exchanging messages and sending documents to their case advocate, using computers, smartphones or tablets.

TAS focused the initial months of the pilot on employee training, project launch, and data collection. Throughout the pilot, TAS captured data on the number of taxpayers invited to participate and how many accepted, declined, created an online account, and communicated through the Secure Messaging system. TAS also conducted focus group sessions in each pilot site to capture employee opinions on the system, and their observations about taxpayers' perceptions of the system.[20]

TAS had to suspend pilot activity just after the six-month mark because the IRS suspended authentication for taxpayers wishing to create new online accounts in applications such as Secure Messaging, Get Transcript Online, View Your Balance, and Identity Protection PIN (IP PIN)[21] due to security concerns.[22] This unforeseen situation has put a hold on the pilot. TAS is continuing to evaluate how it will further use the pilot once the authentication system has been reactivated. In its November 2017 report based on focus group sessions at each pilot site, TAS was able to capture employee observations and opinions about taxpayers' willingness to use the system and employees' thoughts about the system.[23] Commentary and preliminary data from the EITC cases confirmed TAS's hypothesis regarding the ability of unrepresented, low income taxpayers to utilize digital systems such as TDC. While hundreds of TAS taxpayers were offered the option of using the TDC system, fewer than a dozen had set up or used an account at the time of the TAS Focus Group Report, underscoring the importance of having an omnichannel universe available to all taxpayers.[24] The preliminary data highlights the need to explore different approaches for authenticating taxpayers' access to IRS digital services.[25]

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19 TAS-13-0417-001, *Interim Guidance on the Taxpayer Digital Communications (TDC) Pilot* (Apr. 13, 2017).

20 *See* TAS Communications and Liaison, *TAS Focus Group Report: Taxpayer Digital Communication (TDC) Pilot* (Nov. 2017).

21 The Identity Protection PIN (IP PIN) is a six digit number used to validate a taxpayer's identity. Taxpayers filing electronically will be prompted by the software to input an IP PIN. If a taxpayer files on paper, the IP PIN is placed in the section of the return titled "Identity Protection PIN." *See* IRM 25.23.2.20, *Identity Protection Personal Identification Number* (Sept. 15, 2017).

22 The IRS suspended the Equifax contract after Equifax disclosed cyber criminals breached its systems. As a result of the contract suspension, the IRS is unable to create new online accounts for taxpayers. John McCrank, *IRS puts Equifax Contract on Hold During Security Review*, Reuters, Oct. 13, 2017, https://www.reuters.com/article/us-equifax-cyber/irs-puts-equifax-contract-on-hold-during-security-review-idUSKBN1CI2G9.

23 *See* TAS Communications and Liaison, *TAS Focus Group Report: Taxpayer Digital Communication (TDC) Pilot* (Nov. 2017). *See also* Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*, *supra*.

24 *Id.*

25 *See* TAS Communications, Stakeholder Liaison and Online Services, *TAS Focus Group Report: Taxpayer Digital Communication (TDC) Pilot* (Nov. 2017). *See also* Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*, *supra*.

This is particularly important for taxpayers sending information or documents, but not necessarily communicating via secure messaging.

CASE RECEIPT TRENDS IN FISCAL YEAR 2017

As described above, the TAS Case Advocacy function is primarily responsible for direct contact with individual taxpayers, business taxpayers, tax-exempt entities, their representatives, and congressional staff to resolve specific problems taxpayers are experiencing with the IRS. Information from these contacts and case results are vital to TAS's statutory mission to propose changes in the IRS's administrative practices to alleviate taxpayers' problems and to identify potential legislative changes to relieve such problems. The National Taxpayer Advocate and her Attorney Advisors[26] often use Case Advocacy's findings as the basis for many of the Most Serious Problems and Legislative Recommendations in the National Taxpayer Advocate's Annual Report to Congress.

Intake Strategy

TAS's intake strategy allows taxpayers to receive assistance at the earliest possible moment while reserving the skills and experience of case advocates to focus on the most complex cases, and those taxpayers most in need of TAS assistance.

The primary mission of TAS's intake strategy is to resolve taxpayer issues on initial contact, to obtain additional information about the underlying issues, to determine the urgency of the issue, to help the taxpayer understand what to expect from TAS, to build the case, and ensure that appropriate cases come to TAS. Under the TAS intake strategy, all Intake Advocates (IAs) conduct in-depth interviews with taxpayers to determine the correct disposition of their issues. Intake advocates:

- Assist taxpayers with self-help options;
- Take actions where possible to resolve the issue upfront;
- Create cases after validating the taxpayer meets TAS criteria; or
- Refer the taxpayer to the appropriate Business Operating Division (BOD) for assistance.

TAS expanded the authority granted to Intake Advocates by allowing them to resolve more types of taxpayer problems during initial contact or to take additional actions to resolve or suspend actions once TAS establishes a case and assigns it to a case advocate.[27]

Under the TAS Centralized Case Intake (CCI) process, IRS employees who handle taxpayer calls from the NTA toll-free line, transfer calls they believe meet TAS criteria directly to TAS IAs in the CCI sites, providing the taxpayer immediate access to a TAS employee.[28]

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26 TAS Attorney Advisors do not purport to offer formal legal advice or represent the agency, but they are indispensable in enabling the National Taxpayer Advocate to develop an independent perspective and advocate as the law intends, including by providing support to TAS case advocates to assist taxpayers in legally complex cases and by writing large sections of the National Taxpayer Advocate's annual reports to Congress.

27 TAS 13-2-1, *Authority of the Taxpayer Advocate Service Employees to Perform Certain Administrative Functions* (July 27, 2015). Previously, when the IRS toll-free line assistors received a call they determined met TAS criteria, they would enter the case onto the Accounts Management System, and then later transfer it directly to TAS. This process continues for all IRS toll-free lines except the NTA toll-free line. Now, NTA toll-free calls are handled under the Centralized Case Intake (CCI) process.

28 Previously, when the IRS toll-free line assistors received a call they determined met TAS criteria, they would enter the case onto the Accounts Management System, and then later transfer it directly to TAS. This process continues for all IRS toll-free lines except the NTA toll-free line. Now, NTA toll-free calls are handled under the CCI process.

In FY 2017, CCI IAs answering calls transferred from the NTA toll-free line created cases in 67 percent (42,065 of 62,755) of calls.[29] Of the remaining 33 percent (20,690) of the calls, CCI IAs assisted taxpayers without creating a new case. Providing taxpayers this assistance during the initial contact allows TAS to use its specialized skills and resources on more complex situations. Additionally, IAs processed 986 quick closures.[30]

TAS's intake strategy allows taxpayers to receive assistance at the earliest possible moment while reserving the skills and experience of case advocates to focus on complex or difficult cases, and those taxpayers most in need of TAS assistance. In FY 2017, TAS provided training to new intake advocates that will further our efforts to provide assistance at the earliest possible moment. As shown in Figure 4.1.3, the intake strategy has contributed to the reduction of the number of cases established in TAS inventory because intake advocates are able to build the case, obtain better information about issues and urgency at the initial contact, and help taxpayers understand what to expect from TAS, thereby resolving taxpayer issues over the telephone or through another option, such as self-help, or referral to a specific IRS unit or assistance line.

Volume of Cases

In FY 2017, TAS received 167,336 cases, closed 167,687 cases, providing relief to taxpayers in approximately 79 percent of the closed cases.[31] Of those closures, 1,010 were resolved as "quick closure" cases by an Intake Advocate, freeing up case advocates to focus on more complex cases requiring more analysis and multiple actions to resolve.[32] Another 9,500 (6 percent) of taxpayers received relief directly from the IRS prior to TAS intervention.[33] Figure 4.1.3 compares FY 2016 and FY 2017 case receipts and relief rates by case acceptance category.

29 The Intake Strategy includes all Intake Advocates (IAs) in TAS, but tracks the number of calls received by our CCI IAs who use the Aspect phone system (currently migrating to the Infrastructure Update Project (IUP). The Taxpayer Advocate Management Information System (TAMIS) is used to capture cases meeting TAS criteria. TAS is currently working with IRS Information Technology on improvements to capture the work of all IAs, providing additional capabilities for case building and resolution. These features are scheduled to be delivered by September 30, 2018.

30 When IAs take immediate action to resolve taxpayer issues, they process this as a "quick closure" on TAMIS under TAS 13-2-1, *Authority of the Taxpayer Advocate Service Employees to Perform Certain Administrative Functions* (July 27, 2015). Cases assigned to case advocates are not "quick closure" cases.

31 Data obtained from TAMIS (Oct. 1, 2017).

32 *Id.*

33 *Id.*

FIGURE 4.1.3, TAS Case and Intake Receipts and Relief Rates, FYs 2016–2017[34]

Case Categories	Receipts FY 2017	Receipts FY 2016	Percent Change	Relief Rates FY 2017	Relief Rates FY 2016	Percent Change
Economic Burden	90,868	119,324	-23.8%	75.3%	74.5%	-1.1%
Systemic Burden	75,795	89,681	-15.5%	83.1%	82.4%	-0.9%
Best Interest of the Taxpayer	448	382	17.3%	82.4%	76.5%	-7.2%
Public Policy	225	122	84.4%	79.8%	78.3%	-1.9%
Subtotal	**167,336**	**209,509**	**-20.1%**	**78.9%**	**77.9%**	**-1.3%**
Calls Resolved by Intake Advocates	20,690	21,554	-4.0%			
Grand Total Receipts	**188,026**	**231,063**	**-18.6%**			

Case Complexity

TAS monitors the complexity of its work to ensure it meets taxpayers' needs efficiently by assigning workload to match the skills of its employees, by identifying when case advocates need additional resources (such as technical advisor assistance,[35] Attorney Advisors to the National Taxpayer Advocate advice, or Counsel advice)[36] and by balancing case inventory levels between TAS offices to ensure prompt action. TAS measures case complexity in a number of ways, including whether a case involves multiple account-related issues or multiple tax periods and whether case advocates need technical advice, thus requiring more resources to resolve the matter.[37] An account-related issue is any tax issue that an individual or business taxpayer has requested TAS to resolve with the IRS. These issues include issues or activities listed under the IRS's Accounts Management function. TAS guidance requires that case advocates must resolve all issues before closing a case.[38] Case advocates must identify primary and secondary core issue codes (PCIC and SCIC, respectively) on cases and record them in the Taxpayer Advocate Management Information System (TAMIS), as a way to measure complexity.[39] More factors may be identified as the case evolves.

34 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017).

35 IRM 13.1.12.1.1, *Technical Advisors' Roles and Responsibilities* (Nov. 13, 2009), states in part that "[t]echnical Advisors are responsible for resolving the most technically complex or sensitive issues using effective research, communication, coordination, and negotiating skills."

36 TAS employees often need legal advice to resolve their cases. Attorneys in the Office of Chief Counsel provide legal advice on the correct interpretation of the IRC. *See* IRC § 7803(b)(2) and IRM 13.1.10.2, *Obtaining Legal Advice From Chief Counsel* (April 9, 2012). TAS Attorney Advisors do not purport to offer formal legal advice or represent the agency, but they provide support throughout TAS. *See supra* note 26.

37 IRM 13.4.5.4, *Case Factors Screen* (July 16, 2012). TAS uses a complexity factor screen in its case management system. This screen contains 24 factors, where the presence of any one of these factors indicates greater case complexity. For example, one factor is whether the case involves analysis of the assessment, collection, or refund statute date to determine if it is about to expire.

38 IRM 13.1.21.1.1, *Introduction* (May 4, 2016).

39 IRM 13.1.16.13.1, *Issue Codes* (Mar. 28, 2017). IRM 13.1.16.13.1.2, *Primary Core Issue Code* (Mar. 28, 2017), states the primary core issue code (PCIC) is a three-digit code that defines the most significant issue, policy, or process within the IRS that underlies the cause of the taxpayer's problem. IRM 13.1.16.13.1.3, *Secondary Core Issue Code* (Mar. 28, 2017), states that the secondary core issue code (SCIC) identifies multiple issues involved in the case that TAS spent time researching or working to resolve.

Complex cases include collection cases (levy release with alternative collection solutions, return of levy proceeds, offer in compromise (OIC), or seizure prevention), ID Theft cases, EITC cases, examination cases with multiple periods and technical issues, or income verification cases for self-employed persons with or without EITC issues.

TAS closed over 94,000 cases (56 percent of all closures) with one or more SCICs, which means the taxpayer had more than one account-related issue to resolve, which is a slight decrease from last year where 59 percent of TAS closed cases reflected multiple issues.[40] This decrease reflects a higher concentration of issues that generally involve a single issue, like refund, wage verification, and return processing issues, which usually involve a problem impacting a current year return only.[41]

In addition to cases with multiple issues, TAS technical advisors assisted case advocates in understanding and resolving the complex issues in over 10,300 TAS closed cases in FY 2017.[42] Moreover, over 32 percent of TAS closed cases involved multiple tax periods.[43] These numbers continue to indicate that while the overall number of TAS cases may have declined, the inventory is complex, requiring more resources, training, and direct time.

Most Prevalent Issues in TAS Cases

Figure 4.1.4 represents the top ten sources of TAS receipts by PCIC categories from all sources without regard to TAS criteria, comparing FY 2016 and FY 2017. The "Other TAS Receipts" category encompasses the remaining 118 PCICs not in the top ten.[44]

40 Data obtained from TAMIS (Oct. 1, 2017).

41 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017).

42 Data obtained from TAMIS (Oct. 1, 2017).

43 *Id.*

44 TAMIS Coding Reference Guide (Sept. 5, 2017).

FIGURE 4.1.4, Top 10 Issues for Cases Received in TAS in FYs 2016–2017[45]

Rank	Issue Description	FY 2016	FY 2017	FY 2017 Percent of Total	Percent Change FY 2016 to FY 2017
1	Identity Theft (ID Theft)	41,819	23,248	13.9%	-44.4%
2	Pre-Refund Wage Verification Hold	29,174	20,014	12.0%	-31.4%
3	Earned Income Tax Credit (EITC)	11,378	13,901	8.3%	22.2%
4	Processing Amended Return	9,671	7,713	4.6%	-20.2%
5	Taxpayer Protection Program (TPP) Unpostables	7,160	6,906	4.1%	-3.5%
6	Other Refund Inquiries and Issues	3,855	5,822	3.5%	51.0%
7	Processing Original Return	6,325	5,434	3.2%	-14.1%
8	Unpostable and Reject	6,938	4,942	3.0%	-28.8%
9	Health Insurance Premium Tax Credit for Individuals under IRC § 36B	10,910	4,643	2.8%	-57.4%
10	Reconsideration of Audits and Substitute for Return under IRC § 6020(b)	6,264	4,596	2.7%	-26.6%
Other TAS Receipts[46]		76,015	70,117	41.9%	-7.8%
Total TAS Receipts		**209,509**	**167,336**	**100.0%**	**-20.1%**

Refund inquiries and issues entered the top ten PCICs this year. Financially-strapped taxpayers anticipating refunds often rely on the customary timely release of those refunds to meet necessary living expenses or to resolve significant economic burdens, like automobile repairs, medical procedures, or higher-education expenses. These taxpayers often file early, and when using e-file and direct deposit, may have received those refunds within 10 days in prior years. However, in 2017, the IRS announced the delay of any refund involving certain refundable credits due to the Protecting Americans from Tax Hikes (PATH) Act until after February 15.[47] The IRS also updated the Where's My Refund Online Application with messaging to educate taxpayers to not expect their refunds earlier than 21 days.[48] When legislative requirements or IRS procedures delay the release of refunds, taxpayers are directed to TAS, or seek out TAS, for assistance because they meet our criteria, and because the IRS is unable to resolve the problem in time to address the individual taxpayer's specific needs through ordinary IRS timeframes.

TAS Identity Theft (ID Theft) receipts declined by 44 percent as the IRS also reported a significant reduction in ID Theft work after implementing processes and procedures to better identify

45 Data obtained from TAMIS (Oct. 1, 2016; Oct 1, 2017).

46 Levies, open audit-non EITC, injured spouse claims, installment agreements, and returned/stopped refunds round out the top fifteen issues which comprise a total of 11.3 percent of the total case receipts.

47 Protecting Americans from Tax Hikes Act of 2005 (PATH Act), Pub. L. No. 114-113, Div. Q, Title II, § 201, 129 Stat. 2242, 3076 (2015) (codified at IRC § 6402(m)). IRC § 6402(m) mandates that no credit or refund for an overpayment for a taxable year shall be made to a taxpayer before Feb. 15 if the taxpayer claimed the Earned Income Tax Credit (EITC) or Additional Child Tax Credit on the return. *See* National Taxpayer Advocate FY 2018 Objectives Report to Congress 61–69 (Area of Focus: *TAS Continues to Pursue Improvements to the IRS's Administration of the Earned Income Tax Credit (EITC), Particularly With Recent Changes to the Law*).

48 *See* IRS, *2017 Tax Season Refund Frequently Asked Questions*, https://www.irs.gov/refunds/tax-season-refund-frequently-asked-questions (last visited Dec. 11, 2017).

potentially-fraudulent returns and provide protection to victims of ID Theft.[49] TAS has worked closely with the IRS to address and improve treatment of victims and processes designed to prevent fraudulent returns from going through.[50] However, TAS's ongoing high volume of ID Theft cases indicates that taxpayers continue to face sizeable, complex problems from ID Theft, despite a decline from the previous year.[51] Erroneous information resulting from ID Theft can impact a victim's account for multiple tax periods and cause multiple issues, and often requires action from the Accounts Management, Examination, and Collection functions.

ECONOMIC BURDEN CASES

Economic burden (EB) cases often occur where an IRS action or inaction has caused or will cause negative financial consequences or have a long-term adverse impact on the taxpayer. For the sixth consecutive fiscal year, more than half of TAS's case receipts involved taxpayers experiencing EB.[52] Because these taxpayers face potential immediate adverse financial consequences, TAS requires employees to work the cases using accelerated timeframes.[53] TAS receives 41 percent of their cases as referrals from IRS employees, who are directed to send taxpayers meeting our criteria to us for resolution, if they are unable to resolve the taxpayer's issue within 24 hours.[54] During FY 2017, the IRS received approximately 96 million telephone calls on its toll-free lines.[55] However, during the 2017 filing season, 79 percent of these calls were answered.[56] Taxpayers calling a toll-free number with an issue that requires submission of documentation, completed tax forms, or other paper documentation cannot be "helped" over the phone. TAC offices require the taxpayer to schedule an appointment and may not

49 In calendar year 2016, the IRS stopped 883,000 confirmed identity theft returns, a 37 percent drop from 2015. Through August 2017, the IRS stopped 443,000 confirmed identity theft returns, a 30 percent decline from the same period in 2016. The number of people reporting to IRS that they were victims of ID Theft through August 2017 was 189,000 taxpayers, a drop of about 40 percent from the same period in 2016. *See* Prepared Remarks of Commissioner John Koskinen at the Security Summit Press Briefing (Oct. 17, 2017).

50 National Taxpayer Advocate 2015 Annual Report to Congress 180–87 (Most Serious Problem: *Identity Theft (IDT): The IRS's Procedures for Assisting Victims of IDT, While Improved, Still Impose Excessive Burden and Delay Refunds for Too Long*).

51 For a detailed discussion of identity theft issues see Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*. *See also* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayer Returns Are Still Being Improperly Stopped by These Systems, Resulting in Refund Delays, supra.*; National Taxpayer Advocate 2016 Annual Report to Congress 151–60 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*); National Taxpayer Advocate 2015 Annual Report to Congress 180–87 (Most Serious Problem: *Identity Theft (IDT): The IRS's Procedures for Assisting Victims of IDT, While Improved, Still Impose Excessive Burden and Delay Refunds for Too Long*); National Taxpayer Advocate 2013 Annual Report to Congress 75–83 (Most Serious Problem: *Identity Theft: The IRS Should Adopt a New Approach to Identity Theft Victim Assistance That Minimizes Burden and Anxiety for Such Taxpayers*).

52 See National Taxpayer Advocate 2012 Annual Report to Congress 533 (TAS Case Advocacy), which reflects that 60.6 percent of TAS case receipts included economic burden (EB) factors in FY 2012. Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct.1, 2017).

53 IRM 13.1.18.3(1), *Initial Contact* (May 5, 2016). The TAS employee is to contact the taxpayer or representative by telephone within three workdays of the TARD for criteria 1-4 cases and within five workdays of the Taxpayer Advocate Received Date (TARD) for criteria 5-9 cases to notify of TAS's involvement. Per IRM 13.1.18.1.1, *Working TAS Cases* (Feb. 1, 2011), TAS's policy is that cases involving EB will be worked sooner than other cases.

54 Data obtained from TAMIS (Oct. 1, 2017). *See also* IRM 21.3.5.4.6.2, *Interim Referral Procedures* (Oct. 22, 2015).

55 IRS, Joint Operations Center (JOC), *Snapshot Reports: Enterprise Snapshot, IRS Enterprise Total* (final week of each fiscal year (FY) for FY 2008 through FY 2016) (showing telephone call volumes exceeding 100 million in every year).

56 IRS, JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Apr. 22, 2017). *See also* Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment, supra.*; Literature Review: *Improving Telephone Service Through Better Quality Measures*, *infra*.

be accessible to taxpayers in rural areas or taxpayers with transportation challenges.[57] TAS is the only resource available to taxpayers needing immediate intervention.

FIGURE 4.1.5[58]

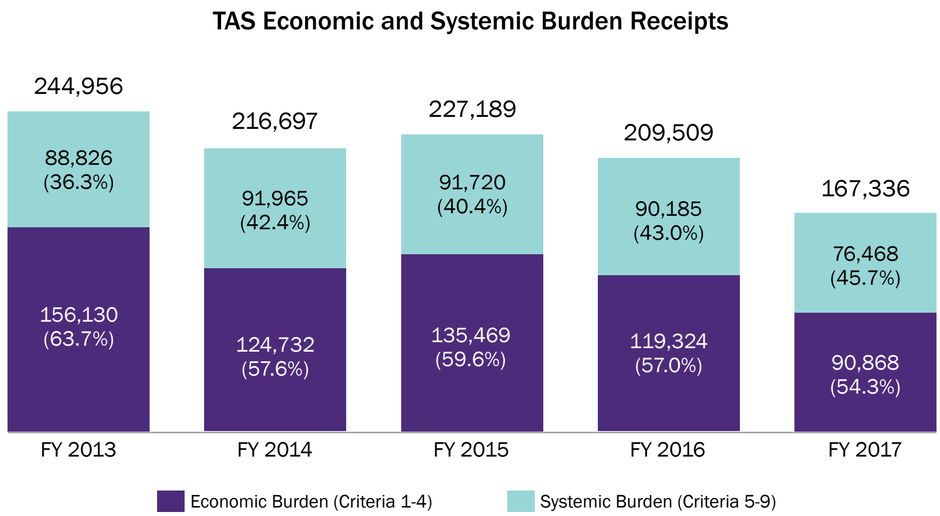


Figure 4.1.6 below shows the top five issues driving EB receipts, which represent the bulk of EB case receipts. TAS dedicates significant resources to resolving the systemic causes of these issues, and as discussed in the Most Serious Problems section of this and past reports, provides recommendations to the IRS to improve processes that cause taxpayers to experience economic or systemic burden.[59]

57 See Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance, supra. See also* National Taxpayer Advocate 2016 Annual Report to Congress 86-97 (Most Serious Problem: *Geographic Focus: The IRS Lacks an Adequate Local Presence in Communities, Thereby Limiting Its Ability to Meet the Needs of Specific Taxpayer Populations and Improve Voluntary Compliance*).

58 Data obtained from TAMIS (Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

59 See, e.g., Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*. *See also* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayer Returns Are Still Being Improperly Stopped by These Systems, Resulting in Refund Delays, supra*; National Taxpayer Advocate 2016 Annual Report to Congress 138–50 (Most Serious Problem: *Earned Income Tax Credit (EITC): The Future State's Reliance on Online Tools Will Harm EITC Taxpayers*).

FIGURE 4.1.6, Top Five Issues Causing Economic Burden, FYs 2016–2017[60]

Rank	Issue Description	FY 2016	EB Receipts as % Total EB Receipts for Issue FY 2016	FY 2017	EB Receipts as % Total EB Receipts for Issue FY 2017	EB % Change FY 2016–FY 2017
1	Identity Theft	26,710	22.4%	13,360	14.7%	-50.0%
2	Pre-Refund Wage Verification Hold	16,442	13.8%	11,329	12.5%	-31.1%
3	Earned Income Tax Credit	8,790	7.4%	10,937	12.0%	24.4%
4	Taxpayer Protection Program Unpostables	5,679	4.8%	4,217	4.6%	-25.7%
5	Levies	4,850	4.1%	3,873	4.3%	-20.1%

As discussed in the next section, the decline in Identity Theft and Wage Verification receipts over the years shows that TAS's inventory became bloated because of IRS processes' failure to address taxpayer concerns relating to these issues. Through TAS advocacy and collaboration, IRS ultimately adopted many of the National Taxpayer Advocate's recommendations, and as a result, TAS cases in these categories have declined in recent years, bringing case receipts down to a more manageable level.

Identity Theft (ID Theft)

The number one reason for which taxpayers sought assistance from TAS in FY 2017 was ID Theft issues.[61] TAS experienced a decrease in ID Theft case receipts partly because the IRS also experienced a decrease in ID Theft reports, but also because TAS created a separate issue code to track returns impacted by the Taxpayer Protection Program (TPP).[62] TAS added this issue code to better quantify and understand the taxpayers we work with who are not actual victims of ID Theft, but whose returns are "stopped" by IRS filters designed to detect potential ID Theft. TAS did this in response to the high "false positive" rate reported by TPP, and has collaborated with Return Integrity and Compliance Services (RICS) to improve the filters that "catch" returns.[63]

Over the past 14 years, the National Taxpayer Advocate has consistently advocated for taxpayers whose legitimate refunds have been unreasonably delayed by the IRS, recommending improvements to reduce taxpayer burden while preventing refund fraud. As a result of TAS's advocacy, the IRS now tracks false positive rates for its ID Theft and refund fraud filters. Towards that end, the IRS has set a goal for its ID Theft filters of about 50 percent and intends in the future to set a goal for its refund fraud filters, despite its initial rejection of this TAS recommendation. As part of the IRS's phased retirement of its Electronic Fraud Detection System (EFDS) system, the Return Review Program (RRP), a nimbler and more flexible system that has the capacity to have its filters adjusted in real time, is the primary system

60 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017). TAS computed the top five EB issue codes using only the PCIC. Often TAS cases involve more than one issue and TAS tracks this data; however, these are not included within this computation to avoid counting a case more than once.

61 Data obtained from TAMIS (Oct. 1, 2017).

62 *See Taxpayer Protection Program*, *infra*.

63 See Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayer Returns Are Still Being Improperly Stopped by These Systems, Resulting in Refund Delays*, *supra*.

responsible for selecting returns where refund fraud is suspected.[64] Despite the integration of the IRS's new RRP system as its primary refund fraud selection system, the IRS made no filter adjustments to the system during the 2017 filing season. Consequently, it failed to use the system's full capacity to be adjusted in real time, which is one reason for the RRP's 66 percent false positive rate between January 1, 2017, through September 30, 2017.[65]

While the overall cycle time to bring relief to a victim of ID Theft improved after the IRS created a single ID Theft Victim Assistance (IDTVA) organization, there is a category of ID Theft victims who continue to not benefit from IDTVA. As the National Taxpayer Advocate discusses in this and prior reports, several IRS functions were not included in the IRS's reorganization of ID Theft functions.[66] As a result, there are no procedures in place to allow ID Theft victims with account issues spanning multiple IRS functions outside of IDTVA to deal with a sole point of contact, which increases the risk of an ID Theft case falling through the cracks. One way to ensure that ID Theft victims do not fall through the cracks is to assign a sole IRS contact person who would interact with the taxpayer throughout and oversee the resolution, no matter how many different IRS functions need to be involved behind the scenes.

The National Taxpayer Advocate initially addressed ID Theft as a Most Serious Problem in her 2004 Annual Report to Congress,[67] and she further identified problems and recommended solutions in later reports.[68] Since 2010, TAS has helped over 325,000 ID Theft victims resolve their account problems.[69] In FY 2017, TAS obtained relief for about 83 percent of ID Theft victims.[70] In FY 2017, TAS worked ID Theft cases to their conclusions in 74 days on average, which is significantly less than the IRS's normal processing time of 120 days for most cases, and as much as 180 days for more complex cases.[71] TAS closed 23,248 ID Theft cases in FY 2017, including 57 percent with EB.[72]

64 The IRS Electronic Fraud Detection System (EFDS) system retirement includes three systems: Return Review Program (RRP), Enterprise Case Selection (ECS), and Enterprise Case Management (ECM). Of the three, RRP is used for anomaly detection, but fraud processing still relies on the legacy EFDS systems to perform case management screening and to take case actions.

65 A false positive occurs when a system selects a legitimate return and delays the refund past the prescribed review period. *See* IRS response to TAS Information Request (Oct. 19, 2017). *See also* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayer Returns Are Still Being Improperly Stopped by These Systems, Resulting in Refund Delays, supra.* Despite the RRP's ability to be adjusted in real time, the IRS has failed to fully utilize the system's capabilities.

66 *See* Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*. *See also* National Taxpayer Advocate FY 2017 Objectives Report to Congress 119–22 (Area of Focus: *The IRS Re-Engineering of Its Identity Theft Victim Assistance Procedures Is a Step in the Right Direction But Does Not Go Far Enough*).

67 *See* National Taxpayer Advocate 2004 Annual Report to Congress 132–42 (Most Serious Problem: *Inconsistent Campus Procedures*).

68 *See* Most Serious Problem: *Fraud Detection: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*; National Taxpayer Advocate 2016 Annual Report to Congress 151–60; National Taxpayer Advocate 2015 Annual Report to Congress 180–87; National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, 44–55; National Taxpayer Advocate 2013 Annual Report to Congress 75–83; National Taxpayer Advocate 2012 Annual Report to Congress 42–67; National Taxpayer Advocate 2011 Annual Report to Congress 48–68; National Taxpayer Advocate 2009 Annual Report to Congress 307–11; National Taxpayer Advocate 2008 Annual Report to Congress 79–93; National Taxpayer Advocate 2007 Annual Report to Congress 96–115; National Taxpayer Advocate 2005 Annual Report to Congress 180–91; National Taxpayer Advocate 2004 Annual Report to Congress 133–36.

69 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

70 Data obtained from TAMIS (Oct. 1, 2017).

71 IRM 25.23.2.10, *IDTVA Case Processing Time Frames* (Mar. 30, 2017). Data obtained from TAMIS (Oct. 1, 2017).

72 Data obtained from TAMIS (Oct. 1, 2017).

As Figures 4.1.7 and 4.1.8 demonstrate, TAS had significant ID Theft receipts from FY 2010 to FY 2017, while TAS greatly improved its timeframes for completing ID Theft cases over time.[73] In FY 2017, ID Theft receipts comprised 14 percent of all receipts and 15 percent of EB receipts.[74] While TAS's case receipts from ID Theft have declined, the National Taxpayer Advocate continues to monitor any activities related to processing the returns or correcting the accounts of ID Theft victims.[75]

FIGURE 4.1.7[76]

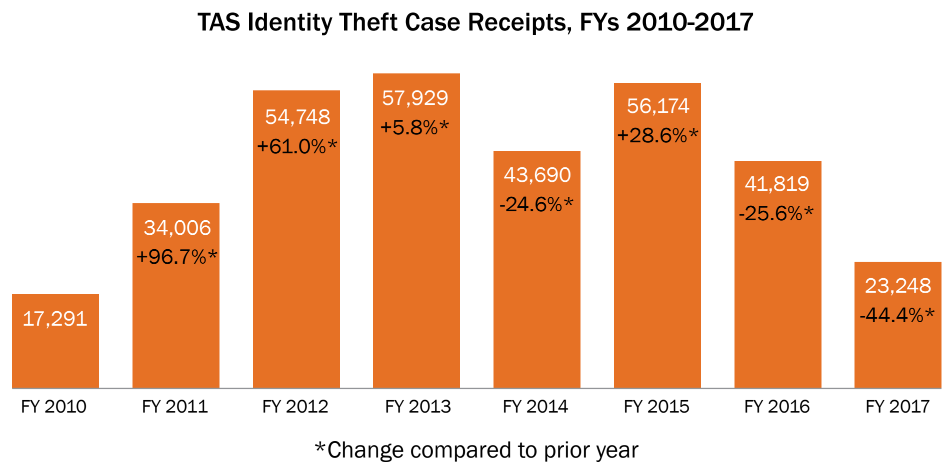
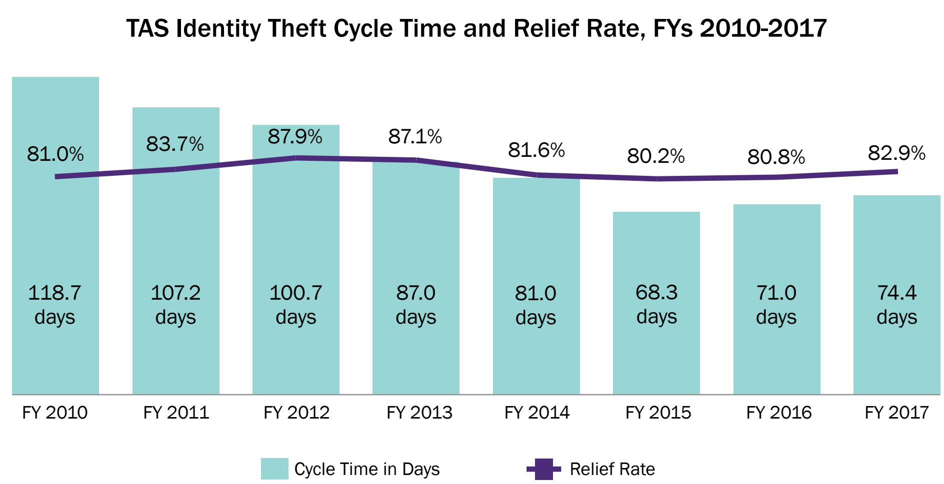


FIGURE 4.1.8[77]



73 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

74 Data obtained from TAMIS (Oct. 1, 2017).

75 *See* National Taxpayer Advocate FY 2017 Objectives Report to Congress 119–22 (Area of Focus: *The IRS Re-Engineering of Its Identity Theft Victim Assistance Procedures Is a Step in the Right Direction But Does Not Go Far Enough*).

76 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

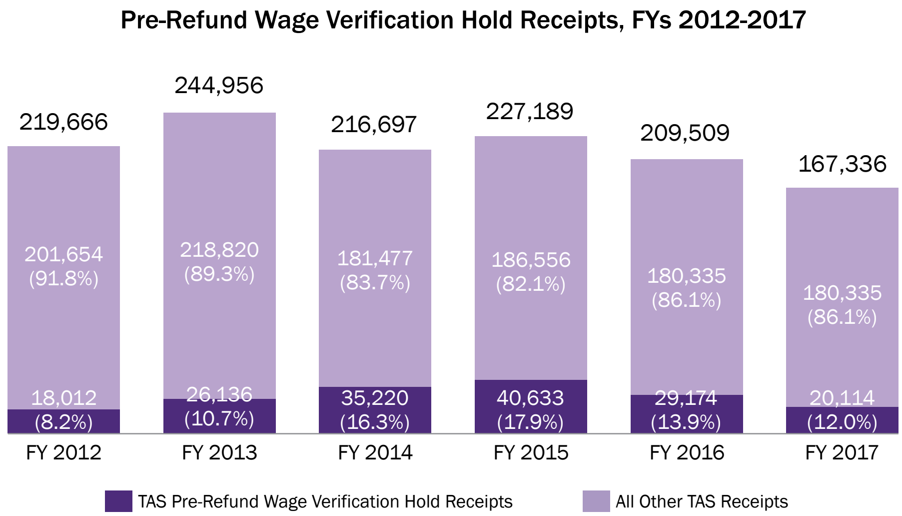
77 *Id.*

Pre-Refund Wage Verification Holds

The IRS employs various models and data mining techniques in an attempt to prevent issuing fraudulent refunds. For example, the IRS uses the pre-refund wage verification hold (PRWVH) to delay refunds pending wage and withholding verification. In the past, the IRS's actions have raised significant taxpayer rights issues and brought increasing numbers of taxpayers to TAS.[78]

In FY 2017, while the TAS PRWVH cases declined 31 percent from FY 2016, they again constituted the second most frequent reason that taxpayers came to TAS for assistance. PRVWH cases were 12 percent of TAS's total case receipts in FY 2017.[79] The volume of TAS cases reinforces the concerns about significant systemic and procedural issues in the RICS program.[80]

FIGURE 4.1.9[81]



78 For a more detailed discussion of this issue, see Most Serious Problem: *Identity Theft*: *As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*, *supra*; National Taxpayer Advocate 2016 Annual Report to Congress 151–60 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*); National Taxpayer Advocate 2005 Annual Report to Congress 25, addressing the IRS's Questionable Refund Program (subsequently called the Return Integrity and Compliance Services (RICS) program) that failed to provide taxpayers with adequate due process protections and failed to maintain an adequate system to vet the IRS's concerns about taxpayer refund claims.

