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CIVIL TAX PROCEDURE

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CIVIL TAX PROCEDURE

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to
SECOND EDITION

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PREFACE

This 2015 Update Letter introduces to you our new co-author, Sam Ullman. "Introduces" may be a poor choice of words since many of you may know, or know of, Sam, either from his many years of sophisticated and successful tax practice or from his years of teaching Tax Procedure in the University of Florida's outstanding tax law program. In any event, his co-authors are delighted to share with you Sam's deep understanding of federal tax procedure. We are confident that you will gain much from it, even as we, his co-authors, already have.

Tax procedure doesn't stand still. Developments since publication of the Second Edition of CIVIL TAX PROCEDURE were covered in a 2011 Update Letter and a 2014 Update Letter, both sent to professors adopting the book. This 2015 Update Letter is cumulative. It captures the major developments in the 2011 and 2014 Updates plus major developments occurring in the last 12 months.

Sometimes a too-long document is almost as bad as a too-short document. To have included in the 2015 Update everything in the prior Updates plus subsequent developments would have produced a document so long that adopters might have found it unwieldy. Accordingly, we omitted from this 2015 Update some interesting-but-not-crucial items that appeared in the 2011 or 2014 Updates. Be assured that the major developments since publication of the Second Edition appear in this 2015 Update.

We are at work on the Third Edition. We have benefited from comments already received from adopters. If you have additional thoughts, please convey them to Steve Johnson at sjohnson@law.fsu.edu, (850-644-1777).

As always, we are grateful for your thoughts and support. We wish you success and joy in your courses as you initiate budding tax lawyers into the fraternity/sorority of tax practitioners and provide them with the tools, skills, and honed intuition needed to render excellent service to their clients and their society.

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Chapter 1

STRUCTURE OF TAX ADMINISTRATION AND SOURCES OF TAX LAW

Page 3. Add the following new footnote at the end of the second full paragraph:

> **6.1** *See* Thomas J. Callahan, Gregory J. Gawlik & Jon R. Stefanik II, *Joint Committee Refund Review: Twelve Questions to Consider,* J. Tax Prac. & Proc., Oct.–Nov. 2008, p. 19; Eric Kroh, *JCT Will Review a Refund If It's Big Enough*, Tax Notes, Apr. 14, 2014, p. 160. In fiscal year 2013, the Joint Committee's refund review office received about 1300 cases, involving refunds totaling over $30 billion. It raised concerns in only about 5% of the cases it sees. The Committee lacks the authority to veto a refund (having such authority would raise separation-of-powers questions), but the IRS pays great attention to concerns the Committee raises.

Page 4. Add the following at the end of footnote 10:

> Recent cases typically accord Bluebooks little or no weight. *E.g.*, United States v. Woods, 134 S. Ct. 557, 568 (2013); Exxon Mobil Corp. v. Commissioner, 689 F.3d 191, 201 & n. 15 (2d Cir. 2012). Nonetheless, parties continue to cite Bluebooks, and they constitute authority for purposes of the "substantial authority" defense to section 6662 penalties. *See* Reg. § 1.6662-4(d)(3)(iii).

Page 5. First sentence: Change "General Accounting Office" to "Government Accountability Office."

Page 6. Substitute the following for the current contents of footnote 14:

> **14** In addition, the Office of Management and Budget (part of the federal Executive apparatus) periodically publishes lists of proposed and final regulations of the various agencies, including the Treasury Department.

Page 6. Add the following new paragraph and footnotes after the first paragraph under heading ***2. IRS***:

The IRS mission statement changes from time to time. The current mission statement reads: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."[14.1] A different emphasis appears in an older "Statement of some principles of Internal Revenue tax administration," which states in part:

> Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud. [14.2]

These statements, however, are merely aspirational. They do not as give rise to enforceable obligations.[14.3]

In June 2014, the IRS announced its Taxpayer Bill of Rights ("TBOR") (not to be confused with a series of similarly named pieces of legislation enacted in the 1980s and 1990s). The IRS TBOR sets out

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ten principles embodied in IRS Publication 1 "Your Rights as a Taxpayer." These "rights" too currently are only aspirational. Proposals have been made to secure them via legislation.

14.1 The mission statement is set out in every issue of the Internal Revenue Bulletin.

14.2 Rev. Proc. 64-22, 1964-1 C.B. 689.

14.3 *E.g.*, Adams v. Commissioner, T.C. Memo. 1978-152, *aff'd without op.*, 609 F.2d 505 (4th Cir. 1979).

Page 7. Add the following sentences and new footnote at the end of the second paragraph:

Subsequently, the IRS recognized that some advantages of geographical organization had been lost. It has tried to develop a "matrix management" approach to balance functionality and geography.[21.1]

22.1 This approach is explained by the IRS Chief Counsel in Jasper L. Cummings, Jr. & Alan J.J. Swirski, *Interview: William J. Wilkins,* ABA Section of Taxation News Quarterly, Summer 2010, p. 6, 7.

Page 7. Add the following at the end of footnote 20:

The current organization and structure of the IRS is described at its website www.irs.gov. For a brief history and description of the IRS and its functions, see Charles P. Rettig, *At-a-Glance: The Internal Revenue Service, Its Mission and Function,* J. Tax Prac. & Proc., Aug.–Sept. 2006, p. 47.

Page 8. Add the following sentences and new footnote at the end of the fifth paragraph:

In 2010, the IRS changed the name of this operating division to the Large Business and International (LB&I) division, reflecting the IRS's high priority on improving its global tax administration efforts.[21.2]

21.2 See IR-2010-088 (Aug. 4, 2010).

Page 10. Add the following to footnote 26:

In fiscal year 2013, TAS had about 245,000 cases of all kinds. Its criteria for accepting cases usually are accessible to taxpayers via periodic amendments to Internal Revenue Manual.

Page 10. Add the following before the last paragraph:

Portions of Circular 230 were invalidated in two high-profile 2014 decisions.[31.1] The rationale of these decisions—that the provisions exceeded the rulemaking power delegated to the Treasury by the enabling act, 31 U.S.C. § 330—create the possibility that other portions of Circular 230 may fall if challenged in the courts.[31.2]

31.1 Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014); Ridgely v. Lew, 2014 U.S. Dist. LEXIS 96447 (D.D.C. 2014).