79 Data obtained from TAMIS (Oct. 1, 2017). *See also* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayer Returns Are Still Being Improperly Stopped by These Systems, Resulting in Refund Delays*, *supra*.

80 *See also* Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, but a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected by These Systems, Resulting in Refund Delays*, *supra*. National Taxpayer Advocate Annual 2015 Report to Congress 45–55 (Most Serious Problem: *Revenue Protection: Hundreds of Thousands of Taxpayers File Legitimate Tax Returns That Are Incorrectly Flagged and Experience Substantial Delays in Receiving Their Refunds Because of an Increasing Rate of "False Positives" Within the IRS's Pre-Refund Wage Verification Program*). For additional discussion, see National Taxpayer Advocate FY 2016 Objectives Report to Congress 143–45 (Area of Focus: *TAS Receipts Suggest the IRS Needs to Enhance Efforts to Detect and Prevent Refund Fraud*).

81 Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

While IRS has made systemic improvements to the income verification process based on recommendations from the National Taxpayer Advocate,[82] TAS continues to advocate for the taxpayers who came to TAS when the IRS delayed their refunds under these programs. In FY 2017, TAS achieved an almost 78 percent relief rate and the average cycle time was approximately 49 days.[83]

Earned Income Tax Credit (EITC) Cases

The EITC is a complex credit that entitles certain working low income taxpayers to claim a refundable credit of up to $6,269 for 2016.[84] The EITC may be available to taxpayers either with or without a qualifying child. Certain limitations apply to the EITC related to residency,[85] filing status,[86] certain foreign benefits,[87] and status as a qualifying child of another taxpayer.[88] In FY 2017, TAS experienced an *increase* of nearly 23 percent in EITC receipts from FY 2016.[89] TAS received over 2,000 more EITC cases involving Systemic Burden (SB), an increase of 24 percent from FY 2016. TAS also received 14 percent more EITC cases involving EB in FY 2017.[90]

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82 The IRS developed the RRP which replaced the EFDS.

83 Data obtained from TAMIS (Oct. 1, 2017).

84 IRC § 32. The maximum amount of the credit is available to a taxpayer with three or more qualifying children. For tax years beginning in 2016, the maximum credit available for a taxpayer with one qualifying child is $3,373, with two qualifying children is $5,572, and with no qualifying children is $506. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. An individual must meet five tests in order to be a qualifying child under IRC § 152(c): relationship, age, residency, support, and no joint return filed with the individual's spouse. An individual meets the **relationship** test to be a qualifying child if the individual is a child of the taxpayer or a descendant of a child of the taxpayer or a brother, sister, stepbrother or stepsister of the taxpayer or a descendant of such a relative, IRC § 152(c)(2). The term "child" means an individual who is a son, daughter, stepson, or stepdaughter of the taxpayer or an eligible foster child of the taxpayer. IRC § 152(f)(1)(A). A child legally adopted by a taxpayer or a child lawfully placed with a taxpayer for legal adoption is treated as a child of the taxpayer by blood. IRC § 152(f)(1)(B). An eligible foster child means an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction. IRC § 152(f)(1)(C). The terms "brother" and "sister" include a half-brother or a half-sister. IRC § 152(f)(4). To meet the **age** requirement, to be a qualifying child, an individual must be under the age of 19 at the end of the year, under the age of 24 at the end of the year and a "student," as defined in IRC § 152(f)(2), or any age if "permanently and totally disabled," as defined in IRC § 22(e)(3). IRC § 152(c)(3). To meet the **residency** requirement to be a qualifying child, an individual must have the same principal place of abode as the taxpayer for more than half of the taxable year. IRC § 152(c)((1)(B). See, however, IRC § 152(e) for a special rule for a child of parents who are divorced or separated or who live apart and IRC § 152(f)(6) for rules on the treatment of missing children. See also, the regulations under section 152 for rules on temporary absences, children who were placed with the taxpayer in foster care or for adoption during the taxable year, or children who were born or died during the taxable year. To meet the **support** test to be a qualifying child, an individual must not have provided more than one-half of his or her own support for the calendar year in which the taxable year of the taxpayer begins. Treas. Reg. §1.152-2. The individual must not have filed a joint return with the individual's spouse for the taxable year in question. IRC § 152(c)(1)(E).

85 A taxpayer is not eligible for the EITC if he or she is a nonresident alien for any portion of the taxable year, unless the taxpayer files a joint return with a spouse who is a United States citizen or resident alien. IRC § 32(c)(1)(D).

86 A taxpayer is not eligible for the EITC if he or she files married filing separately. IRC § 32(d).

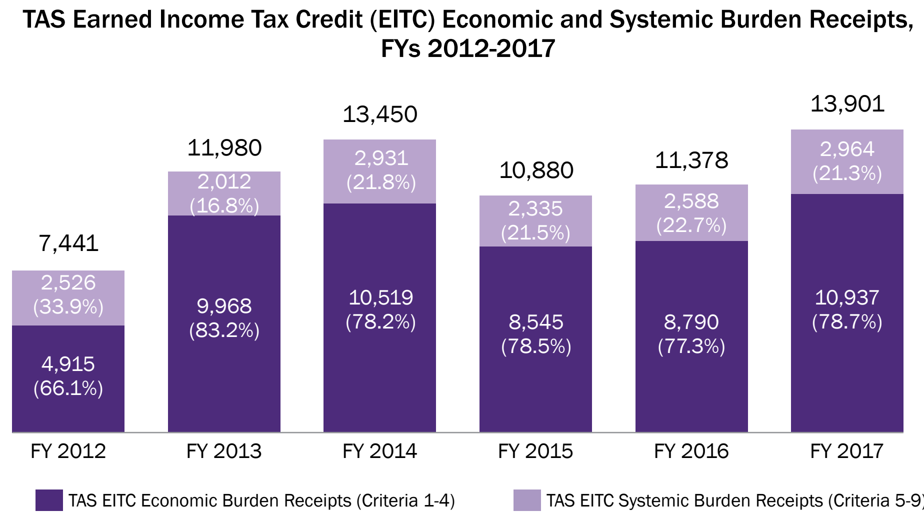
87 A taxpayer is not eligible for the EITC if he or she claims a foreign earned income exclusion or deducts or excludes a foreign housing cost amount. IRC § 32(c)(1)(C).

88 A taxpayer is not eligible for the EITC if he or she is the qualifying child of another taxpayer. IRC § 32(c)(1)(B).

89 Data obtained from TAMIS (Oct. 1, 2017; Oct. 1, 2016).

90 *Id.* TAS received 8,790 EITC EB receipts in FY 2016 and 10,937 in FY 2017.

FIGURE 4.1.10[91]



When taxpayers face difficulty substantiating their qualification for the EITC, they turn to TAS for assistance. In these cases, securing the required documents can be overwhelming (*e.g.*, the need to obtain birth certificates to prove relationship for a niece, nephew, or other extended relative).[92] When it comes to complying with document requests, migratory living patterns, lack of education, lack of time (*e.g.*, holding multiple jobs), lack of transportation, and limited access to technology (internet, faxes, etc.) all add to the difficulty of finding and submitting documents.[93]

TAS continuously reviews how it advocates in EITC cases. In FY 2017, TAS provided its employees with training on advocating for taxpayers with EITC issues. The training stressed the importance of discussions with taxpayers in an effort to understand their circumstances. The training also included how to solicit alternative documentation to establish qualifications for EITC and how to effectively present the cases to the IRS.[94] TAS urges case advocates to use technical advisors to help assemble the necessary EITC documentation and to assist with presenting a fully developed case to the IRS. Additionally, TAS is an active participant on a collaborative IRS team dedicated to identifying ways to improve the audit process for taxpayers claiming the EITC.[95] Through the EITC Audit Improvement

91 Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

92 *See* National Taxpayer Advocate 2015 Annual Report to Congress 235; National Taxpayer Advocate 2013 Annual Report to Congress 109; National Taxpayer Advocate 2011 Annual Report to Congress 296, 304; National Taxpayer Advocate 2009 Annual Report to Congress 110.

93 *See* National Taxpayer Advocate 2015 Annual Report to Congress 250; National Taxpayer Advocate 2011 Annual Report to Congress 304; National Taxpayer Advocate 2008 Annual Report to Congress 233.

94 For example, if the taxpayer lived in several places throughout the year, TAS case advocate will spend time linking leases, affidavits, and rental receipts to prove residency. For self-employed taxpayers, TAS will speak with third-party customers and secure affidavits when the taxpayer does not keep complete logs of customer service and billing to prove his or her earned self-employment income.

95 *See* Most Serious Problem: *Earned Income Tax Credit (EITC): The IRS Continues to Make Progress to Improve Its Administration of the EITC, But It Has Not Adequately Incorporated Research Findings That Show Positive Impacts of Taxpayer Education on Compliance*; *supra*. *See also* Nina E. Olson, *Earned Income Tax Credit (EITC): TAS Study Finds that Sending an Informative, Tailored Letter to Taxpayers Who Appear to Have Erroneously Claimed the EITC Can Avert Future Noncompliance*, Taxpayer Advocate Service: NTA BLOG (Oct. 11, 2017), https://taxpayeradvocate.irs.gov/news/nta-blog-eitc-TPLetters-avert-noncompliance.

Team, the IRS added IRM Exhibit 4.19.14-1 in July 2016.[96] This IRM section fosters acceptance of substantiating documentation outside of the traditional EITC documentation. Additionally, it includes a list of various "new" documents for Exam employees to consider, such as paternity test results, eviction notices, and statements from homeless shelters (non-inclusive).[97] The team also implemented the use of three templates (school, doctor's office and daycare provider) for use by third parties to help provide information to the IRS. These templates are available on irs.gov.[98]

As an example of a case where non-traditional EITC documentation was used, the IRS disallowed the EITC claimed by a taxpayer due to the child being older than the age requirement. The IRS did not consider the exception to the age requirement that arises when an individual is "permanently and totally disabled."[99] The Internal Revenue Code's definition of disability is the same used by the Social Security Administration to determine whether disability claimants seeking Social Security Disability (SSDI) benefits. To prove the taxpayer met the definition of disabled, TAS provided the IRS with a copy of the Social Security determination letter. The IRS agreed that the individual was disabled and allowed the EITC credit.

Taxpayer Protection Program (TPP)

The Taxpayer Protection Program (TPP) was the fifth largest source of TAS cases overall and the fourth largest source of EB receipts.[100] Taxpayers typically need their refunds expedited to alleviate financial hardships. The IRS uses filters on refund returns to detect and suspend potential ID Theft returns.[101] Through the TPP, the IRS protects government funds and attempts to reduce taxpayer burden by assisting legitimate filers to authenticate their suspended returns,[102] while negating losses to the government due to ID Theft. A taxpayer must either call the TPP toll-free line or visit a Taxpayer Assistance Center (TAC) to verify his identity by answering a series of questions.[103] However, this process is burdensome for taxpayers. The extended telephone hold times has resulted in difficulty for taxpayers in resolving their ID Theft issues over the telephone. Moreover, visiting a TAC center may burden the victimized taxpayer because he or she may have to take off work, (resulting in financial harm), travel long distances to the nearest TAC office, or have difficulty scheduling an appointment.[104] Thus, taxpayers end up turning to TAS for assistance.

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96 IRM Exhibit 4.19.14-1, *Examples of Acceptable Documentation for EITC claims (not all-inclusive)* (Jul. 29, 2016).

97 *Id.*

98 *See* IRS, *I Received a Letter from IRS about EITC or I Am Being Audited, What Should I Do?,* https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/letter-or-audit-for-eitc (last visited Dec. 10, 2017).

99 IRC § 152(c)(3)(B).

100 TAS did not record data on case receipts specifically from the Taxpayer Protection Program (TPP) until January 2016, so TAS does not have FY 2015 data for comparison. Recording the cases separately accounted for a portion of the decrease in IDT case receipts in FY 2017.

101 *See* National Taxpayer Advocate 2016 Annual Report to Congress 151–60 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*); National Taxpayer Advocate 2013 Annual Report to Congress 173–74. Based on prior years' returns, including those involving "verified" fraud, models are built and implemented for detecting fraud. The IRS passes incoming returns requesting refunds through the knowledge base and scores them for likelihood of fraud. The IRS flags returns that it diverts into a workload for further inspection before it issues any refund. IRS, Kenneth A. Kaufman, *An Analysis of Data Mining in the Electronic Fraud Detection System* (Apr. 28, 2010).

102 IRM 25.25.6.1, *Taxpayer Protection Program* (July 14, 2017).

103 *Id.* Identity verification requires answering "Out of Wallet" questions, which are knowledge-based questions about private information not readily available, that only the user should know.

104 Service at all TACs is by appointment only. *See* IRS News Release IR-2017-54, *Tax Time Guide: Save Time, Make an Appointment before Visiting an IRS Taxpayer Assistance Center* (March 8, 2017).

In FY 2017, TAS received 6,906 TPP cases, including 4,217 with EB criteria, when taxpayers could not authenticate their identity with the IRS.[105] TAS provided taxpayers with instructions on the types of documents needed to authenticate their return in a TAC. TAS secured relief in 78 percent of TPP cases in an average of 49 days.[106]

COLLECTION CASES

The National Taxpayer Advocate is concerned about whether taxpayers' *rights to privacy* and *to a fair and just tax system* are being protected. A lien or levy can significantly harm the taxpayer's credit and therefore negatively affect his or her ability to obtain financing, find or retain a job, secure affordable housing or insurance, and ultimately pay the outstanding tax debt.[107]

Taxpayers face severe consequences when the IRS enforces collection by levies on income or other assets, liens on property, or seizures of property. TAS received 17,107 collection issue cases in FY 2017, a decrease of nearly ten percent from FY 2016.[108] The IRS's use of levies and liens declined during this same period.[109] However, liens and levies accounted for about 44 percent of TAS's contact from taxpayers with collection issues in FY 2017, with nearly 83 percent of the lien and levy cases involving EB.[110]

105 Data obtained from TAMIS (Oct. 1, 2017).

106 *Id*.

107 *See* National Taxpayer Advocate 2016 Annual Report to Congress 386–92 (Legislative Recommendation: *Notices of Federal Tax Lien (NFTL): Amend the Internal Revenue Code to Require a Good Faith Effort to Make Live Contact with Taxpayers Prior to the Filing of the NFTL*) for a legislative proposal to amend IRC § 6323 to require the IRS to make a good faith effort for contacting a taxpayer prior to the issuance of a NFTL.

108 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017).

109 *See* National Taxpayer Advocate 2015 Annual Report to Congress 100–11. In 2014, TAS's case receipts for all collection PCICs were 21,936. In FY 2015, they were 22,084, an increase of less than one percent. In FY 2016, they were 19,043, a decrease of approximately 14 percent. In FY 2017, they were 17,107, a decrease of approximately 10 percent. From FY 2010 to FY 2017, levies issued by the IRS decreased by about 84 percent and lien filings decreased 60 percent. IRS, Collection Activity Report 5000-25, *Liens Report* (Sept. 2017); Collection Activity Report 5000-24, *Levy and Seizure Report* (Sept. 2010; Sept. 2017).

110 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017). In FY 2016, TAS received 5,626 levy cases and 3,072 lien cases for a total of 8,698 cases, or 45.7 percent of the total collection cases. Of the 8,698 cases, 4,850 levy cases and 2,377 lien cases were economic burden, or 83.1 percent. In FY 2017, TAS received 4,500 levy cases and 3,012 lien cases for a total of 7,512 cases, or 43.9 percent of the total collection cases. Of the 7,512 cases, 3,873 levy cases and 2,350 lien cases were EB, or 82.8 percent.

FIGURE 4.1.11[111]

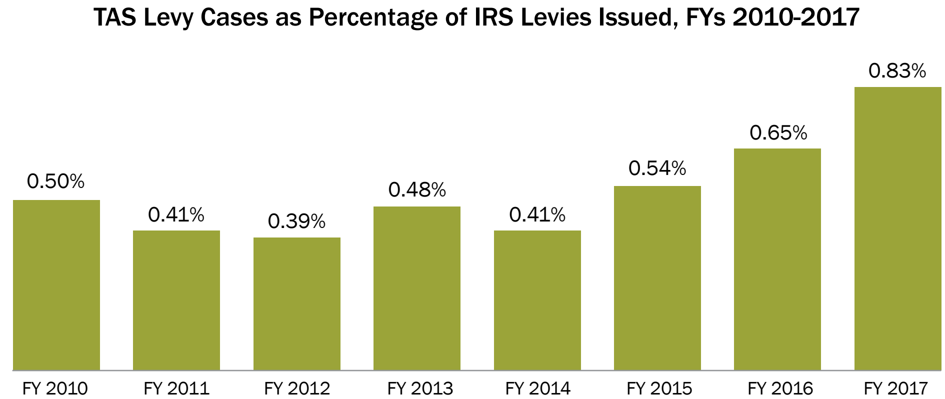
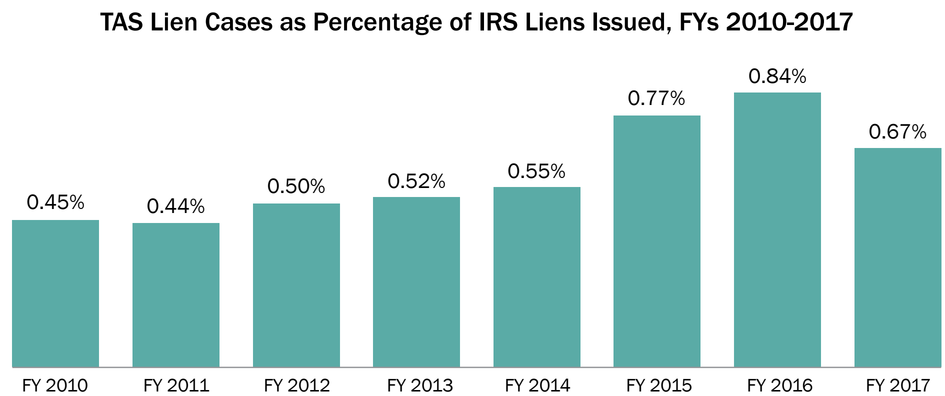


FIGURE 4.1.12[112]



Despite a decline in the number of liens or levies being issued by the IRS, the percentage of taxpayers seeking TAS assistance with these issues has not declined proportionately, as shown in Figures 4.1.11 and 4.1.12. In FY 2017, the IRS issued 37 percent fewer levies than in FY 2016, but TAS levy receipts only declined by 20 percent.[113] The IRS issued 22 percent more liens in FY 2017 than in FY 2016 and TAS lien receipts decreased by 60 cases (two percent.)[114] Levies on a taxpayer's sole source of income or primary bank account obviously have significant adverse impact on the taxpayer's finances, creating

111 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014, Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017). IRS, 5000-23 Collection Workload Indicators Report (Mar. 22, 2011; Oct. 11, 2011); IRS, 5000-25 Collection Activity Report (Oct. 1, 2012; Sept. 30, 2013; Sept. 29, 2014, Oct. 9, 2015; Oct. 19, 2016).

112 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014, Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017). IRS, 5000-23 Collection Workload Indicators Reports (Mar. 22, 2011; Oct. 11, 2011); IRS, 5000-24 Collection Activity Report (Oct. 9, 2012; Oct. 22, 2013); IRS, 5000-25 Collection Activity Report (Oct. 6, 2014, Oct. 7, 2015; Oct. 19, 2016). IRS liens may be placed on an account in one year but become a TAS case in a different year. For purposes of this chart, TAS divided the number of lien cases received by TAS in the given FY by the number of liens issued by the IRS for the same FY.

113 IRS issued 869,196 levies in FY 2016 and 545,026 levies in FY 2017. Collection Activity Report C-24, *Levy & Seizure Report* (Oct. 3, 2017). TAS received 5,626 levy cases in FY 2016 and 4,500 cases in FY 2017. Data obtained from TAMIS.

114 IRS reported 366,663 liens in FY 2016 and 446,378 liens in FY 2017. Collection Activity Report C-25, *Liens Report* (Oct. 3, 2017). TAS received 3,072 lien cases in FY 2016 and 3,012 cases in FY 2017. Data obtained from TAMIS.

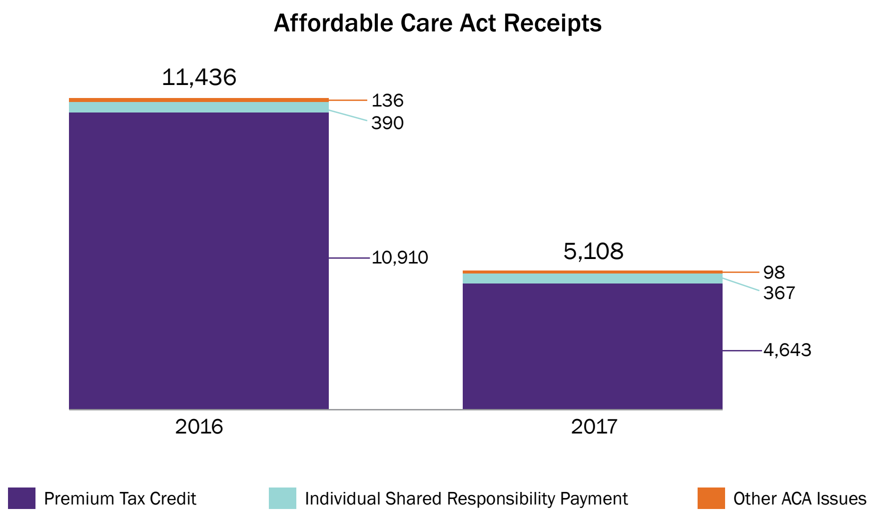
economic burden. Thus, most taxpayers with a levy meet TAS criteria. Liens also have significant economic impact on taxpayers. As long as the IRS issues liens and levies, taxpayers will seek or be referred to TAS for assistance in relieving those burdens.

Taxpayers who cannot reach an IRS Customer Service Representative often contact TAS.[115] TAS resolves taxpayer collection issues by educating the taxpayer on collection alternatives, such as an Installment Agreement or OIC, or by reviewing the taxpayers case to ensure that the taxpayers rights have not been violated and that the IRS has followed applicable law and procedures. Some taxpayers are referred to an LITC which can further assist the taxpayer in preparing an OIC, even as TAS retains the case.

Affordable Care Act (ACA)

TAS continues to focus on issues taxpayers are experiencing as a result of the Affordable Care Act (ACA). Issues surrounding the Premium Tax Credit (PTC) made up 91 percent of the ACA cases TAS received in FY 2017.

FIGURE 4.1.13 AFFORDABLE CARE ACT RECEIPTS



While TAS ACA cases decreased by 55 percent as taxpayers became more accustomed to the reporting requirements and exchanges improved the accuracy of reporting, many taxpayers continue to struggle with correctly reporting and calculating the PTC, causing processing problems and delays.[116] Oftentimes, taxpayers do not understand how income and family size changes during the tax year impact the PTC, and seek TAS assistance with unpostable returns and math error notices related to the PTC or Individual Shared Responsibility Payment (ISRP).

115 In FY 2017, only 56 percent of calls were answered by IRS Customer Service lines with an average hold time of 17 minutes. It is likely that many of the taxpayers who were not able to get through to an IRS Customer Service Representative and was unable to resolve their collection issues.

116 *See* National Taxpayer Advocate 2016 Annual Report to Congress 266–76 (Most Serious Problem: *Affordable Care Act (ACA): The IRS Has Made Progress in Implementing the Individual and Employer Provisions of the ACA But Challenges Remain*).

The National Taxpayer Advocate developed a self-help website with over 50 tax-related topics to assist taxpayers with many of their questions.[117] Using plain language explanations of common tax issues, self-help videos and guides, and other tools, the website helps taxpayers become better informed about their tax obligations and how to handle them. As part of that enhancement effort, the website offers self-help tools that support taxpayers' understanding of specific tax related responsibilities under the ACA. One of these tools is the ISRP estimator. It assists taxpayers in determining if they are liable for a payment. If they are liable, it then helps estimate the amount they will owe on their tax return. Use of this tool has grown significantly, indicating its usefulness to taxpayers. Over the last two years, taxpayers visited this tool nearly 400,000 times.

The ISRP estimator is just one of the ACA self-help tools available on TAS's website. There are currently four ACA estimators. Two are designed for individual taxpayers and two are designed for business use. All can be used to estimate tax responsibilities and for planning purposes throughout the year. The four available ACA estimators[118] are listed below with brief descriptions of their primary purpose:

- Individual Shared Responsibility Payment Estimator: This estimates any payment due for not having minimum essential medical insurance coverage for all or part of the year where no exemption is applicable.
- Premium Tax Credit Change Estimator: Estimates premium tax credit changes throughout the year if income or family size changes.
- Small Business Health Care Tax Credit Estimator: Estimates if users may be eligible for the Small Business Health Care Tax Credit and estimates the tax credit.
- Employer Shared Responsibility Payment Estimator: Employers can use this to estimate the number of full-time employees, including full-time equivalent employees (FTEs), whether a business may be considered an applicable large employer (ALE), and, if the business is an ALE, an estimate of the maximum amount of the potential liability for the employer shared responsibility payment that could apply to the business based on the number of FTEs that it reports if it fails to offer coverage to full-time employees.

Currently the National Taxpayer Advocate is developing TAS Employer Shared Responsibility Payment training that will kick off with Train-the-Trainer sessions in early 2018 and continue with training all TAS employees in January as part of Filing Season Readiness training. This training will provide our employees with guidance regarding Employer Shared Responsibility Payments under IRC § 4980H of the IRC. Although the effective date of IRC § 4980H and reporting requirements under IRC § 6056 first applied in 2015, the National Taxpayer Advocate is anticipating that TAS will begin providing more and more assistance to taxpayers in resolving tax issues related to IRC § 4980H and its reporting requirements.

EMERGING ISSUES

Private Debt Collection (PDC)

In 2015, Congress enacted legislation requiring the IRS to enter into "qualified tax collection contracts" for the collection of "inactive tax receivables."[119] The National Taxpayer Advocate cautioned that the

117 *See* TAS, *Get Help*, https://taxpayeradvocate.irs.gov/get-help (last visited Nov. 14, 2017).

118 ACA Estimators, http://www.taxpayeradvocate.irs.gov/get-help/aca (last visited Dec. 27, 2017).

119 Fixing America's Surface Transportation Act (FAST Act), Pub. L. No. 114-94, Div. C, Title XXXII, § 32102,129 Stat. 1312, 1733–36 (2015), (amending IRC § 6306).

initiative, as implemented, appeared inconsistent with the law and would disproportionately burden taxpayers experiencing economic hardship.[120] The IRS assigned the first tax debts to private collection agencies (PCAs) in April 2017.[121]

In preparation for case assignments to PCAs, in January 2017, TAS delivered in-person training to Private Collection Agency (PCA) managers. The training included a 45-minute video of the National Taxpayer Advocate explaining how the Taxpayer Bill of Rights applies to PCA employees and activities. TAS requested that all PCA employees be required to view the video as part of their training, but the IRS refused to impose this training requirement.[122]

TAS also delivered training to all Local Taxpayer Advocates in March 2017, prior to the assignment of the first cases to PCAs. Additional training was provided in December 2017 focusing on issues that arose from actual experience with these cases. Other resources for employees include a dedicated mailbox for case advocates to send any questions they have about the program; and answers to their questions are generally provided within 24 hours. TAS training and messaging for employees stresses the importance of considering all viable collection alternatives, including review of the accuracy or validity of the underlying balance due, when advocating for taxpayers assigned to a PCA.[123]

To ensure taxpayers, stakeholders, and congressional offices are informed about the program and its procedures, TAS developed the following educational and outreach materials:

- Information about the PDC initiative on the Taxpayer Toolkit,[124] which includes a link to a sample of a letter taxpayers can use to request the PCA to stop contacting them;
- Information about the program for LTAs to consider including in their correspondence with congressional offices; and
- Talking points for LTAs for their outreach events.

By the end of FY 2017, TAS had received 38 cases from taxpayers whose debts had been assigned to a PCA.[125] By the end of FY 2017, TAS had closed 14 of the 38 cases.[126]

120 *See* National Taxpayer Advocate 2016 Annual Report to Congress 172–91 (Most Serious Problem: *The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship*).

121 IRS News Release IR-2017-74, *Private Collection of Some Overdue Federal Taxes Starts in April; Those Affected Will Hear First From IRS; IRS Will Still Handle Most Tax Debts* (Apr. 4, 2017), https://www.irs.gov/newsroom/private-collection-of-some-overdue-federal-taxes-starts-in-april-those-affected-will-hear-first-from-irs-irs-will-still-handle-most-tax-debts. *See also* Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship, supra.*

122 However, one private collection agency (PCA) appears to be including the video in its training. Another PCA, committed to displaying IRS Publication 5170, Taxpayer Bill of Rights, throughout its workplace, including in each PCA employee cubicle. Publication 5170 is a bilingual (English and Spanish) brochure that displays as a poster and lists and explains the ten taxpayer rights in the TBOR.

123 *See* IGM TAS-13-1217-006, *Interim Guidance on Advocating for Taxpayers Whose Module(s) the IRS Assigned to a Private Collection Agency* (Dec. 27, 2017).

124 *See* TAS, *Private Debt Collection Program – What You Need to Know*, https://taxpayeradvocate.irs.gov/news/private-debt-collection-program-what-you-need-to-know (last visited Dec. 28, 2017).

125 Data obtained from TAMIS (Oct. 3, 2017).

126 *Id.*

FIGURE 4.1.14, PDC FY 2017 Case Closures[127]

Case Resolution	FY 2017
Hardship Currently Not Collectible	5
Closed as no response (no relief)	3
Installment Agreement	2
Answered TP's Questions	2
Reversed Erroneous Assessment	1
Sent Transcripts and Blank Form 1040X	1
Total Closures	14

All of these 38 cases were recalled from the PCA, as opening a TAS case causes the case to be recalled.

Individual Taxpayer Identification Number (ITIN)

Individual Taxpayer Identification Numbers (ITINs) play a valuable role in tax administration by allowing taxpayers who are ineligible for Social Security Numbers (SSNs) to file returns and pay taxes that are required under the law. ITINs facilitate international business with foreign taxpayers, who provide ITINs to third parties and withholding agents to document foreign status and claim exemptions from withholding or reduced rates of withholding. In late 2015, Congress passed the Protecting Americans from Tax Hikes (PATH) Act and for the first time, codified elements of the ITIN program, including how an applicant may apply, what is required documentation, when an ITIN expires, and when an ITIN must be issued to claim certain refundable credits. The PATH Act also expanded the IRS's math error authority to correct returns containing expired ITINs. Following the passage of the PATH Act, the IRS implemented changes to the ITIN program.[128] These changes have created hardships for:

- Taxpayers whose ITINs expired, did not know to renew it, and owe taxes due to a math error notice;
- Taxpayers whose ITIN applications the IRS has rejected without providing an adequate explanation; and
- Taxpayers whose original documents are lost or returned to them after much delay.[129]

For example, a taxpayer who was experiencing a family emergency and needed to travel out of the country with his children contacted TAS for assistance. He sent his children's passports to the IRS with his 2015 tax return, along with Form W-7, *Application for IRS Individual Taxpayer Identification*

127 The IRS can place an account into currently not collectible (CNC) status when the collection of the liability would create a hardship for taxpayers by leaving them unable to meet necessary living expenses. A hardship occurs when an individual taxpayer is unable to meet their basic living expenses. IRM 5.19.1.1.6.5.2, *Hardship CNC Closing Codes* (Mar. 1, 2016). The standard amounts for basic living expenses will be established by the IRS, and will vary according to the unique circumstances of the individual taxpayer. IRM 5.19.17.2.1.3, *CNC Unable to Pay – Hardship* (Oct. 5, 2017). In terms of "Answered TP's Questions," for example, after answering the taxpayer's questions, one of the taxpayers chose to work with the assigned PCA. Another taxpayer chose to utilize the irs.gov Online Payment Agreement (OPA) application to set up an installment agreement because the installment agreement user fee is lower by completing it online.

128 *See* National Taxpayer Advocate FY 2018 Objectives Report to Congress 70–75 (Area of Focus: *The IRS Makes Needed Changes to the Individual Taxpayer Identification Number (ITIN) Program, But Barriers for ITIN Applicants Remain*).

129 For a detailed discussion of these problems and administrative recommendations, see Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): The IRS's Failure to Understand and Effectively Communicate with the ITIN Population Imposes Unnecessary Burden and Hinders Compliance*, *supra*.

Number (ITIN), requesting ITINs be assigned for his children. The IRS processed his return without considering his ITIN request and did not allow his dependency exemptions, causing a balance due on his return. TAS checked the return information and found that the passports were attached to the back of the return. TAS contacted the IRS to show them the return so they could see that the ITIN application requests had not been processed and the passports had not been returned. TAS explained the urgency of overnighting the passports by 2:00 p.m. that same day. The IRS expedited the ITIN request and manually assigned the ITINs by noon that same day, so the passports could be mailed overnight to the taxpayer. The taxpayer received the passports in time to travel for his family emergency. TAS then advised the taxpayer to file an amended return to claim the dependency exemptions for the children now that ITINs were assigned, which would eliminate the balance due on the taxpayer's 2015 return.

TAS created an Educational Learning Management System (ELMS) training course in 2017 that provides information on the requirement that every individual tax document have a TIN. This course is mandatory curriculum for new hires, but is made available to all TAS employees.

Revocation or Denial of Passports

In 2015, Congress passed the Fixing America's Surface Transportation (FAST) Act, which requires the Department of State to deny an individual's passport application and allows the Department of State to revoke or limit an individual's passport if the IRS has certified the individual as having a seriously delinquent tax debt.[130]

The IRS will implement the passport certification program in January 2018, and the proposed IRS procedures and policies raise concerns about how the program will harm taxpayers and infringe upon their rights.[131] First, the IRS has refused to exclude from certification open TAS cases resulting in taxpayers being certified to the Department of State with unresolved tax issues. Second, taxpayers may be unaware that their tax debts have been certified to the Department of State prior to certification taking place because of the lack of prior notice. Third, some taxpayers may need their passports more quickly than the time it takes to resolve their tax issue with the IRS and have the decertification transmitted to the Department of State.

In preparation of the potential problems associated with the Passport Revocation program, the National Taxpayer Advocate has developed training to educate case advocates on how to advocate for taxpayers whose passport has or may be in the process of being revoked or denial because of the FAST Act. The training will cover the specifics of the legislation, as well as advocacy options for the taxpayer. TAS will also issue guidance to its employees regarding when and how to issue Taxpayer Assistance Orders (TAOs) in appropriate cases.

130 FAST ACT Pub. L. No. 114-94, Div. C, Title XXXII, § 32101, 129 Stat. 1312, 1729-32 (2015) (codified as IRC § 7345).

131 Most Serious Problem: *Passport Denial and Revocation: The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights, supra.*

TAS OPERATIONS ASSISTANCE REQUEST (OAR) TRENDS

To assist taxpayers more efficiently, the Commissioner of Internal Revenue delegated to the National Taxpayer Advocate certain tax administration authorities that do not conflict with or undermine TAS's unique statutory mission, but allow TAS to resolve routine problems.[132] When TAS lacks the statutory or delegated authority to resolve a taxpayer's problem, it works with the responsible IRS BOD or function to resolve the issue, a process necessary in 65 percent of all TAS cases closed in FY 2015, 68 percent in FY 2016, and 68 percent in FY 2017.[133] After independently reviewing the facts and circumstances of a case and communicating with the taxpayer, TAS issues OARs to convey a recommendation or request that the IRS take action to resolve the issue, and provides documentation that supports it. The OAR also serves as an advocacy tool by:

- Giving the IRS a second chance to resolve the issue;
- Giving TAS and the BOD a chance to resolve the issue without having to elevate it; and
- Documenting systemic trends that could lead to improvements in IRS processes.

All BODs agree to work TAS cases on a priority basis and expedite the process for taxpayers whose circumstances warrant immediate handling. The Service Level Agreements (SLAs) require the BODs to direct resources to process OARs.[134] The OAR report alerts the BODs to the number of taxpayers who seek TAS assistance, because they have not been able to resolve their problems through regular channels within the BODs' control and the types of issues. Form 12412, *Operations Assistance Request*, includes an "expedite" box that TAS case advocates may check when the BOD needs to act immediately to relieve the taxpayer's significant hardship.

TAS generally sends one or more OARs on individual cases to secure action by the IRS, but TAS may use a single OAR to work the same issue for multiple taxpayers, which TAS calls a "bulk OAR." During the 2016 filing season, TAS successfully implemented a bulk OAR process for cases involving Integrity and Verification Operations (IVO) Pre-Refund Wage Verification Holds. TAS and IVO used this process during FY 2017 and TAS sent 109 accounts to IVO on bulk OARs. IVO quickly reviewed and took action to release refunds to taxpayers in two business days or less. In addition, during FY 2017, TAS successfully implemented a bulk OAR process for taxpayers impacted by identity theft whom required the issuance of an identity protection personal identification number (IP PIN). The bulk OAR process was used to issue an IP PIN to 47 taxpayers during FY 2017.

Writing effective recommendations for OARs gives the IRS the information needed for efficient resolution to a taxpayer's issue(s). The National Taxpayer Advocate delivered training to case advocates in May 2017 for writing effective OARs to improve our advocacy efforts.