31.2 *See* Steve R. Johnson, *How Far Does Circular 230 Exceed Treasury's Statutory Authority?,* Tax Notes, Jan. 12, 2015, p. 221; Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 Vill. L. Rev. 515 (2014).

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Page 10. Add the following at the end of footnote 28:

Other valuable government reports on tax administration include (1) the IRS Data Book published annually, (2) periodic reports issued by the IRS Statistics of Income (SOI) Division and (3) occasional reports issued by the Treasury Inspector General for Tax Administration.

Page 10. Add the following to footnote 30:

As a result principally of the tax shelter wars, Circular 230 has been amended with unusual frequency in recent decades. *See generally* David L. Click, *Taxing Standards: Recent Changes in the Practice of Tax Law*, Tax Notes, Jan. 14, 2008, p. 293; Richard M. Lipton & Robert S. Walton, *New Ethical Guidance in Revisions to Circular 230 Will Affect All Tax Practitioners*, J. Tax'n, Jan. 2008, p. 5.

Page 14. Add the following after the first paragraph:

A major current dynamic is that Congress is tasking the IRS with large and growing responsibilities separate from the core mission of revenue raising. Many of the legal challenges arising therefrom are being brought under the Administrative Procedure Act ("APA"), not the Internal Revenue Code. APA suits raise a host of procedural issues, including constitutional and prudential standing, the Anti-Injunction Act, ripeness, mootness, exhaustion of remedies, and available remedies.

[41.1] *See, e.g.*, Kristin E. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717 (2014).

[41.2] *E.g.,* Roberts v. IRS, 113 AFTR2d 1412 (M.D. Fla. 2014); *see* 5 U.S.C. §§ 702-706 (APA judicial review provisions).

[41.3] I.R.C. § 7421. This section is discussed in Chapter 13.

[41.4] *See, e.g.*, Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011)(en banc), *on remand*, 853 F. Supp. 2d 138 (D.D.C. 2012), *aff'd*, 751 F.3d 629 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 946 (2015)(the courts invalidated under the APA an improper refund procedure created by the IRS, but the courts lacked authority to impose a different procedure or to compel the IRS to create a new procedure).

Page 16. Add the following after the first (incomplete) paragraph:

The Tax Court has implemented an initiative for electronic filing of documents and remote access to its files and records. E-filing is now mandatory for most parties represented by counsel. Instructions for e-filing are on the Tax Court's website: http://ustaxcourt.gov/.

The Tax Court has released an eight-part video series describing its work and procedures, entitled "An Introduction to the United States Tax Court." The parts are: Welcome & Overview, Understanding the Process, Introduction to the United States Tax Court, Filing the Petition, Pretrial Matters, Calendar Call and Trial, Post Trial Proceedings, and Conclusion and Review. The series may be accessed through the Tax Court's website. A new tax practitioner should view the series before handling his/her first Tax Court case.

The constitutional place of Article I courts is a tricky matter. The teaching of the hard-to-reconcile case law is the Tax Court, for constitutional purposes, is a "Court of Law" which exercises a portion of the judicial power of the United States but is within the Article II Executive Branch although it is independent of Executive control.[46.1]

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46.1 *See* Freytag v. Commissioner, 501 U.S. 868 (1991); Kuretski v. Commissioner, 755 F.3d 929 (D.C. Cir. 2014), *cert. petition filed*, No. 14-622 (Nov. 26, 2014); South Carolina State Ports Auth. v. Federal Maritime Comm'n, 243 F.3d 165, 171 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002).

Page 17. Add the following new footnote at the end of the paragraph under heading ***III. Administrative Sources and Authorities in Tax***:

52.1 For additional description of administrative tax interpretations, see Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 Duq. L. Rev. 323 (2008).

Page 20. Add the following new footnote at the end of the first (incomplete) paragraph:

56.1 The IRS stopped publishing the C.B. in 2009 and discontinued paper copies of the I.R.B. in 2013. The I.R.B. is now available on the IRS website. Ann. 2013-12, 2013-11 I.R.B. 651.

Page 21. Add new footnote 57.1 at the end of the second sentence of the first paragraph:

57.1 *E.g.,* BMC Softwear, Inc. v. Commissioner, 780 F.3d 669, 675-76 (5th Cir. 2015); Costantino v. TRW, Inc., 13 F.3d 969, 980-81 (1994) (both refusing to give deference to IRS Notices, holding that they lacked the force of law). The IRS views Notices as being on the same persuasive plane as revenue rulings. Rev. Rul. 90-91, 1990-2 C.B. 262.

Page 23. Add the following at the end of the first paragraph:

The number of private letter rulings – like the number of revenue rulings – issued by the IRS has been declining for many years.[62.1]

62.1 *See, e.g.,* Eric Kroh, *IRS Predicts 10 Percent Drop in Letter Rulings in Fiscal 2014*, Tax Notes, May 26, 2014, p. 891;Jeremiah Coder, *Shifting Resources from PLRs to Other Guidance,* Tax Notes, Sept. 20, 2010, p. 1208.

Page 27. Add the following to footnote 75:

How deferential are courts when they apply *Skidmore*? *Skidmore* "has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other," United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citations and punctuation omitted); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*; 12/4/2007 Colum. L. Rev. Sidebar 1 (finding, from a sample, that federal circuit courts held for the agency 50% of the time under the non-deferential version of *Skidmore* and about 60% of the time under the deferential version).

Page 27. Add the following to footnote 79:

The citation for Professor Hickman's article is 82 Notre Dame L. Rev. 1727 (2007). *See also* Kristin E. Hickman, A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, 76 Geo. Wash. L. Rev. 1153 (2008); Joseph L. Cummings, Jr., *Treasury Violates the APA?*, 117 Tax Notes 263 (2007) (responding to Professor Hickman).

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Page 27. Add new footnote 75.1 at the end of the second sentence of the first full paragraph:

> **75.1** *E.g.*, Lantz v. Commissioner, 132 T.C. 131 (2009), *rev'd,* 607 F.3d 379 (7th Cir. 2010) Lewis v. Commissioner, 128 T.C. 48, 54 (2007); Gerson v. Commissioner, 127 T.C. 139 (2006) (full-court reviewed), *aff'd*, 507 F.3d 435 (6th Cir. 2007), *cert. denied sub nom.* Kleinman v. Commissioner, 553 U.S. 1076 (2008).