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132 IRM 1.2.50.3(1), *Delegation Order 13-2 (Rev. 1) Authority of the National Taxpayer Advocate to Perform Certain Tax Administration Functions* (Mar. 3, 2008).

133 TAS closed 149,484 cases with Operations Assistance Requests (OARs) in FY 2014; 156,273 in FY 2015; 149,739 in FY 2016; 114,669 in FY 2017. TAS can issue more than one OAR on a case. Data obtained from TAMIS (Oct. 6, 2014; Oct. 5, 2016; Oct. 3, 2016; Oct. 23, 2017). If the IRS already has an open control on an account, TAS must use the OAR process and request that the IRS function take the requested actions.

134 TAS has a Service Level Agreement (SLA) with each business operating division (BOD). Each SLA states the terms of engagement between TAS and the BODs, as agreed to by their respective executives, including timeframes and processes for communication in the OAR and Taxpayer Assistance Order (TAO) processes to assure that the IRS treats TAS cases with the agreed upon level of priority.

FIGURE 4.1.15, Expedited and Non-Expedited OARs Issued by BOD, FY 2017[135]

Business Operating Division	FY 2017 OARs Issued Requesting Expedite Action	FY 2017 OARs Issued without Expedite Request	FY 2017 Total OARs Issued
Appeals	777	274	1,051
Criminal Investigation	100	34	134
Large Business & International	994	258	1,252
Small Business/Self-Employed	40,884	18,922	59,806
Tax Exempt/Governmental Entity	471	217	688
Wage & Investment	149,834	77,270	227,104
Total	**193,060**	**96,975**	**290,035**

TAS USES TAXPAYER ASSISTANCE ORDERS (TAOS) TO ADVOCATE EFFECTIVELY

The TAO is a powerful statutory tool, delegated by the National Taxpayer Advocate to LTAs to resolve taxpayer cases.[136] LTAs issue TAOs to order the IRS to take certain actions, cease certain actions, or refrain from taking certain actions.[137] A TAO may also order the IRS to expedite consideration of a taxpayer's case, reconsider its determination in a case, or review the case at a higher level.[138] If the facts and law support relief and the taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered, an LTA may issue a TAO.[139] Once TAS issues a TAO, the BOD must comply with the request or appeal the issue for resolution at higher management levels.[140] Only the National Taxpayer Advocate, Commissioner of Internal Revenue, or Deputy Commissioner may rescind a TAO by the National Taxpayer Advocate, and unless that rescission occurs, the BOD must abide by the action(s) ordered in the TAO.[141]

In FY 2017, TAS issued 166 TAOs,[142] including 15 in cases where the IRS failed to respond to an OAR, further delaying relief to taxpayers. Of these 15 TAOs, the IRS complied with 14 TAOs in an average of 13 days, meaning the IRS did not have a significant disagreement as to the resolution and the taxpayers could have had relief sooner if the IRS had been more responsive to TAS.[143] Figure 4.1.16 reflects the results of all TAOs. Figure 4.1.17 shows the TAOs issued by fiscal year.

135 Data obtained from TAMIS (Oct. 1, 2017). As depicted in Figure 4.1.15, TAS issues OARs across all IRS Business Operating Divisions and Functions.

136 IRC § 7811(f) states that for purposes of this section, the term "National Taxpayer Advocate" includes any designee of the National Taxpayer Advocate. *See* IRM 1.2.50.2, *Delegation Order 13-1 (Rev. 1)* (Mar. 17, 2009).

137 IRC § 7811(b); Treas. Reg. § 301.7811-1(c)(3); IRM 13.1.20.3, *Purpose of Taxpayer Assistance Orders* (Dec. 15, 2007).

138 Treas. Reg. § 301.7811-1(c)(3): IRM 13.1.20.3, *Purpose of Taxpayer Assistance Orders* (Dec. 15, 2007).

139 IRC § 7811(a)(1); Treas. Reg. § 301.7811-1(a)(1) and (c).

140 Treas. Reg. § 301.7811-1(b); IRM 13.1.20.5(2), *TAO Appeal Process* (Dec. 9, 2015).

141 IRC § 7811(c)(1) and Treas. Reg. § 301.7811-1(b).

142 Data obtained from TAMIS (Oct. 1, 2017).

143 *Id.*

FIGURE 4.1.16, Actions Taken on FY 2017 TAOs Issued[144]

Action	Total
IRS Complied with the TAO	109
IRS Complied after the TAO was modified	5
TAS Rescinded the TAO	11
TAS Pending (in Process)	41
Total	**166**

FIGURE 4.1.17, TAOs Issued to the IRS, FYs 2012–2017[145]

Fiscal Year	TAOs Issued
2012	434
2013	353
2014	362
2015	236
2016	144
2017	166

The examples presented in this report illustrate issues raised in cases handled by TAS. To comply with IRC § 6103, which generally requires the IRS to keep taxpayers' returns and return information confidential, the details of the fact patterns have been modified or redacted. In certain examples, TAS has obtained the written consent of the taxpayer to provide more detailed facts. Cases in which a written consent were received are indicated below. The examples in the following sections illustrate the use of TAOs to obtain taxpayer relief.

Taxpayer Assistance Orders Involving Account Resolution

As discussed above, ID Theft can adversely affect taxpayers. Approximately 74 percent of individual taxpayers filing returns claimed refunds, averaging about $2,800.[146] In an ID Theft situation, where the IRS has processed a false return before the actual taxpayer files a return, the IRS will not issue a refund to the actual taxpayer until the IRS fully resolves the SSN ownership, which the IRS estimates can take 180 days.[147] In FY 2017, TAS issued seven TAOs involving ID Theft. The IRS complied with six of these TAOs within an average of 47 days.[148] TAS issued four ID Theft-related TAOs in cases that met EB case criteria and thus needed expedited case handling.[149] Specific examples of hardships encountered by these taxpayers and exacerbated by IRS delays included:

- Taxpayer was being evicted;

144 Data obtained from TAMIS (Oct. 1, 2017).

145 Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

146 IRS, *2017 IMF Filing Season Statistics for Week Ending May 12, 2017*, https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-may-12-2017 (last visited Dec. 22, 2017). Through May 12, 2017, the IRS received 139,586 million individual tax returns, of which 102,863 million claimed a refund averaging $2,769.

147 IRM 25.23.2.10, *IDT Case Processing Time Frames* (Mar 30, 2017).

148 Data obtained from TAMIS (Oct. 1, 2017).

149 *Id.*

- Taxpayer needed to pay rent and utilities; and
- Taxpayer was behind on bills and needed to repair auto to get to work.

TAS issued 81 TAOs involving account resolution for issues other than ID Theft, return preparer misconduct issues, and exam issues.

Examples of TAOs involving account resolution issues include the following:

> A Power of Attorney (POA) contacted TAS to resolve an ongoing challenge with filing an amended return for his clients.[150] The IRS timely received and processed Forms 1040, *U.S. Individual Income Tax Return* for tax year 2011 for two separate individual accounts. Some months later, the IRS received a Form 1040X, *Amended U.S. Individual Income Tax Return* for tax year 2011, with an explanation of the taxpayers' marital status change from single to married filing joint as based on Revenue Ruling 2013-17,[151] a breakdown of each taxpayers' original single tax returns and their total joint tax return, and signed Forms 2848, *Power of Attorney and Declaration of Representative* for both taxpayers. Each Form 2848 appointed the same POA and authorized the POA to sign their tax returns. However, the IRS rejected the 2011 Form 1040X and requested additional supporting documentation, even though a similar Form 1040X for 2012 was processed near the same time. The IRS failed to record the Form 2848, and neither the POA nor the taxpayers received the reject notice. The POA sent another Form 2848, but the IRS responded with a letter incorrectly stating the 2011 Form 1040X would not be considered since the refund statute of limitations had now expired, even though it had been filed timely.[152] The POA contacted TAS to request assistance in resolving the issue. TAS sent a Form 12412, Operations Assistance Request (OAR) to the IRS, requesting that the Form 1040X be processed and a refund issued. However, the IRS rejected the request, citing a missing signature on the Form 1040X, and suggested the taxpayers file an appeal. TAS issued a TAO clarifying the authorized signature issue, outlining the inconsistent treatment between processing of the two tax years, and failure to allow the POA an opportunity to perfect the signature issue.[153] Subsequently, the IRS processed the Form 1040X and a refund was issued to the taxpayers.

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150 In this instance, the taxpayer has provided written consent for the National Taxpayer Advocate to use facts specific to the taxpayer's case. Release signed by the taxpayer dated Sept. 16, 2017 (on file with TAS).

151 In *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Supreme Court invalidated Section 3 of the 1996 Defense of Marriage Act, which barred married same-sex couples from being treated as married under federal law. Following the Windsor decision, the IRS issued Revenue Ruling 2013-17, which holds that married same-sex couples are now treated as married for all federal tax purposes where marriage is a factor, if the couple is lawfully married under state law. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. The revenue ruling declared that a civil union, registered domestic partnership, or other similar formal relationship recognized under state law that is not treated as a marriage under the laws of that state does not fall within the definition of marriage as used in the tax code. Additionally, the revenue ruling stated that terms in the tax code which reference marriage, spouse, husband, or wife include all married couples, irrespective of gender, so long as the individuals are lawfully married under state law.

152 IRM 21.5.3.4.6.1, *Disallowance and Partial Disallowance Procedures* (Mar. 2, 2017), states "Letters must contain the specific reason for the claim disallowance. NOTE: If the claim is being disallowed due to statute issues, the 105C letter must include the received date of the original/amended return or postmark date of the envelope and the date the claim should have been filed to be considered timely for the specific tax year. NOTE: This explanation is required under IRC § 6402(l), formerly IRC § 6402(k), which states, "In the case of a disallowance of a claim for refund, *the Secretary shall provide the taxpayer with an explanation for such disallowance*." [Emphasis added.]

153 Per IRM 21.5.3.4.2 *Tax Decrease or Credit Increase Processing* (Dec. 20, 2010), the taxpayer or power of attorney (POA) may perfect a claim.

In another case, a taxpayer filed a tax return with the IRS, which included flow-through income from a subchapter S corporation. Later, the taxpayer filed an amended Form 1040X to correct some of the income amounts, which was subsequently audited by the IRS. After consulting with a tax professional, the taxpayer filed a second amended return to correct the subchapter S income from passive to non-passive income. Accounts Management (AM) refused to process the amended return, stating that the Form 1040X must be sent to Exam for an audit reconsideration. The POA sought assistance from TAS to resolve the issue, and TAS issued an OAR requesting that AM refer the case to Exam as a Joint Committee case, since the amended return could result in a very large refund with interest payable.[154] AM initially refused, stating the claim must be sent for audit reconsideration. After a second OAR was sent with additional information from the initial audit, Exam still refused to review the claim, stating that the taxpayer would need to provide information not previously considered in the initial audit. Even after manager review, AM and Exam remained under the incorrect impression that this issue was previously audited and the taxpayer had agreed to a disallowance, and that the claim should not be considered. TAS issued a TAO advocating that the nature of the new claim is significantly different from the original examination and should therefore be examined as a new issue, and the amended return was accepted for Exam review.

Taxpayer Assistance Orders to Examination Functions

In FY 2017, TAS issued 32 TAOs to examination units in W&I, Small Business/Self-Employed (SB/SE), and LB&I BODs for issues including return preparer misconduct, the EITC, audit reconsiderations, actions to complete open audits of original returns, penalty abatements, and appeal rights.[155] The IRS complied with 28 within an average of 13 days. In one example, a taxpayer came to TAS after the IRS did not issue the refund claimed on the return. Exam then disallowed the EITC because the taxpayer could not verify the income. Exam disallowed the income from the taxpayer's employer because the Employer Identification Number (EIN) was not on the pay stubs. The taxpayer had no prior compliance issues, and the delayed refund created an economic hardship. TAS secured Form W-2 information from the IRS's own database that included the EIN and issued a TAO for Exam to reevaluate its prior determination, including allowance of the income and corresponding withholding. Exam subsequently accepted the documentation, issued the refund, and closed their case. The taxpayer was able to avoid eviction due to TAS's efforts.

In another example, the taxpayer had claimed the EITC on a properly filed tax return, which was selected for exam due to a mismatch in reported income. The taxpayer, who was unemployed and experiencing financial hardship, requested TAS assistance with providing the necessary documentation for the Exam review. Once received, TAS submitted an OAR to Exam to substantiate the income information. After reviewing the supporting information, Exam adjusted the account to match the income verified by the taxpayer, agreed to allow the two dependents claimed, but implemented the two-year EITC ban[156] due to prior year concerns regarding the taxpayer's EITC claims. Exam incorrectly

154 *See* IRC § 6405 (report must be made to the Joint Committee on Taxation before a refund or credit in excess of $2 million ($5 million in the case of a C corporation) can be made).

155 Data obtained from TAMIS (Oct. 1, 2017).

156 Per IRM 4.19.14.6.1, *2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET)* (Dec. 9, 2016), a two-year ban applies when it is determined that a taxpayer recklessly or intentionally disregarded the EITC, rules and regulations when claiming the credit. The two-year ban should be considered by the technician on every EITC case. A variety of facts must be considered by the CET in determining whether the two-year ban should be imposed. A taxpayer's failure to respond adequately or not respond at all does not in itself indicate that the taxpayer recklessly or intentionally disregarded the rules and regulations. For a discussion of the National Taxpayer Advocate's concerns regarding the application of the EITC two-year ban, see 2013 National Taxpayer Advocate Annual Report to Congress 103–15; 311–15.

determined the taxpayer had a history of inflating income in an apparent attempt to maximize EITC. TAS then issued a TAO for Exam to reconsider the two-year ban as excessively harsh and unnecessary, based on the taxpayer's education and reliance on a neighborhood preparer who mistakenly reported unemployment income and withholding. Exam reversed its decision on the two-year ban, and the taxpayer received a refund.

Taxpayer Assistance Orders on Collection Issues

TAS provided relief in about 73 percent of collection cases in FY 2017, compared to approximately 79 percent on all issues.[157] In FY 2017, TAS issued 46 TAOs in collection cases where the IRS did not agree with TAS's recommendations initially.[158] Of these 46 TAOs, the IRS complied with 27 in an average of 24 days, meaning the IRS's negative responses to TAS's requests unnecessarily delayed resolution, further harming the taxpayers, when there was no material disagreement on the resolution.[159]

TAS issued 23 TAOs involving levies cases in FY 2017.[160] The IRS complied with 12 of the 23 TAOs within an average of 26 days for levies in FY 2017, with TAS subsequently rescinding one TAO.[161] Fourteen of the 23 levy-related TAOs requested the return of levy proceeds for taxpayers experiencing EB.[162] TAS issued 23 TAOs to collection functions for non-levy issues.[163] The IRS complied with 15 within an average of 22 days. Non-levy issues include OICs, lien withdrawal, collection statute of limitation issues, and transfer of payments from one tax period to another. Examples of collection TAOs include:

In one case, a taxpayer contacted TAS for assistance after the IRS placed a levy on the taxpayer's monthly social security benefits.[164] Since the taxpayer's sole source of income is social security and a small pension, the levy on her social security was creating an economic hardship as it left her with insufficient funds to pay for medication and normal living expenses.[165] TAS immediately sent an OAR to the IRS to release the levy on the social security benefits and have the account placed in currently-not-collectible (CNC) status. TAS also requested that the IRS return two levy payments. The IRS agreed there was economic hardship and released the levy and placed the taxpayer's account in CNC. It also returned the second of the two levy payments but refused to return the first payment stating that the taxpayer had not met the criteria for return of the levy proceeds. TAS then issued a TAO, requesting return of the first levy payment. In the TAO, TAS relied on IRM 5.19.9.3.8 which provides that when a levy was released due to a finding of economic hardship, it is in generally in the Government's best interest to return the payment. Ultimately, the first levy payment was returned to the taxpayer but only after the IRS appealed and the National Taxpayer Advocate sustained the TAO to the SB/SE Commissioner.

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157 Data obtained from TAMIS (Oct. 1, 2017).

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 In this instance, the taxpayer has provided written consent for the National Taxpayer Advocate to use facts specific to the taxpayer's case. Release signed by the taxpayer dated Oct. 18, 2017 (on file with TAS).

165 IRC § 6343(a)(1)(D) provides that a levy should be released when the Secretary has determined the levy "is creating an economic hardship due to the financial condition of the taxpayer."

In another example, a taxpayer was making payments on a tax debt through a direct debit installment agreement.[166] Due to changes in the taxpayer's financial situation, the taxpayer called the IRS three times over a four-month period requesting that payments no longer be debited automatically. Despite efforts to obtain relief, which were documented on IRS records, the IRS continued to debit the taxpayer's account each month. The taxpayer contacted TAS for assistance. TAS determined that the contractual language for the installment agreement clearly stated that the authorization to initiate a monthly payment is to remain in effect until the taxpayer notifies the IRS to terminate the authorization.[167] TAS issued an OAR requesting a refund of the three payments, but the IRS declined, incorrectly citing the terms of a subsequent OIC that had been accepted. TAS then issued a TAO to Collection and secured a refund of the installment payments erroneously retained by IRS.

Taxpayer Assistance Orders to Appeals

TAS issued eight TAOs during FY 2017 to the Office of Appeals, and Appeals complied with three.[168]

In one case, a representative for a taxpayer/small business owner contacted TAS for assistance with an issue that had been unresolved for over three years. At issue was the correction of employment taxes attributable to the business for payments that were reclassified from distributions to wages. The IRS had examined two tax years and assessed additional quarterly taxes. Subsequently, the representative requested an Appeals review, and the additional quarterly taxes on one of the two tax years was abated. Despite correspondence from the previous Appeals Officer stating that both years should have been abated, Appeals failed to correct the second year. After reviewing the facts and circumstances of the case, TAS sent an OAR to Appeals requesting that the remaining balance be adjusted, as previously indicated by the Appeals Officer. TAS ultimately issued a TAO to request abatement of the quarterly taxes from the remaining tax year, and relief was provided to the taxpayer.

CONGRESSIONAL CASE TRENDS

Taxpayers often turn to their congressional representatives when faced with IRS issues. The congressional representatives refer these taxpayers to TAS, which is responsible for responding to tax account inquiries sent to the IRS by Members of Congress. Figure 4.1.18 reflects the total congressional case receipts and total TAS receipts from other contacts.

166 In this instance, the taxpayer has provided written consent for the National Taxpayer Advocate to use facts specific to the taxpayer's case. Release signed by the taxpayer dated Oct. 16, 2017 (on file with TAS).

167 Form 433D, *Installment Agreement*, Direct Debit.

168 Data obtained from TAMIS (Oct. 1, 2017).

FIGURE 4.1.18[169]

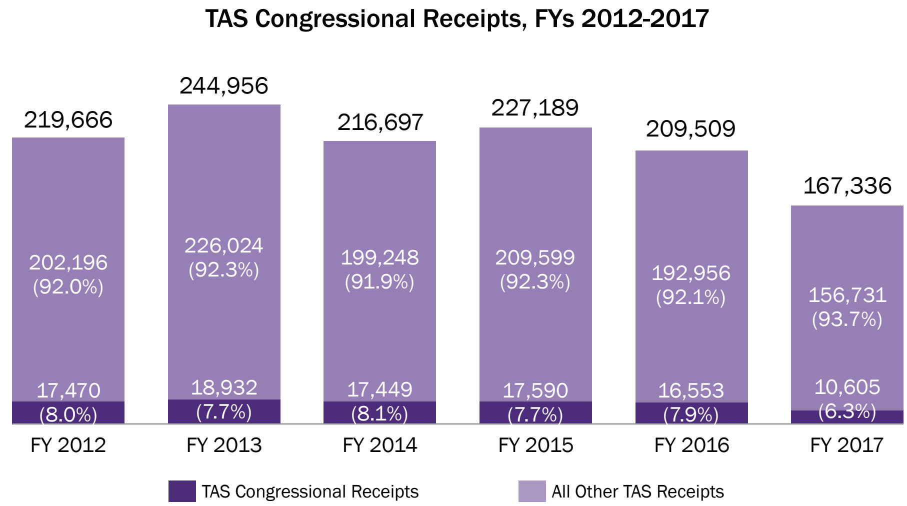

Figure 4.1.19, seen below, shows the top ten PCICs causing taxpayers to seek the assistance of their congressional representatives. ID Theft receipts decreased by more than 64 percent between FY 2016 and FY 2017, and Pre-Refund Wage Verification Holds decreased by more than 65 percent.[170] Issues associated with the processing of amended returns decreased by more than 42 percent. These trends followed the overall TAS decrease in receipts for these issues.[171]

FIGURE 4.1.19, TAS Top Ten Congressional Receipts by Primary Core Issue Code, FYs 2016–2017[172]

Rank	Issue Description	FY 2016	FY 2017	Percent Change
1	Identity Theft	2,556	911	-64.4%
2	Processing Original Return	852	543	-36.3%
3	Transcript Request	517	480	-7.2%
4	Other Refund Inquiry/Issue	569	431	-24.3%
5	Processing Amended Return	731	418	-42.8%
6	Installment Agreement	498	399	-19.9%
7	Pre-Refund Wage Verification Hold	1,062	368	-65.3%
8	Failure to File Penalty (FTF)/Failure to Pay Penalty (FTP)	465	339	-27.1%
9	Open Automated Underreporter	389	323	-17.0%
10	Levies	409	303	-25.9%
Other Issues		8,505	6,090	-28.4%
Total Congressional Receipts		**16,553**	**10,605**	**-35.9%**

169 Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017).

170 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017).

171 PCIC 460 Application for Exempt Status cases from all sources, including congressional referrals, were 486 in FY 2016 and 407 in FY 2017, which was a decline of approximately 16 percent.

172 Data obtained from TAMIS (Oct. 1, 2016; Oct. 1, 2017).

Appendix 1: Top 25 Case Advocacy Issues for Fiscal Year (FY) 2017 by TAMIS* Receipts

Rank	Issue Code	Description	FY 2017 Case Receipts
1	425	Identity Theft	23,248
2	045	Pre-Refund Wage Verification Hold	20,014
3	63x - 640	Earned Income Tax Credit	13,901
4	330	Processing Amended Return	7,713
5	318	Taxpayer Protection Program Unpostables	6,906
6	090	Other Refund Inquiries and Issues	5,822
7	310	Processing Original Return	5,434
8	315	Unpostable and Reject	4,942
9	920	Health Insurance Premium Tax Credit for Individuals Under IRC § 36B	4,643
10	620	Reconsideration of Audits and Substitute for Return Under IRC § 6020(b)	4,596
11	71x	Levies	4,500
12	610	Open Audit - Non-Earned Income Credit	3,959
13	340	Injured Spouse Claim	3,871
14	75x	Installment Agreements	3,369
15	040	Returned and Stopped Refunds	3,196
16	72x	Liens	3,012
17	670	Closed Automated Underreporter	2,691
18	065	Refund Hold (Delinquent Return Refund Hold Program)	2,665
19	060	IRS Offset	2,536
20	790	Other Collection Issues	2,370
21	151	Transcript Requests	2,030
22	91x	Appeals	2,008
23	320	Math Error	1,928
24	520	Failure to File (FTF) Penalty and Failure to Pay (FTP) Penalty	1,922
25	010	Lost and Stolen Refunds	1,794
Total Top 25 Receipts			**139,070**
Total TAS Receipts			**167,336**

* Taxpayer Advocate Management Information System (TAMIS).

Appendix 2: Glossary of Acronyms

Acronym	Definition
AA	Acceptance Agent
AARP	American Association of Retired Persons
ABA	American Bar Association
ACA	Affordable Care Act
ACH	Automated Clearing House
ACI	American Career Institutes
ACS	Automated Collection System
ACSS	Automated Collection System Support
ACTC	Additional Child Tax Credit
AD&D	Application Development and Delivery
ADR	Alternative Dispute Resolution
AE	Audit Experience
AFSP	Annual Filing Season Program
AGI	Adjusted Gross Income
AICPA	American Institute of CPAs
AIMS	Audit Information Management System
AJAC	Appeals Judicial Approach and Culture
ALE	Allowable Living Expenses; or Applicable Large Employer
ALERTS	Automated Labor and Employee Relations Tracking System
AM	Accounts Management
AML	Anti-Money Laundering
AMS	Accounts Management System
AMT	Alternative Minimum Tax
AO	Appeals Officer
APA	Administrative Procedure Act
APTC	Advance Premium Tax Credit
AQC	Automated Questionable Credit
ARC	Annual Report to Congress
ARDI	Accounts Receivable Dollar Inventory
ASA	Average Speed of Answer
ASFR	Automated Substitute for Return
ATAO	Application for Taxpayer Assistance Order
ATM	Automated Teller Machine
ATO	Australian Taxation Office
AUR	Automated Underreporter
BAH	Basic Allowance for Housing
BAS	Basic Allowance for Subsistence
BFS	Bureau of Fiscal Services
BI	Business Intelligence
BLS	Bureau of Labor Statistics
BMF	Business Master File
BOD	Business Operating Division
BPR	Business Performance Review
BWH	Back-Up Withholding
CA	Correspondence Audit
CAA	Certified Acceptance Agent
CAP	Collection Appeals Program
CAS	Customer Account Services
CBO	Congressional Budget Office
CCA	Chief Counsel Advice
CCDM	Chief Counsel Directives Manual
CCE	Compliance Center Exam
CCH	Commerce Clearing House
CCI	Centralized Case Intake
CDC	Center for Disease Control and Prevention
CDP	Collection Due Process
CDR	Coverage Data Repository
CDW	Compliance Data Warehouse
CEO	Chief Executive Officer
CET	Correspondence Guidelines for Examination Technicians
CEWS	Cognitive Early Warning System
CFf	Collection Field Function
CFR	Code of Federal Regulations
CI	Criminal Investigation (Division)
CIS	Correspondence Imaging System; or Collection Information Statement; or Client Information System
CJE	Critical Job Element
CNC	Currently Not Collectible
COD	Cancellation of Debt
COIC	Centralized Offer in Compromise
CONOPS	Concept of Operations
COPS	Community Oriented Policing Services
CP	Coercive Power
CPA	Certified Public Accountant
CPE	Continuing Professional Education
CRA	Canada Revenue Agency
CRM	Customer Relationship Management
CRP	Case Resolution Program

Acronym	Definition
CRS	Congresional Research Service; or Common Reporting Standard
CSED	Collection Statute Expiration Date
CSO	Communication and Stakeholder Outreach
CSR	Customer Service Representative
CTC	Child Tax Credit
CWA	Contemporaneous Written Acknowledgement
CX	Customer Experience
CY	Calendar Year
DCA	Department of Consumer Affairs
DDB	Dependent Database
DF	Deterrence Factors
DI	Debt Indicator
DIF	Discriminant Index Function
DISC	Domestic International Sales Corporation
DJ	Distributive Justice
DMF	Death Master File
DOD	Department of Defense
DOJ	Department of Justice
DOR	Department of Revenue
E2E	End to End
EA	Enrolled Agent
EB	Economic Burden
EC	Enforced Compliance
ECM	Enterprise Case Management
ECS	Enterprise Case Selection
ED	U.S. Department of Education
EDCA	Executive Director Case Advocacy
EDSA	Executive Director Systemic Advocacy
EEOC	Equal Employment Opportunity Commission
EFDS	Electronic Fraud Detection System
EFTPS	Electronic Federal Tax Payment System
EH	Equivalent Hearing
EIN	Employer Identification Number
EITC	Earned Income Tax Credit
ELMS	Educational Learning Management System
EO	Exempt Organization
EPA	Environmental Protection Agency
EQRS	Embedded Quality Review System
ESL	English as a Second Language
EST	Eastern Standard Time
ETA	Effective Tax Administration
ETAAC	Electronic Tax Administration Advisory Committee

Acronym	Definition
EU	European Union
EVP	Exchange Visitor Program
FA	Field Audit
FAST	Fixing America's Surface Transportation Act
FATCA	Foreign Account Tax Compliance Act
FBAR	Report of Foreign Bank and Financial Accounts; or Foreign Bank Account Report
FCA	False Claims Act
FCC	Federal Communications Commission
FCR	First Contact Resolution; or First Call Resolution
FDR	False Detection Rate
FEMA	Federal Emergency Management Agency
FFEL	Federal Family Education Loans
FOIA	Freedom Of Information Act
FPL	Federal Poverty Level
FPLP	Federal Payment Levy Program
FPR	False Positive Rate
FS	Filing Season
FTC	Foreign Tax Credit
FTD	Federal Tax Deposit
FTF	Failure To File
FTL	Federal Tax Lien
FTP	Failure To Pay
FWP	Fleischer Wealth Plan
FY	Fiscal Year
GAO	Government Accountability Office
GSA	General Services Administration
HBSW	Home-Based Service Workers
HCO	Human Capital Office
HEA	Higher Education Act
HHI	Household Income
HMRC	Her Majesty's Revenue and Customs
HOH	Head of Household
HSA	Health Savings Account
HUD	Housing and Urban Development
IA	Installment Agreement
IBR	Income-Based Repayment Plans
ICR	Income-Contingent Repayment Plans
IDRS	Integrated Data Retrieval System
IDT	Identity Theft
IDTTRF	Identity Theft Tax Refund Fraud
IDTVA	Identity Theft Victim Assistance
IGM	Interim Guidance Memorandum

Acronym	Definition
IGT	Inspector-General of Taxation
IJ	Informational Justice
IMD	Internal Management Document
IMF	Individual Master File
IOAA	Independent Offices Appropriations Act
IP	Interpersonal Justice
IP PIN	Identity Protection Personal Identification Number
IPSU	Identity Protection Specialized Unit
IRA	Individual Retirement Account
IRB	Internal Revenue Bulletin
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IRMF	Information Returns Master File
IRP	Information Return Program
IRS	Internal Revenue Service
IRSAC	Internal Revenue Service Advisory Council
IRTF	Individual Returns Transaction File
ISRP	Individual Shared Responsibility Payment
IT	Information Technology
ITIN	Individual Taxpayer Identification Number
IUP	Infrastructure Update Project
IVES	Income Verification Express Service
IVO	Integrity & Verification Operation
IVR	Interactive Voice Response
IWV	Income Wage Verification
JCT	Joint Committee on Taxation
JOC	Joint Operations Center
JP	Justice Perceptions
KPI	Key Performance Indicators
LB&I	Large Business and International Operating Division
LCCI	Last Chance Compliance Initiative
LEP	Limited English Proficiency
LIF	Low Income Filter
LILO	Lease-in/Lease-out
LITC	Low Income Taxpayer Clinic
LLC	Limited Liability Company
LLP	Limited Liability Partnership
LOI	Liaison Officer Initiative
LOS	Level of Service
LP	Legitimate Power
LQMS	LB&I Quality Measurement System
LR	Legislative Recommendation

Acronym	Definition
LTA	Local Taxpayer Advocate
MAC	Medicare Administrative Contractor
MANCOVA	Multivariate Analysis of Covariance
MFJ	Married Filing Joint
MFS	Married Filing Separately
MLI	Most Litigated Issue
MOU	Memorandum of Understanding
MSP	Most Serious Problem
NAEA	National Association of Enrolled Agents
NAQC	North American Quitline Consortium
NASE	National Association of the Self-Employed
NBER	National Bureau of Economic Research
NCR	Net Compliance Rate
NDAA	National Defense Authorization Act
NFTL	Notice of Federal Tax Lien
NO FEAR	Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002
NOL	Net Operating Loss
NPL	National Pulic Liaison
NPM	New Public Management
NPRM	Notice of Proposed Rulemaking
NQRS	National Quality Review System
NRC	Nuclear Regulatory Commission
NRP	National Research Program
NTA	National Taxpayer Advocate
NTE	Not to Exceed
NYPD	New York Police Department
NYSBA	New York State Bar Association
OA	Office Audit
OAR	Operations Assistance Request
OCC	Office of Chief Counsel
OCCP	Offshore Credit Card Project
OD	Operating Division
OECD	Organisation for Economic Co-Operation and Development
OIC	Offer in Compromise
OLS	Office of Online Services
OMB	Office of Management and Budget
OMM	Operation Mass Mailing
OPA	Online Payment Agreement
OPERA	Office of Program Evaluation and Risk Analysis
OS	Operations Support
OTC	Office of Taxpayer Correspondence
OUO	Official Use Only

Acronym	Definition
OVCI	Offshore Voluntary Compliance Initiative
OVD	Offshore Voluntary Disclosure
OVDI	Offshore Voluntary Disclosure Initiative
OVDP	Offshore Voluntary Disclosure Program
PACER	Public Access to Court Electronic Records
PATH	Protecting Americans from Tax Hikes
PAYE	Pay-As-You-Earn
PC	Perceived Compliance
PCA	Private Collection Agency
PCI	Potentially Collectible Inventory
PCIC	Primary Core Issue Code
PDC	Private Debt Collection
PFA	Pre-Filing Agreement
PII	Personally Indentifiable Information
PIN	Personal Identification Number
PIT	Personal Income Tax
PJ	Procedural Justice
PLR	Private Letter Ruling
PMPA	Program Management/Process Assurance
PMTA	Program Manager Technical Advice
POA	Power Of Attorney
PON	Pre-Offset Notice
PPG	Policy and Procedure Guide
PPIA	Partial Pay Installment Agreement
P&R	Personnel and Readiness
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act
PRWVH	Pre-Refund Wage Verification Hold
PSD	Problem Solving Day
PSP	Payroll Service Provider
PTC	Premium Tax Credit
PTIN	Preparer Tax Identification Number
PTSD	Post-Traumatic Stress Disorder
PY	Processing Year
QAM	Quality Assurance Monitoring
QAR	Qualified Amended Return
QBI	Qualified Business Income
QC	Qualifying Child
QHDA	Qualified Hazardous Duty Area
QRP	Questionable Refund Program
QSS	Quality Statistical Sample
QTE	Qualified Tax Expert
RA	Revenue Agent

Acronym	Definition
RAA	Reporting Agent Authorization
RAAS	Research, Analysis, and Statistics; or Research, Applied Analytics, and Statistics
RAC	Refund Anticipation Check
RAD	Research Analysis and Data
RAL	Refund Anticipation Loan
RAND	Research and Development
RAS	(Office of) Research, Analysis and Statistics
RCA	Reasonable Cause Assistant
RCP	Reasonable Collection Potential
RDC	Research Development Center
RDD	Random-Digit Dialing or Dialed
REPAYE	Revised Pay As You Earn
RIA	Research Institute of America
RICS	Return Integrity and Correspondence Services
RIO	Return Integrity Operations
RO	Revenue Officer
ROI	Return on Investment
RPM	Return Preparer Misconduct
RPO	Return Preparer Office
RRA 98	Internal Revenue Service Restructuring and Reform Act of 1998
RRP	Return Review Program
RV	Recreational Vehicle
SAMS	Systemic Advocacy Management System
SB/SE	Small Business/Self-Employed Operating Division
SBA	Small Business Administration
SCIC	Secondary Core Issue Code
SCRA	Servicemembers Civil Relief Act
SDOP	Streamlined Domestic Offshore Procedures
SEE	Special Enrollment Examinations
SERP	Servicewide Electronic Research Program
SES	Socio-Economic Status
SFOP	Streamlined Foreign Offshore Procedures
SFR	Substitute for Return
SILO	Sale-in/Lease-out
SL	Stakeholder Liaison
SLA	Service Level Agreement
SME	Small/Medium Enterprise
SNAP	Supplemental Nutrition Assistance Program
SNIP	Servicewide Notice Information Program
SNOD	Statutory Notice of Deficiency
SO	Settlement Officer

Acronym	Definition
SOI	Statistics of Income
SP	Submission Processing
SPEC	Stakeholder Partnerships, Education & Communication
SPECTRUM	Stakeholder Partnerships, Education & Communications Total Relationship Management
SPP	Service Priorities Project
SSA	Social Security Administration
SSCRA	Veterans and Sailors Civil Relief Act of 1940
SSDI	Social Security Disability Insurance or Income
SSF	Slippery Slope Framework
SSI	Supplemental Security Income
SSN	Social Security Number
SVC	Stored Value Cards
TAB	Taxpayer Assistance Blueprint
TAC	Taxpayer Assistance Center
TAD	Taxpayer Advocate Directive
TAMIS	Taxpayer Advocate Management Information System
TANF	Temporary Assistance to Needy Families
TAO	Taxpayer Assistance Order
TAP	Taxpayer Advocacy Panel
TARD	Taxpayer Advocate Received Date
TAS	Taxpayer Advocate Service
TASIS	Taxpayer Advocate Service Integrated System
TBOR	Taxpayer Bill of Rights
TC	Transaction Code
TCE	Taxpayer Counseling for the Elderly
TCMP	Tax Compliance Measurement Program
TDA	Taxpayer Delinquent Account
TDC	Taxpayer Digital Communication
TDI	Taxpayer Delinquent Investigation
TE/GE	Tax Exempt & Government Entities Operating Division
TFRP	Trust Fund Recovery Penalty