Page 27. Add the following just before heading ***B. Deference to Particular Types of Regulations****:*

Recent years have seen an explosion of litigation as to the validity of tax regulations. By far the most recent important case as to the validity of tax regulations is *Mayo*, in which the Supreme Court unanimously held that *Chevron*, not *Skidmore* or *National Muffler,* provides the governing standard when the validity of tax regulations is challenged.[77.1]

> **77.1** Mayo Foundation for Medical Education & Research v. United States, 562 U.S. 44 (2011). For discussion of *Mayo* and other tax cases, see Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 Va. Tax Rev. 269 (2012); Steve R. Johnson, Mayo *and the Future of Tax Regulations,* Tax Notes, Mar. 28, 2011, p. 1547.

Page 28: Revise the second and third paragraphs to read as follows and delete current footnotes 81 and 82:

In practical terms, does it matter whether a regulation is legislative or interpretive (in the tax sense of those terms)? No. Formerly, some courts said that specific authority (erroneously called "legislative") regulations are entitled to greater deference than general authority (erroneously called "interpretive") regulations. That line of thought was swept away by the Supreme Court's 2010 *Mayo* decision. Both types of regulations are tested under *Chevron*, and they receive equal deference.[81]

> **81** Mayo Foundation for Medical Education & Research v. United States, 562 U.S 44 (2011).

Page 28. Add the following at the end of footnote 85:

> ; Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation,* 2009 Mich. St. L. Rev. 239.

Page 29. Add the following new footnote at the end of the second sentence of the first full paragraph:

> **88.1** *E.g.*, Taproot Admin. Serv., Inc. v. Commissioner, 133 T.C. 202, 208-09 & n. 15 (2009), *aff'd*, 679 F.3d 1109, 1115-16 (9th Cir. 2012) (both parties and both courts agreed to test a revenue ruling under *Skidmore*). The IRS often loses under the *Skidmore* standard. *E.g.*, Federal Nat'l Mortgage Ass'n v. United States, 379 F.3d 1303, 1307-09 (Fed. Cir. 2004), *cert. denied*, 552 U.S. 1139 (2008)(revenue procedure); Validus Reinsurance Ltd. v. United States, 19 F. Supp. 3d 225, at n. 5 (D.D.C. 2014) *appeal filed*, No. 14-5081 (D.C. Cir. Apr. 9, 2014)(revenue ruling).

Page 29. Add the following just before heading ***D. Regulations Changing Case Law****:*

It sometimes is argued that lower-level positions acquire greater force when they have been around for a long time and Congress has not objected to them. Courts seem to accept this argument more readily if made by the government than if made by the taxpayer.[90.1]

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[90.1] *Compare* Higgins v. Commissioner, 312 U.S. 212, 216 (1941) (rejecting such an argument offered by the taxpayer) *with* United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219-20 (2001) (accepting such an argument in holding for the government).

Pages 29-30. Replace the sentence straddling the two pages and footnote 93 with the following:

The cases, however, have accorded the regulations *Chevron* deference and upheld them.[93]

[93] *E.g.*, McNamee v. Department of Treasury, 488 F.3d 100 (2d Cir. 2007); Littriello v. United States, 484 F.3d 372 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1290 (2008).

Page 30. Add new footnote 95.1 at the end of the first full paragraph:

[95.1] For a case misinterpreting *Brand X* and construing it too narrowly, see Carpenter Family Investments, LLC v. Commissioner, 136 T.C. 373 (2011). The Supreme Court had an opportunity to clarify *Brand X* in United States v. Home Concrete Supply, LLC, 132 S. Ct. 1836 (2012) (invalidating regulations under section 6501(e)). Unfortunately, the 4-1-4 division of the Court leaves the teaching of *Home Concrete* obscure. *E.g.*, Steve R. Johnson, *Reflections on* Home Concrete, 13 Fla. St. U. Bus. Rev. 75 (2014); Patrick J. Smith, *What We Didn't Learn from Home Concrete*, Tax Notes, June 25, 2012, p. 1625.

Page 30. Add new footnote 95.2 at the end of the first paragraph under heading ***E. Use of Private Letter Rulings****:*

[95.2] *E.g.*, AmerGen Energy Co., LLC v. United States, 94 Fed. Cl. 413 (2010) (holding private letter rulings not binding, irrelevant, and not discoverable by the taxpayer).

Page 31. Add the following at the end of footnote 99:

Some cases involved retroactive application of an anti-tax shelter provision, amended regulation section 1.752-6. The cases split. *Compare* Cemco Investors, LLC v. United States, 515 F.3d 749, 752 (7th Cir. 2008) *&* Maguire Partners – Master Invs., LLC v. United States, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,215 (C.D. Cal. 2009) (upholding retroactive application) *to* Sala v. United States, 552 F. Supp. 2d 1167, 1185 (D. Colo. 2008), *rev'd on other grounds,* 613 F.3d 1249 (10th Cir. 2010) & Stobie Creek Inv. LLC v. United States, 82 Fed. Cl. 636 (2008) (rejecting retroactive application), *aff'd on other grounds,* 608 F.3d 1366 (Fed. Cir. 2010).

Page 32. Add the following to footnote 101:

Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 Utah L. Rev. 317; Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution,* 77 Tenn. L. Rev. 563 (2010).

A taxpayer wishing to make this argument should seriously consider bringing the case in the Court of Federal Claims, the court most favorably disposed to it. *See* Computer Sciences Corp. v. United States, 50 Fed. Cl. 388 (2001), *appeal dismissed*, 79 Fed. Appx. 430 (Fed. Cir. 2003).

Page 32. Add new footnote 104.1 at the end of the third full paragraph:

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[104] *E.g.*, Sklar v. Commissioner, 549 F.3d 1252, 1264-67 (9th Cir. 2008); Schering-Plough Corp. v. United States, 2007-2 U.S. Tax Cas. (CCH) ¶ 50,831 (D.N.J. 2007); Rowe v. Commissioner, 128 T.C. 13 (2007).

Page 33. Add the following new section just before the Problem:

I. Bootstrapping

The line of cases culminating in *Home Concrete*, *supra,* involved challenges to the validity of regulations clarifying or extending the six-year limitations period to over 25% underpayments resulting from overstated basis. Treasury issued those regulations when the trend of the cases was running against the IRS on statutory interpretation grounds. Can the government do that? It seems unfair or unsporting for the government to bootstrap itself to victory, to change the playing field after the game has started.

The preponderance of the case law, however, allows the government to do that via regulations. If an otherwise valid regulation is promulgated, it is not invalid simply because it was motivated by the possibility or even the actuality of litigation as to the issue.[109] The argument has a better chance of success when used against a sub-regulation administrative interpretation.[110]

[109] *E.g.,* Smiley v. Citibank, 517 U.S. 735, 742-43 (1996); Indianapolis Life Insurance Co. v. Commissioner, 115 F.3d 430, 436 (7th Cir. 1997). *But see* Chock Full O'Nuts Corp. v. United States, 453 F.2d 300, 303 (2d Cir. 1971) (combination of bootstrapping and retroactivity held fatal to a tax regulation).

[110] *E.g.,* Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-13 (1988) (agency litigating position). *See generally* Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U.L. Rev. 643 (2012).

Page 38. Add the following at the end of the last sentence of the paragraph beginning "In deciding whether . . .":

; *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007).

Page 39. Add new footnote 111 at the end of the paragraph preceding heading B.:

[111] Although they are not part of this Problem, constitutional questions exist about section 107. *See*, *e.g.*, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional,* 24 Whittier L. Rev. 707 (2003); Michael L. Gompertz, *The Clergy Exemption Is Unconstitutional*, Tax Notes, July 21, 2014, p. 315. However, the courts turn away challenges to section 107 on standing grounds. E.g., Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (2104); American Atheists Inc. v. Shulman, 21 F. Supp. 3d 856 (E.D. Ky. 2014).

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Chapter 2

REPORTING OBLIGATIONS

Page 42. Add the following after the first paragraph:

Responding to concerns about identity theft, Treasury has finalized regulations allowing information return filers to truncate the payee's tax identification number on payee statements and some other documents. The truncated taxpayer identification number (TTIN) takes the place of a payee's Social Security number, individual taxpayer identification number (ITIN), or adoption taxpayer identification number (ATIN). T.D. 9675, 79 Fed. Reg. 41127-02 (July 15, 2014).

Page 42. Add the following after the fourth paragraph:

During the fiscal year 2014, the IRS received nearly 240 million returns, including approximately 147 million individual income tax returns, 2 million C corporation returns, 3 million estate and trust income tax returns, 34 thousand estate tax returns, 335 thousand gift tax returns, 30 million employment tax returns, 1 million excise tax returns, 3.8 million partnership returns, and 4.6 million S corporation returns. *2014 IRS Data Book*, at 4.

"In 2009, the IRS had 833 tax forms and 299 sets of instructions posted on its website." David E. Vance, *Unconstitutional Vagueness and the Tax Code,* Tax Notes, May 19, 2014, at 827, 828. The recordkeeping, return preparation, and return filing obligations impose psychic and financial costs on taxpayers and third parties. But the psychic costs are unquantifiable, and estimates of the financial costs vary widely. *E.g.,* Jason Fichtner & Jacob Feldman, *The Hidden Cost of Tax Compliance,* Mercatus Center, George Mason Univ., at 3 (May 20, 2013), *available at* http://mercatus.org/publication/hidden-costs-tax-compliance.

Page 42. Add the following footnote 1.3 at the end of the fourth sentence of the fourth paragraph:

[1.3] In some circumstances, taxpayers may use substitutes for the forms prescribed by the IRS. Because of the possibility of abuse, this possibility is tightly controlled. *See* Rev. Proc. 2010-21, 2010-1 C.B. 473.

Pages 43-44. Add the following after the bridge paragraph:

With adequate funding, the IRS hopes to raise the electronic filing rate to 90% for individuals and 50% for businesses. According to the IRS's 2014-2017 strategic plan, the IRS plans to "foster a culture of data-driven decision making" to better use information technology for the IRS's internal systems and in expanding electronic interactions with taxpayers. *New Strategic Plan Emphasizes Better IT, "Big Data" to Improve Taxpayer Services,* 33 Bloomberg BNA Tax Management Weekly Rep. 887 (June 27, 2014).

Page 44. Add the following new paragraph after the first full paragraph:

Legislation in 2009 requires return preparers who file more than ten individual income tax returns per year – in other words, nearly all return preparers – to e-file such returns, beginning in 2011.[8.1] Treasury has promulgated proposed regulations,[8.2] and further changes are likely.

[8.1] Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. 111-92 (2009).

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[8.2] REG-100194-10, 2010-2 C.B. 891.

Page 47. Add the following just before heading IV:

Section 170(f)(8) requires contemporaneous written acknowledgment of charitable contributions of $250 or more. For a comedy of errors culminating in disallowance of over $25,000 of contributions made by check to a church, see Durden v. Comm'r, T.C. Memo. 2012-40.

Bitcoin and other virtual currencies may be used to pay for some goods and services or may be held for investment. The IRS has issued guidance as to tax principles applicable to virtual currency transactions, including reporting and penalties. Notice 2014-21, Q&A 12 & 16, 2014-16 I.R.B. 938.

Page 47. Add the following after heading IV but before heading A:

As seen below, statutes and regulations define which taxpayers are required to file returns of the various kinds. Some taxpayers who are required to file, fail to do so. This creates an enforcement problem, necessitating IRS examinations as described in Chapter 4 and penalties for late filing and payment as described in Chapter 11A.

Conversely, many taxpayers who are not legally required to file returns, nonetheless unnecessarily do file. This creates an efficiency problem: wasted time, effort, and resources by both taxpayers and the IRS. One study found that in the three years 2005 to 2008, approximately eight million unnecessary returns were filed, wasting $390 million and 75 million hours. Vance, *supra* n. 1, at 828 (citing reports by the Treasury Inspector General for Tax Administration Office of Audit).

Page 49. Add the following before heading B:

The Supreme Court invalidated a key portion of the Defense of Marriage Act. United States v. Windsor, 133 S. Ct. 2675 (2013). In Rev. Rul. 2013-17, 2013-2, C.B. 201, the IRS interpreted *Windsor*, ruling that "marriage" includes legally married same-sex couples for all federal tax purposes. The IRS recognizes as married those who legally married in any state, regardless of whether their state of domicile recognizes same-sex marriages. However, "marriage" does not include domestic partnerships, civil unions, and similar arrangements.