Acronym	Definition
TIA	Tax Information Authorization
TIGTA	Treasury Inspector General for Tax Administration
TIN	Taxpayer Identification Number
TIPRA	Tax Increase Prevention and Reconciliation Act
TK	Tax Knowledge
TMA	TriCare Management Activity
TOD	Tour of Duty
TP	Taxpayer
TPC	Tax Policy Center
TPI	Total Positive Income
TPNC	Taxpayer Notice Codes
TPP	Taxpayer Protection Program
TSA	Transportation Security Administration
TY	Tax Year
UI	Unemployment Insurance
UNAX	Unauthorized Access of Taxpayer Account
UK	United Kingdom
USCIS	U.S. Citizenship and Immigration Service
USD	Under Secretary of Defense
USDL	U.S. Department of Labor
USERRA	Uniformed Services and Reemployment Rights Act
USPS	United States Postal Service
VA	Veterans Affairs
VAT	Value Added Tax
VC	Voluntary Compliance
VCR	Voluntary Compliance Rate
VDP	Voluntary Disclosure Practice
VITA	Volunteer Income Tax Assistance
VSD	Virtual Service Delivery
WE	Wage Earners
W&I	Wage and Investment Operating Division
YTD	Year to Date

Appendix 3: Most Litigated Issues Tables

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Alexander v. Comm'r, T.C. Summ. Op. 2017-23	6662(b)(2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional	Yes	IRS
Austin v. Comm'r, T.C. Memo. 2017-69	6662(b)(1), (2) - TPs (MFJ) were negligent and substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Barnhorst, Estate of, v. Comm'r, T.C. Memo. 2016-177	6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause	No	IRS
Bates v. Comm'r, T.C. Memo. 2017-72	6662(b)(1), (2) - TPs (MFJ) did not establish reasonable cause and good faith	Yes	IRS
Brown v. Comm'r, T.C. Summ. Op. 2017-29	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records and substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Cheves v. Comm'r, T.C. Memo. 2017-22	6662(b)(1) - TPs (MFJ) established reasonable cause and good faith	Yes	TP
Coates v. Comm'r, T.C. Memo. 2016-197	6662(b)(1), (2) - TPs (MFJ) were not negligent; established reasonable cause and good faith	No	TP
Collodi v. Comm'r, T.C. Summ. Op. 2016-57	6662(b)(2) - TPs (MFJ) substantially understated income tax; reasonably relied on advice of tax professional and acted in good faith	Yes	TP
Czekalski v. Comm'r, T.C. Summ. Op. 2016-56	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause	Yes	IRS
Elaine v. Comm'r, T.C. Memo. 2017-3	6662(b)(2) - TP substantially understated income tax; established reasonable cause and good faith	Yes	TP
Gerencser v. Comm'r, T.C. Memo. 2016-151, *appeal docketed*, No. 17-70134 (9th Cir. Jan. 17, 2017)	6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	Yes	IRS
Graev v. Comm'r, 147 T.C. No. 16 (2016), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017)	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith, substantial authority, or reasonable basis for TPs' position	No	IRS
Haag v. Comm'r, T.C. Summ. Op. 2016-29	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause	No	IRS
Harriss v. Comm'r, T.C. Memo. 2017-5, *appeal docketed*, No. 17-72233 (9th Cir. Aug. 9, 2017)	6662(b)(1), (2) - TP substantially understated income tax and was negligent; did not establish reasonable cause and good faith	Yes	IRS
Hill v. Comm'r, T.C. Memo. 2016-181	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause	Yes	IRS
Hill v. Comm'r, T.C. Summ. Op. 2016-64	6662(b)(2) - TP substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Hirsch v. Comm'r, T.C. Summ. Op. 2016-37	6662(b)(2) - TPs (MFJ) did not reasonably rely on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Humphrey v. Comm'r, T.C. Memo. 2017-78	6662(b)(2) - TP was negligent; failed to make an adequate disclosure; did not establish reasonable cause and good faith	Yes	IRS
Joseph v. Comm'r, 119 A.F.T.R.2d (RIA) 2017-2023 (9th Cir. 2017)	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause	Yes	IRS

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Kennedy v. Comm'r, T.C. Summ. Op. 2016-61	6662(b)(2) - TP substantially understated income tax; reasonably relied on a tax professional; established reasonable cause and good faith	Yes	TP
Lin, Estate of, v. Comm'r, T.C. Memo. 2017-77	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause	Yes	IRS
Mallory v. Comm'r, T.C. Memo. 2016-110	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith; failed to make an adequate disclosure and had no reasonable basis	No	IRS
Martinez v. Comm'r, T.C. Memo. 2016-182	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith; failed to show substantial authority for TPs' position; failed to make an adequate disclosure and had no reasonable basis	No	IRS
McGrady v. Comm'r, T.C. Memo. 2016-233	6662(b)(1), (2) - TPs (MFJ) reasonably relied on a tax professional; established good faith	No	TP
Mojarro v. Comm'r, 119 A.F.T.R.2d (RIA) 1569 (9th Cir. 2017), *aff'g* No. 1492-14 (T.C. Feb. 25, 2015)	6662(b)(2) - TP did not establish reasonable cause and good faith	Yes	IRS
Muñiz v. Comm'r, 661 F. App'x 1027 (11th Cir. 2016), *aff'g* T.C. Memo. 2015-125	6662(b)(2) - TP did not establish reasonable cause and good faith	Yes	IRS
Nordloh v. Comm'r, T.C. Summ. Op. 2017-37	6662(b)(2) - TPs (MFJ) substantially understated income tax; reasonably relied on a tax professional; established reasonable cause and good faith	Yes	TP
O'Connor v. Comm'r, 653 F. App'x 633 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-155	6662(b)(1) - TPs (MFJ) were negligent	Yes	IRS
Okiyi v. Comm'r, T.C. Summ. Op. 2017-28	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Ozimkoski v. Comm'r, T.C. Memo. 2016-228	6662(b)(2) - TP established reasonable cause and good faith with respect to a portion of the underpayment; did not establish reasonable cause and good faith with respect to the other portion of the underpayment	Yes	Split
Payne v. Comm'r, T.C. Summ. Op. 2016-30	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause; failure to keep adequate books and records	Yes	IRS
Perry v. Comm'r, T.C. Memo. 2016-172	6662(b)(2) - TP substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Peterson v. Comm'r, T.C. Summ. Op. 2016-52	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Qunell v. Comm'r, T.C. Summ. Op. 2016-86	6662(b)(2) - TP substantially understated income tax; reasonably relied on a tax professional; made an adequate disclosure; established reasonable cause	Yes	TP
Roach v. Comm'r, T.C. Summ. Op. 2017-27	6662(b)(1), (2) - TP substantially understated income tax	No	IRS
Sanek v. Comm'r, T.C. Summ. Op. 2016-60	6662(b)(1) - TP established reasonable cause and good faith	Yes	TP
Sullivan v. Comm'r, T.C. Memo. 2017-2	6662(b)(1), (2) - TP was negligent and substantially understated income tax; failed to show substantial authority for TP's position; failed to make an adequate disclosure and had no reasonable basis	Yes	IRS
Tsehay v. Comm'r, T.C. Memo. 2016-200	6662(b)(1), (2) - TP reasonably relied on a tax professional; established reasonable cause and good faith	Yes	TP

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Zang v. Comm'r, T.C. Memo. 2017-55	6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Alabsi v. Comm'r, T.C. Summ. Op. 2017-5	6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
American Metallurgical Coal Co. v. Comm'r, T.C. Memo. 2016-139	6662(b)(2) - TP substantially understated income tax; failed to show substantial authority for TP's position; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Arashiro v. Comm'r, T.C. Summ. Op. 2016-70	6662(b)(1), (2) - TP was negligent and substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Backemeyer, Estate of, v. Comm'r, 147 T.C. No. 17 (2016)	6662(b)(2) - TP did not substantially understate income tax	No	TP
Barnes v. Comm'r, T.C. Memo. 2016-212	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Barnhart Ranch, Co. v. Comm'r, T.C. Memo. 2016-170, *appeal docketed*, No. 16-60834 (5th Cir. Dec. 16, 2016)	6662(b)(1), (2) - TP was negligent and substantially understated income tax; failed to show substantial authority for TP's position; did not establish reasonable cause and good faith	No	IRS
Basic Eng'g, Inc. v. Comm'r, T.C. Memo. 2017-26	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Beckey v. Comm'r, T.C. Summ. Op. 2017-13	6662(b)(1), (2) - TPs (MFJ) were negligent and substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Besong v. Comm'r, T.C. Summ. Op. 2016-71	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Beyer, Estate of, v. Comm'r, T.C. Memo. 2016-183	6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	No	IRS
Boree v. Comm'r, 837 F.3d 1093 (11th Cir. 2016), *rev'g* T.C. Memo. 2014-85	6662(b)(2) - TPs (MFJ) reasonably relied on a tax professional; established reasonable cause and good faith	No	TP
Borna v. Comm'r, T.C. Memo. 2017-73	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records and substantially understated income tax; no reasonable reliance on a tax professional	No	IRS
Brodmerkle v. Comm'r, T.C. Memo. 2017-8	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause	Yes	IRS
Brown v. Comm'r, T.C. Summ. Op. 2016-89	6662(b)(1), (2) - TP was negligent; did not establish reasonable cause and good faith	Yes	IRS
Bulakites v. Comm'r, T.C. Memo. 2017-79	6662(b)(2) - TP substantially understated income tax; use of tax preparation software did not establish reasonable cause	Yes	IRS
Carmody v. Comm'r, T.C. Memo. 2016-225	6662(b)(2) - TP substantially understated income tax; reasonable reliance on a tax professional in regard to a portion of the underpayment; did not establish reasonable cause and good faith with respect to the other portion of the underpayment	No	Split

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Castigliola v. Comm'r, T.C. Memo. 2017-62	6662(b)(1), (2) - TPs (MFJ) not negligent; reasonable reliance on a tax professional; established reasonable cause and good faith; IRS did not meet burden of production for substantial understatement penalty	No	TP
Chaganti v. Comm'r, T.C. Memo. 2016-222, *appeal docketed*, No. 17-71874 (9th Cir. June 27, 2017)	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records and substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Chai v. Comm'r, 851 F.3d 190 (2d Cir. 2017), *rev'g* T.C. Memo. 2015-42	6662(b)(1), (2) - IRS did not meet burden of production with respect to penalties	No	TP
Chibanguza v. Comm'r, T.C. Summ. Op. 2016-84	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records and substantially understated income tax; did not establish reasonable cause	Yes	IRS
Chowdhury v. Comm'r, T.C. Summ. Op. 2016-31	6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Cole v. Comm'r, T.C. Summ. Op. 2016-63	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Cooke v. Comm'r, T.C. Memo. 2017-74	6662(b)(1) - TP was negligent due to failure to keep adequate books and records and substantially understated income tax; no reasonable reliance on a tax professional	No	IRS
Creigh v. Comm'r, T.C. Summ. Op. 2017-26	6662(b)(2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional	Yes	IRS
Ekeh v. Comm'r, T.C. Summ. Op. 2016-80	6662(b)(1), (2) - TP was negligent; did not establish reasonable cause and good faith	No	IRS
Embroidery Express, LLC v. Comm'r, T.C. Memo. 2016-136	6662(b)(1), (2) - TPs (MFJ) reasonably relied on a tax professional; established reasonable cause and good faith	No	TP
Engstrom, Lipscomb & Lack, APC v. Comm'r, 674 F. App'x 617 (9th Cir. 2016), *aff'g* T.C. Memo. 2014-221	6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	No	IRS
Ericson v. Comm'r, T.C. Memo. 2016-107	6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate books and records	Yes	IRS
Exelon Corp. v. Comm'r, 147 T.C. No. 9 (2016), *appeal docketed*, No. 17-2964 (9th Cir. Sept. 22, 2017)	6662(b)(1), (2) - TP was negligent; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Finnegan v. Comm'r, T.C. Memo. 2016-118, *appeal docketed*, No. 17-10676 (11th Cir. Feb. 8, 2017)	6662(b)(1) - TPs (MFJ) were negligent	No	IRS
Franklin v. Comm'r, T.C. Memo. 2016-207	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Gaines v. Comm'r, T.C. Summ. Op. 2017-15	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Galbraith v. Comm'r, T.C. Memo. 2016-168	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish good faith	Yes	IRS
Gaston v. Comm'r, T.C. Summ. Op. 2016-41	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Ghazawi v. Comm'r, T.C. Memo. 2017-48	6662(b)(2) - TPs (MFJ) did not reasonably rely on a tax professional; did not establish reasonable cause and good faith	No	IRS

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Green Gas Del. Statutory Trust v. Comm'r, 147 T.C. 1 (2016), *appeal docketed*, Nos. 17-1025 & 17-1026 (D.C. Cir. Jan. 26, 2017)	6662(b)(1) - TPs (partnerships) were negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Hailstock v. Comm'r, T.C. Memo. 2016-146	6662(b)(1), (2) - TP was negligent; did not establish reasonable cause and good faith	No	IRS
Hardy v. Comm'r, T.C. Memo. 2017-16	6662(b)(1), (2) - IRS did not meet burden of production for negligence penalty; TPs (MFJ) reasonably relied on a tax professional in regard to a portion of the underpayment; did not establish reasonable cause and good faith in regard to remainder of the underpayment	No	Split
Hatcher v. Comm'r, T.C. Memo. 2016-188, *appeal docketed*, No. 17-60315 (5th Cir. Apr. 26, 2017)	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith in regard to a portion of the underpayment; established reasonable cause and good faith in regard to the remainder of the underpayment	Yes	Split
Hicks v. Comm'r, T.C. Summ. Op. 2016-68	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause; failed to show substantial authority for TPs' position	Yes	IRS
Home Team Transition Mgmt. v. Comm'r, T.C. Memo. 2017-51	6662(b)(1), (2) - TP did not establish reasonable cause and good faith	No	IRS
Hylton v. Comm'r, T.C. Memo. 2016-234, *appeal docketed*, Nos. 17-1776 & 17-1777 (4th Cir. June 28, 2017)	6662(b)(2) - TP substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Hynes v. Comm'r, 118 A.F.T.R.2d (RIA) 6821 (1st Cir. 2016), *aff'g* 2015 U.S. Tax Ct. LEXIS 55	6662(b)(2) - TP substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause	No	IRS
Ibidunni v. Comm'r, T.C. Memo. 2016-218	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Jackson v. Comm'r, 672 F. App'x 760 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-160	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Jasperson v. Comm'r, 658 F. App'x 962 (11th Cir. 2016), *aff'g* T.C. Memo. 2015-186	6662(b)(2) - TP substantially understated income tax; no reasonable reliance on tax professional; did not establish reasonable cause and good faith	No	IRS
Jauregui v. Comm'r, T.C. Summ. Op. 2016-39	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause	Yes	IRS
Kahmann v. Comm'r, T.C. Summ. Op. 2017-35	6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; negligence due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Kauffman v. Comm'r, T.C. Memo. 2017-38	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause	Yes	IRS
Khinda v. Comm'r, T.C. Summ. Op. 2017-32	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith, substantial authority, or reasonable basis for TPs' position	Yes	IRS
Kilpatrick v. Comm'r, T.C. Memo. 2016-166	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith, substantial authority, or reasonable basis for TPs' position	Yes	IRS
Larkin v. Comm'r, T.C. Memo. 2017-54	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Levi v. Comm'r, T.C. Memo. 2016-108	6662(b)(1), (2) - TPs (MFJ) did not file valid return, and therefore, accuracy penalties were not applicable	Yes	TP
Lombardi v. Comm'r, T.C. Memo. 2017-4	6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	Yes	IRS
Long v. Comm'r, T.C. Summ. Op. 2016-88	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Luczaj v. Comm'r, T.C. Memo. 2017-42	6662(b)(1), (2) - TPs (MFJ) were negligent; did not establish reasonable cause and good faith	No	IRS
Mack v. Comm'r, T.C. Memo. 2016-229	6662(b)(2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause	Yes	IRS
Main v. Comm'r, T.C. Memo. 2016-127, *appeal docketed*, No. 17-71070 (9th Cir. Apr. 13, 2017)	6662(b)(1) - TP was negligent; did not establish reasonable cause	Yes	IRS
Makric Enters., Inc. v. Comm'r, 119 A.F.T.R.2d (RIA) 1273 (5th Cir. 2017), *aff'g* T.C. Memo. 2016-44	6662(b)(1), (2) - TP did not establish reasonable cause and good faith	No	IRS
Martin v. Comm'r, T.C. Memo. 2016-189	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
McNally v. Comm'r, T.C. Memo. 2017-93	6662(b)(2) - TPs (MFJ) did not establish reasonable cause	Yes	IRS
McNeill v. U.S., 237 F. Supp. 3d 1171 (D. Wyo. 2017), *appeal dismissed*, No. 17-8032 (10th Cir. May 24, 2017)	6662 - TPs (MFJ) reasonably relied on a tax professional; established reasonable cause and good faith	No	TP
Nawrot v. Comm'r, T.C. Summ. Op. 2016-50	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Nebeker v. Comm'r, T.C. Memo. 2016-155	6662(b)(2) - TP substantially understated income tax; reasonable reliance on a tax professional	No	TP
Nguyen v. Comm'r, T.C. Memo. 2016-126, *appeal dismissed*, No. 17-70318 (9th Cir. Apr. 24, 2017)	6662(b)(1) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Nwabasili v. Comm'r, T.C. Memo. 2016-220	6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	Yes	IRS
Oatman v. Comm'r, T.C. Memo. 2017-17	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Obayagbona v. Comm'r, T.C. Summ. Op. 2016-72	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith in regard to a portion of the underpayment; established reasonable cause and good faith in regard to the remainder of the underpayment	Yes	Split
Okorogu v. Comm'r, T.C. Memo. 2017-53	6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Palisi v. Comm'r, T.C. Summ. Op. 2017-34	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Parker v. Comm'r, T.C. Memo. 2016-194	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause	Yes	IRS
Penley v. Comm'r, T.C. Memo. 2017-65	6662(b)(1) - TPs (MFJ) were negligent; no reasonable reliance on a tax professional; did not establish reasonable cause	Yes	IRS

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Phillips v. Comm'r, T.C. Memo. 2017-61, *appeal docketed*, No. 17-14439 (11th Cir. Oct. 5, 2017)	6662(b)(1), (2) - IRS did not meet burden of production with respect to penalties	No	TP
Powell v. Comm'r, T.C. Memo. 2016-111, *aff'd*, 119 A.F.T.R.2d (RIA) 1959 (4th Cir. 2017)	6662(b)(2) - TPs (MFJ) did not establish reasonable cause	Yes	IRS
Power v. Comm'r, T.C. Memo. 2016-157	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional	No	IRS
Probandt v. Comm'r, T.C. Memo. 2016-135	6662(b)(1), (2) - TP was negligent; did not establish reasonable cause	No	IRS
Rangen v. Comm'r, T.C. Memo. 2016-195	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause	Yes	IRS
Rivas v. Comm'r, T.C. Memo. 2016-158, *appeal dismissed*, No. 16-16365 (11th Cir. Aug. 15, 2017)	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Roy v. Comm'r, T.C. Summ. Op. 2016-77	6662(b)(2) - no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Safakish v. Comm'r, 119 A.F.T.R.2d (RIA) 1589 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-242	6662(b)(1) - TP was negligent	Yes	IRS
Sensenig v. Comm'r, T.C. Memo. 2017-1, *appeal docketed*, No. 17-2866 (3d Cir. Aug. 29, 2017)	6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Singh v. Comm'r, T.C. Summ. Op. 2017-19	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	Yes	IRS
Sioui v. Comm'r, T.C. Summ. Op. 2016-85	6662(b)(1) - TP was negligent due to failure to keep adequate books and records	Yes	IRS
Slavin v. Comm'r, T.C. Summ. Op. 2016-28	6662(b)(1) - TPs (MFJ) were negligent; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Stanley v. Comm'r, T.C. Memo. 2016-196	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records and substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Sweeney v. Comm'r, T.C. Summ. Op. 2016-32	6662(b)(2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS
Szanto v. Comm'r, T.C. Memo. 2016-145	6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate records; did not establish reasonable cause and good faith	Yes	IRS
Transupport, Inc. v. Comm'r, T.C. Memo. 2016-216, *appeal docketed*, No. 17-1265 (1st Cir. Mar. 23, 2017)	6662(b)(2) -TP substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith, substantial authority, or reasonable basis for TPs' position	No	IRS
Tzivleris v. Comm'r, T.C. Summ. Op. 2016-26	6662(b)(1), (2) - TP reasonably relied on a tax professional; established reasonable cause and good faith	Yes	TP
Udeobong v. Comm'r, T.C. Memo. 2016-109	6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	Yes	IRS
Wainwright v. Comm'r, T.C. Memo. 2017-70	6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	No	IRS

TABLE 1: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	*Pro se*	Decision
Walker v. Comm'r, T.C. Memo. 2016-159	6662(b)(1), (2) - TP was not negligent and maintained adequate records; reasonable reliance on a tax professional	No	TP
Wang v. Comm'r, T.C. Memo. 2016-123	6662(b)(2) - IRS did not meet burden of production for substantial understatement penalty	Yes	TP
Wang v. Comm'r, T.C. Memo. 2017-81	6662(b)(2) - TPs (MFJ) substantially understated income tax; no reasonable reliance on a tax professional; did not establish reasonable cause	Yes	IRS
Wells Fargo & Co. v. U.S., 119 A.F.T.R.2d (RIA) 1976 (D. Minn. 2017)	6662(b)(1) - TP was negligent; failed to show substantial authority for TP's position; no reasonable basis	No	IRS
Wilson v. Comm'r, T.C. Summ. Op. 2017-25	6662(b)(1), (2) - TP was negligent and substantially understated income tax; did not establish reasonable cause and good faith	No	IRS
Windham v. Comm'r, T.C. Memo. 2017-68	6662(b)(1), (2) - TP was negligent; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	No	IRS
Zarrinnegar v. Comm'r, T.C. Memo. 2017-34	6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	No	IRS
Zolghadr v. Comm'r, T.C. Memo. 2017-49	6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; no reasonable reliance on a tax professional; did not establish reasonable cause and good faith	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Brown v. Comm'r, T.C. Summ. Op. 2017-29	Schedule A unreimbursed employee expenses disallowed because TP did not meet burden of showing employer would not reimburse under § 162; TP's request to add Schedule C to his return to deduct purported network marketing business expenses denied since court was unable to make a finding on whether the expenses were ordinary and necessary under § 162; Schedule A job search expenses for travel disallowed under § 274(d) and because TP failed to reasonably reconstruct lost records; business use of home deduction disallowed under § 280A	Yes	IRS
Collodi v. Comm'r, T.C. Summ. Op. 2016-57	Schedule A unreimbursed employee expenses for travel disallowed because TP was not away from his tax home; mileage expense disallowed as personal under § 262	Yes	Split
Czekalski v. Comm'r, T.C. Summ. Op. 2016-56	Schedule A unreimbursed employee expenses unsubstantiated and not ordinary and necessary under § 162; business use of home substantiated under § 280A	Yes	Split
Haag v. Comm'r, T.C. Summ. Op. 2016-29	Schedule A unreimbursed employee expenses disallowed for vehicle parking and mileage as personal under § 262, commuting and home office location use not established under § 280A to permit an exception; computer equipment and meals expense disallowed because TPs (MFJ) did not meet burden of showing employer would not reimburse under § 162 or that expenses were ordinary and necessary under § 162; TP (H) allowed a small deduction for meals expense during travel away from home; work clothing and tools expenses treated as substantiated based on TPs' credible testimony	No	Split
Hirsch v. Comm'r, T.C. Summ. Op. 2016-37	Schedule A unreimbursed employee expenses for travel disallowed as personal under § 262 and the temporary work assignment exception did not apply	Yes	IRS
Humphrey v. Comm'r, T.C. Memo. 2017-78	Schedule A unreimbursed employee expenses disallowed because TP did not meet burden of showing employer would not reimburse under § 162	Yes	IRS
Jones v. Comm'r, T.C. Summ. Op. 2017-2	TP (W)'s legal fees were not deductible on an unrelated Schedule C business belonging to TP (H) because the origin of the legal claim pertained to TP (W)'s former employer and TP (W)'s motives to protect her reputation were irrelevant; the same legal fees were recharacterized by the court and permitted as Schedule A miscellaneous itemized deductions subject to the 2% limitation under § 67(a)	Yes	IRS
Kopaigora v. Comm'r, T.C. Summ. Op. 2016-35	Schedule A unreimbursed employee expense for master's degree allowed under § 162 since TP (H) substantiated that his unemployment did not prevent him from continuing his trade or business as a finance and accounting business manager and degree did not qualify TP (H) for a new trade or business	No	TP
Liljeberg v. Comm'r, 148 T.C. No. 6 (2017), *appeal docketed*, No. 17-1204 (D.C. Cir. Sept. 12, 2017)	Schedule A unreimbursed employee expenses for travel, meals & entertainment disallowed to three foreign students engaged in the temporary business of being employees in the U.S. because they could not substantiate that they were away from home under § 162; Schedule A unreimbursed employee expense for health insurance policy costs reclassified by the court and allowed as a medical expense deduction under § 213	No	Split
Lock v. Comm'r, T.C. Summ. Op. 2017-10	Schedule A unreimbursed employee expenses disallowed as unsubstantiated under § 162, disallowed as personal under § 262, disallowed because TP (H) did not meet burden of showing employer would not reimburse under § 162, and disallowed because TP (H)'s testimony was not credible	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Nacchio v. U.S., 824 F.3d 1370 (Fed. Cir. 2016), *aff'g in part* and *rev'g in part*, 115 Fed. Cl. 195 (2014), *cert. denied*, No. 16-810 (S. Ct. 2017)	TP (H)'s criminal court-ordered forfeiture from insider trading activity is a nondeductible fine or similar penalty within the meaning of § 162(f); forfeiture monies are not deductible under § 162 as a trade or business expense and not deductible under § 165(c) as a loss	No	IRS
O'Connor v. Comm'r, 653 F. App'x 633 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-155	Schedule A unreimbursed employee expenses for law degree disallowed under § 162 since TP (H) could not substantiate that his degree did not maintain or improve his skills but qualified him for a new trade or business	Yes	IRS
Okiyi v. Comm'r, T.C. Summ. Op. 2017-28	TPs' Schedule A itemized deductions, including unreimbursed employee expenses, disallowed as unsubstantiated under § 274(d); disallowed because TP (W) did not meet burden of showing employer would not reimburse under § 162, and because TP (H)'s testimony was not credible	Yes	IRS
Pham v. Comm'r, T.C. Summ. Op. 2016-73	Gambling losses disallowed as unsubstantiated and *Cohan* rule inapplicable since TPs (MFJ) provided no rational basis for estimating amount	Yes	IRS
Rangen v. Comm'r, T.C. Memo. 2016-195	Schedule A unreimbursed employee expenses disallowed as not ordinary and necessary under § 162, disallowed as unsubstantiated under § 274(d), and disallowed because TP (H)'s testimony was not credible	Yes	IRS
Sanek v. Comm'r, T.C. Summ. Op. 2016-60	Schedule A unreimbursed employee expenses allowed for vehicle mileage per TP's credible testimony and substantiation; tolls expense disallowed as unsubstantiated under § 274(d); Schedule A cell phone expense disallowed as personal under § 262 and *Cohan* rule inapplicable since TP provided no rational basis for estimating amount; uniform expense partially allowed per TP's credible testimony	Yes	Split
Tanzi v. Comm'r, T.C. Memo. 2016-148	Schedule A unreimbursed employee expenses disallowed for home internet, cell phone, computer, depreciation and satellite television as personal under § 262 and *Cohan* rule inapplicable since TPs (MFJ) provided no rational basis for estimating amount	Yes	IRS
Windham v. Comm'r, T.C. Memo. 2017-68	Schedule A unreimbursed employee expenses for meals & entertainment, vehicle, and other expenses disallowed as unsubstantiated under § 274(d); Schedule A employee bonus payment allowed because substantiated; Schedule A cell phone expense disallowed as personal under § 262 and *Cohan* rule inapplicable since TP provided no rational basis for estimating; partial allowance for Schedule A tolls and advertising expenses partially allowed per TP's credible testimony; *Cohan* rule used to allow one-third of Schedule A supplies expenses	No	Split
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Alabsi v. Comm'r, T.C. Summ. Op. 2017-5	TP(H) was engaged in gambling as a trade or business activity under § 183 analysis; wagering losses allowed under § 165(d); some travel expenses substantiated under § 274(d), while other travel expenses disallowed as personal under § 262	Yes	Split
Alexander v. Comm'r, T.C. Memo. 2016-214	Business use of home deduction and related Schedule C expenses disallowed under § 280A; Schedule C rent expense for network marketing business partially substantiated, while wages paid to stepson and claimed § 274(d) expenses were unsubstantiated	Yes	Split
Alpenglow Botanicals, LLC v. U.S., 118 A.F.T.R.2d (RIA) 6968 (D. Colo. 2016), *appeal docketed*, No. 17-1223 (10th Cir. June 28, 2017)	Business deductions for rent, costs of labor, wages, advertising, taxes and licenses and depreciation disallowed under § 280E since medical marijuana dispensary is in the business of trafficking a controlled substance	No	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Amadi v. Comm'r, T.C. Memo. 2016-120	Unsubstantiated Schedule C expenses; travel expenses unsubstantiated under § 274(d)	No	IRS
American Metallurgical Coal Co. v. Comm'r, T.C. Memo. 2016-139	Business interest deductions disallowed for the 2007 tax year; the advance of the purchase price of three partnership units was not a bona fide loan but an equity investment	No	IRS
Ballard v. Comm'r, T.C. Memo. 2017-57	Unsubstantiated Schedule C expenses because TP(H) dealt primarily in cash and maintained no records	Yes	IRS
Barnes v. Comm'r, T.C. Memo. 2016-212	Unsubstantiated Schedule C expenses; car and truck expenses disallowed under § 274(d) because expense log did not meet contemporaneous requirement; *Cohan* rule inapplicable for internet expense since TP provided no rational basis for estimating; supplies expense disallowed as personal under § 262	Yes	IRS
Beckey v. Comm'r, T.C. Summ. Op. 2017-13	Schedule A unreimbursed employee expenses disallowed because TP(W) did not meet burden of showing employer would not reimburse under § 162 and expenses were either unsubstantiated under § 274(d) or disallowed as personal under § 262; TP(H) was not engaged in a trade or business under § 162 and could not deduct the payment of corporate expenses for a corporate entity on Schedule C	Yes	IRS
Berry v. Comm'r, T.C. Summ. Op. 2016-81	TP was not engaged in a trade or business of selling tools and machinery under § 162; TP's sale was a one-time event	Yes	IRS
Besong v. Comm'r, T.C. Summ. Op. 2016-71	Schedule C contract labor expense, commissions & fees, vehicle expenses substantiated; travel, meals & entertainment expenses substantiated for 2010 but not for 2009 tax year; § 274(d) substantiation requirements inapplicable in this case because expenses were mischaracterized and *Cohan* rule was inapplicable for 2009 since TP provided no rational basis for estimating; cost of goods sold deduction for 2009 disallowed based on lack of substantiation	Yes	Split
Borna v. Comm'r, T.C. Memo. 2017-73	Schedule C taxes and licenses expense recharacterized by the court as miscellaneous itemized deductions and partially allowed for 2004 & 2006 tax years; Schedule C rent and lease expenses partially substantiated and allowed; Schedule C commissions and fees disallowed as potential duplicate expenses and were unsubstantiated	No	Split
Brodmerkle v. Comm'r, T.C. Memo. 2017-8	Unsubstantiated Schedule C expenses and carryover net operating losses (NOLs) disallowed	Yes	IRS
Brown v. Comm'r, T.C. Summ. Op. 2016-89	Schedule C deductions and related Schedule A deductions disallowed because TP cannot claim personal deductions for the payment of corporate expenses; Schedule A unreimbursed employee expenses disallowed because TP did not meet burden of showing employer would not reimburse under § 162; Schedule A job search expenses partially allowed due to TP's substantiation through credible testimony and reasonable reconstruction of lost records; *Cohan* rule inapplicable for other Schedule A job search expenses since TP provided no rational basis for estimating; Schedule A magazine and publication expenses disallowed as personal under § 262; additional deduction for Schedule A state and local income taxes substantiated	Yes	Split
Brown v. Comm'r, T.C. Memo. 2017-18	TPs' (MFJ) S corporation was not engaged in a trade or business during 2012 under § 162 because there was no evidence that it had any assets or engaged in any activities after 2002; payment for trust fund recovery penalties was unsubstantiated and also nondeductible under § 162(f)	No	IRS
Bulakites v. Comm'r, T.C. Memo. 2017-79	Unsubstantiated business interest expense disallowed under § 162; "other expense" alleged to be a net operating loss (NOL) unsubstantiated and disallowed under § 172	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Carmody v. Comm'r, T.C. Memo. 2016-225	TP was not engaged in horse racing as a trade or business activity under § 183 analysis; Horse racing expenses recharacterized by the court as Schedule A miscellaneous expenses and allowed only to the extent of horse racing income	No	IRS
CGG Americas, Inc. v. Comm'r, 147 T.C. 78 (2016)	Amortization of geological and geophysical expenditures allowed under § 167(h)	No	TP
Chaganti v. Comm'r, T.C. Memo. 2016-222, *appeal docketed*, No. 17-71874 (9th Cir. June 27, 2017)	Schedule C expenses unsubstantiated under § 274(d); TP's tax home was determined to be St. Louis and his per diem amounts for meal expenses limited to business trips away from St. Louis; net operating loss (NOL) unsubstantiated and disallowed under § 172	Yes	IRS
Chowdhury v. Comm'r, T.C. Summ. Op. 2016-31	Schedule C expenses disallowed and recharacterized by the court as § 165 loss from abandonment of business property	Yes	IRS
Cole v. Comm'r, T.C. Summ. Op. 2016-63	Schedule C legal and professional expenses substantiated and ordinary and necessary under § 162; travel, meals & entertainment unsubstantiated under § 274(d); other business expenses partially substantiated and allowed, while others were not	Yes	Split
Creigh v. Comm'r, T.C. Summ. Op. 2017-26	Schedule C education expenses and related vehicle expenses disallowed since TP (W) could not substantiate that her degree maintained or improved her skills but qualified her for a new trade or business	Yes	IRS
Embroidery Express, LLC v. Comm'r, T.C. Memo. 2016-136	TPs were not engaged in the cattle, deer hunting preserve, or resort activities as trade or business activities under § 183 analysis; Schedule C vehicle related expenses for *Embroidery Express* disallowed as unsubstantiated under § 274(d); Schedule C wage expense for *Advanced Embroidery Supply* partially allowed under the *Cohan* rule; Schedule C vehicle depreciation expense for *Stitch It* partially allowed under the *Cohan* rule for three trucks determined by the court not to be listed property under § 280F(d); other disputed Schedule C expenses for *Stitch It* disallowed as either unsubstantiated under § 274(d), personal under § 262, or not ordinary and necessary under § 162; Schedule C vehicle interest deduction for *Embroidery Services* allowed for one truck while land investment interest disallowed for lack of investment motive; Schedule C depreciation expenses for *Juice Plus* disallowed as unsubstantiated under § 274(d) and as personal under § 262; loss from sale of motor home disallowed under § 165	No	Split
Engstrom, Lipscomb & Lack, APC v. Comm'r, 674 F. App'x 617 (9th Cir. 2016), *aff'g* T.C. Memo. 2014-221	Corporate business deduction for travel disallowed as unsubstantiated under § 274(d); shareholder's personal payments to third party for travel expenses were not on the behalf of TP in the form of a loan	No	IRS
Ericson v. Comm'r, T.C. Memo. 2016-107	Schedule C expenses unsubstantiated under § 274(d) and *Cohan* rule inapplicable since TPs (MFJ) provided no rational basis for estimating other expenses; Schedule A unreimbursed employee expenses for TP (W) disallowed as unsubstantiated under § 162	Yes	IRS
Exelon Corp. v. Comm'r, 147 T.C. No. 9 (2016), *appeal docketed*, No. 17-2964 (9th Cir. Sept. 22, 2017)	Depreciation, interest and transaction cost deductions disallowed for the 2001 tax year; transactions lacked substance	No	IRS
Gaines v. Comm'r, T.C. Summ. Op. 2017-15	Schedule C vehicle expense unsubstantiated under § 274(d)	No	IRS
Galbraith v. Comm'r, T.C. Memo. 2016-168	Unsubstantiated Schedule C expenses under § 274(d), including a cell phone determined to be listed property under § 280F(d); several other expense categories unsubstantiated under § 162; *Cohan* rule inapplicable since TP (H) provided no rational basis for estimating; office expenses & utilities disallowed as personal; home office related utility expenses disallowed under § 280A	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Gaston v. Comm'r, T.C. Summ. Op. 2016-41	Schedule C vehicle expense for 2009 and 2010 unsubstantiated under § 274(d); supplies and interest expenses for 2009 unsubstantiated under § 162 and *Cohan* rule inapplicable since TP provided no rational basis for estimating expenses; wages and legal expenses both disallowed as unrelated to Schedule C notary business; Schedule C property management business attached to amended return conceded by TP as fictitious business and disallowed	Yes	IRS
Goldsmith v. Comm'r, T.C. Memo. 2017-20	Closing home costs and related payment not ordinary and necessary under § 162 and disallowed as personal under § 262; closing home costs and related payment also disallowed in the alternative as unsubstantiated under § 162 and *Cohan* rule inapplicable since TP provided no rational basis for estimating; wages paid to sole shareholder recharacterized by the court as nontaxable return of capital to the extent of his basis	Yes	IRS
Green Gas Del. Statutory Trust, Methane Bio, LLC v. Comm'r, 147 T.C. 1 (2016), *appeal docketed*, Nos. 17-1025 & 17-1026 (D.C. Cir. Jan. 26, 2017)	Partnership expenses for operation & maintenance agreements, consulting fees, and legal fees disallowed as unsubstantiated and not ordinary and necessary under § 162; some miscellaneous expenses allowed to extent substantiated	No	Split
Hatcher v. Comm'r, T.C. Memo. 2016-188, *appeal docketed*, No. 17-60315 (5th Cir. Apr. 26, 2017)	TP (W) was not engaged in the trade or business of lending money under § 162 and could not deduct the purported business bad debt on Schedule C for the TPs' (MFJ) 2010 return; net operating loss (NOL) originating from the bad debt deduction was also disallowed	Yes	IRS
Hess v. Comm'r, T.C. Summ. Op. 2016-27	TPs (MFJ) were not engaged in Amway product distribution as a trade or business activity under § 183 analysis	Yes	IRS
Hicks v. Comm'r, T.C. Summ. Op. 2016-68	Schedule C expenses for vehicle mileage, children's education costs, homeowner's insurance, and legal expenses disallowed as personal under § 262; other legal expense pertaining to development of an electronic device partially allowed as substantiated; credit card interest expense unsubstantiated under § 162	Yes	Split
Hylton v. Comm'r, T.C. Memo. 2016-234, *appeal docketed*, Nos. 17-1776 & 17-1777 (4th Cir. June 28, 2017)	TP was not engaged in horse breeding activity as a trade or business under § 183 analysis	No	IRS
Ibidunni v. Comm'r, T.C. Memo. 2016-218	*All Boards Sports* Schedule C: advertising expense unsubstantiated; vehicle expenses unsubstantiated under § 274(d) and TP's testimony was not credible; credit card interest disallowed as personal; repairs & supplies expense unsubstantiated and *Cohan* rule inapplicable since TP provided no rational basis for estimating; rent expense allowed per landlord's credible testimony; other expenses disallowed as unsubstantiated; TP must recapture 2008 & 2009 excess depreciation because TP's vehicle was listed property under § 280F(d) and was not predominantly used in a qualified business in 2010/*B&E Enterprises* Schedule C: All 2010 tax year expenses for short-term vacation rental activity disallowed because TP failed to meet the requirements of § 280A(g); some utilities expense allowed under the *Cohan* rule for 2011 tax year/*Materials Consultants Associates* Schedule C: Insurance expense allowed to the extent substantiated in 2010 tax year; all other expenses unsubstantiated and disallowed for 2010 & 2011 tax years/*Crossroads Wellness* Schedule C: Expenses disallowed under § 280E since medical marijuana dispensary is in the business of trafficking a controlled substance, and disallowed in the alternative, as unsubstantiated; *Cohan* rule inapplicable since TP provided no rational basis for estimating	Yes	Split