Page 49-50. Add the following in place of the bridge paragraph:

The American Taxpayer Relief Act of 2012 resolved uncertainties about the Federal estate and gift taxes. A permanent unified exclusion (and generation-skipping transfer tax exemption) is set at $5 million with inflation adjustment. The estate tax filing threshold adjusts accordingly. In general, an estate tax return must be filed if either (a) the gross estate, plus adjusted taxable gifts and specific exemption, exceeds an inflation-adjusted amount ($5.34 million in 2014) or (b) the executor elects to transfer the Deceased Spousal Unused Exclusion, regardless of the size of the gross estate.

Page 51. Add the following after the first paragraph:

As a result of inflation adjustment, the annual gift tax exclusion was $14,000 in 2014. In general, a gift tax return for 2014 did not need to be filed if the sum of the gifts (of present interests) made by the donor to the donee during the year did not exceed $14,000.

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Page 54. Add the following after the first full paragraph:

As a result0 of 2008 legislation, section 6045 requires third-party brokers to track the basis customers have in marketable securities, to facilitate reporting of gain or loss on sale of the securities. Treasury has issued final and temporary regulations as to some such securities. T.D. 9616, 78 Fed. Reg. 23116-01 (Apr. 18, 2013). For a proposal to extend this approach, to require pass-through entities to track and report basis, see James Alm & Jay A. Soled, *Improving Tax Basis Reporting for Passthrough Entities*, Tax Notes, May 19, 2014, at 809.

Page 54. Add the following after the second full paragraph.

The IRS has provided guidance on who has authority to execute returns, waivers, and statute extensions with respect to decedents. Chief Counsel Advisory CCA 201334040 (Aug. 23, 2013).

Page 54. Add the following new subsection just before heading V. Signing and Verifying Returns:

3. Expanded Information Reporting

In 1970, the IRS received about 360 million information return documents a year. It now receives over 2 billion such documents each year, about 10 to 15 for each taxpayer.[58.1]

More information reporting leads to more tax compliance. Consider this progression. Items subject to third-party information reporting and withholding (like wages) are misreported only about 1.2% of the time. Items (like interest and dividends) subject to third-party information reporting, but not withholding, are misreported about 4.5% of the time. Items (like capital gains and losses) subject to partial third-party information reporting are misreported about 8.6% of the time. But items subject to neither withholding nor third-party information reporting are misreported over 50% of the time.[58.2]

Accordingly, expanded information reporting is an important strategy in efforts to improve tax compliance.[58.3] For example, in recent years, (1) 2008 legislation added new section 6050W requiring banks and others to report gross credit and debit card payments received by merchants during the year.[58.4] (2) 2008 legislation requires brokers and mutual funds to report basis and other information to investors and the IRS for stock bought in 2011 or later.[58.5] (3) 2010 legislation would have required businesses to file Forms 1099 for many payments of $600 or more.[58.6] Howls of protest from the business community, however, led to substantial repeal of this requirement in 2011.

[58.1] IR-2011-38 (April 6, 2011) (remarks of IRS Commissioner Doug Shulman at the National Press Club.)

[58.2] Charles P. Rettig, *Nonfilers Beware: Who's That Knocking at Your Door?,* J. Tax Prac. & Proc., Oct.-Nov. 2006, p. 19, 19-20 (reporting IRS data for 2001).

[58.3] *See, e.g.,* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?,* 78 Fordham L. Rev. 1733 (2010); Mark A. Luscombe, *The Tax Gap and the Growth of Third-Party Reporting,* Taxes, Aug. 2010, p. 3.

[58.4] Housing Assistance Tax Act of 2008, Pub. L. 110-289 (enacting IRC § 6050W); *see* Treas. Reg. § 1.6050W-1. In 2011, the IRS created Form 1099-K to implement these rules.

[58.5] Energy Improvement and Extension Act of 2008, Pub. L. 110-343; *see* Prop. Reg. REG-101896-09, T.D. 9504, 2010-2 C.B. 670; IRS Notice 2010-67, 2010-2 C.B. 529.

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[58.6] Patient Protection and Affordable Care Act of 2010, Pub. L. 109-280 (enacting IRC § 6041(i)).

Page 54. Add the following at the end of footnote 64:

There can be nice questions as to who is the appropriate party to sign returns of entities. *See, e.g.,* Sheldon I. Banoff & Richard M. Lipton, *Who Can Sign an LLC's 1065 Tax Return? It's Still Not Clear,* J. Tax'n, Apr. 2011, p. 254; Sheldon I. Banoff & Allan G. Donn, *Who Can Sign a Partnership's or LLC's Tax Returns? Simple Questions; Complex Answers,* J. Tax'n, Sept. 2010, p. 144.

Page 56. Add the following new paragraph and footnotes immediately before heading VI. Time and Place for Filing:

If a taxpayer fails to file a required return, section 6020 allows the IRS to prepare a substitute for return. There are two kinds. Section 6020(a) allows the IRS to prepare a return from information provided by the taxpayer, with the taxpayer then signing the return. Section 6020(b) allows the IRS to prepare a return from information the IRS obtains from other sources.[73.1]

[73.1] The Treasury has revised Reg. § 301.6060-1 to facilitate preparation of section 6020(b) substitutes for returns. T.D. 9380, Substitute for Return, 2008-1 C.B. 718. In Chief Counsel Notice CC-2008-22-026 (May 30, 2008), the IRS concluded that section 6020(b) allows revenue officers to prepare employment tax returns in employment tax cases involving worker classification issues.

Page 59. Add the following after the first full paragraph:

When a taxpayer discovers that her original return was erroneous, she is not currently legally obligated to file an amended return. *E.g.,* Broadhead v. Comm'r, 14 T.C.M. 1284 (1955). For a proposal to create such an obligation, see T. Keith Fogg & Calvin H. Johnson, *Amended Returns – Imposing a Duty to Correct Material Mistakes,* Tax Notes, Sept. 8, 2008, at 979.

Page 59. Add the following as the last paragraph:

The IRS publishes a list of private delivery services designated for section 7502 purposes. Notice 2004-83, 2004-2 C.B. 1030. The list should be reviewed carefully. Not all services offered by all delivery services are designed.

Page 59. Add a new sentence at the end of the last text paragraph:

The IRS generally takes the position that section 7502 does not apply to the filing of amended returns.[89.1]

[89.1] *See, e.g.,* CCA 201052003 (Dec. 2011) (interpreting Treas. Reg. § 301.7502-1(b)(1)).

Page 60. Add the following as the first paragraph:

The proposed regulation discussed by this paragraph has been finalized and is in effect. The regulation establishes the general rule that section 7502 requires actual delivery. Reg. § 301.7502-1(e)(1). The only exceptions are proof of proper use of registered or certified mail or of a duly designated private delivery service. "No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered." Reg. § 301.7502-1(e)(2); *see* Stocker v. United States, 705 F.3d 225 (6th Cir. 2013) (following this rule and holding against the taxpayer, who had failed to have the Post Office date-stamp his copy of the certified mail receipt).

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Page 60. Add new footnote 96.1 at the end of the second paragraph:

> [96.1] Operation of these rules was illustrated in 2011. The normal last date for filing individual income tax returns would have been Friday, April 15, 2011. That day, however, was Emancipation Day, a legal holiday in the District of Columbia. Saturday, April 16 and Sunday, April 17 were weekend days. So returns properly mailed on Monday, April 18, were timely.

Page 65. Add the following text and footnotes at the end of the text:

The reportable transaction rules continue to evolve. The Treasury has issued final regulations under section 6011. The final regulations removed certain categories of reportable transactions but also added a new category: transactions of interest.[128] Treasury and the IRS have frequently refined rules under section 6011 and related sections, by both regulations[129] and lower-level administrative pronouncements.[130]

X. TAX RETURN PREPARERS

Tax return preparers occupy a crucial role in our tax system. Good preparers educate their clients, help them through the intricacies of a dizzying complex set of laws, and fortify their clients' better ethical impulses. Bad preparers do not improve – and may undermine – the accuracy of their clients' returns.

As noted in Chapter 1, those who practice before the IRS – attorneys, accountants, and enrolled agents – are subject to rules of conduct under Treasury Circular 230. However, many of the activities of return preparers fall outside the ambit of Circular 230. There has been movement over the decades – slow at first but accelerated recently – towards increased regulation of return preparers.

Return preparers may be penalized under section 6694(a) with respect to unrealistic positions on their clients' returns, under section 6694(b) for willful or reckless conduct, or under section 6695 for a variety of associated derelictions.[131] "Tax return preparer" is defined in section 7701(a)(36). With stated exceptions, the term includes "any person who prepares for compensation . . . any return of tax . . . or any claim for refund of tax . . . . [T]he preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund."[132]

Section 6694 and the regulations under it have been frequently revised in recent years, sometimes in ways cancelling out prior changes. In May 2007, Congress amended section 6694, in part to require that, in order to endorse tax return positions, preparers had to have reasonable belief that the positions were more likely than not correct.[133] This provoked a firestorm of criticism, especially because "more likely than not" was a higher standard than most of the relief standards applicable to penalties on taxpayers.[134]

Responding to the criticism, Congress went "back to the future" in October 2008. It lowered the required confidence standard for return preparers to the "substantial authority" threshold required for taxpayers under section 6662, except that it kept the "more likely than not" standard for reporting positions with respect to tax shelter transactions.[135] The change is generally retroactive to May 2007.[136] Treasury and the IRS have issued guidance as to the new rules.[137]

In egregious cases, tax return preparers may also be subject to criminal sanctions. Conspiring with or otherwise willfully assisting taxpayers to evade tax liability is potentially punishable under criminal provisions in both the Internal Revenue Code and other titles of the United States Code.[138] In addition, wrongful disclosure or other use of taxpayer information by tax preparers is criminally punishable under section 7216.[139]

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However, many people – both inside and outside the Government – believe that the above measures are piecemeal and inadequate. Considerable momentum gathered behind efforts to strengthen regulations of tax preparers. In January 2010, the IRS made findings and recommendations based on an in-depth review of the tax return preparer industry. The IRS recommended enhanced oversight of preparers. To this end, in 2010 Treasury and the IRS issued (1) final regulations (at 75 Fed. Reg. 60309) requiring preparers to obtain in PTINs (preparer tax identification numbers), (2) final regulations (at 75 Fed. Reg. 60316) as to user fees for obtaining and renewing PTINs, and (3) proposed regulations (amending Treasury Circular 230) dealing with competency testing, continuing education, and ethical obligations of return preparers. In general, beginning in January 2011, all paid preparers must have PTINs before preparing returns; beginning in mid-2011, preparers must pass an examination demonstrating competence to prepare federal tax returns; and as of an as yet unspecified starting date, preparers must receive continuing education annually.[141]

The regulations as to return preparers were invalidated in 2013. Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014). The IRS continues to believe that heightened regulation is necessary to protect both taxpayers and the fisc. As described *supra* in chapter 1 of this Update, bills to reverse *Loving* have been introduced in Congress but have not yet been enacted. The IRS also has established a voluntary program for return preparer certification. Rev. Proc. 2014-42, 2014-29 I.R.B. 192. The American Institute of Certified Public Accountants believes that the allegedly voluntary new program is *de facto* mandatory. It has brought suit attempting to invalidate this "obvious attempt to bypass [*Loving*] and to assume powers Congress has not given [to the IRS]." William Hoffman, *AICPA Files Suit to Stop IRS Preparer Certification Program*, Tax Notes, July 21, 2014 at 240, 240 (quoting AICPA's complaint).

[128] T.D. 9350, AJCA Modifications to the Section 6011 Regulations, 2007-2 C.B. 607. At the same time, the Treasury issued companion final regulations. T.D. 9351, AJCA Modifications to the Section 6111 Regulations, 2007-2 C.B. 616 (disclosure of reportable transactions by material advisers under section 6111); T.D. 9352, AJCA Modifications to the Section 6112 Regulations, 2007-2 C.B. 721 (maintenance of lists by material advisers under section 6112).

[129] *E.g.*, T.D. 9425, Section 6707A and the Failure To Include on Any Return or Statement Any Information Required To Be Disclosed Under Section 6011 with Respect to a Reportable Transaction, 2008-2 C.B. 1100 (temporary and proposed regulations on section 6707A penalties for failure to disclose reportable transactions under section 6011); REG-129916-07, Patented Transactions, 2007-2 C.B. 891 (proposed regulations making patented tax transactions a category of reportable transactions under sections 6011, 6111, and 6112).

[130] *E.g.*, IRS Notice 2008-111, 2008-2 C.B. 1299 (guidance as to "intermediary transactions" as a category of listed transaction); Rev. Proc. 2008-20, 2008-1 C.B. 980 (providing guidance to material advisers required to keep lists of reportable transactions under section 6112); Rev. Proc. 2007-20, 2007-1 C.B. 517 (updated guidance as to exceptions under Reg. § 1.6011-4(b)(4) for reportable transactions with contractual protection).