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Jackson v. Comm'r, 672 F. App'x 760 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-160	Schedule C business expenses for recreational vehicle depreciation and interest disallowed under § 280A	No	IRS
Jasperson v. Comm'r, 658 F. App'x 962 (11th Cir. 2016), *aff'g* T.C. Memo. 2015-186	TP did not prove he carried back his purported 2005 and 2006 net operating losses (NOLs) or that he timely elected to waive the carryback as required under § 172	No	IRS
Jauregui v. Comm'r, T.C. Summ. Op. 2016-39	Schedule C business expenses unsubstantiated under § 162; vehicle mileage expense unsubstantiated under § 274(d); tools expense partially allowed to extent substantiated; tax return preparation fees allowed per TP's credible testimony	Yes	Split
Kauffman v. Comm'r, T.C. Memo. 2017-38	Schedule C consulting fees disallowed based on failure to substantiate as not ordinary and necessary under § 162	Yes	IRS
Khinda v. Comm'r, T.C. Summ. Op. 2017-32	Schedule A unreimbursed employee expenses disallowed as either unsubstantiated under § 274(d) or not ordinary and necessary under § 162; Schedule C rent expense partially allowed in respect to the mortgage interest paid on office; *Cohan* rule inapplicable for Schedule C utilities expense since TP provided no rational basis for estimating; Schedule C travel, meals & entertainment expenses disallowed as unsubstantiated under § 274(d) and as personal under § 262	Yes	Split
Kilpatrick v. Comm'r, T.C. Memo. 2016-166	Schedule C vehicle expenses unsubstantiated under § 274(d); Schedule C office furnishings expense recharacterized by the court as capital expenditures but depreciation disallowed since furnishings were antiques; 2009 Schedule C laptop expense recharacterized by the court as a capital expense but disallowed as unsubstantiated under § 274(d) and for failure to make a timely § 179 election; other Schedule C expenses partially allowed in 2009 tax year; continuing education expenses disallowed under § 162 as not "necessary" since employer reimbursement was available; tax preparation software allowed in 2010 tax year under § 162 as ordinary and necessary and because TP's testimony was credible; other Schedule C office expenses in 2010 tax year disallowed as personal under § 262; *Cohan* rule inapplicable for cellular telephone and internet expenses since TP provided no rational basis for estimating and TP's testimony for both was not credible; 2010 potted plants expense recharacterized and allowed as advertising expense, instead of gifts subject to § 274(b)(1), due to TP's credible testimony	Yes	Split
Larkin v. Comm'r, T.C. Memo. 2017-54	Schedule C home office related expenses disallowed under § 280A; Schedule C depreciation for computer disallowed as personal and unsubstantiated since TP's (H) testimony was not credible; Schedule C interest expense unsubstantiated; Schedule C pension plan expense allowed in tax years 2003 and 2006 to the extent substantiated; Schedule C travel, meals & entertainment expenses disallowed as unsubstantiated under § 274(d); Schedule C medical insurance premium expense disallowed as unsubstantiated and reclassified as Schedule A medical expense with only a partial allowance for tax year 2003; Schedule C "home leave" expense comprised of TPs' family travel between the U.S. and U.K. and disallowed as personal under § 262	Yes	Split
Levi v. Comm'r, T.C. Memo. 2016-108	Unsubstantiated Schedule A and Schedule C expenses pertaining to dog breeding business	Yes	IRS
Lingren v. Comm'r, T.C. Memo. 2016-213	Schedule C travel expenses unsubstantiated under § 274(d); vehicle expenses unsubstantiated under § 274(d)	Yes	IRS
Little Mountain Corp. v. Comm'r, T.C. Memo. 2016-147, *appeal docketed*, No. 16-73957 (9th Cir. Dec. 22, 2016)	Corporate business deduction for consulting fees disallowed as unsubstantiated and not ordinary and necessary under § 162	No	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Lombardi v. Comm'r, T.C. Memo. 2017-4	Schedule C meals & entertainment expenses disallowed as unsubstantiated under § 274(d) and as personal; Schedule C legal fees allowed as substantiated, as ordinary and necessary under § 162, and because TP (H)'s testimony was credible	Yes	Split
Long v. Comm'r, T.C. Summ. Op. 2016-88	TP was not engaged in real estate activity as a trade or business under § 183 analysis; Schedule C continuing education deduction for master's degree recharacterized by the court and allowed as a Schedule A unreimbursed employee expense since degree did not qualify TP for a new trade or business and TP was ineligible for employer reimbursement	Yes	Split
Luczaj v. Comm'r, T.C. Memo. 2017-42	Several corporate business expenses (including vehicle expenses, insurance, telephone, and meals & entertainment) disallowed as unsubstantiated under § 274(d), not ordinary and necessary under § 162, as personal under § 262, and because TPs' testimonies were not credible; corporate deduction for home office related expenses disallowed under § 280A; Schedule A unreimbursed employee expenses disallowed as unsubstantiated and as personal under § 262, except for partial allowance in 2012 tax year for classroom supplies	No	Split
Main v. Comm'r, T.C. Memo. 2016-127, *appeal docketed*, No. 17-71070 (9th Cir. Apr. 13, 2017)	TP was engaged in automobile restoration activity as a trade or business under § 183 analysis and those expenses that were substantiated could be deducted; camcorder and wireless router were listed property under § 280F and did not meet substantiation requirements under § 280F	Yes	Split
Martin v. Comm'r, T.C. Memo. 2016-189	Schedule A unreimbursed employee expenses disallowed because TP (H) did not meet burden of showing employer would not reimburse under § 162, expenses were unsubstantiated under § 162, *Cohan* rule inapplicable since TP (H) provided no rational basis for estimating, and TP (H)'s testimony was not credible; Schedule C vehicle expense allowed as substantiated under § 274(d) and because TP (H)'s testimony was credible	No	Split
McNally v. Comm'r, T.C. Memo. 2017-93	Schedule A job expenses and other miscellaneous deductions unsubstantiated under § 162; Schedule C travel and vehicle expenses disallowed as unsubstantiated under § 274(d)	Yes	IRS
Moyer v. Comm'r, T.C. Memo. 2016-236	TP (H) was not engaged in human relations training activity as a trade or business under § 183 analysis	No	IRS
Nawrot v. Comm'r, T.C. Summ. Op. 2016-50	Schedule A unreimbursed employee expenses for travel, meals & entertainment disallowed because TP did not meet burden of showing employer would not reimburse under § 162; Schedule A uniform expenses disallowed as unsubstantiated and TP's testimony was not credible; Schedule C travel, meals & entertainment expenses disallowed as unsubstantiated under § 274(d) and because TP's testimony was not credible	Yes	IRS
Nebeker v. Comm'r, T.C. Memo. 2016-155	European cycling events disallowed for failure to qualify as either Schedule C travel or Schedule C advertising expenses since TP's testimony was not credible, trips were personal in nature, and unsubstantiated under § 274(d); other Schedule C travel also disallowed as unsubstantiated under § 274(d)	No	IRS
Oatman v. Comm'r, T.C. Memo. 2017-17	Schedule A unreimbursed employee expenses for vehicle, meals & entertainment disallowed as unsubstantiated under § 274(d) and because TP (W) did not meet burden of showing employer would not reimburse under § 162; Schedule C business expenses disallowed as unsubstantiated under § 162 and § 274(d) and *Cohan* rule inapplicable since TP (H) provided no rational basis for estimating	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Obayagbona v. Comm'r, T.C. Summ. Op. 2016-72	Schedule C office rent expense for separate "Nigeria project" activity not ordinary or necessary under § 162 and was unrelated to Schedule C consulting business; TP failed to make a timely § 195 election to capitalize and deduct the "Nigeria project" start-up business costs; other Schedule C office and travel expenses disallowed as unsubstantiated and not ordinary or necessary under § 162	Yes	IRS
Okorogu v. Comm'r, T.C. Memo. 2017-53	Schedule A and Schedule C expenses disallowed as unsubstantiated under § 162 since TPs (MFJ) produced no documents	No	IRS
Parker v. Comm'r, T.C. Memo. 2016-194	Mid-Atlantic Schedule C utility expenses allowed under *Cohan* rule; unsubstantiated contract labor expenses paid to family members disallowed as personal under § 262; vehicle mileage disallowed as unsubstantiated under § 274(d) and *Cohan* rule inapplicable since TP (H) provided no rational basis for estimating; other Schedule C expenses generally disallowed as unsubstantiated under § 162	Yes	IRS
Powell v. Comm'r, T.C. Memo. 2016-111, *aff'd*, 119 A.F.T.R.2d (RIA) 1959 (4th Cir. 2017)	2011 Schedule E vehicle expenses partially allowed to the extent substantiated under § 274(d); additional 2012 Schedule E deductions allowed per TP (H)'s credible testimony	Yes	Split
Power v. Comm'r, T.C. Memo. 2016-157	Net operating losses (NOLs) unsubstantiated and disallowed under § 172	No	IRS
Probandt v. Comm'r, T.C. Memo. 2016-135	Reconstructed Schedule C travel expenses partially allowed under *Cohan* since TP's testimony was credible and lost records were beyond TP's control; other portion of travel expenses were not reconstructed and were disallowed since TP did not show that he was not reimbursed by his partnership, his testimony was not credible, and the expenses were unsubstantiated under § 274(d); Schedule C consulting fees and printing expense disallowed since the court determined TP's sole testimony was insufficient to substantiate, TP could have offered secondary evidence despite lost records, and the court declined to invoke the *Cohan* rule for these expenses; Schedule C rent expense disallowed as unsubstantiated under § 162	No	Split
Qinetiq U.S. Holdings, Inc. v. Comm'r, 845 F.3d 555 (4th Cir. 2017), *aff'g* T.C. Memo. 2015-123, *cert. denied*, No. 16-1197 (S. Ct. Oct. 2, 2017)	Corporate TP's business deduction for wage expense disallowed in 2008 tax year for purported stock compensation to executive employee since the stock was not issued subject to a substantial risk of forfeiture as required under § 83; the Administrative Procedure Act's requirement of a reasoned explanation in support of a final agency action does not apply to a Notice of Deficiency issued by the IRS	No	IRS
Reynoso v. Comm'r, T.C. Memo. 2016-185	Business expense deductions disallowed in full as unsubstantiated, *Cohan* rule inapplicable since TP provided no rational basis for estimating and TP's testimony not credible	Yes	IRS
Rivas v. Comm'r, T.C. Memo. 2016-158, *appeal dismissed*, No. 16-16365 (11th Cir. Aug. 15, 2017)	Schedule C business expenses disallowed as unsubstantiated under § 162 and § 274(d) since TP produced no documents	Yes	IRS
Roy v. Comm'r, T.C. Summ. Op. 2016-77	Schedule C vehicle mileage and depreciation expenses disallowed as unsubstantiated under § 274(d) and because TP's testimony was not credible; Schedule C legal fees disallowed as unsubstantiated under § 162 and litigation files deemed not covered by attorney-client privilege or destroyed by the City of Los Angeles as part of a conspiracy against TP; Schedule C professional membership fees substantiated under § 162	Yes	Split
Safakish v. Comm'r, 119 A.F.T.R.2d (RIA) 1589 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-242	Unsubstantiated Schedule C business expenses disallowed	Yes	IRS

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Scheurer v. Comm'r, T.C. Memo. 2017-36	Business bad debt deduction disallowed due to lack of substantiation, lack of economic substance to qualify as a bona fide loan transaction and TP was not engaged in the trade or business of lending money; net operating loss (NOL) disallowed since Court reclassified purported advances as capital contributions or gifts	Yes	IRS
Sensenig v. Comm'r, T.C. Memo. 2017-1, *appeal docketed*, No. 17-2866 (3d Cir. Aug. 29, 2017)	TPs (MFJ) are not entitled to a business bad debt deduction because they did not substantiate based on written evidence that there was an enforceable obligation; advances did not have the economic substance of loans and were reclassified as capital contributions by the Court	Yes	IRS
Sioui v. Comm'r, T.C. Summ. Op. 2016-85	Schedule C business expenses disallowed in full as personal under § 262, generally unsubstantiated under § 162, or because TP did not meet burden of showing employer would not reimburse	Yes	IRS
Slavin v. Comm'r, T.C. Summ. Op. 2016-28	Schedule E mortgage interest deduction disallowed for 2008 & 2009 because the interest was unpaid and capitalized in the principal for these tax years	Yes	IRS
Stanley v. Comm'r, T.C. Memo. 2016-196	Schedule C expenses for vehicle and dues disallowed as unsubstantiated under § 162 since TPs (MFJ) produced no documents; Schedule C loan interest expense disallowed as personal under § 262	No	IRS
Tizard v. Comm'r, T.C. Summ. Op. 2016-42	TP was not engaged in aviation activity as a trade or business during 2010 under § 162 because TP had no clients and did not formally advertise	No	IRS
Transupport, Inc. v. Comm'r, T.C. Memo. 2016-216, *appeal docketed*, No. 17-1265 (1st Cir. Mar. 23, 2017)	Corporate TP's unreasonable wage expenses were reduced, because chief executive officer's determinations on compensation amounts payable to his four sons were without negotiation, without regard to qualifications, and lacked arm's-length bargaining	No	Split
Vest v. Comm'r, T.C. Memo. 2016-187, *aff'd*, 690 F. App'x 210 (5th Cir. 2017)	TP was not engaged in homicide-related investigative activities as a trade or business under § 183 analysis	Yes	IRS
Wainwright v. Comm'r, T.C. Memo. 2017-70	Schedule C depreciation expenses disallowed because TP did not substantiate that it was engaged in consulting activity as a trade or business under § 162	No	Split
Walker v. Comm'r, T.C. Memo. 2016-159	Schedule C vehicle and contract labor expenses disallowed as unsubstantiated since TP's testimony was confusing and TP made no reasonable reconstruction of lost records; Schedule C legal and professional services expenses allowed as substantiated under § 162 per TP's credible testimony	No	Split
Wang v. Comm'r, T.C. Memo. 2017-81	Schedule C home office disallowed under § 280A; Schedule C supplies expense included a vehicle purchase that court determined must be disallowed and recharacterized as a capital expenditure under § 263; Schedule C depreciation disallowed because TPs (MFJ) failed to establish the cost basis of depreciable property	Yes	IRS
Wasco Real Properties I, LLC v. Comm'r, T.C. Memo. 2016-224, *appeal docketed*, No. 17-71810 (9th Cir. June 21, 2017)	Partnership expenses for real estate taxes and interest must be capitalized rather than deducted under § 263A	No	IRS
Wilson v. Comm'r, T.C. Summ. Op. 2017-25	Schedule C legal fees in connection with purported home office disallowed since home office was not properly established under § 280A	No	IRS
Zarrinnegar v. Comm'r, T.C. Memo. 2017-34	Schedule C supplies expense unsubstantiated and disallowed as personal under § 262; Schedule C marketing expense consisting of restaurant meals unsubstantiated under § 274(d); Schedule C office expenses partially allowed per TP (H)'s credible testimony	No	Split

TABLE 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Zolghadr v. Comm'r, T.C. Memo. 2017-49	Schedule C business expenses disallowed as unsubstantiated under § 162 and § 274(d) and TP (H)'s testimony was not credible; Schedule C depreciation expense disallowed since TPs' (MFJ) did not make a timely election or substantiate under § 179; Schedule C net operating loss (NOL) disallowed under § 172; Schedule C interest expense disallowed as unsubstantiated and TP (W)'s testimony was not credible; Schedule C wage expense disallowed as generally unsubstantiated under § 162	Yes	IRS

TABLE 3: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Adolphsen, U.S. v., 119 A.F.T.R.2d (RIA) 1461 (W.D. Mich. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1459 (W.D. Mich. 2017)	Summons enforced	Yes	IRS
Adolphsen, U.S. v., 119 A.F.T.R.2d (RIA) 1453 (W.D. Mich. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1451 (W.D. Mich. 2017)	Summons enforced	Yes	IRS
Appenrodt v. U.S., 118 A.F.T.R.2d (RIA) 5266 (N.D. Cal. 2016)	Summons enforced; TP's petition to quash third-party summons denied	No	IRS
Azarian, U.S. v., 118 A.F.T.R.2d (RIA) 5526 (D. Minn. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5523 (D. Minn. 2016), *appeal dismissed*, No. 17-1954 (8th Cir. May 23, 2017) (parties stipulated to dismissal)	Summons denied; TPs properly invoked Fifth Amendment privilege in not producing certain documents and electronic materials	No	TP
Babayan, U.S. v., 119 A.F.T.R.2d (RIA) 1199 (C.D. Cal. 2016)	Summons enforced	Yes	IRS
Barela, U.S. v., No. 16-cv-01805 (E.D. Cal. Mar. 24, 2017), *adopting* 119 A.F.T.R.2d (RIA) 1013 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Belcik, U.S. v., 118 A.F.T.R.2d (RIA) 5129 (M.D. Fla. 2016), *interlocutory appeal dismissed*, 2017 U.S. App. LEXIS 20091 (11th Cir. 2017) (court dismissed appeal due to TP's fugitive status)	Finding of TP's contempt remain in effect	No	IRS
Bolanos v. Comm'r, 118 A.F.T.R.2d (RIA) 5762 (E.D. Cal. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5522 (E.D. Cal. 2016)	TP's petition to quash third-party summons dismissed for failure to timely serve petition	No	IRS
Briggs, U.S. v., 2017 U.S. Dist. LEXIS 11596 (D. Me. 2017), *adopting* 119 A.F.T.R.2d (RIA) 496 (D. Me. 2017)	Summons enforced	Yes	IRS
Carroll, U.S. v., 119 A.F.T.R.2d (RIA) 2123 (D. Vt. 2016)	Summons enforced	Yes	IRS
Chapa, U.S. v., 119 A.F.T.R.2d (RIA) 1254 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1090 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Ciufo, U.S. v., 2017 U.S. Dist. LEXIS 90267 (D. Vt. 2017)	Summons enforced	Yes	IRS
Clements v. U.S., 119 A.F.T.R.2d (RIA) 1784 (W.D. Tex. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1472 (W.D. Tex. 2017)	Summons enforced; TP's petition to quash third-party summonses denied	Yes	IRS
Clower, U.S. v., 666 F. App'x 869 (11th Cir. 2016), *aff'g* 117 A.F.T.R.2d (RIA) 1446 (N.D. Ga. 2016)	Summons enforced	No	IRS
Craven, U.S. v., 119 A.F.T.R.2d (RIA) 353 (D. Vt. 2016)	Summons enforced	Yes	IRS
Cullinan, U.S. v., 118 A.F.T.R.2d (RIA) 5429 (M.D. Fla. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5428 (M.D. Fla. 2016)	Summons enforced	Yes	IRS
Espinar, U.S. v., 118 A.F.T.R.2d (RIA) 6441 (D. Conn. 2016)	Summons enforced	Yes	IRS
Espinar, U.S. v., 118 A.F.T.R.2d (RIA) 6440 (D. Conn. 2016)	Summons enforced	Yes	IRS
Ewers, U.S. v., 2017 U.S. Dist. LEXIS 14316 (N.D. Tex. 2017), *adopting* 2017 U.S. Dist. LEXIS 14313 (N.D. Tex. 2017)	Summons enforced	Yes	IRS
Francois, U.S. v., 119 A.F.T.R.2d (RIA) 1915 (S.D. Miss. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1914 (S.D. Miss. 2017)	Summons enforced; Bench warrant issued	Yes	IRS
Fridman, U.S. v., 665 F. App'x 94 (2d Cir. 2016), *aff'g in part, vacating in part, and remanding* 118 A.F.T.R.2d (RIA) 6890 (S.D.N.Y. 2015)	Documents requested by IRS were relevant to its investigation; Case vacated and remanded to develop a record sufficient to determine whether TP properly invoked Fifth Amendment privilege claim and any applicable exceptions	No	Split
Funes, U.S. v., No. 16-cv-00273 (D. Neb. Oct. 21, 2016), *adopting* 118 A.F.T.R.2d (RIA) 5833 (D. Neb. 2016)	Summons enforced	Yes	IRS

TABLE 3: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro se*	Decision
Giannopoulos, U.S. v., 2016 U.S. Dist. LEXIS 179154 (M.D. Fla. 2016), *adopting* 2016 U.S. Dist. LEXIS 180043 (M.D. Fla. 2016)	Summons enforced	Yes	IRS
Gibson, U.S. v., 117 A.F.T.R.2d (RIA) 2037 (W.D. Mo. 2016), *adopting* 117 A.F.T.R.2d (RIA) 2035 (W.D. Mo. 2016)	Summons enforced	Yes	IRS
Gislason, U.S. v., 118 A.F.T.R.2d (RIA) 5563 (M.D. Fla. 2016)	Summons enforced	Yes	IRS
Greenberger, U.S. v., 117 A.F.T.R.2d (RIA) 2204 (N.D. Ga. 2016), *adopting* 117 A.F.T.R.2d (RIA) 2193 (N.D. Ga. 2016)	Summons enforced	No	IRS
Greenfield, U.S. v., 831 F.3d 106 (2d Cir. 2016), *vacating and remanding* 118 A.F.T.R.2d (RIA) 5309 (S.D.N.Y. 2015), *motion to dismiss* case, No. 14-mc-00350 (S.D.N.Y. Oct. 27, 2016) (government abandoned pursuit of summons enforcement action), *order to dismiss*, No. 14-mc-00350 (S.D.N.Y. Oct. 28, 2016)	Court vacated district court order enforcing the summons and denying TP's motion to quash and remanded the case due to Fifth Amendment privilege concerns	No	TP
Harrison v. U.S. Comm'r, 2017 U.S. Dist. LEXIS 9742 (S.D. Tex. 2017), *adopting* 119 A.F.T.R.2d (RIA) 593 (S.D. Tex. 2016).	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Hernandez, U.S. v., 119 A.F.T.R.2d (RIA) 1377 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1134 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Hernandez, U.S. v., 2017 U.S. Dist. LEXIS 54728 (N.D. Cal. 2017), *adopting* 2017 U.S. Dist. LEXIS 40762 (N.D. Cal. 2017)	Summons enforced	Yes	IRS
Ingram, U.S. v., 119 A.F.T.R.2d (RIA) 1109 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 800 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Jaques, U.S. v., 119 A.F.T.R.2d (RIA) 726 (D. Haw. 2016)	Summons enforced	Yes	IRS
Johnson v. U.S., 118 A.F.T.R.2d (RIA) 5979 (D. Utah 2016)	Summons enforced; TP's petition to quash third-party summonses denied	No	IRS
Jones, U.S. v., 2017 U.S. Dist. LEXIS 5347 (W.D. Mich. 2017)	Summons enforced	Yes	IRS
Joy v. U.S., IRS, 2017 U.S. Dist. LEXIS 76846 (W.D.N.C. 2017)	Summons enforced; TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Keene, U.S. v., 2017 U.S. Dist. LEXIS 63258 (D. Me. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1465 (D. Me. 2017)	Summons enforced	Yes	IRS
Killebrew, U.S. v., 119 A.F.T.R.2d (RIA) 1318 (S.D. Cal. 2017)	Summons enforced	Yes	IRS
Lal, U.S. v., No. 16-mc-05024 (W.D. Wash. Oct. 26, 2016), *adopting* 2016 U.S. Dist. LEXIS 148456 (W.D. Wash. 2016), *order modifying the Order of Enforcement of Summonses*, No. 16-mc-05024 (W.D. Wash. July 11, 2017) (summons modified to request new period of records & information)	Summons enforced	Yes	IRS
Lal, U.S. v., No. 16-mc-05025 (W.D. Wash. Oct. 26, 2016), *adopting* 2016 U.S. Dist. LEXIS 148449 (W.D. Wash. 2016), *order modifying the Order of Enforcement of Summonses*, No. 16-mc-05025 (W.D. Wash. July 10, 2017) (summons modified to request new period of records & information)	Summons enforced	Yes	IRS
Lonnen, U.S. v., 118 A.F.T.R.2d (RIA) 5431 (M.D.N.C. 2016)	TP held in contempt; Arrest warrant issued	Yes	IRS
Mann, U.S. v., 119 A.F.T.R.2d (RIA) 657 (E.D. Tenn. 2017)	Summons enforced	Yes	IRS
McConnell, U.S. v., 119 A.F.T.R.2d (RIA) 942 (N.D. Ga. 2017), *adopting* 119 A.F.T.R.2d (RIA) 939 (N.D. Ga. 2017)	Summons enforced	Yes	IRS
McMillan, U.S. v., 118 A.F.T.R.2d (RIA) 6436 (M.D. Fla. 2016), *adopting* 118 A.F.T.R.2d (RIA) 6434 (M.D. Fla. 2016)	Summons enforced	Yes	IRS

TABLE 3: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro se*	Decision
Meyer v. U.S., 119 A.F.T.R.2d (RIA) 1255 (D. Ariz. 2017), *appeal dismissed*, No. 17-16140 (9th Cir. Aug. 3, 2017) (case dismissed for failure to prosecute)	TP's petition to quash third-party summons denied	Yes	IRS
Meyer, U.S. v., 119 A.F.T.R.2d (RIA) 883 (D. Minn. 2017), *summons enforced by*, No. 16-cv-00774 (D. Minn. July 14, 2017)	TP's petition to quash third-party summons denied	Yes	IRS
Mitchell v. U.S., 119 A.F.T.R.2d (RIA) 368 (N.D. Ga. 2016)	TP's petition to quash third-party summons denied, Lack of subject matter jurisdiction	Yes	IRS
Morton, U.S. v., 119 A.F.T.R.2d (RIA) 364 (W.D. Mich. 2017), *adopting* 119 A.F.T.R.2d (RIA) 362 (W.D. Mich. 2016), *aff'd*, No. 17-1260 (6th Cir. Oct. 17, 2017)	Summons enforced	Yes	IRS
Muller, U.S. v., 119 A.F.T.R.2d (RIA) 1958 (D.N.M. 2016)	Summons enforced	Yes	IRS
Nevius v. U.S., 190 F. Supp. 3d 191 (D.D.C. 2016)	TP's petition to quash one third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Oliver v. U.S., 2016 U.S. Dist. LEXIS 124677 (M.D. Fla. 2016), *adopting* 2016 U.S. Dist. LEXIS 124899 (M.D. Fla. 2016)	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Pate, U.S. v., 118 A.F.T.R.2d (RIA) 5989 (W.D. Mo. 2016), *adopting in part* 118 A.F.T.R.2d (RIA) 5984 (W.D. Mo. 2016), *appeal docketed*, No. 16-4282 (8th Cir. Nov. 23, 2016)	Summons enforced	Yes	IRS
Perez v. U.S., 118 A.F.T.R.2d (RIA) 6509 (C.D. Cal. 2016), *adopting* 118 A.F.T.R.2d (RIA) 6473 (C.D. Cal. 2016)	TP's petition to quash third-party summons denied	Yes	IRS
Pfeifer, U.S. v., 117 A.F.T.R.2d (RIA) 2106 (S.D. Ill. 2016)	TP held in contempt; Arrest warrant issued	Yes	IRS
Polocoser, U.S. v., 118 A.F.T.R.2d (RIA) 6592 (E.D. Mich. 2016)	Summons enforced	Yes	IRS
Rael, U.S. v., 118 A.F.T.R.2d (RIA) 6828 (D.N.M. 2016)	Summons enforced	Yes	IRS
Rea, U.S. v., 119 A.F.T.R.2d (RIA) 1313 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1065 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Reeves, U.S. v., 118 A.F.T.R.2d (RIA) 5168 (E.D. Tex. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5167 (E.D. Tex. 2016)	Summons enforced	Yes	IRS
Rippl v. IRS, 118 A.F.T.R.2d (RIA) 5053 (N.D. Ohio 2016)	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Roskop, U.S. v., 2016 U.S. Dist. LEXIS 110329 (D. Minn. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5761 (D. Minn. 2016)	Summons enforced	Yes	IRS
Scott, U.S. v., 119 A.F.T.R.2d (RIA) 1963 (M.D. Fla. 2016)	Summons enforced	Yes	IRS
Shannon, U.S. v., 117 A.F.T.R.2d (RIA) 1968 (C.D. Cal. 2016)	Summons enforced	Yes	IRS
Singh, U.S. v., 119 A.F.T.R.2d (RIA) 1360 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 990 (E.D. Cal. 2017), *appeal docketed*, No. 17-15659 (9th Cir. Apr. 7, 2017)	TP's petition to quash summons denied as summons already enforced; TP ordered to pay compensatory sanctions	Yes	IRS
Siripane, U.S. v., 119 A.F.T.R.2d (RIA) 1407 (E.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1062 (E.D. Cal. 2017)	Summons enforced	Yes	IRS
Smith v. U.S., 117 A.F.T.R.2d (RIA) 2208 (M.D. Fla. 2016), *adopting* 117 A.F.T.R.2d (RIA) 2207 (M.D. Fla. 2016)	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	Yes	IRS
Smith, U.S. v., 119 A.F.T.R.2d (RIA) 1775 (W.D. Mich. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1774 (W.D. Mich. 2017)	Summons enforced	Yes	IRS

TABLE 3: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro se*	Decision
Tomczak v. U.S., 118 A.F.T.R.2d (RIA) 6805 (W.D. Wis. 2016)	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction	No	IRS
Uemura, U.S. v., 2016 U.S. Dist. LEXIS 108322 (D. Haw. 2016), *adopting* 2016 U.S. Dist. LEXIS 109295 (D. Haw. 2016)	Summons enforced	Yes	IRS
Ukazim, U.S. v., 118 A.F.T.R.2d (RIA) 6502 (S.D. Fla. 2016), *appeal dismissed*, No. 16-16859 (11th Cir. Nov. 28, 2016) (case dismissed after government's motion for dismissal)	Summons enforced in part; TP entitled to Fifth Amendment privilege for questions that could be used in evidentiary chain to prove federal tax crime	No	Split
Welsh, U.S./IRS v., 118 A.F.T.R.2d (RIA) 6109 (D.N.M. 2016)	Summons enforced	Yes	IRS
Whitcomb, U.S. v., 2017 U.S. Dist. LEXIS 37467 (M.D.N.C. 2017), *adopting* 2016 U.S. Dist. LEXIS 185132 (M.D.N.C. 2016)	Summons enforced	Yes	IRS
Witt, U.S. v., 678 F. App'x 587 (9th Cir. 2017), *aff'g* 116 A.F.T.R.2d (RIA) 5060 (E.D. Cal. 2015)	Summons enforced	Yes	IRS
Xiao Wu Chen, U.S v., 2017 U.S. Dist. LEXIS 5346 (W.D. Mich. 2017)	Summons enforced	Yes	IRS
Zelen v. U.S., 661 F. App'x 499 (9th Cir. 2016), *aff'g* 113 A.F.T.R.2d (RIA) 1205 (C.D. Cal. 2014)	Summons enforced; TP's petition to quash third-party summons denied; TP's attorney-client, Fifth Amendment, and attorney work product claims denied	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Bible Study Time, Inc., v. U.S., 240 F. Supp. 3d 409 (D.S.C. 2017)	Summons enforced; TP's petition to quash third-party summons denied; summonses on banks of TP claiming church status were third-party summons under § 7609 and not church tax inquiry under § 7611	No	IRS
Cade Corp., U.S. v., 118 A.F.T.R.2d (RIA) 5626 (N.D. Cal. 2016)	Summons enforced and evidentiary hearing denied as TP failed to point to IRS's bad faith or abuse of the court's process	No	IRS
Chabot, U.S. v., 119 A.F.T.R.2d (RIA) 1179 (D.N.J. 2016), *aff'd*, 681 F. App'x 134 (3d Cir. 2017), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017)	TP held in contempt and subsequently fined	No	IRS
Chabot, U.S. v., 681 F. App'x 134 (3d Cir. 2017), *aff'g* 119 A.F.T.R.2d (RIA) 1179 (D.N.J. 2016), *petition for cert. filed*, No. 17-477 (Oct. 2, 2017)	Contempt finding by lower court was proper	No	IRS
Chaiken, Estate of, v. U.S., 119 A.F.T.R.2d (RIA) 988 (N.D. Cal. 2017), *adopting* 119 A.F.T.R.2d (RIA) 981 (N.D. Cal. 2016)	Estate's petition to quash granted in part and summonses enforced in part; Original request for "all medical records" of the late TP to determine expectation of repayment for alleged loan was too broad and court could modify the date range of medical records requested	No	Split

TABLE 3: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro se*	Decision
Futurevision, Ltd. v. U.S., 2017 U.S. Dist. LEXIS 102655 (D. Colo. 2017)	Summons enforced; TP's petition to quash third-party summons denied; TP's allegations that summons on the Colorado Department of Revenue's Marijuana Enforcement Division for marijuana business is aimed at looking at Controlled Substance Act violation is conclusory	No	IRS
High Desert Relief, Inc. v. U.S., 119 A.F.T.R.2d (RIA) 1369 (D.N.M. 2017), *appeal docketed*, No. 17-2083 (10th Cir. May 31, 2017)	Summons enforced; TP's petition to quash third-party summons denied	No	IRS
High Desert Relief, Inc. v. U.S., 119 A.F.T.R.2d (RIA) 1495 (D.N.M. 2017), *appeal docketed*, No. 17-2095 (10th Cir. June 12, 2017)	Summons enforced; TP's petition to quash third-party summons denied	No	IRS
Jones, U.S. v., 119 A.F.T.R.2d (RIA) 1958 (C.D. Cal. 2017), *dismissed by* 2017 U.S. Dist. LEXIS 76831 (C.D. Cal. 2017) (case dismissed due to stipulation of the parties)	Summons enforced and subsequently dismissed due to stipulation of the parties	Yes	IRS
Lefkoff v. U.S., 2017 U.S. Dist. LEXIS 103165 (M.D. Fla. 2017), *adopting* 2017 U.S. Dist. LEXIS 103509 (M.D. Fla. 2017)	TP's petition to quash third-party summons denied	No	IRS
Martina, U.S. v., 119 A.F.T.R.2d (RIA) 400 (M.D. Fla. 2016)	Summons enforced	Yes	IRS
Maxcrest Ltd. v. U.S., 205 F. Supp. 3d 1099 (N.D. Cal. 2016), *appeal docketed*, No. 16-16587 (9th Cir. Sept. 9, 2016)	Summons enforced; TP's petition to quash third-party summons denied	No	IRS
Micro Cap Ky. Ins., U.S. v., 246 F. Supp. 3d 1194 (E.D. Ky. 2017), *adopting* 119 A.F.T.R.2d (RIA) 1279 (E.D. Ky. 2017), *motion to dismiss case*, No. 17-5611 (6th Cir. June 6, 2017) (government decided not to pursue appeal), *appeal dismissed*, No. 17-5611 (6th Cir. June 7, 2017)	Summons denied; TPs entitled to attorney-client privilege	No	TP
Presley v. U.S., 119 A.F.T.R.2d (RIA) 313 (S.D. Fla. 2017), *appeal docketed*, No. 17-10182 (11th Cir. Jan. 11, 2017)	TP's petition to quash third-party summons denied; No expectation of privacy in records held by third-party bank through Florida law because of preemption of federal law	No	IRS
Schaeffler v. U.S, 117 A.F.T.R.2d 2139 (S.D.N.Y 2016), *aff'd*, 120 A.F.T.R.2d (RIA) 5618 (2d Cir. 2017)	TP's petition to quash third-party summons denied; Lack of subject matter jurisdiction as IRS withdrew summons making matter moot	No	IRS
Tax Liabs. of Doe, In re, 118 A.F.T.R.2d (RIA) 6780 (N.D. Cal. 2016)	Court granted government's ex parte petition for leave to serve "John Doe" summons to virtual currency exchanger Coinbase, Inc.	No	IRS

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)				
Adolphson v. Comm'r, 842 F.3d 478 (7th Cir. 2016), *aff'g* No. 14-21816 (T.C. Feb. 3, 2015)	Levy	Lower court affirmed; Tax Court lacked subject matter jurisdiction to consider TP's challenge to levies	No	IRS
Beckenfeld, Estate of, v. Comm'r, T.C. Memo. 2017-25, *appeal docketed*, No. 17-71219 (9th Cir. Apr. 28, 2017)	Levy	Notice of determination sustained; proposed collection action sustained	No	IRS
Bigley v. Comm'r, 671 F. App'x 992 (9th Cir. 2016), *aff'g* Nos. 12-17529 (T.C. Jan. 17, 2014) & 12-17747 (T.C. Jan. 24, 2014)	Levy	Lower court affirmed; no abuse of discretion; proposed collection actions sustained; TP precluded from challenging the underlying tax liability	Yes	IRS
Brugnara v. Comm'r, 667 F. App'x 250 (9th Cir. 2016), *aff'g* No. 12-10243 (T.C. Oct. 22, 2013)	Levy	Lower court affirmed; TP precluded from challenging the underlying tax liabilities; notice of deficiency was properly mailed	Yes	IRS
Buffano v. Comm'r, T.C. Memo. 2016-121	Levy	TP precluded from challenging the underlying tax liabilities; notices of deficiency were properly mailed; proposed collection action sustained	Yes	IRS
Buffano v. Comm'r, T.C. Memo. 2016-122	Lien/Levy	TP could challenge the underlying tax liabilities; notices of deficiency were not properly mailed; proposed collection actions not sustained and the underlying tax liabilities were invalidly assessed	Yes	TP
Burningham v. Comm'r, 677 F. App'x 316 (9th Cir. 2017), *aff'g* Nos. 12-24619 (T.C. Dec. 19, 2013) & 12-21372 (T.C. Dec. 18, 2013)	Levy	Lower court affirmed and the underlying tax liabilities sustained; no abuse of discretion in dismissing TP's appeal for failure to prosecute	Yes	IRS
Carter v. Comm'r, T.C. Summ. Op. 2016-38	Lien	TPs (MFJ) precluded from challenging the underlying tax liability; notice of deficiency was properly mailed; proposed collection action sustained	Yes	IRS
Chandler v. Comm'r, 660 F. App'x 694 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-215	Lien	Lower court affirmed; no abuse of discretion in rejecting offer-in-compromise or TP's request for remand to the Appeals Office; TP's circumstances had not materially changed; proposed collection action sustained	Yes	IRS
Chiarelli v. Comm'r, T.C. Memo. 2017-91	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Craven v. Comm'r, T.C. Memo. 2017-23	Levy	No abuse of discretion in denying requests for collection alternatives since requested information was not provided; proposed collection action sustained	Yes	IRS
Cropper v. Comm'r, 826 F.3d 1280 (10th Cir. 2016), *aff'g* T.C. Memo. 2014-139	Lien/Levy	No abuse of discretion; notices of deficiency were properly mailed; proposed collection action sustained	No	IRS
Daniel v. Comm'r, T.C. Memo. 2017-82	Levy	No abuse of discretion in denying requests for collection alternatives since requested information was not provided; proposed collection action sustained	Yes	IRS
Dean v. Comm'r, T.C. Memo. 2016-203, *aff'd*, No. 17-1123 (D.C. Cir. Sept. 13, 2017)	Lien	No abuse of discretion; proposed collection actions sustained	Yes	IRS

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Evans v. Comm'r, T.C. Summ. Op. 2016-34	Lien	TP could challenge the underlying tax liabilities; tax sustained because TP's arguments were frivolous; no abuse of discretion in sustaining determination to proceed with collection action	Yes	IRS
Ertelt v. Comm'r, T.C. Memo. 2017-41, *appeal docketed*, No. 17-72386 (9th Cir. Aug. 23, 2017)	Lien	Notice of deficiency was properly mailed; TP precluded from challenging the underlying tax liability; no abuse of discretion in denying petitioner a face-to-face hearing; proposed collection action sustained	Yes	IRS
Ferrari v. Comm'r, 675 F. App'x. 653 (9th Cir. 2017), *aff'g* No. 13-18531 (T.C. Nov. 21, 2014)	Lien/Levy	Lower court affirmed; TP's argument that notices of deficiency were invalid were frivolous; TP precluded from challenging the underlying tax liabilities; proposed collection action sustained	Yes	IRS
Fine v. Comm'r, T.C. Memo. 2016-217, *appeal docketed*, No. 17-71042 (9th Cir. Apr. 11, 2017)	Lien	No abuse of discretion in denying request for "currently-not-collectible" status or in rejecting proposed collection alternatives since requested information was not provided; proposed collection action sustained	Yes	IRS
Garrett v. Comm'r, T.C. Memo. 2016-179	Lien	Notice of deficiency was properly mailed; proposed collection action sustained	Yes	IRS
Giaimo, U.S. v., 854 F.3d 483 (8th Cir. 2017), *aff'g* 2016 WL 4045429 (E.D. Mo. 2016)	Lien	Lower court affirmed; collection limitations period was tolled during pendency of the Tax Court action; Tax Court petition was timely filed and Tax Court had proper jurisdiction	No	IRS
Harris v. Comm'r, T.C. Memo. 2016-175	Lien/Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Hartmann v. Comm'r, 667 F. App'x 374 (3d Cir. 2016), *aff'g* No. 14-6825 (T.C. Aug. 21, 2015)	Levy	Lower court affirmed; no abuse of discretion; proposed collection action sustained	Yes	IRS
Iames v. Comm'r, 850 F.3d 160 (4th Cir. 2017), *aff'g* No. 14-10306 (T.C. June 16, 2015)	Levy	Lower court affirmed; TP precluded from challenging the underlying tax liability in CDP hearing	No	IRS
Kaebel v. Comm'r, T.C. Memo. 2017-37, *appeal dismissed*, No. 17-60508 (5th Cir. Aug. 17, 2017)	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Leslie v. Comm'r, T.C. Memo. 2016-171	Lien/Levy	Remanded to the Appeals Office; failure to consider a collection alternative was an abuse of discretion	No	TP
MacInnis v. Comm'r, T.C. Summ. Op. 2016-78	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Martinez v. Comm'r, T.C. Memo. 2017-47	Lien	No abuse of discretion; proposed collection action sustained	Yes	IRS
McElhaney v. Comm'r, 651 F. App'x 256 (5th Cir. 2016), *aff'g* No. 14-17561 (T.C. May 1, 2015)	Lien/Levy	Lower court affirmed; TP precluded from challenging the underlying tax liability; no abuse of discretion; proposed collection action sustained	Yes	IRS
Morton v. Comm'r, T.C. Memo. 2016-227	Lien/Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Myers, Estate of, v. Comm'r, T.C. Memo. 2017-11	Lien/Levy	No abuse of discretion in rejecting offer-in-compromise or filing notice of lien; proposed collection action sustained	No	IRS
Niski v. Comm'r, T.C. Summ. Op. 2017-33	Lien	No abuse of discretion in rejecting interest abate requests; proposed collection action sustained	No	IRS

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Noyes v. Comm'r, T.C. Memo. 2017-27, *appeal dismissed*, No. 17-71594 (9th Cir. Sept. 1, 2017)	Lien	Proposed collection action sustained for all tax years except for 2006 tax year	Yes	Split
Olson v. Comm'r, T.C. Memo. 2017-33	Lien	No abuse of discretion in rejecting offer in compromise and proposed installment agreement; proposed collection action sustained	Yes	IRS
Phillips v. Comm'r, T.C. Memo. 2017-13	Levy	No abuse of discretion in rejecting proposed collection alternatives since requested information was not provided; proposed collection action sustained	No	IRS
Pitner v. Comm'r, T.C. Memo. 2016-237	Lien	No abuse of discretion in rejecting TP's proposed installment agreement	No	IRS
Portwine v. Comm'r, 668 F. App'x 838 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-29	Lien/Levy	Lower court affirmed; TP precluded from challenging the underlying tax liabilities; notices of deficiency were properly mailed	No	IRS
Rivas v. Comm'r, T.C. Memo. 2017-56, *appeal docketed*, No. 17-2732 (2d Cir. Sept. 1, 2017)	Lien/Levy	TP precluded from challenging the underlying tax liability; notice of deficiency was properly mailed; no abuse of discretion in sustaining proposed collection actions; notice of determination sustained	Yes	IRS
Ruddy v. Comm'r, T.C. Memo. 2017-39, *appeal docketed*, No. 17-1654 (4th Cir. May 24, 2017)	Levy	Notice of deficiency was properly mailed; limitations period for assessment had not expired and tax was timely assessed; no abuse of discretion; proposed collection action sustained	Yes	IRS
Santana v. Comm'r, T.C. Memo. 2017-14	Levy	No abuse of discretion in rejecting penalty and interest abatement requests and sustaining proposed collection action	No	IRS
Satchell v. Comm'r, T.C. Summ. Op. 2016-55	Levy	TP precluded from challenging the underlying tax liability; no abuse of discretion; notice of determination sustained	Yes	IRS
Schuster v. Comm'r, T.C. Memo. 2017-15, *appeal docketed*, No. 17-11647 (11th Cir. Apr. 11, 2017)	Levy	Collection limitations period had not expired; notice of determination sustained	No	IRS
Spinner v. Comm'r, T.C. Memo. 2017-87	Lien	No abuse of discretion; collection action sustained	Yes	IRS
Talbot v. Comm'r, T.C. Memo. 2016-191, *appeal docketed*, No. 17-70826 (9th Cir. Mar. 22, 2017)	Lien/Levy	TP precluded from challenging the underlying liabilities; determination to proceed with collection was an abuse of discretion for some tax years but not for other tax years	Yes	Split
Ward v. Comm'r, T.C. Memo. 2016-124	Lien	No abuse of discretion in sustaining proposed collection action	Yes	IRS
Weiss v. Comm'r, 147 T.C. 179 (2016), *appeal docketed*, No. 16-1407 (D.C. Cir. Nov. 23, 2016)	Levy	Collection period of limitations was suspended and had not expired; no abuse of discretion in sustaining collection action	No	IRS
West v. Comm'r, T.C. Memo. 2016-134	Levy	TP challenged the underlying tax liabilities; tax sustained and interest abatement denied; no abuse of discretion in sustaining determination to proceed with collection action	Yes	IRS
Williams v. Comm'r, T.C. Memo. 2017-58, *appeal docketed*, No. 17-13628 (11th Cir. Aug. 14, 2017)	Levy	TP precluded from challenging the underlying tax liabilities; no abuse of discretion in sustaining determination to proceed with collection action; levy suspension removed; frivolous arguments penalty asserted	Yes	IRS

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Yambo v. Comm'r, T.C. Memo. 2017-85	Lien	No abuse of discretion in rejecting proposed collection alternatives since requested information was not provided; proposed collection action sustained	Yes	IRS
Yates v. Comm'r, 2017 U.S. App. LEXIS 5936 (4th Cir. 2017), *aff'g* No. 15-16473 (T.C. Aug. 15, 2016)	Lien	Lower court affirmed; collection action sustained	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)				
Agility Network Servs. v. U.S., 848 F.3d 790 (6th Cir. 2017), *aff'g* 116 A.F.T.R.2d (RIA) 6911 (W.D. Mich. 2015)	Lien/Levy	Lower court affirmed; no waiver of sovereign immunity; TP's claims for damages and temporary restraining order were properly dismissed because specified conduct did not occur in connection with tax collection	No	IRS
Allen v. Comm'r, T.C. Memo. 2017-64	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Anderson v. Comm'r, T.C. Memo. 2016-211	Lien/Levy	No abuse of discretion in denying a face-to-face hearing or rejecting offer-in-compromise; proposed collection action sustained	No	IRS
Anderson v. Comm'r, T.C. Memo. 2016-219	Levy	TP precluded from challenging the underlying tax liabilities; no abuse of discretion in declining to grant further delays for CDP hearing date; notice of determination sustained	Yes	IRS
Archer v. Comm'r, T.C. Memo. 2016-230	Levy	Notices of deficiency were properly mailed; TPs (MFJ) precluded from challenging the underlying tax liabilities; proposed collection action sustained	No	IRS
Bitter v. Comm'r, T.C. Memo. 2017-46	Levy	TP precluded from challenging the underlying tax liabilities; no abuse of discretion; proposed collection action sustained	No	IRS
Byers v. Comm'r, T.C. Memo. 2017-28, *appeal docketed*, No. 17-2652 (8th Cir. July 31, 2017)	Lien	No abuse of discretion; no evidence that Appeals Officer engaged in ex parte communications or excluded material documents from the record; frivolous arguments penalty asserted	Yes	IRS
Byrne v. U.S., 127 Fed. Cl. 284 (2016)	Lien	Motion to dismiss granted for the US's assertion for TFRP assessment balance due	No	IRS
Cox v. Comm'r, T.C. Summ. Op. 2016-53	Levy	TP precluded from challenging the underlying tax liabilities; no abuse of discretion; proposed collection action sustained	No	IRS
Crescent Manor, Inc. v. Comm'r, T.C. Memo. 2017-94	Levy	No abuse of discretion; proposed collection action sustained; Appeals Officer was found to be impartial	No	IRS
Dalton v. Comm'r, T.C. Memo. 2017-43	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Duncan, Estate of, v. Comm'r, T.C. Memo. 2016-204, *appeal docketed*, No. 17-60145 (5th Cir. Mar. 3, 2017)	Levy	No abuse of discretion; proposed collection action sustained	No	IRS
Durda v. Comm'r, T.C. Memo. 2017-89	Lien	No abuse of discretion; proposed collection action sustained	Yes	IRS
First Rock Baptist Church Child Dev. Ctr. v. Comm'r, 148 T.C. No. 17 (2017)	Lien	No abuse of discretion; proposed collection action sustained; TP precluded from challenging the underlying tax liability	No	IRS

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Fitzpatrick v. Comm'r, T.C. Memo. 2016-199	Lien	TP could challenge the underlying tax liabilities because TP properly raised challenge during CDP hearing; TP was not responsible for the underlying tax liabilities	No	TP
Flume v. Comm'r, T.C. Memo. 2017-21	Levy	TP could challenge the underlying tax liabilities because TP properly raised challenge during CDP hearing; TP was responsible for the underlying tax liabilities	No	IRS
Hauptman v. Comm'r, 831 F.3d 950 (8th Cir. 2016), *aff'g* T.C. Memo. 2014-214	Levy	Lower court affirmed; no abuse of discretion in rejecting TP's offer-in-compromise; proposed collection action sustained	No	IRS
Hennessey Manor Nursing Home, Inc. v. Comm'r, T.C. Memo. 2017-97	Levy	No abuse of discretion in rejecting TP's proposed installment agreement and sustaining collection action	No	IRS
Heber E. Costello, LLC v. Comm'r, T.C. Memo. 2016-184	Levy	No abuse of discretion; proposed collection action sustained	No	IRS
Jewell v. Comm'r, T.C. Memo. 2016-239	Lien	No abuse of discretion; proposed collection action sustained	No	IRS
Keller Tank Servs. II v. Comm'r, 854 F.3d 1178 (10th Cir. 2017), *aff'g* No. 14-11611 (T.C. June 16, 2015)	Levy	Lower court affirmed; TP precluded from challenging the underlying tax liability	No	IRS
Konkus, Estate of, v. Comm'r, T.C. Memo. 2017-45	Lien/Levy	No abuse of discretion in rejecting the TP's offer-in-compromise; proposed collection action sustained	No	IRS
LG Kendrick, LLC v. Comm'r, 684 F. App'x 744 (10th Cir. 2017), *aff'g* 146 T.C. 17 (2016)	Lien/Levy	Lower court affirmed; no abuse of discretion; TP precluded from challenging the underlying tax liability	Yes	IRS
Lindsay Manor Nursing Home, Inc. v. Comm'r, 148 T.C. No. 9 (2017), *related proceeding at* T.C. Memo. 2017-50, *appeal docketed*, No. 17-9002 (10th Cir. May 23, 2017)	Levy	Section 301.6343-1(b)(4), Procedure & Administration Regulation is a valid regulation that limits economic hardship relief to individual TPs and does not include corporate TPs	No	IRS
Lindsay Manor Nursing Home, Inc. v. Comm'r, T.C. Memo. 2017-50, *related proceeding at* 148 T.C. No. 9 (2017), *appeal docketed*, No. 17-9002 (10th Cir. May 23, 2017)	Levy	No abuse of discretion in rejecting TP's proposed installment agreement and sustaining collection action; Appeals Officer was found to be impartial	No	IRS
Lloyd v. Comm'r, T.C. Memo. 2017-60	Levy	No abuse of discretion in rejecting the TP's offer-in-compromise; proposed collection action sustained	No	IRS
Lunnon v. Comm'r, 652 F. App'x 623 (10th Cir. 2016), *aff'g* T.C. Memo. 2015-156	Lien/Levy	Lower court affirmed; collection actions sustained; TP failed to introduce new evidence on prior remand of case	Yes	IRS
Our Country Home Enters. v. Comm'r, 855 F.3d 773 (7th Cir. 2017), *aff'g* 145 T.C. 1 (2015)	Levy	Lower court affirmed; TP may not challenge its liability for a tax penalty in a CDP hearing after having unsuccessfully challenged its liability for that penalty in an earlier administrative hearing	No	IRS
Paynter v. Comm'r, T.C. Summ. Op. 2017-12	Levy	TP did not establish affirmative misconduct on the part of the IRS to invoke estoppel doctrine; proposed collection action sustained	Yes	IRS
Pazzo Pazzo, Inc. v. Comm'r, T.C. Memo. 2017-12	Lien/Levy	No abuse of discretion in sustaining the collection actions; IRS's motion to permit immediate levy denied for lack of good cause	No	Split

TABLE 4: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citations	Lien/Levy	Issue(s)	*Pro se*	Decision
Shaffran v. Comm'r, T.C. Memo. 2017-35	Lien/Levy	TP could challenge the underlying tax liabilities because TP properly raised challenge during CDP hearing; TP was not responsible for the underlying tax liabilities	Yes	TP
Silvercrest Manor Nursing Home, Inc. v. Comm'r, T.C. Memo. 2017-96	Levy	No abuse of discretion in rejecting TP's proposed installment agreement and sustaining collection action; Appeals Officer was found to be impartial	No	IRS
Smith v. Comm'r, T.C. Memo. 2016-186	Lien/Levy	No abuse of discretion; notice of determination sustained	Yes	IRS
Snodgrass v. Comm'r, T.C. Memo. 2016-235, *appeal dismissed*, No. 17-60308 (5th Cir. Oct. 12, 2017)	Levy	No abuse of discretion in sustaining proposed collection action; notices of deficiency were properly mailed; TP precluded from challenging underlying tax liabilities	Yes	IRS
Sulphur Manor, Inc. v. Comm'r, T.C. Memo. 2017-95	Levy	No abuse of discretion in rejecting TP's proposed installment agreement and sustaining collection action; Appeals Officer was found to be impartial	No	IRS
Western Hills Residential Care, Inc. v. Comm'r, T.C. Memo. 2017-98	Levy	No abuse of discretion in rejecting TP's proposed installment agreement, denying request for "currently-not-collectible" status, or sustaining collection action; Appeals Officer was found to be impartial	No	IRS

TABLE 5: Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Alexander v. Comm'r, T.C. Summ. Op. 2017-23	Unreported non-employee compensation and disability income	Yes	IRS
Arkow v. Comm'r, T.C. Summ. Op. 2016-87	Settlement proceeds not excludable under § 104(a)(2)	Yes	IRS
Barnhorst, Estate of, v. Comm'r, T.C. Memo. 2016-177	Insurance distributions not excludable under § 105(a) and recharacterized by the court as taxable deferred compensation	No	IRS
Barrion v. Comm'r, T.C. Memo. 2016-153	Unreported wage and interest income	Yes	IRS
Bates v. Comm'r, T.C. Memo. 2017-72	Settlement proceeds not excludable under § 104(a)(2)	Yes	IRS
Blair v. Comm'r, T.C. Memo. 2016-215	Unreported wages, dividend income, and IRA distribution	Yes	IRS
Braddock v. Comm'r, T.C. Summ. Op. 2016-46	Settlement proceeds not excludable under IRC § 105 or § 104(a)(2)	No	IRS
Brown v. Comm'r, T.C. Summ. Op. 2017-24	Unreported constructive dividends	Yes	IRS
Canzoni v. Comm'r, T.C. Memo. 2016-165, *vacated*, No. 279-15 (T.C. Oct. 28, 2016)	Unreported wage and gambling income	Yes	IRS
Cheves v. Comm'r, T.C. Memo. 2017-22	Unreported IRA withdrawal	Yes	IRS
Dalton v. Comm'r, T.C. Memo. 2017-43	Unreported pass-through income	Yes	IRS
Durland v. Comm'r, T.C. Memo. 2016-133	Unreported wages and purported loan income	Yes	IRS
Franklin v. Comm'r, T.C. Memo. 2016-207	Unreported interest income, IRA distribution, unexplained bank deposits, and cancellation of debt income includable in income; but no constructive dividend	Yes	Split
Gardner v. Comm'r, 845 F. 3d 971 (9th Cir. 2017), *aff'g* T.C. Memo. 2013-67	Unreported self-employment income	Yes	IRS
George v. Comm'r, T.C. Memo. 2016-156	Settlement proceeds not excludable under IRC § 104(a)(2)	No	IRS
Goldsmith v. Comm'r, T.C. Memo. 2017-20	S Corp. payments were not wage income; unreported cancellation of debt income	Yes	Split
Harrell v. Comm'r, T.C. Memo. 2017-76	Annuity payment not excludable from income	Yes	Split
Harriss v. Comm'r, T.C. Memo. 2017-5, *appeal docketed*, No. 17-72233 (9th Cir. Aug. 9, 2017)	Unreported wage income and IRA distribution	Yes	IRS
Hill v. Comm'r, T.C. Summ. Op. 2016-64	Unreported IRA withdrawal	Yes	IRS
Hill v. Comm'r, T.C. Memo. 2016-181	Unreported unemployment income	Yes	IRS
Jackson v. Comm'r, T.C. Summ. Op. 2016-69	Unreported non-employee compensation	Yes	IRS
Jim, U.S. v., 118 A.F.T.R.2d (RIA) 6360 (S.D. Fla. 2016), *judgment entered by* 2016 U.S. Dist. LEXIS 114118 (S.D. Fla. 2016), *appeal docketed*, No. 16-17109 (11th Cir. Nov. 15, 2016)	Unreported per capita distributions of Tribal net gaming revenue	No	IRS
Joseph v. Comm'r, 119 A.F.T.R.2d (RIA) 2023 (9th Cir. 2017), *aff'g* No. 23968-13 (T.C. July 23, 2015)	Unreported IRA withdrawal	Yes	IRS
Keeter v. Comm'r, T.C. Summ. Op. 2017-36	Military disability income excludable under IRC § 104(a)(4)	No	TP
Klein v. Comm'r, T.C. Summ. Op. 2016-58	Unreported wages	Yes	IRS
Kupersmit v. Comm'r, T.C. Memo. 2016-202, *appeal dismissed*, No. 17-1486 (3d Cir. May 24, 2017)	Unreported Social Security, interest, dividends, capital gains, and gambling income	Yes	IRS

TABLE 5: Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Leslie v. Comm'r, T.C. Memo. 2016-171	Unreported alimony income	No	IRS
Lin, Estate of, v. Comm'r, T.C. Memo. 2017-77	Unreported IRA distribution	Yes	IRS
Mallory v. Comm'r, T.C. Memo. 2016-110	Unreported constructive life insurance distribution	No	IRS
Martinez v. Comm'r, T.C. Memo. 2016-182	Unreported retirement plan distributions, educational plan distribution, interest income, and life insurance income	No	IRS
McKinney v. Comm'r, T.C. Memo. 2017-6	Settlement proceeds not excludable under IRC § 104(a)(2)	Yes	IRS
Mojarro v. Comm'r, 119 A.F.T.R.2d (RIA) 1569 (9th Cir. 2017), *aff'g* No. 1492-14 (T.C. Feb. 25, 2015)	Settlement proceeds not excludable under IRC § 104(a)(2)	Yes	IRS
Murray v. Comm'r, T.C. Memo. 2017-67	Unreported interest income, cancellation of debt income, and IRA distribution	Yes	IRS
Newman v. Comm'r, T.C. Memo. 2016-125	Unreported cancellation of debt income was excludable under IRC § 108(a)(1)(B) insolvency exception	No	TP
Nordloh v. Comm'r, T.C. Summ. Op. 2017-37	Unreported Social Security disability income	Yes	IRS
Olson v. Comm'r, T.C. Memo. 2017-33	Retirement payment not excludable from income under IRC § 104(a)(1)	Yes	IRS
Okorogu v. Comm'r, T.C. Memo. 2017-53	Unreported unemployment compensation and cancellation of debt income	No	IRS
Ozimkoski v. Comm'r, T.C. Memo. 2016-228	Unreported IRA distributions	Yes	IRS
Parisi v. Comm'r, T.C. Summ. Op. 2016-40	Unreported IRA withdrawal	Yes	IRS
Peterson v. Comm'r, T.C. Summ. Op. 2016-52	Unreported annuity income	Yes	IRS
Reed v. Comm'r, T.C. Summ. Op. 2017-30	Unreported cancellation of debt income	No	IRS
Schieber v. Comm'r, T.C. Memo. 2017-32	Unreported cancellation of debt income was excludable under IRC § 108(a)(1)(B) insolvency exception	No	TP
Skog v. Comm'r, T.C. Memo. 2016-210	Unreported IRA withdrawal	Yes	IRS
Sullivan v. Comm'r, T.C. Memo. 2017-2	Unreported wage and annuity income	Yes	IRS
Taylor v. Comm'r, T.C. Summ. Op. 2017-4	Unreported military retirement disability benefits	Yes	IRS
Timmins v. Comm'r, T.C. Memo. 2017-86	Unreported unemployment compensation	Yes	IRS
Tishkoff v. Comm'r, T.C. Summ. Op. 2016-65	Settlement proceeds not excludable under IRC § 104(a)(2)	Yes	IRS
Trimmer v. Comm'r, 148 T.C. No. 14 (2017)	IRA distributions not included in income	No	TP
Tzivleris v. Comm'r, T.C. Summ. Op. 2016-26	Unreported cancellation of debt income and unexplained bank deposits	Yes	IRS
Zang v. Comm'r, T.C. Memo. 2017-55	Unreported wage, rental and gambling income and purported loan proceeds	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
Alabsi v. Comm'r, T.C. Summ. Op. 2017-5	Unreported gambling income	Yes	Split
Austin v. Comm'r, T.C. Memo. 2017-69	Unreported compensation income and dividend income	No	Split
Ballard v. Comm'r, T.C. Memo. 2016-205	Unreported gross receipts and other income	Yes	IRS
Ballard v. Comm'r, T.C. Memo. 2017-57	Unreported gross receipts	Yes	IRS
Barnes v. Comm'r, T.C. Memo. 2016-212	Unreported business income; some bank deposits were nontaxable reimbursements	Yes	Split
Borna v. Comm'r, T.C. Memo. 2017-73	Unreported business income, unstated interest income, capital gains income, sale of property	No	IRS

TABLE 5: Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro se*	Decision
Brodmerkle v. Comm'r, T.C. Memo. 2017-8	Unreported business income and cancellation of debt income	Yes	IRS
Castigliola v. Comm'r, T.C. Memo. 2017-62	Undistributed funds in law firm's trust account not included in gross income	No	TP
Chibanguza v. Comm'r, T.C. Summ. Op. 2016-84	Unreported business income but some bank deposits were nontaxable	Yes	Split
Edwards v. Comm'r, T.C. Memo. 2016-117	Unreported interest and commission income; personal expenses paid from business	Yes	IRS
Ericson v. Comm'r, T.C. Memo. 2016-107	Unreported sole proprietor income	Yes	IRS
Exelon Corp. v. Comm'r, 147 T.C. No. 9 (2016), *appeal docketed*, No. 17-2964 (9th Cir. Sept. 22, 2017)	Recharacterized original issue discount income	No	IRS
Fleischer v. Comm'r, T.C. Memo. 2016-238	Unreported business income	No	IRS
George v. Comm'r, 837 F. 3d 79 (1st Cir. 2016), *aff'g* T.C. Memo. 2015-158	Unreported business income; purported not-for-profit entity did not exist	No	IRS
Ghazawi v. Comm'r, T.C. Memo. 2017-48	Unreported gross receipts	No	IRS
Hailstock v. Comm'r, T.C. Memo. 2016-146	Unreported rental income	No	IRS
Ibidunni v. Comm'r, T.C. Memo. 2016-218	Unreported gross receipts and other unreported nonbusiness income	Yes	IRS
Kahmann v. Comm'r, T.C. Summ. Op. *2017-35*	Unreported gross receipts	Yes	IRS
Larkin v. Comm'r, T.C. Memo. 2017-54	Unreported IRA distribution and partnership income distributive shares includable in income; some foreign earned income excludable	Yes	Split
Luczaj v. Comm'r, T.C. Memo. 2017-42	Unreported constructive dividend income	No	IRS
Mack v. Comm'r, T.C. Memo. 2016-229	Unreported partnership income	Yes	IRS
Nguyen v. Comm'r, T.C. Memo. 2016-126, *appeal dismissed*, No. 17-70318 (9th Cir. Apr. 24, 2017)	Unreported business income; some items were gifts and loans	Yes	Split
Palisi v. Comm'r, T.C. Summ. Op. 2017-34	Unreported gross receipts; some bank redeposits not income	Yes	Split
Parker v. Comm'r, T.C. Memo. 2016-194	Unreported business income	Yes	IRS
Pena v. Comm'r, T.C. Memo. 2016-208	Unreported business income	Yes	IRS
Power v. Comm'r, T.C. Memo. 2016-157	Unreported S-Corp distributions	No	IRS
Probandt v. Comm'r, T.C. Memo. 2016-135	Unreported partnership income	No	Split
Reynoso v. Comm'r, T.C. Memo. 2016-185	Unreported gross receipts	Yes	IRS
Rivas v. Comm'r, T.C. Memo. 2016-158, *appeal dismissed*, No. 16-16365 (11th Cir. Aug. 15, 2017)	Unreported cancellation of debt income and gambling income	Yes	IRS
Schwartz v. Comm'r, T.C. Memo. 2016-144, *aff'd*, No. 16-2502 (6th Cir. Sept. 5, 2017)	Unreported business income	Yes	IRS
Squeri v. Comm'r, T.C. Memo. 2016-116	Unreported S-Corp distributions	No	IRS
Stanley v. Comm'r, T.C. Memo. 2016-196	Unreported business income; some loan proceeds excluded	No	Split
Udeobong v. Comm'r, T.C. Memo. 2016-109	Unreported insurance reimbursement	Yes	Split
White v. Comm'r, T.C. Memo. 2016-167	Unreported non-employee compensation	No	IRS
Zolghadr v. Comm'r, T.C. Memo. 2017-49	Unreported rental, business, interest, retirement income, purported loan income	Yes	IRS

TABLE 6: Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citations	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Alexander v. Comm'r, T.C. Memo. 2016-214	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument 6654 - No exceptions apply	Yes	IRS
Barrion v. Comm'r, T.C. Memo. 2016-153	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument	Yes	IRS
Bennett v. Comm'r, 119 A.F.T.R.2d (RIA) 1782 (9th Cir. 2017), *aff'g Bennett v. Comm'r*, T.C. Memo. 2014-256	6651(a)(2) - No reasonable cause	Yes	IRS
Beyer, Estate of, v. Comm'r, T.C. Memo. 2016-183	6651(a)(1), (2) - No reasonable cause	No	IRS
Blair v. Comm'r, T.C. Memo. 2016-215	6651(a)(1), (2) - No reasonable cause 6654 - IRS did not meet burden of production; No tax liability in preceeding year	Yes	Split
Brown v. Comm'r, T.C. Summ. Op. 2016-89	6651(a)(1) - Taxpayer failed to exercise ordinary business care and prudence	Yes	IRS
Canzoni v. Comm'r, T.C. Memo. 2016-165, *vacated*, No. 279-15 (T.C. Oct. 28, 2016)	6651(a)(1), (2) - No reasonable cause	Yes	IRS
Crummey v. Comm'r, 119 A.F.T.R.2d (RIA) 1387 (5th Cir. 2017), *aff'g* T.C. Memo. 2016-9	6651(a)(1), (2) - No reasonable cause	Yes	IRS
Duggan v. Comm'r, 119 A.F.T.R.2d (RIA) 565 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-17	6651(a)(1) - Taxpayer offered no reasonable cause argument 6654 - Taxpayer did not offer any evidence showing exceptions apply	Yes	IRS
Fattah v. U.S., 119 A.F.T.R.2d (RIA) 1902 (E.D. Pa. 2017)	6651(a)(1), (2) - Reliance on tax professional did not establish reasonable cause	Yes	IRS
Hake, Estate of, v. U.S., 119 A.F.T.R.2d (RIA) 727 (M.D. Pa. 2017), *appeal docketed*, No. 17-2010 (3d Cir. May 4, 2017)	6651(a)(1) - Reliance on tax professional established reasonable cause; Taxpayer exercised ordinary business care and prudence	No	TP
Harriss v. Comm'r, T.C. Memo. 2017-5, *appeal docketed*, No. 17-72233 (9th Cir. Aug. 9, 2017)	6651(a)(1) - No reasonable cause 6651(a)(2) - IRS did not meet burden of production	Yes	Split
Jim, U.S. v., 118 A.F.T.R.2d (RIA) 6360 (S.D. Fla. 2016), *judgment entered by* 2016 U.S. Dist. LEXIS 114118 (S.D. Fla. 2016), *appeal docketed*, No. 16-17109 (11th Cir. Nov. 15, 2016)	6651(a)(1), (2) - No reasonable cause	No	IRS
Kernan v. Comm'r, 670 F. Appx. 944 (9th Cir. 2016), *aff'g* T.C. Memo. 2014-228	6651(a)(1) - IRS met its burden of production; Taxpayer offered no reasonable cause 6654 - IRS met its burden of production	Yes	IRS
Klein v. Comm'r, T.C. Summ. Op. 2016-58	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument	Yes	IRS
Kupersmit v. Comm'r, T.C. Memo. 2016-202, *appeal dismissed*, No. 17-1486 (3d Cir. May 24, 2017)	6651(a)(1), (2) - No reasonable cause 6654 - No exceptions apply	Yes	IRS
Leslie v. Comm'r, T.C. Memo. 2016-171, *appeal docketed*, No. 17-70450 (9th Cir. Feb. 15, 2017)	6651(a)(1) - Mental illness did not establish reasonable cause	No	IRS
Mallory v. Comm'r, T.C. Memo. 2016-110	6651(a)(1) - Taxpayer offered no reasonable cause	No	IRS
Muncy v. Comm'r, T.C. Memo. 2017-83, *on remand from* F. App'x 276 (8th Cir. 2016), *vacating and remanding* T.C. Memo. 2014-251, *appeal docketed*, No. 17-2576 (8th Cir. July 19, 2017)	6651(a)(2) - No reasonable cause 6654 - IRS did not meet its burden of production with respect to first year of substitute for return (SFR); burden met regarding subsequent years	Yes	Split