[131] There are seven types of punishable conduct under section 6695. They include failure to furnish a copy of the return to the taxpayer, failure to sign returns as preparers, and failure to file correct information returns. IRC § 6695(a), (b) & (e). *See* Notice 2008-12, 2008-1 C.B. 280 (specifying which returns require a preparer signature).

[132] IRC § 7701(a)(36)(A); Reg. § 301.7701-15. The exceptions are in section 7701(a)(36)(B). *See also* IRS Notice 2008-12, 2008-1 C.B. 280 (specifying when a preparer is required to sign a return).

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[133] U.S. Troops Readiness, Veterans Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, Pub. L. No. 110-28, § 8246, 121 Stat. 200 (2007).

[134] See Chapter 8.

[135] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 506(a), 122 Stat. 3765 (2008).

[136] For description of the new rules, see Patricia D. Hopson, James F. Hopson & David Joy, *The Changing Landscape of Return Preparer Penalties*, Tax Notes, Feb. 16, 2009, p. 872; Charles P. Rettig, *Practitioner Penalties: Potential Pitfalls in the Tax Trenches*, Tax Notes, Apr. 13, 2009, p. 207; Bryan C. Skarlatos & Megan L. Brackney, *The New and Improved Section 6694 Tax Return Preparer Penalty*, Tax Management Memo. 131 (2009).

[137] T.D. 9436, Tax Return Preparer Penalties Under Sections 6694 and 6695, 74 Fed. Reg. 5103-02 (corrected as of Jan. 29, 2009); Rev. Proc. 2009-11, 2009-1 C.B. 313, *corrected by* IRS Announcement 2009-15, 2009-1 C.B. 687 (listing forms subject to the new return preparer rules); IRS Notice 2009-5, 2009-1 C.B. 309, *corrected by* IRS Announcement 2009-15, 2009-1 C.B. 687 (providing interim guidance on application of T.D. 9436); *see* Richard M. Lipton & Robert S. Walton, *Tax Return Preparer Penalty Final Regulations*, J. Tax'n, Apr. 2009, p. 229.

[138] *E.g.*, IRC §§ 7201, 7206 & 7212(a); 18 U.S.C. §§ 371 & 1001. For detailed discussion, see another book in this LexisNexis Graduate Tax Series: John A. Townsend, Larry A. Campagna, Steve Johnson & Scott A. Schumacher, *Tax Crimes* (2008).

[139] *See* T.D. 9375, Guidance Necessary to Facilitate Electronic Tax Administration – Updating of Section 7216 Regulations, 2008-1 C.B. 344; REG-136596-07, Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection with the Preparation of a Tax Return, 73 Fed. Reg. 1131-02 (Jan. 7, 2008) (notice of rulemaking under section 7216).

[140] IRS Information Release IR-2009-57 (June 4, 2009).

[141] *See, e.g.,* IRS Notice 2011-11, 2011-7 I.R.B. 497; IRS Notice 2011-6, 2011-3 I.R.B. 315.

XI. MAKING OF ELECTIONS

The Code contains hundreds of elections available to taxpayers. Elections are to be made as prescribed in the applicable statute, regulation, or revenue procedure. Often, elections are required to be made on the return for the tax period in question.

Often, failure to make the election when required is fatal. However, in some cases, relief options exist as to failures to make timely elections. Such relief is popularly called "section 9100 relief." To secure it, taxpayers must satisfy requirements set out in the applicable regulations.[142]

[142] Reg. §§ 301.9100-1 to -3; *see* Timothy J. Watt & Thomas L. Evans, *Requesting 9100 Relief,* Tax Adviser, Oct. 2008, p. 654.

XII. CONFIDENTIALITY OF RETURN INFORMATION

Our tax system depends on taxpayers filing complete, accurate, and timely returns. Thus it is important to minimize barriers to such filing. This fact helps explain the strong (though not unlimited)

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confidentiality that attaches to tax return information. Congress has concluded that voluntary compliance with the tax laws would diminish if taxpayers faced the risk that their privacy would be violated, that their financial disclosures about themselves could become matters of public knowledge.[143]

Section 6103 is the principal section reflecting this conclusion. Section 6103(a) provides that tax "[r]eturns and return information shall be confidential," and it generally prohibits federal employees and designated other persons from disclosing "any return or return information obtained by [them] in any manner in connection with [government service or otherwise under the section]." Section 6103(b) defines tax returns and tax return information broadly.[144]

Section 6103 is complemented by other sections, including section 6110 (allowing redaction of IRS written determinations and background files otherwise open to public inspection), sections 7213, 7213A, and 7216 (criminal provisions as to unauthorized inspection or disclosure of confidential tax information by IRS employees, return preparers, and others), and sections 7431 and 7435 (civil damages for unauthorized inspection, disclosure, or enticement as to tax return information).

Section 6103 is a very long section, however, and its definitional rules and its exceptions allow disclosures of some tax information for purpose deemed to be of sufficient social significance. The IRS is required to report to Congress annually on request for disclosures, disclosures actually made, and the purposes of such disclosures.[145] Such reports show that the IRS legally discloses billions of items of tax return information each year.[146]

Outside of section 6103, there is another relevant context. Sometimes discovery of tax returns is sought in "private party versus private party" law suits. The federal courts have crafted a common law privilege that offers some protection – varying from jurisdiction to jurisdiction – against such discovery.[147]

[143] *See generally* Stephen W. Mazza, *Taxpayers Privacy and Tax Compliance,* 51 U. Kan. L. Rev. 1065 (2003).

[144] *See* Baskin v. United States, 135 F.3d 338, 340-42 (5th Cir. 1998) (tracing the history of disclosure prohibitions); 1 Joint Comm. on Tax'n, *Study of General Disclosure Provisions* (Jan. 28, 2000).

[145] IRC § 6103(p)(3).

[146] In 2010, for instance, the IRS disclosed 7.1 billion such items to federal and state agencies, including 4.2 billion to the states, 1.5 billion to congressional committees, 1.3 billion to the Census Bureau, 39 million for Medicare premium subsidy adjustments, and 13.6 million to child support enforcement agencies.

[147] *See* Nancy T. Bowen, *Strategies for Defending Against Discovery Requests for Tax Returns,* Tax Notes, Jan. 12, 2009, p. 217.