TABLE 6: Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citations	Issue(s)	*Pro se*	Decision
Murray v. Comm'r, T.C. Memo. 2017-67	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument 6654 - No exceptions apply	Yes	IRS
Niski v. Comm'r, T.C. Summ. Op. 2017-33	6651(a)(1), (2) - Taxpayer offered no reasonable cause 6654 - No exceptions apply	No	IRS
Ozimkoski v. Comm'r, T.C. Memo. 2016-228	6651(a)(1) - No reasonable cause	Yes	IRS
Qunell v. Comm'r, T.C. Summ. Op. 2016-86	6651(a)(1) - Taxpayer offered no reasonable cause argument 6651(a)(2) - IRS did not meet burden of production	Yes	Split
Rogers v. Comm'r, T.C. Memo. 2016-152	6651(a)(1), (2) - Loss of home in fire established reasonable cause; Taxpayer exercised ordinary business care and prudence	No	TP
Specht v. U.S., 661 F. App'x 357 (6th Cir. 2016), *aff'g* 115 A.F.T.R.2d (RIA) 357 (S.D. Ohio 2015)	6651(a)(1), (2) - Reliance on tax professionals did not establish reasonable cause	No	IRS
Sullivan v. Comm'r, T.C. Memo. 2017-2	6651(a)(1) - Taxpayer's failure to sign return did not establish reasonable cause	Yes	IRS
Tishkoff v. Comm'r, T.C. Summ. Op. 2016-65	6651(a)(1), (2) - No reasonable cause 6654 - IRS did not meet burden of production; No tax liability in preceeding year	Yes	Split
West v. Comm'r, T.C. Memo. 2016-134	6651(a)(1), (2) - No reasonable cause	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
American Metallurgical Coal Co. v. Comm'r, T.C. Memo. 2016-139	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument 6651(a)(2) - IRS conceded	No	Split
Ballard v. Comm'r, T.C. Memo. 2016-205	6651(a)(1) - Taxpayer offered no reasonable cause argument	Yes	IRS
Ballard v. Comm'r, T.C. Memo. 2017-57	6651(a)(1) - Taxpayer offered no reasonable cause argument	Yes	IRS
Brodmerkle v. Comm'r, T.C. Memo. 2017-8	6651(a)(1) - Medical condition did not establish reasonable cause	Yes	IRS
Brown v. Comm'r, T.C. Summ. Op. 2017-29	6651(a)(1) - Taxpayer offered no reasonable cause	Yes	IRS
C1 Design Group v. U.S., 118 A.F.T.R.2d (RIA) 6974 (D. Idaho 2016), *judgment entered by* No. 15-00146 (D. Idaho Feb. 17, 2017)	6651(a)(1) - Taxpayer exercised ordinary business care and prudence	No	TP
Chaganti v. Comm'r, T.C. Memo. 2016-222, *appeal docketed*, No. 17-71874 (9th Cir. June 27, 2017)	6651(a)(1) - No reasonable cause	Yes	IRS
Curet v. Comm'r, T.C. Memo. 2016-138, *appeal docketed*, No. 16-2326 (1st Cir. Nov. 2, 2016)	6651(a)(1), (2) - Taxpayer failed to exercise ordinary business care and prudence	Yes	IRS
Deaton Oil Co. v. U.S., 119 A.F.T.R.2d (RIA) 1945 (W.D. Ark. 2017), *appeal docketed*, No. 17-2326 (8th Cir. June 15, 2017)	6651(a)(1) - Reliance on agent did not establish reasonable cause	No	IRS
Durda v. Comm'r, T.C. Memo. 2017-89	6651(a)(1), (2) - Taxpayer offered no reasonable cause	Yes	IRS
Franklin v. Comm'r, T.C. Memo. 2016-207	6651(a)(1) - Taxpayer offered no reasonable cause argument 6651(a)(2) - IRS did not meet its burden of production 6654 - No exceptions apply	Yes	Split

TABLE 6: Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citations	Issue(s)	*Pro se*	Decision
Goldsmith v. Comm'r, T.C. Memo. 2017-20	6651(a)(1), (2) - Taxpayer offered no reasonable cause argument	Yes	IRS
Hailstock v. Comm'r, T.C. Memo. 2016-146	6651(a)(1) - Taxpayer offered no reasonable cause argument	No	IRS
Home Team Transition Mgmt. v. Comm'r, T.C. Memo. 2017-51	6651(a)(1) - Taxpayer offered no reasonable cause argument	No	IRS
Hylton v. Comm'r, T.C. Memo. 2016-234, *appeal docketed*, Nos. 17-1776 & 17-1777 (4th Cir. June 28, 2017)	6651(a)(1) - Taxpayer offered no reasonable cause argument; IRS did not meet burden of production with regard to all the years at issue	No	Split
Hynes v. Comm'r, 118 A.F.T.R.2d (RIA) 6821 (1st Cir. 2016), *aff'g* 2015 Tax Ct. LEXIS 55	6651(a)(1) - Reliance on tax professional did not establish reasonable cause	No	IRS
Kimdun Inc. v. U.S., 202 F. Supp. 3d 1136 (C.D. Cal. 2016)	6651(a)(1), (2) - No reasonable cause	No	IRS
Larkin v. Comm'r, T.C. Memo. 2017-54	6651(a)(1) - No reasonable cause	Yes	IRS
Levi v. Comm'r, T.C. Memo. 2016-108	6651(a)(1) - Taxpayer offered no reasonable cause argument	Yes	IRS
Lyerly v. U.S., 218 F. Supp. 3d 1309 (N.D. Ala. 2016), *joint stipulation of dismissal entered by order*, No. 15-00745 (N.D. Ala. June 15, 2017)	6651(a)(1) - Valid extension to file was granted 6654(a)(2) - No evidence extension to pay was granted 6654 - No evidence extension to pay was granted	No	Split
Main v. Comm'r, T.C. Memo. 2016-127, *appeal docketed*, No. 17-71070 (9th Cir. Apr. 13, 2017)	6651(a)(1) - No reasonable cause	Yes	IRS
Namen v. Comm'r, T.C. Memo. 2017-24	6651(a)(1) - Taxpayer offered no reasonable cause argument	No	IRS
Paynter v. Comm'r, T.C. Summ. Op. 2017-12	6651(a)(2) - No reasonable cause 6654 - No exceptions apply	Yes	IRS
Peake v. Comm'r, T.C. Memo. 2016-231	6651(a)(2) - No reasonable cause 6654 - No exceptions apply	Yes	IRS
Pizza Pro Equip. Leasing, Inc. v. Comm'r, 147 T.C. No. 14 (2016), *appeal docketed*, No. 17-1297 (8th Cir. Feb. 9, 2017)	6651(a)(1), (2) - Reliance on tax professional did not establish reasonable cause; Taxpayer failed to show ordinary business care and prudence; No reasonable cause	No	IRS
Probandt v. Comm'r, T.C. Memo. 2016-135	6651(a)(1) - No reasonable cause	No	IRS
Reynoso v. Comm'r, T.C. Memo. 2016-185	6651(a)(2) - No reasonable cause 6654 - No exceptions apply	Yes	IRS
Rivas v. Comm'r, T.C. Memo. 2016-158, *appeal dismissed*, No. 16-16365 (11th Cir. Aug. 15, 2017)	6651(a)(1) - Taxpayer offered no reasonable cause argument	Yes	IRS
Safakish v. Comm'r, 119 A.F.T.R.2d (RIA) 1589 (9th Cir. 2017), *aff'g* T.C. Memo. 2014-242	6651(a)(1) - No reasonable cause	Yes	IRS
Szanto v. Comm'r, T.C. Memo. 2016-145	6651(a)(1) - No reasonable cause	Yes	IRS
Walker v. Comm'r, T.C. Memo. 2016-159	6651(a)(1) - Reliance on tax professional did not establish reasonable cause	No	IRS
Zolghadr v. Comm'r, T.C. Memo. 2017-49	6651(a)(1) - Taxpayer offered no reasonable cause argument	Yes	IRS

TABLE 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Aikens, U.S. v., 118 A.F.T.R.2d (RIA) 6369 (E.D. Mich. 2016)	Default judgment against TP; federal tax liens valid and may be enforced against TP's real property; federal tax liens are not extinguished by prior sale	Yes	IRS
Aldrich, U.S. v., 118 A.F.T.R.2d (RIA) 6034 (D. Minn. 2016)	Default judgment against TP (estate) and surviving spouse in her individual capacity; federal tax liens valid and may be enforced against TP's real property	Yes	IRS
Atkins, U.S. v., 119 A.F.T.R.2d (RIA) 1787 (D. Ariz. 2017)	Default judgment against TP and third parties; federal tax lien superior to third parties' claims except for one; federal tax lien valid and foreclosed against TP's real property	Yes	IRS
Austin, U.S. v., 119 A.F.T.R.2d (RIA) 1491 (D.S.C. 2017)	Default judgment against TP and third parties; federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Bedford, U.S. v., 118 A.F.T.R.2d (RIA) 6596 (M.D. Fla. 2016)	Federal tax liens valid and foreclosed against marital property; federal tax lien subordinate to bank lien; post-divorce transfer does not extinguish TP's (H) liens	Yes	IRS
Bell, U.S. v., 119 A.F.T.R.2d (RIA) 1789 (D. Ariz. 2017)	Default judgment against TP and third parties; federal tax liens valid and foreclosed against TP's real properties; TP controlled entities are nominees	Yes	IRS
Bigley, U.S. v., 119 A.F.T.R.2d (RIA) 1792 (D. Ariz. 2017), *appeal docketed*, No. 17-16966 (9th Cir. Sept. 28, 2017)	Default judgment against third party; federal tax liens valid and foreclosed against TP's real property; TP controlled entity and TP's brother-in-law are nominees and fraudulent transferees	Yes	IRS
Boldin, U.S. v., 118 A.F.T.R.2d (RIA) 5676 (E.D. Wis. 2016), *appeal docketed*, No. 17-2812 (7th Cir. Sept. 1, 2017)	Federal tax liens valid and may be enforced against marital real property; the innocent spouse is also listed as a defendant to extinguish any potential claims of interest she may still hold to the marital property	No	IRS
Boyce, U.S. v., 119 A.F.T.R.2d (RIA) 1206 (9th Cir. 2017), *aff'g* 38 F. Supp. 3d 1135 (C.D. Cal. 2014)	Affirmed lower court; federal tax liens valid and foreclosed against marital real property; TPs' controlled entity is nominee and fraudulent transferee	Yes	IRS
Braithwaite, U.S. v., 119 A.F.T.R.2d (RIA) 1963 (N.D. Ill. 2017)	Federal tax liens valid and may be enforced against marital real property	No	IRS
Cardaci, U.S. v., 856 F.3d 267 (3d Cir. 2017), *aff'g in part, vacating in part, and remanding* 114 A.F.T.R.2d (RIA) 6744 (D.N.J. 2014)	District Court's authority to determine a forced sale is affirmed, but decision vacated and remanded to recalculate the interests in the marital property and to reconsider the balance of equities; 10-year statute of limitations also tolled as suit filed days before expiration	No	Split
Defazio, U.S. v., 118 A.F.T.R.2d (RIA) 5893 (E.D. Cal. 2016), *appeal dismissed*, No. 16-16922 (9th Cir. Apr. 18, 2017)	Federal tax liens valid and foreclosed against TP's real property	No	IRS
Derparseghian, U.S. v., 119 A.F.T.R.2d (RIA) 1484 (C.D. Cal. 2017)	Federal tax liens valid and foreclosed against TP's real property; family trust is nominee; federal tax liens superior to third parties' claims	No	IRS
Dew, U.S. v., 670 F. App'x 170 (4th Cir. 2016), *aff'g* 116 A.F.T.R.2d (RIA) 5861 (D.S.C. 2015)	Affirmed lower court; federal tax liens valid and foreclosed against marital real property	Yes	IRS
Dougherty, U.S. v., 118 A.F.T.R.2d (RIA) 5733 (E.D.N.Y. 2016), *adopting* 118 A.F.T.R.2d (RIA) 5727 (E.D.N.Y. 2016)	Default judgment against various third parties; federal tax liens superior to third parties' claims; liens may be enforced against TP's real property	No	IRS
Draper, U.S. v., 2016 U.S. Dist. LEXIS 172957 (D. Col. 2016)	Federal tax liens valid and foreclosed against TP's real property	No	IRS

TABLE 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro se*	Decision
Eure, U.S. v., 118 A.F.T.R.2d (RIA) 5916 (C.D. Cal. 2016)	Default judgment against TP and third party; federal tax liens valid and foreclosed against TP's real properties; TP's friend is nominee in regard to the condo property	Yes	IRS
Gray, U.S. v., 118 A.F.T.R.2d (RIA) 6611 (E.D. Tex. 2016), *adopting* 115 A.F.T.R.2d (RIA) 1267 (E.D. Tex. 2014)	Default judgment against TP and third parties; federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Gutierrez, U.S. v., 2016 U.S. Dist. LEXIS 158812 (W.D. Tex. 2016)	Foreclosure was denied pursuant to Rodgers analysis	No	TP
Halverson, U.S. v., 118 A.F.T.R.2d (RIA) 5438 (W.D. Wis. 2016)	Federal tax liens valid and foreclosed against TP's real property	No	IRS
Hamilton, U.S. v., 119 A.F.T.R.2d (RIA) 470 (N.D. Ill. 2017)	Federal tax liens valid and foreclosed against marital real property; non-liable spouse will receive one half of sales proceeds	No	IRS
Herrington, U.S. v., 118 A.F.T.R.2d (RIA) 5734 (E.D. Mich. 2016), *aff'd*, No. 16-2339 (6th Cir. Sept. 8, 2017)	Federal tax liens valid and foreclosed against marital real property	Yes	IRS
Ireland, U.S. v., 118 A.F.T.R.2d (RIA) 5930 (E.D.N.Y. 2016), *adopting* 2016 U.S. Dist. LEXIS 105232 (E.D.N.Y. 2016)	Default judgment against various third parties; federal tax lien superior to third parties' claims; federal tax lien valid and foreclosed against TP's real property	No	IRS
Jennings, U.S. v., 119 A.F.T.R.2d (RIA) 1523 (W.D. Wash. 2017)	Federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Joling, U.S. v., 118 A.F.T.R.2d (RIA) 6438 (D. Or. 2016), *appeal dismissed*, No. 17-35217 (9th Cir. June 15, 2017)	Default judgment against TPs (MFJ) and various third parties; federal tax liens valid and foreclosed against TPs' marital real properties; various entities are nominees and fraudulent transferees	Yes	IRS
Jones, U.S. v., 670 F. App'x 907 (8th Cir. 2016), *aff'g* 116 A.F.T.R.2d (RIA) 6737 (D. Minn. 2015)	Affirmed lower court's decision to foreclose against TP's real property	Yes	IRS
Kain, U.S. v., 119 A.F.T.R.2d (RIA) 545 (N.D. Ind. 2017)	Default judgment against TP, nonliable spouse and third party; federal tax liens superior to third parties' claims; liens may be enforced against TP's real property; TP's non-registered entity is nominee and fraudulent transferee	Yes	IRS
Klimek, U.S. v., 2016 U.S. Dist. LEXIS 180948 (S.D. Iowa 2016)	Liens may be enforced against TP's real property; no innocent third party ownership claims presented; failure of nonliable spouse to assert her financial interest precludes either the Rodgers or Jensen analysis; failure to establish nonliable spouse suffers a serious health condition	No	IRS
McGrew, U.S. v., 669 F. App'x 831 (9th Cir. 2016), *aff'g* 114 A.F.T.R. 2d (RIA) 7031 (C.D. Cal. 2014)	Affirmed lower court's decision to foreclose against TP's real property; federal tax liens are valid despite transfer to non-liable spouse in divorce settlement	No	IRS
Murphy, U.S. v., 119 A.F.T.R.2d (RIA) 374 (E.D. Wisc. 2016)	Amended default judgment against TP; federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Ritland, U.S. v., 119 A.F.T.R.2d (RIA) 307 (E.D. Wis. 2017), *appeal dismissed*, No. 17-1099 (7th Cir. Mar. 22, 2017)	Federal tax liens valid and foreclosed against TP's real property	No	IRS
Robinson, U.S. v., 2016 U.S. Dist. LEXIS 187806 (C.D. Cal. 2016)	IRS properly filed the tax lien; federal tax lien foreclosed against the real property	Yes	IRS
Saccullo, U.S. v., 119 A.F.T.R.2d (RIA) 542 (M.D. Fla. 2017)	Default judgment against TP (estate) and surviving heir in his individual capacity; federal tax liens superior to third parties' claims; liens may be enforced against TP's real properties	Yes	IRS

TABLE 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro se*	Decision
Sanders, U.S. v., 118 A.F.T.R.2d (RIA) 6219 (S.D. Ill. 2016), *aff'd*, 676 F. App'x 599 (7th Cir. 2017)	Federal tax liens foreclosed against TP's real properties; family trusts are nominees	Yes	IRS
Sanders, U.S. v., 676 F. App'x 599 (7th Cir. 2017), *aff'g* 118 A.F.T.R.2d (RIA) 6219 (S.D. Ill. 2016)	Affirmed lower court's decision to foreclose against TP's real properties; family trusts are nominees; appeal is frivolous	Yes	IRS
Schmidt, U.S. v., 118 A.F.T.R.2d (RIA) 6407 (E.D. Wash. 2016), *appeal dismissed*, No. 17-35024 (9th Cir. June 28, 2017)	Federal tax liens valid and foreclosed against marital real property	Yes	IRS
Silverman, U.S. v., 119 A.F.T.R.2d (RIA) 933 (E.D.N.Y. 2017), *adopting* 119 A.F.T.R.2d (RIA) 928 (E.D.N.Y. 2017)	Default judgment against TP; federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Sygitowicz, U.S. v., 117 A.F.T.R.2d (RIA) 2225 (W.D. Wash. 2016)	Federal tax liens valid and foreclosed against TPs' marital real property; TPs' friends are nominees and fraudulent transferees; federal tax lien subordinate to county property tax lien	No	IRS
Tannenbaum, U.S. v., 118 A.F.T.R.2d (RIA) 5466 (E.D.N.Y. 2016)	Federal tax liens valid and foreclosed against TP's marital real property; non-liable spouse to receive one half of sales proceeds	No	IRS
Thornton, U.S. v., 119 A.F.T.R.2d (RIA) 1878 (S.D. Ga. 2017)	Default judgment against TP and various third parties; federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Watters, U.S. v., 119 A.F.T.R.2d (RIA) 1361 (S.D. Fla. 2016)	Default judgment against fictitious John or Jane Doe with vested interest in subject property denied; federal tax lien valid and foreclosed against TP's real property	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedule C, E, F)			
Acacia Corp. Mgmt., U.S. v., 119 A.F.T.R.2d (RIA) 1931 (9th Cir. 2017), *aff'g U.S. v. Booth*, 113 A.F.T.R.2d (RIA) 526 (E.D. Cal. 2014)	Affirmed lower court's decision to foreclose; federal tax liens valid; nominee six-factor test properly applied and determined	No	IRS
Cazzell, U.S. v., 118 A.F.T.R.2d (RIA) 6371 (W.D. Mo. 2016)	Federal tax lien valid and foreclosed against marital real properties	No	IRS
Davis, U.S. v., 681 F. App'x 338 (5th Cir. 2017), *aff'g* 116 A.F.T.R.2d (RIA) 6228 (W.D. La. 2015)	Affirmed lower court; federal tax liens attached to community property and remained subject to seizure and sale after the death of TP's non-liable spouse; federal tax lien superior to children's inherited interests in the real property; lien foreclosed against the TP's real property	No	IRS
Davis, U.S. v., 119 A.F.T.R.2d (RIA) 314, (W.D. La. 2017), *appeal docketed*, No. 17-30015 (5th Cir. Jan. 10, 2017)	Federal tax liens superior to third party's claims; federal tax liens valid and foreclosed against TP's real property with 1/3 of proceeds distributed to the Gov't	No	IRS
Dorf, U.S. v., 118 A.F.T.R.2d (RIA) 6833 (S.D. Ohio 2016), *adopting* 118 A.F.T.R.2d (RIA) 6252 (S.D. Ohio 2016)	Default judgment against TP and various third parties; federal tax liens superior to third parties' claims; federal tax liens valid and may be enforced against TP's real property	No	IRS
Drennen, U.S. v., 118 A.F.T.R.2d (RIA) 6398 (E.D. Ky. 2016)	Federal tax liens valid and foreclosed against TP's one-half interest in marital real properties	No	IRS
Giaimo, U.S. v., 854 F.3d 483 (8th Cir. 2017), *aff'g* 117 A.F.T.R.2d (RIA) 1058 (E.D. Mo. 2016)	Affirmed lower court; federal tax lien valid and foreclosed against TP's real property; ten-year collections statute of limitations period was tolled due to TP's appeal to the Tax Court	No	IRS
Griffith, U.S. v., 118 A.F.T.R.2d (RIA) 5774 (E.D. Mich. 2016)	Default judgment against TP; federal tax lien valid and foreclosed against TP's real property	No	IRS

TABLE 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro se*	Decision
Hodges, U.S. v., 117 A.F.T.R.2d (RIA) 1939 (W.D. Okla. 2016), *aff'd*, 119 A.F.T.R.2d (RIA) 1474 (10th Cir. 2017)	Federal tax lien valid and foreclosed against TP's real property	Yes	IRS
Hodges, U.S. v., 119 A.F.T.R.2d (RIA) 1474 (10th Cir. 2017), *aff'g* 117 A.F.T.R.2d (RIA) 1939 (W.D. Okla. 2016)	Affirmed lower court; TP did not dispute the validity of federal tax liens asserted prior to quitclaim deed transfer to his nonliable spouse; whether nonliable spouse had notice of the pre-transfer federal tax liens does not affect foreclose; TP's arguments rebutting post-transfer liens are moot; pre-transfer federal tax liens valid and foreclosed against TP's real property	Yes	IRS
Lehmann, U.S. v., 118 A.F.T.R.2d (RIA) 6719 (D. Ore. 2016)	Federal tax liens valid and foreclosed against TP's real property; family trust is nominee and fraudulent transferee; non-liable spouse and third party have no legitimate interests in the real property	Yes	IRS
Nassar Family Irrevocable Trust v. U.S., 118 A.F.T.R.2d (RIA) 6007 (S.D.N.Y. 2016), *aff'd* 2017 WL 4708170 (2d Cir. 2017)	Family trust is nominee; federal tax liens valid and foreclosed on TP's real property; TP's bank account levies were proper since accounts were also held by nominees	No	IRS
Peeler, U.S. v., 120 A.F.T.R.2d (RIA) 5101 (M.D. Fla. 2016)	Federal tax liens valid and foreclosed against the real property; TPs' controlled entity is alter ego and fraudulent transferee; federal tax liens superior to third parties' claims	No	IRS
Pivaroff, U.S. v., 118 A.F.T.R.2d (RIA) 5160 (D. Nev. 2016)	Federal tax liens valid and foreclosed against marital real property; mortgage lien claim invalid and is a sham transaction	No	IRS
Stone, U.S. v., 117 A.F.T.R.2d (RIA) 1987 (W.D. Tex. 2016)	Default judgment against TP and non-liable spouse with potential claim of interest in real property; federal tax liens foreclosed	Yes (attorneys withdrew)	IRS
Urioste, U.S. v., 119 A.F.T.R.2d (RIA) 458 (N.D. Ala. 2017)	Federal tax liens valid and foreclosed against TP's (estate) real properties; third parties' equitable defenses against foreclosure of Forest Ave parcel denied	No	IRS
Watson, U.S. v., 2017 U.S. Dist. LEXIS 11446 (W.D. Va. 2017)	Federal tax liens valid and foreclosed against TP's real properties; non-liable spouse to receive one half of sales proceeds	No	IRS
Weinberg, U.S. v., 118 A.F.T.R.2d (RIA) 6495 (E.D. Penn. 2016)	Default judgment against TP and third parties; federal tax liens valid and foreclosed against TP's real property; third party co-defendant, who the property was originally conveyed to along with TP, disclaimed her interest in the real property	Yes	IRS
Wilson, U.S. v., 117 A.F.T.R.2d (RIA) 2002 (E.D. Mich. 2016)	Federal tax liens valid and foreclosed against one of TP's real properties, but not against the other subject property; family partnership is nominee in regard to one property but unclear as to the second property where genuine issue of material fact remains; innocent third-party claim denied in regard to the foreclosed property	No	IRS

TABLE 8: Charitable Deductions Under IRC § 170

Case Citations	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Barnes v. Comm'r, T.C. Memo. 2016-212	TP failed to present any written substantiation for certain contributions	Yes	IRS
Brown v. Comm'r, T.C. Summ. Op. 2016-89	Non-cash contributions substantiated in part, unsubstantiated in part	Yes	Split
Brown v. Comm'r, T.C. Summ. Op. 2017-29	Non-cash contributions substantiated in part, unsubstantiated in part	Yes	Split
Carmody v. Comm'r, T.C. Memo. 2016-225	Cash and non-cash contributions unsubstantiated	No	IRS
Gaines v. Comm'r, T.C. Summ. Op. 2017-15	TP failed to present any written substantiation for contributions; Non-cash contributions unsubstantiated	No	IRS
Gaston v. Comm'r, T.C. Summ. Op. 2016-41	Non-cash contributions unsubstantiated	Yes	IRS
Haag v. Comm'r, T.C. Summ. Op. 2016-29	Cash and non-cash contributions unsubstantiated	No	IRS
Izen v. Comm'r, 148 T.C. No. 5 (2017)	Non-cash contributions unsubstantiated	Yes	IRS
Kaplan v. Comm'r, T.C. Memo. 2016-149	Non-cash contributions substantiated in part, unsubstantiated in part	Yes	Split
Larkin v. Comm'r, T.C. Memo. 2017-54	TP offered no substantiation to contributions	Yes	IRS
Levi v. Comm'r, T.C. Memo. 2016-108	TP offered no substantiation to contributions	Yes	IRS
McGrady v. Comm'r, T.C. Memo. 2016-233	TP had donative intent to convey conservation easement; court reduced the value of property contributed by TPs	No	Split
McNally v. Comm'r, T.C. Memo. 2017-93	Cash and non-cash contributions unsubstantiated	Yes	IRS
Mountanos v. Comm'r, 651 F. App'x 592 (9th Cir. 2016), *aff'g* T.C. Memo. 2013-138	TP failed to substantiate valuation of conservation easement	No	IRS
Oatman v. Comm'r, T.C. Memo. 2017-17	Cash contributions unsubstantiated	Yes	IRS
Okiyi v. Comm'r, T.C. Summ. Op. 2017-28	TP failed to present any written substantiation for non-cash contributions	Yes	IRS
Payne v. Comm'r, T.C. Summ. Op. 2016-30	Non-cash contributions unsubstantiated	Yes	IRS
Spencer v. Comm'r, T.C. Summ. Op. 2016-62	Non-cash contributions unsubstantiated	Yes	IRS
Wainwright v. Comm'r, T.C. Memo. 2017-70	Non-cash contributions unsubstantiated	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
15 West 17th Street LLC v. Comm'r, 147 T.C. No. 19 (2016)	Non-cash contributions unsubstantiated	No	IRS
Cave Buttes, L.L.C. v. Comm'r, 147 T.C. No. 10 (2016)	TP substantiated valuation of conservation easement	No	TP
Embroidery Express, LLC v. Comm'r, T.C. Memo. 2016-136	Cash and non-cash contributions substantiated in part, unsubstantiated in part	No	Split
Hailstock v. Comm'r, T.C. Memo. 2016-146	Contribution unsubstantiated	No	IRS
Hubbell v. Comm'r, T.C. Summ. Op. 2016-67	Contribution not made pursuant to will that was trust's governing instrument	No	IRS
Ibidunni v. Comm'r, T.C. Memo. 2016-218	Non-cash contributions unsubstantiated	Yes	IRS
Luczaj & Assocs. v. Comm'r, T.C. Memo. 2017-42	Cash and non-cash contributions mostly unsubstantiated	No	Split
Palmer Ranch Holdings Ltd. v. Comm'r, T.C. Memo. 2016-190	TP substantiated valuation of conservation easement	No	TP
Partita Partners LLC v. U.S., 216 F. Supp. 3d 337 (S.D. N.Y. 2016)	TP lacked donative intent to convey conservation easement	No	IRS

TABLE 9: Family Status Issues Under IRC §§ 2, 24, 32, and 151

Case Citations	Issue(s)	*Pro se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Alexander v. Comm'r, T.C. Memo. 2016-214	Dependency Exemption	Yes	IRS
Berry v. Comm'r, T.C. Summ. Op. 2016-81	EITC	Yes	IRS
Besong v. Comm'r, T.C. Summ. Op. 2016-71	Dependency Exemption	Yes	IRS
Binns v. Comm'r, T.C. Summ. Op. 2016-90	CTC, Dependency Exemption, EITC, Filing Status	Yes	Split
Brown v. Comm'r, T.C. Summ. Op. 2017-24	Filing Status	Yes	IRS
Cappel v. Comm'r, T.C. Memo. 2016-150	CTC, Dependency Exemption, Filing Status	Yes	IRS
Conti v. Comm'r, T.C. Memo. 2016-162	Dependency Exemption, Filing Status	Yes	IRS
Cook v. Comm'r, T.C. Summ. Op. 2016-36	Dependency Exemption	No	IRS
Gomez v. Comm'r, T.C. Memo. 2016-173	CTC, Dependency Exemption, EITC, Filing Status	Yes	IRS
Jenkins v. Comm'r, T.C. Summ. Op. 2017-22	CTC, Dependency Exemption, EITC, Filing Status	Yes	IRS
Kennedy v. Comm'r, T.C. Summ. Op. 2016-61	CTC, Dependency Exemption	Yes	IRS
Levi v. Comm'r, T.C. Memo. 2016-108	Dependency Exemption	Yes	IRS
Lopez v. Comm'r, T.C. Summ. Op. 2017-16	CTC, EITC	No	TP
Lowe v. Comm'r, T.C. Memo. 2016-206	CTC, Dependency Exemption	Yes	IRS
McCutcheon-Cox v. Comm'r, T.C. Summ. Op. 2017-20	CTC, Dependency Exemption	Yes	TP
McSweeney v. Comm'r, T.C. Summ. Op. 2016-51	CTC, Dependency Exemption, EITC, Filing Status	No	IRS
Moss v. Comm'r, T.C. Memo. 2017-30	Filing Status, Personal Exemption	Yes	IRS
Polsky v. U.S., 844 F.3d 170 (3d Cir. 2016)	CTC	Yes	IRS
Rivas v. Comm'r, T.C. Memo. 2016-158, *appeal dismissed*, No. 16-16365 (11th Cir. Aug. 15, 2017)	Dependency Exemption, Filing Status	Yes	IRS
Roach v. Comm'r, T.C. Summ. Op. 2017-27	CTC, Dependency Exemption	No	IRS
Skaggs v. Comm'r, 148 T.C. No. 15 (2017)	EITC	Yes	IRS
Smyth v. Comm'r, T.C. Memo. 2017-29	CTC, Dependency Exemption, EITC, Filing Status	No	IRS
Tsehay v. Comm'r, T.C. Memo. 2016-200	CTC, Dependency Exemption, EITC, Filing Status	Yes	Split
Walker v. Comm'r, T.C. Summ. Op. 2017-8	CTC, Dependency Exemption, EITC, Filing Status	Yes	Split

TABLE 10: Relief from Joint and Several Liability Under IRC § 6015

Case Citations	Issue(s)	*Pro se*	Intervenor	Decision
Individual Taxpayers (But Not Sole Proprietorships)				
Asad v. Comm'r, T.C. Memo. 2017-80	6015(b), (c) (understatement)	Yes	No	IRS
Armour v. Comm'r, T.C. Memo. 2016-129	6015(b), (c), (f) (understatement)	Yes	Yes	IRS
Bullock v. Comm'r, T.C. Summ. Op. 2016-44	6015(b), (c), (f) (understatement)	Yes	Yes	IRS
Calvo v. Comm'r, 653 F. App'x 767 (D.C. Cir. 2016) *aff'g* No. 19746-14 (T.C. Mar. 2, 2015)	6015(b), (c), (f) (underpayment); statutory time for claiming a refund had expired	Yes	No	IRS
Canty v. Comm'r, T.C. Memo. 2016-169	6015(b), (f) (understatement)	No	No	IRS
Durland v. Comm'r, T.C. Memo. 2016-133	6015(b), (c), (f) (understatement)	No	Yes	IRS
Hardin v. Comm'r, T.C. Memo. 2016-141	6015(f) (understatement)	No	Yes	IRS
Harris v. Comm'r, T.C. Summ. Op. 2017-21	6015(b), (c) (understatement); IRS failed to establish TP had actual knowledge of facts giving rise to understatement	No	No	TP
Hudson v. Comm'r, T.C. Summ. Op. 2017-7	6015(f) (underpayment)	Yes	No	TP
Hunter v. Comm'r, T.C. Memo. 2016-164	6015(b), (c), (f) (understatement)	Yes	No	IRS
Lock v. Comm'r, T.C. Summ. Op. 2017-10	6015(c) (understatement)	Yes	Yes	TP
McDonald v. Comm'r, T.C. Summ. Op. 2016-79	6015(c) (understatement)	Yes	Yes	TP
Okorogu v. Comm'r, T.C. Memo. 2017-53	6015(b), (c), (f) (understatement)	No	Yes	TP
Pendergraft, In re, 119 A.F.T.R.2d (RIA) 1229 (S.D. Tex. 2017)	6015(f); (underpayment); TP must follow § 6015(f) procedures before petitioning Bankruptcy Court for a remedy under 505(a)(1)	No	Yes	IRS
Rubel v. Comm'r, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016)	6015(c), (f) (underpayment)	No	No	IRS
Simonetta v. Comm'r, T.C. Summ. Op. 2016-43	6015(f) (underpayment)	Yes	No	TP
Smaaland v. Comm'r, T.C. Memo. 2017-31	6015(b), (c), (f) (understatement)	No	No	IRS
Taft v. Comm'r, T.C. Memo. 2017-66	6015(b), (c), (f) (understatement)	No	No	TP
Vu v. Comm'r, T.C. Summ. Op. 2016-75	6015(e) (understatement); TP's petition for innocent spouse relief was not timely filed and court lacked jurisdiction	Yes	No	IRS
White v. Comm'r, T.C. Summ. Op. 2016-48	6015(c) (understatement)	Yes	No	TP
Williams v. Comm'r, T.C. Memo. 2017-10	6015(f); § 6511 Statute of limitations barred reimbursement	Yes	No	IRS
Wilson v. Comm'r, T.C. Memo. 2017-63	6015(b), (c), (f) (understatement)	Yes	No	IRS
Yancey v. Comm'r, T.C. Memo. 2017-59	6015(b), (c), (f) (understatement)	Yes	No	IRS
Zhang v. Comm'r, T.C. Summ. Op. 2016-76	6015(b), (c), (f) (underpayment)	Yes	Yes	IRS

TABLE 11: Unpublished Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Amnesty National v. Comm'r	13961-15 L	1/4/17	Challenge to the underlying tax liability; § 6673(a) frivolous penalty	Yes	IRS	CDP (levy)
Ballard v. Comm'r	1240-16 L	1/30/17	Challenge to the underlying tax liability	Yes	IRS	CDP (levy)
Barie v. Comm'r	10426-16	2/13/17	Default summary judgment; IRA contributions	Yes	IRS	Gross Income
Baxter v. Comm'r	14153-15 L	8/8/16	Partial summary judgment on the challenge to the underlying tax liability and application of the 2011 overpayment; however, abuse of discretion inquiry will continue to trial	No	Split	CDP (levy)
Berglund v. Comm'r	20782-15 L	9/1/16	Default summary judgment; challenge to the underlying tax liability and abuse of discretion inquiry as to proposed collection action; § 6673(a) frivolous penalty	Yes	IRS	CDP (lien/levy)
Bhambra v. Comm'r	1395-16 L	12/23/16	Partial summary judgment for collection of court-ordered restitution from prior criminal conviction for preparing false tax returns; separate issue pertaining to the collection of the civil fraud penalty will proceed to trial to determine whether notice of deficiency was received by the taxpayer	Yes	Split	CDP (lien)
Borg v. Comm'r	20476-10	12/29/16	Default judgment; business deductions and itemized deductions; unreported income; failure to file § 6651(a)(1) penalty, failure to pay § 6651(a)(2) penalty, and failure to pay estimated tax § 6654 penalties	Yes	IRS	Gross Income, Trade or Business Issues and Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Boulware v. Comm'r	5885-16	5/31/17	Partial summary judgment for business deduction and itemized deductions; failure to file § 6651(a)(1) penalty and § 6663 civil fraud penalty for filing false tax returns and tax evasion; issue of unreported income remains disputed and petitioner allowed to submit further evidence	No	Split	Gross Income, Trade or Business Issues and Failure to File Penalty
Brown v. Comm'r	20006-13 L	1/24/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether petitioner's account should have been placed in "currently-not-collectible" status and collection action sustained	No	TP	CDP (levy)

TABLE 11: Unpublished Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Buehler v. Comm'r	10491-13	6/2/16	Default summary judgment; unreported income; failure to file § 6651(a)(1) penalty, failure to pay § 6651(a)(2) penalty, and failure to pay estimated tax § 6654 penalties	No	IRS	Gross Income and Failure to Pay, Failure to File and Failure to Pay Estimated Tax Penalties
Caplan v. Comm'r	1347-16 L	2/14/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether petitioner's account should have been placed in "currently-not-collectible" status and collection action sustained	Yes	IRS	CDP (levy)
Caracappa v. Comm'r	728-16 SL	1/31/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and petitioner was not filing compliant	Yes	IRS	CDP (levy)
Carlson v. Comm'r	1363-12 SL	12/29/16	Abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and petitioner was not filing compliant; whether rejection of offer-in-compromise was proper	Yes	IRS	CDP (levy)
Caudle v. Comm'r	17558-15 L	6/2/16	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether proposed collection action should be sustained	Yes	IRS	CDP (lien/levy)
Caudle v. Comm'r	17543-15 L	6/2/16	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether proposed collection action should be sustained	Yes	IRS	CDP (lien/levy)
Counts v. Comm'r	17630-16 SL	3/6/17	Abuse of discretion inquiry as to whether proposed collection action should be sustained when petitioner was not filing compliant at the time of Appeal; whether rejection of installment agreement was proper	No	IRS	CDP (levy)
CTREC Hilton IT Academy, Inc. v. Comm'r	29852-14 L	7/28/16	Abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and petitioner was not filing compliant; whether rejection of installment agreement was proper	No	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
De Beck v. Comm'r	26744-15 L	4/13/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided; whether rejection of installment agreement was proper	No	IRS	CDP (levy)
Delgado v. Comm'r	31946-15 L	11/22/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided; whether denial of offer-in-compromise request was proper	No	IRS	CDP (lien)
DeLon v. Comm'r	7097-13 L	1/6/17	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency for multiple tax years; IRS concedes 2009 tax year in its motion for summary judgment	Yes	Split	CDP (lien/levy)
DeMersseman v. Comm'r	31050-14 L	6/1/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and no collection alternative proposed	Yes	IRS	CDP (levy)
Dencklau v. Comm'r	28103-15 SL	3/27/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided, petitioner was not filing compliant, and collection alternative was not properly requested	Yes	IRS	CDP (levy)
Doty v. Comm'r	24790-09	6/13/16	Default summary judgment; alimony deduction	No	IRS	Gross Income
Durden v. Comm'r	15096-14 L	1/24/17	Abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and no collection alternative proposed	Yes	IRS	CDP (levy)
Emanuel v. Comm'r	17782-15 L	2/8/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided	Yes	IRS	CDP (lien/levy)
Farrell v. Comm'r	18927-15 L	9/7/16	Challenge to the underlying tax liability	Yes	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Fleming v. Comm'r	4925-12 L	8/10/16	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency; § 6702(a) frivolous return penalty	Yes	IRS	CDP (levy)
Fonder v. Comm'r	20498-15 L	9/7/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained	No	IRS	CDP (lien)
Franks v. Comm'r	25359-15 L	8/26/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained; whether rejection of installment agreement was proper when petitioner was not filing compliant	Yes	IRS	CDP (levy)
Fujita v. Comm'r	10100-15 L	10/7/16	Challenge to the underlying tax liability; § 6673(a) frivolous penalty	Yes	SPLIT	CDP (lien)
Gardner v. Comm'r	17830-15 L	11/16/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided, petitioner was not filing compliant, and no collection alternative was proposed; § 6673(a) frivolous penalty	Yes	IRS	CDP (lien/levy)
Geoghegan v. Comm'r	18055-14 L	8/23/16	Abuse of discretion inquiry as to whether rejection of lien withdrawal request was proper when collection alternatives were not proposed	Yes	IRS	CDP (lien)
Giller v. Comm'r	16755-14 L	1/3/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when petitioner was not filing compliant	Yes	IRS	CDP (levy)
Gillespie v. Comm'r	729-09 L	12/30/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained and whether rejection of offer-in-compromise was proper	Yes	IRS	CDP (lien)
Goselin v. Comm'r	6293-14 L	3/10/17	Whether the verification procedures in § 6330(c)(1) were followed; challenge to receipt of notice of deficiency	Yes	IRS	CDP (levy)
Hanger v. Comm'r	19571-15 SL	10/13/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided and petitioner was not filing compliant; whether rejection of installment agreement was proper	Yes	IRS	CDP (lien)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Hans v. Comm'r	8472-16 L	3/23/17	Default summary judgment; abuse of discretion inquiry as to whether rejection of collection alternatives were proper; whether settlement officer's calculations of petitioner's monthly ability to pay were incorrectly overestimated	Yes	IRS	CDP (lien)
Harvey v. Comm'r	19022-15 L	10/5/16	Challenge to the underlying tax liability and application of the 2014 overpayment; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided; whether declining to further consider collection alternatives was proper	Yes	IRS	CDP (levy)
Hassan v. Comm'r	7310-15 L	7/5/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained	Yes	IRS	CDP (levy)
Herbst v. Comm'r	9643-14 SL	9/8/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided	Yes	IRS	CDP (levy)
Heyl v. Comm'r	5280-15 L	9/13/16	Default summary judgment; abuse of discretion inquiry as to whether proposed collection action should be sustained; whether rejection of installment agreement was proper; whether utilizing equity in property would impose an economic hardship on petitioner	Yes	IRS	CDP (lien/levy)
Hoare v. Comm'r	17161-14 SL	9/29/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained when requested financial information was not provided; whether declining request for an installment agreement was proper	Yes	IRS	CDP (levy)
Hogan v. Comm'r	11229-15	3/16/17	Partial summary judgment for denial of interest abatement	Yes	IRS	N/A

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Houk v. Comm'r	22140-15 L	4/5/17	Default summary judgment; challenge to the underlying tax liability will proceed to trial; innocent spouse issue deemed conceded; abuse of discretion inquiry as to whether denial of collection alternative was proper when requested financial information was not provided and petitioner was not filing compliant	Yes	Split	CDP (levy)
Houston v. Comm'r	1445-06 L	4/17/17	Whether petitioners were collaterally estopped from challenging the applicability of § 6621(c) interest during the CDP hearing	No	IRS	CDP (lien)
Hughes v. Comm'r	21103-15 SL	9/29/16	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether collection alternatives were properly denied when no specific collection proposal was presented	Yes	IRS	CDP (lien)
Hunter v. Comm'r	15319-14 L and 15362-14 L	1/31/17	Abuse of discretion inquiry as to whether petitioners had enough equity in assets to full pay; whether rejection of installment agreement was proper	No	IRS	CDP (levy)
Hurford Investments No. 2, Ltd. v. Comm'r	23017-11	4/17/17	Whether the phantom stock in petitioner's possession was a capital asset; what the basis of that capital asset might be	No	TP	N/A
Kelker v. Comm'r	15061-14 L	10/24/16	Challenge to the underlying tax liability; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether collection alternatives were properly denied	Yes	IRS	CDP (levy)
Kelton v. Comm'r	4776-16 SL	3/24/17	Default summary judgment; abuse of discretion inquiry as to whether collection alternatives were properly denied when no specific collection proposal was presented, petitioner was not in filing compliance, and requested financial information was not provided	Yes	IRS	CDP (levy)
Kim v. Comm'r	31154-15 L	2/21/17	Default summary judgment; abuse of discretion as to whether taxpayer was afforded sufficient time to provide requested financial information and abuse of discretion inquiry as to whether settlement officer concluded CDP hearing prematurely; whether declining to consider collection alternatives was proper	No	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Laad v. Comm'r	14555-16 L	4/18/17	Abuse of discretion inquiry as to whether rejection of installment agreement was proper when requested financial information was not provided	No	IRS	CDP (lien)
Lanier v. Comm'r	24027-15 L	8/23/16	Abuse of discretion inquiry as to whether collection action should be sustained when petitioner's only argument is that an unpaid informant reward should offset his tax liability	No	IRS	CDP (levy)
Laub v. Comm'r	17168-13 SL	1/30/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when requested financial information was not provided and no collection alternative was proposed	Yes	IRS	CDP (levy)
Lingo v. Comm'r	17356-12, 17679-12, *17771-12, 17844-12*	12/28/16	IRA contributions	No	TP	Gross Income
Linton v. Comm'r	15904-15	2/2/17	Partial summary judgment on the challenge to the underlying tax liability and application of the 2008 overpayment	Yes	IRS	CDP (levy)
Manning v. Comm'r	10408-16 L	3/20/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when requested financial information was not provided and petitioner was not in filing compliance; whether offer-in-compromise request was properly denied when no proposal was presented	Yes	IRS	CDP (levy)
Martinez v. Comm'r	29472-12	8/18/16	Business deductions and itemized deductions and dependency exemption	Yes	Split	Trade or Business Issues and Family Status Issues
McCarthy v. Comm'r	19274-16 S	3/28/17	Default summary judgment; underreported wages	Yes	IRS	Gross Income
McCluer v. Comm'r	21896-15 L	8/29/16	Abuse of discretion inquiry as to whether rejection of offer-in-compromise was proper	No	IRS	CDP (lien/levy)
McGloster v. Comm'r	29919-15 SL	1/3/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to rejection of lien withdrawal request when requested financial information was not provided and petitioner was not in filing compliance	Yes	IRS	CDP (lien)

TABLE 11: Unpublished Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
McMahon v. Comm'r	26626-15 L	6/17/16	Default summary judgment; abuse of discretion inquiry as to whether rejection of currently-not-collectible status was proper; whether officer's calculations of petitioner's monthly ability to pay were incorrectly overestimated	No	IRS	CDP (levy)
Methvin v. Comm'r	26765-14	1/4/17	Self-employment tax	Yes	IRS	N/A
Miller v. Comm'r	8031-14 L	9/19/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when requested financial information was not provided and petitioner was not filing compliant and failed to participate in CDP hearing	Yes	IRS	CDP (lien/levy)
Miller v. Comm'r	4094-16 L	10/7/16	Challenge to the underlying tax liability	No	IRS	CDP (lien)
Mize v. Comm'r	17723-15 L	6/10/16	Default summary judgment, challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of installment agreement was proper when requested financial information was not provided and petitioner was not filing compliant	Yes	IRS	CDP (levy)
Morales, Jr. v. Comm'r	6207-16 L	8/24/16	Abuse of discretion inquiry as to whether denial of lien withdrawal request and rejection of collection alternatives were proper when petitioner was not filing compliant; whether settlement officer's calculations of petitioner's monthly ability to pay were incorrectly overestimated	Yes	IRS	CDP (lien)
Morales, Jr. v. Comm'r	30203-15 L	8/24/16	Abuse of discretion inquiry as to whether denial of lien withdrawal request and rejection of collection alternatives were proper when petitioner was not filing compliant; whether settlement officer's calculations of petitioner's monthly ability to pay were incorrectly overestimated	Yes	IRS	CDP (lien/levy)
Morris v. Comm'r	1204-16 L	2/23/17	Default summary judgment; abuse of discretion inquiry as to whether collection actions should be sustained and whether rejection of installment agreement was proper when requested financial information was not provided	Yes	IRS	CDP (lien/levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Nones v. Comm'r	24833-15 SL	10/6/16	Challenge to the underlying tax liability; whether petitioner's payments were all properly accounted for in the IRS's payment history; abuse of discretion inquiry as to whether the collection action should be sustained when no specific collection alternative was presented	Yes	IRS	CDP (levy)
O'Brien v. Comm'r	10060-16 L	2/9/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether proposed collection action should be sustained and whether request for an offer-in-compromise was properly denied when requested financial information was not provided and petitioner was not filing compliant	Yes	IRS	CDP (levy)
O'Connor v. Comm'r	2472-11	1/18/17	Whether there was a qualified appraisal to support a charitable deduction carryforward; whether the doctrine of substantial-compliance was applicable	No	IRS	Charitable Contribution
Odums v. Comm'r	19274-15	11/9/16	Unreported income, failure to file § 6651(a)(1) penalty, failure to pay § 6651(a)(2) penalty, failure to pay estimated tax § 6654 penalty and § 6673(a) frivolous penalty (warning)	Yes	IRS	Gross Income, Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Ortega v. Comm'r	18715-15 L	12/2/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of collection alternatives was proper when requested financial information was not provided, estimated tax payments were unpaid and no specific offer was presented	Yes	IRS	CDP (levy)
Patrick v. Comm'r	5259-16 L	2/9/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when collection alternatives were not presented	No	IRS	CDP (levy)
Percy Squire Co., LLC v. Comm'r	4812-16 L	8/10/16	Abuse of discretion inquiry as to whether rejection of an offer-in-compromise and an installment agreement was proper when requested financial information was not provided, employment taxes were unpaid, and no proposed installment agreement terms presented; whether IRS has shown good cause why the levy should no longer be suspended; and § 6673(a) frivolous penalty (warning)	No	IRS	CDP (levy/ lien)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Perez v. Comm'r	16742-16 L	4/3/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of collection alternatives was proper when requested financial information was not provided	Yes	IRS	CDP (levy)
Piel v. Comm'r	12175-16 SL	3/30/17	Default summary judgment; abuse of discretion inquiry as to whether rejection of installment agreement and "currently-not-collectible" status were proper when requested financial information was not provided	Yes	IRS	CDP (levy)
Raimondo v. Comm'r	31544-15 L	4/7/17	Abuse of discretion inquiry as to whether rejection of installment agreement was proper when requested financial information was not provided and petitioner was not filing compliant	Yes	IRS	CDP (levy)
Rice v. Comm'r	9631-16 SL	2/3/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when requested financial information was not provided and no collection alternative was proposed	Yes	IRS	CDP (levy)
Roe v. Comm'r	30661-15 SL	3/15/17	Default summary judgment; challenge to the underlying tax liability; challenge to receipt of notice of deficiency	Yes	IRS	CDP (levy)
Rogers v. Comm'r	15207-15 L	9/12/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when petitioner did not propose collection alternatives and rejected the settlement officer's proposal to enter into an installment agreement	Yes	IRS	CDP (levy)
Rogers v. Comm'r	17023-15 L	6/15/16	Default summary judgment; abuse of discretion inquiry as to whether rejection of offer-in-compromise was proper when requested financial information was not provided; whether settlement officer's calculation of petitioner's monthly allowable living expenses was incorrectly underestimated	Yes	IRS	CDP (lien)
Rogers v. Comm'r	27208-15 L	1/6/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether declining to withdraw lien was proper	No	IRS	CDP (lien)
Rutledge v. Comm'r	17241-14 L	8/31/16	Default summary judgment; challenge to the underlying tax liability	Yes	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Ryan v. Comm'r	29621-11 SL	8/25/16	Default summary judgment; abuse of discretion inquiry as to whether denial of offer-in-compromise request was proper when requested financial information was not provided	Yes	IRS	CDP (levy)
Salari v. Comm'r	17209-15 L	11/14/16	Default summary judgment; abuse of discretion inquiry as to whether rejection of installment agreement was proper when petitioner was not filing compliant and did not provide the financial information requested	Yes	IRS	CDP (levy)
Schlegel v. Comm'r	5878-15 L	9/15/16	Default summary judgment; challenge to the underlying tax liability; challenge to receipt of notice of deficiency; abuse of discretion inquiry as to whether denial of collection alternatives was proper when requested financial information was not provided and petitioner was not filing compliant	Yes	IRS	CDP (lien/levy)
Schneider v. Comm'r	29122-14	9/1/16	Unreported income, failure to file § 6651(a)(1) penalty, failure to pay § 6651(a)(2) penalty, failure to pay estimated tax § 6654 penalty and § 6673(a) frivolous penalty	Yes	IRS	Gross Income, Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Shah v. Comm'r	12928-16 L	9/7/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion as to whether rejection of installment agreement was proper when requested financial information was not provided and petitioner did not provide proof that estimated tax payments were paid in full for the year to date	Yes	IRS	CDP (lien/levy)
Sherwood v. Comm'r	18946-15 L	10/26/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of installment agreement or other collection alternatives was proper after petitioners stated they did not wish to enter one and did not propose other collection alternatives	No	IRS	CDP (levy)
Smith v. Comm'r	14338-16 SL	10/18/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of "currently-not-collectible" status was proper when requested financial information was not provided and petitioner was not in filing compliance	Yes	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Smith v. Comm'r	21436-14 L	10/3/16	Challenge to the frivolous return penalty which constitutes the underlying tax liability in this case; abuse of discretion inquiry as to whether collection action should be sustained when requested financial information was not provided and petitioner was not in filing compliance for multiple tax years	Yes	IRS	CDP (levy)
Smith v. Comm'r	28529-14 L	7/19/16	Whether petitioner's automatic bankruptcy stay remained in effect; abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (levy)
Smith v. Comm'r	13691-15	6/3/16	Default summary judgment; unreported income, failure to file § 6651(a)(1) penalty, failure to pay § 6651(a)(2) penalty, and failure to pay estimated tax § 6654 penalty	Yes	IRS	Gross Income, Failure to File, Failure to Pay, and Failure to Pay Estimated Tax Penalties
Smith v. Comm'r	15232-16	4/5/17	Redetermination of deficiency; whether petitioner, an inmate during the tax year at issue, qualified for the Earned Income Tax Credit	Yes	IRS	Family Status Issues
Squire v. Comm'r	9586-15 L	8/30/16	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether denial to consider collection alternatives was proper when requested financial information was not provided and petitioner was not in filing compliance; § 6673(a) frivolous penalty (warning)	Yes	IRS	CDP (lien)
St. Clair v. Comm'r	28196-15 SL	10/6/16	Default summary judgment; abuse of discretion inquiry as to whether rejections of installment agreement and lien withdrawal were proper when prior installment agreement was defaulted, requested financial information was not provided, and petitioners failed to remit adequate estimated tax payments for multiple tax years	Yes	IRS	CDP (lien)
Stafford v. Comm'r	7909-16 L	4/18/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of installment agreement was proper when requested financial information was not provided	No	IRS	CDP (levy)

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Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Stark v. Comm'r	14842-12 L	6/30/16	Abuse of discretion inquiry as to whether settlement officer's calculation of petitioner's monthly allowable living expenses was incorrectly underestimated; whether rejection of "currently-not-collectible" status was proper	No	TP	CDP (levy)
Stevens v. Comm'r	29815-13, 9539-15	7/20/16	Whether and when the petitioners filed specific returns for years 2005 through 2012 and whether the statute of limitations for assessment has expired for any of these tax years	Yes	Split	N/A
Thomas Conglomerate, Inc. v. Comm'r	6127-15 SL	6/1/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained when collection alternatives were not proposed and requested financial information was not provided	Yes	IRS	CDP (levy)
Thompson v. Comm'r	16947-15 L	6/9/16	Abuse of discretion inquiry as to whether rejection of installment agreement and other collection alternatives was proper when requested information was not provided and no specific proposal was offered	No	IRS	CDP (lien)
Thomson v. Comm'r	14171-16 SL	2/1/17	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of petitioner's challenge to his underlying liability was proper at the CDP hearing when petitioner agreed during his CDP hearing to pay his balance due within 60 days	Yes	IRS	CDP (levy)
Wollschlager v. Comm'r	28428-13 SL	7/7/16	Default summary judgment; whether petitioner's allegedly planned bankruptcy filing would serve as an automatic stay of any collection actions; abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (lien)
Yates v. Comm'r	16473-15 L	8/15/16	Abuse of discretion inquiry as to whether the rejection of offer-in-compromise was proper when petitioners did not submit the application fee or the required initial payment; 2011 tax liability was moot because liability had been paid at time of court's consideration of summary judgment motion	Yes	IRS	CDP (lien)

TABLE 11: Unpublished Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Zapata v. Comm'r	28931-09 L	8/5/16	Default summary judgment; whether the Appeals officer considered the issues properly raised by the petitioner; whether, per 6511(h), the petitioner qualifies for tolling of the refund statute as "financially disabled" and is entitled to apply the 2004 overpayment to the 2002 liability	Yes	IRS	CDP (levy)
Schwartz v. Comm'r	4354-16 L	5/9/17	Default summary judgment; challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection alternatives were properly considered when requested financial information was not provided	Yes	IRS	CDP (levy)
Schuering v. Comm'r	14256-16 L	5/2/17	Default summary judgment; abuse of discretion inquiry as to whether collection alternatives were properly considered when no specific collection proposal was presented, petitioner was not filing compliant, estimated tax payments were not shown to be current, and requested financial information was not provided	Yes	IRS	CDP (lien)

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Amato v. Comm'r	13599-14	7/13/16	Schedule C income and expenses	Yes	TP	Trade or Business Issues
Balekian v. Comm'r	27817-15	12/16/16	Passive activity losses under § 469; § 6662 accuracy-related penalty	Yes	IRS	Accuracy Penalty
Bishop v. Comm'r	8716-13	12/9/16	Gross income from the sale of personal items; § 6662 accuracy-related penalty; § 6673(a) frivolous penalty (warning)	Yes	IRS	Gross Income and Accuracy Penalty
Bowers v. Comm'r	340-15 L	6/29/16	Abuse of discretion inquiry as to whether collection action should be sustained; § 6673(a) frivolous penalty (warning)	Yes	IRS	CDP (Levy/Lien)
Bridges v. Comm'r	228-15	11/10/16	Cancellation of debt income	Yes	TP	Gross Income
Brownstein v. Comm'r	11862-15 S	12/12/16	Retirement distributions subject to § 72(t); schedule C business deductions; § 6662 accuracy-related penalty	Yes	IRS	Gross Income, Trade or Business Issues and Accuracy Penalty
Buczko v. Comm'r	25917-15 S	3/16/17	Dependency exemptions; filing status; CTC; and EITC	Yes	IRS	Family Status Issues
Burgess v. Comm'r	1711-15	1/13/17	Innocent spouse relief	Yes	TP	Innocent Spouse
Burke v. Comm'r	27301-15 S	12/27/16	Unreported lawsuit settlement proceeds and the deduction for legal fees related to suit	Yes	Split	Gross Income
Cannon v. Comm'r	12900-15	5/25/16	Dependency exemptions; filing status; CTC; EITC; and § 6662 accuracy-related penalty	Yes	IRS	Family Status Issues and Accuracy Penalty
Caroll v. Comm'r	5859-15 S	11/9/16	Schedule C business expense deductions	Yes	TP	Trade or Business Issues
Christen v. Comm'r	16147-14	5/26/16	Schedule C business expense deductions; Costs-of-Goods Sold adjustment; bad debt deduction; failure to file § 6651(a)(1) penalty; and § 6662 accuracy-related penalty	Yes	IRS	Trade or Business Issues, Gross Income, Failure to File Penalty and Accuracy Penalty
Coleman v. Comm'r	11752-16	5/11/17	Unreported gross income from settlement proceeds	Yes	IRS	Gross Income
Cook v. Comm'r	18196-15	6/20/16	Unreported retirement distributions; and failure to file § 6651(a)(1), failure to pay § 6651(a)(2) and failure to pay estimated tax § 6654 penalties	Yes	IRS	Gross Income, Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Danzey v. Comm'r	25314-15	2/10/17	Filing status; dependency exemption	Yes	IRS	Family Status Issues
Dieffenbach v. Comm'r	26706-15S L	12/6/16	Abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (levy)

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Dingess v. Comm'r	17989-15 and 17999-15	11/14/16	Tax return preparer fraud	No	IRS	N/A
Dirks v. Comm'r	26567-15 S	11/28/16	Innocent spouse relief	Yes	IRS	Innocent Spouse
Domingo v. Comm'r	11310-14 S	5/24/17	Schedule A deductions, including unreimbursed employee business expenses; charitable contributions; and failure to file § 6651(a)(1) penalty	No	Split	Trade or Business Issues, Charitable Contributions and Failure to File Penalty
Elaine v. Comm'r	26078-14 S	10/21/16	Retirement distributions subject to § 72(t); § 6662 accuracy-related penalty	Yes	Split	Gross Income and Accuracy Penalty
Emerho v. Comm'r	15809-14	12/8/16	Taxable state income tax refunds; rental income & expenses; schedule A deductions, including unreimbursed employee business expenses; § 6662 accuracy-related penalty	Yes	IRS	Gross Income, Trade or Business Issues and Accuracy Penalty
Fitzmaurice v. Comm'r	1252-16S L	12/1/16	Abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (levy)
Flow-Eze Co. v. Comm'r	5511-16S L	2/23/17	Abuse of discretion inquiry as to whether collection action should be sustained; whether settlement officer's rejection of proposed collection alternative was proper when requested financial information was not provided and TP was not compliant with federal tax obligations	Yes	IRS	CDP (levy)
Fulton v. Comm'r	6840-16	4/13/17	Charitable contributions; and failure to file § 6651(a)(1), failure to pay § 6651(a)(2) and failure to pay estimated tax § 6654 penalties	Yes	Split	Charitable Contributions and Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Gattie v. Comm'r	7077-15	11/3/16	Unreported gross income; failure to file § 6651(a)(1) and failure to pay § 6651(a)(2) penalties; § 6673(a) frivolous penalty	Yes	IRS	Gross Income, Failure to File and Failure to Pay Penalties
Genovese v. Comm'r	6730-16S L	12/29/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (lien)
Gioeli v. Comm'r	12002-15 S	6/13/16	Failure to file § 6651(a)(1) penalty	Yes	IRS	Failure to File Penalty

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Golden State Cooperative, Inc. v. Comm'r	2502-15	9/20/16	Unreported income; Costs-of-Goods Sold adjustment; business deductions under § 280E; § 6662 accuracy-related penalty	No	Split	Trade or Business Issues, Gross Income and Accuracy Penalty
Goldman v. Comm'r	9596-16	3/28/17	TP claimed the notice of deficiency was invalid	No	IRS	N/A
Gordon v. Comm'r	9657-16	4/17/17	Unreported retirement distributions	Yes	IRS	Gross Income
Grewal v. Comm'r	17880-13	7/5/16	Schedule C expenses and § 6662 accuracy-related penalty	No	Split	Trade or Business Issues and Accuracy Penalty
Griffin v. Comm'r	8010-16 S	4/3/17	Schedule C expenses; gross income; dependency exemptions; filing status; CTC; EITC; and § 6662 accuracy-related penalty	Yes	Split	Trade or Business Issues, Gross Income, Family Status Issues and Accuracy Penalty
Guerrero v. Comm'r	14274-15 S	11/10/16	Charitable contributions; unreimbursed employee business expenses	Yes	Split	Charitable Contributions and Trade or Business Issues
Haddix v. Comm'r	7385-16 L	2/10/17	Abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (levy)
Hannah v. Comm'r	29480-15S L	3/21/17	Abuse of discretion inquiry as to whether collection action should be sustained; § 6673(a) frivolous penalty (warning)	Yes	IRS	CDP (levy)
Harper v. Comm'r	15740-14 S	1/9/17	Unreported gross income; schedule C expenses; filing status; failure to file § 6651(a)(1) penalty; failure to pay § 6651(a)(2) penalty; § 6662 accuracy-related penalty	Yes	IRS	Gross Income, Trade or Business Issues, Family Status Issues, Failure to File Penalty, Failure to Pay Penalty and Accuracy Penalty
Herrera v. Comm'r	12662-16 S	5/1/17	Schedule A unreimbursed employee business expenses	Yes	IRS	Trade or Business Issues
Hexum v. Comm'r	13994-16	4/17/17	Alimony deduction and § 6662 accuracy-related penalty	Yes	IRS	Gross Income and Accuracy Penalty
Holladay v. Comm'r	31397-15	11/21/16	Unreported retirement distributions	Yes	IRS	Gross Income

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Iverson v. Comm'r	31012-14	7/5/16	Unreported gross income; failure to file § 6651(a)(1), failure to pay § 6651(a)(2) and failure to pay estimated tax § 6654 penalties; § 6673(a) frivolous penalty (warning)	Yes	IRS	Gross Income, Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties
Jones v. Comm'r	19407-15	2/13/17	Dependency exemption; filing status; EITC	Yes	IRS	Family Status Issues
Kanofsky v. Comm'r	18162-15, 18163-15, 18182-15	11/17/16	Unreported gross income; failure to file § 6651(a)(1), failure to pay § 6651(a)(2), failure to pay estimated tax § 6654 penalties; § 6673(a) frivolous penalty	Yes	IRS	Gross Income, Failure to Pay, Failure to File, and Failure to Pay Estimated Tax Penalties
Kayakpah v. Comm'r	24359-15	11/8/16	Dependency exemption; EITC; CTC; filing status	Yes	TP	Family Status Issues
Keith v. Comm'r	1836-15 L	6/20/16	Challenge to the underlying tax liabilities and § 6702(a) penalty liabilities; abuse of discretion inquiry as to whether IRS properly verified the other penalty liabilities	Yes	Split	CDP (Levy/Lien)
Kelly v. Comm'r	26111-15 S	12/7/16	Cancellation of debt income	Yes	IRS	Gross Income
Khan v. Comm'r	30255-15	2/10/17	Dependency exemptions; filing status; EITC	Yes	IRS	Family Status Issues
Kirby v. Comm'r	8560-15	11/14/16	Schedule A medical deductions; § 6662 accuracy-related penalty	Yes	IRS	Accuracy Penalty
Landow v. Comm'r	4361-15	7/12/16	Innocent spouse relief	No	TP	Innocent Spouse
Lim v. Comm'r	15130-15	12/19/16	Loss on the sale of real estate; failure to file § 6651(a)(1) penalty; § 6662 accuracy-related penalty	No	IRS	Failure to File Penalty and Accuracy Related Penalty
Lipe v. Comm'r	4103-15	6/2/16	Unreported gross income, including a retirement distribution subject to § 72(t); failure to pay § 6651(a)(2) penalty	Yes	IRS	Gross Income and Failure to Pay Penalty
Liu v. Comm'r	29121-14 S	6/17/16	Schedule C expenses; and § 6662 accuracy-related penalty	Yes	IRS	Trade or Business Issues and Accuracy Penalty
Luu v. Comm'r	3437-15	8/2/16	Innocent spouse relief	No	TP	Innocent Spouse
Magnuson v. Comm'r	24305-15	11/3/16	Unreported gross income; charitable contributions; filing status; failure to file § 6651(a)(1), failure to pay § 6651(a)(2) and failure to pay estimated tax § 6654 penalties	Yes	IRS	Gross Income, Charitable Contributions, Family Status Issues and Failure to File, Failure to Pay and Failure to Pay Estimated Tax Penalties

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Majcher v. Comm'r	1903-16 S	2/24/17	Schedule A unreimbursed employee business expenses; failure to file § 6651(a)(1) penalty; § 6662 accuracy-related penalty	Yes	IRS	Trade or Business Issues, Failure to File Penalty and Accuracy Penalty
Malev v. Comm'r	1282-16 S	3/1/17	Schedule A medical deduction	No	TP	N/A
Marks v. Comm'r	4864-16 L	2/10/17	Abuse of discretion inquiry as to whether refusal to consider collection alternatives was proper when requested financial information was provided; and whether the collection action should be sustained	Yes	TP	CDP (levy)
Martin v. Comm'r	29808-15	10/24/16	Adjustments to Schedule C gross income and expenses; § 6662 accuracy-related penalty	Yes	IRS	Trade or Business Issues, Gross Income and Accuracy Penalty
Mathews v. Comm'r	16217-15	10/18/16	Dependency exemption; CTC; filing status	Yes	IRS	Family Status Issues
McClain v. Comm'r	22393-14	8/11/16	Filing status; American Opportunity Credit; EITC	Yes	Split	Family Status Issues
Melvin v. Comm'r	12540-15	11/8/16	Unreimbursed employee business expenses	No	IRS	Trade or Business Issues
Miller v. Comm'r	12565-16S L	4/24/17	Challenge to the underlying tax liability; failure to pay § 6651(a)(1) penalty and failure to pay estimated tax § 6654 penalty; abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (levy), Failure to Pay Penalty, Failure to Pay Estimated Tax Penalty
Miller v. Comm'r	6203-16 S	3/28/17	Schedule A unreimbursed employee business expenses	Yes	IRS	Trade or Business Issues
Mull v. Comm'r	30635-14 S	7/8/16	Schedule A medical expense deductions	Yes	TP	N/A
Murray v. Comm'r	22426-15 S	11/17/16	Unreported gross income from wages and taxable interest; failure to pay § 6651(a)(1), fraudulent failure to file § 6651(f) and failure to pay estimated tax § 6654 penalties	Yes	IRS	Gross Income, Failure to Pay and Failure to Pay Estimated Tax Penalties
Murry v. Comm'r	8556-16 S	2/21/17	Schedule C expenses; § 6662 accuracy-related penalty	No	Split	Trade or Business Issues and Accuracy Penalty
Muse v. Comm'r	3078-16 S	12/27/16	Dependency exemption; filing status; EITC; CTC	Yes	IRS	Family Status Issues
Nelson v. Comm'r	12491-16 S	4/19/17	Premium tax credit	Yes	IRS	N/A

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Olsen v. Comm'r	2807-15 S	11/21/16	Retirement distributions subject to § 72(t); § 6662 accuracy-related penalty	Yes	IRS	Gross Income and Accuracy Penalty
Olsen v. Comm'r	16459-15	3/31/17	Schedule A unreimbursed employee business expenses	Yes	IRS	Trade or Business Issues
Otuonye v. Comm'r	16196-15 S	7/8/16	Schedule C expenses; and § 6662 accuracy-related penalty	Yes	Split	Trade or Business Issues and Accuracy Penalty
PBBM-Rose Hill, LTD v. Comm'r	26096-14	10/7/16	Charitable contributions; § 6662(h) increase in penalty in case of gross valuation misstatements; and § 6662 accuracy-related penalty	No	Split	Charitable Contribution and Accuracy Penalty
Pearce v. Comm'r	13287-15 S	11/14/16	Schedule A deductions, including unreimbursed employee business expenses	Yes	IRS	Trade or Business Issues
Peterson v. Comm'r	19899-15 L	12/22/16	Challenge to the underlying tax liability (due process and statute of limitations arguments); and abuse of discretion inquiry as to whether collection action should be sustained	Yes	IRS	CDP (lien)
Polanco v. Comm'r	23632-15	1/3/17	Unreported gross income; § 6662 accuracy-related penalty	Yes	IRS	Gross Income and Accuracy Penalty
Rodriguez v. Comm'r	6261-16 S	11/10/16	Schedule C gross income; dependency exemptions; EITC; CTC; filing status	Yes	IRS	Gross Income and Family Status Issues
Romero v. Comm'r	28845-15 S	11/15/16	Schedule A deductions, including unreimbursed employee business expenses; charitable contributions	Yes	Split	Trade or Business Issues and Charitable Contributions
Rose v. Comm'r	11790-16 S	4/26/17	American Opportunity Credit	Yes	IRS	Family Status Issues
Salter v. Comm'r	21045-15 L	11/3/16	Challenge to the underlying tax liability; abuse of discretion inquiry as to whether rejection of "currently-not-collectible" status was proper	Yes	IRS	CDP (lien)
Sarcone v. Comm'r	17008-15 S	10/24/16	Failure to file § 6651(a)(1) penalty	Yes	IRS	Failure to File Penalty
Sims v. Comm'r	3684-16 SL	3/21/17	Abuse of discretion inquiry as to whether denial of interest abatement request was proper	Yes	IRS	CDP (levy)
Smith v. Comm'r	23442-14	10/18/16	§ 163(h) student loan interest deductions	Yes	IRS	N/A
Spottswood v. Comm'r	6428-15	6/21/16	Innocent spouse relief	Yes	TP	Innocent Spouse
Stevens v. Comm'r	13366-15 S	1/5/17	Dependency exemption; filing status; EITC; CTC	Yes	IRS	Family Status Issues

TABLE 12: Unpublished Tax Court Bench Opinions

Case Name	Docket No.	Order Entered Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Thompson v. Comm'r	13012-15S L	6/24/16	Abuse of discretion inquiry as to Appeals' denial of the application of 2008 overpayment to 2010 tax liability	Yes	IRS	CDP (levy)
Tremont v. Comm'r	4475-16	5/17/17	Unreported gross income and § 6673(a) frivolous penalty (warning)	Yes	IRS	Gross Income
Wang v. Comm'r	30280-15	10/13/16	Adjustments to rental property basis; § 6662 accuracy-related penalty	Yes	Split	Accuracy Penalty
Wang v. Comm'r	8763-16	4/13/17	Retirement distributions subject to § 72(t)	Yes	TP	Gross Income
Williams v. Comm'r	32187-15	11/17/16	Unreported gross income; retirement distributions subject to § 72(t); charitable deductions; schedule C business expenses; § 6662 accuracy-related penalty	Yes	IRS	Gross Income, Charitable Contributions, Trade or Business Issues and Accuracy Penalty
Williams v. Comm'r	27137-12	4/11/17	Gross Income; schedule C expenses; dependency exemption; filing status; failure to file § 6651(a)(1) penalty; and § 6662 accuracy-related penalty	Yes	Split	Gross Income, Trade or Business Issues, Family Status Issues, Failure to File Penalty and Accuracy Penalty
Wolf v. Comm'r	23980-13 L	10/6/16	Challenge to the underlying tax liability; failure to pay estimated tax § 6654 penalty; and abuse of discretion inquiry as to whether rejection of installment agreement was proper	No	IRS	CDP (levy) and Failure to Pay Estimated Tax Penalty
Wright v. Comm'r	18508-14	6/21/16	Unreported gross income; failure to file § 6651(a)(1) penalty and failure to pay § 6651(a)(2) penalty; § 6673(a) frivolous penalty	Yes	IRS	Gross Income, Failure to File and Failure to Pay Penalties
Yates v. Comm'r	4387-15 S	6/30/16	Schedule C expenses	Yes	IRS	Trade or Business Issues
Zadeh v. Comm'r	16045-15	1/3/17	Unreported gross income; EITC	Yes	IRS	Gross Income and Family Status Issues

Appendix 4: Taxpayer Advocate Service Directory

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