XIII. ENHANCED RETURN REPORTING

Chapter 4 describes options available to the IRS for discovering information during audit. That is a "back end" remedy, however. In recent years, Congress, Treasury, and the IRS have increasingly relied on the "front end" approach of requiring taxpayers to report on their returns more information about types of transactions with particularly high potential for noncompliance. Some of the main examples of this approach are described below.

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A. Uncertain Tax Positions ("UTP")

This is an area in which financial accounting has driven tax procedure. In 2006, the Financial Accounting Standards Board issued what is commonly called FIN 48, requiring more detailed analysis of income tax contingencies.[148] In 2010, Treasury and the IRS developed the UTP initiative to capitalize on FIN 48 analysis.

Treasury and the IRS rolled out the UTP program through a series of steps, including initial announcements,[149] promulgation of regulatory authority, [150] finalization of Schedule UTP to be attached to the income tax returns of large corporations, and subsequent guidance.[151]

The UTP reporting requirements will be phased in. Schedule UTP will have to be included in the returns of corporations which have one or more uncertain tax positions (as defined by the instructions to the schedule) on the return and which meet the applicable total asset threshold. The thresholds are $100 million for 2010, $50 million in 2012, and $10 million for 2014 and later years.

The full consequences of the UTP regime will take years to become clear. Some have suggested that UTP may (1) cause whistleblower claims (see chapter 4) to diminish, (2) decrease the significance of the controversy over IRS summonses for companies' tax accrual workpapers (see chapter 4), and (3) along with other rules described below, become the basis for internationally harmonized tax reporting. [152]

The enhanced United States reporting regimes may come to interact with regimes developed by other countries. The Organization for Economic Cooperation and Development (a multilateral treaty organization headquartered in Paris) has developed standards for transparency and information exchange for tax purposes, and these standards have been gaining greater international adherence. [153]

B. Foreign Reporting

The Foreign Account Tax Compliance Act ('FATCA") was enacted as part of 2010 legislation. [154] It increases disclosures required of United States taxpayers who have foreign investments and of foreign financial institutions, trusts, and corporation which invest in the United States. In part, this sweeping legislation establishes a withholding system to encourage foreign entities to disclose the identities of and information about United States persons with whom they do business. This complex regime is being phased in. The IRS has released preliminary guidance on the FATCA provisions. [155]

In addition, persons subject to the jurisdiction of the United States must file Foreign Bank and Financial Accounts Reports ("FBARs") if they have interests in financial accounts abroad exceeding $10,000. This has led to more audit activity. FBAR-related examinations rose by 96% (from 334 to 656) between fiscal years 2004 and 2009. FBAR penalty assessments rose by 388% and FBAR penalty collections by 444%.[156]

Also, section 6038D, enacted in 2010, requires some taxpayers to attach to their returns information as to specified foreign financial assets if the aggregate value of such assets exceeds $50,000.

[148] FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes, interpreting FASB Statement No. 109; *see* Steven S. Schneider, *FIN 48 for Tax Lawyers – Accounting for Uncertainty in Income Taxes,* 2007 Tax Management Memorandum 139.

[149] IRS Announcement 2010-9, 2010-1 C.B. 408; IRS Announcement 2010-75, 2010-2 C.B. 428; IRS Announcement 2010-76, 2010-2 C.B. 432.

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[150] T.D. 9510, 2011-6 I.R.B. 453, accompanying Reg. § 1.6012-2.

[151] In March 2011, the IRS posted on its website frequently asked questions as to Schedule UTP.

[152] For discussion of some possible consequences, see Jerald David August, *Mandatory Disclosure of Uncertain Tax Positions on Income Tax Returns Filed by Corporate Taxpayers: The IRS's New Weapon,* Practical Tax Law., Winter 2011, p. 7; J. Richard "Dick" Harvey, *Schedule UTP Guidance – Initial Observations,* Tax Notes, Oct. 4, 2010, p. 115; Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the HIRE Act: Boldly Going Where No Withholding Has Gone Before,* 79 Fordham L. Rev. 2967 (2011).

[153] *See* Ed Morgan, *International Tax Law as a Ponzi Scheme,* 34 Suffolk Transnational L. Rev. (2011).

[154] Hiring Incentives to Restore Employment (HIRE) Act of 2010, Pub. L. 111-147.

[155] IRS Notice 2011-34, 2011-19 I.R.B. 765; Notice 2010-60, 2010-2 C.B. 329; *see, e.g.,* Mark Leeds, *Passive – Aggressive: IRS Releases Initial Guidance on FATCA Rules,* Tax Management Weekly Report, Nov. 22, 2010, p. 1544.

[156] Treasury Inspector General for Tax Administration, *New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues Are Being Addressed* (2010-30-125). The Treasury's Financial Crimes Enforcement Network (FinCEN) has proposed rules to clarify the reporting obligations of U.S. persons with foreign bank accounts.

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Chapter 3

SPOUSAL RELIEF

Page 72. Add the following to footnote 18:

A request for innocent spouse relief under sections 6015(b) and (c) made after two years from the time a notice of intent to levy is mailed to the requesting spouse is considered untimely. Actual receipt of a notice of intent to levy is not required to begin the two-year limitation period. Mannella v. Commissioner, 132 T.C. 3 (2009), *rev'd on other grounds,* 631 F.3d 115 (3d Cir. 2011).

Page 72. Add the following new paragraph just before heading **D. Not Barred by Res Judicata or a Final Administrative Determination***:*

The two-year limitations period appears in the statute under both subsections (b) and (c) of section 6015. IRC § 6015(b)(1)(E) & (c)(3)(B). It also appears in the regulation – but not in the statute – as to relief under subsection (f). Treasury has dropped the former requirement that section 6015(f) claims be brought within two years. The new rule is that a request for section 6015(f) relief must be filed with the IRS within the section 6502 period for collection of tax (typically ten years from the date of assessment) or the section 6511 period for seeking refund or credit of tax (typically three years from the date the return was filed or two years from the date tax was paid). Treas. Reg. §§ 1.66-4 (j)(2)(ii) & 1.6015-5; Notice 2011-70, 2011-2 C.B. 135. The two-year requirement still applies with respect to claims for relief under subsections 6015(b) and (c).

Page 72. Add the following to footnote 22:

A requesting spouse who received notification from the IRS of her ability to seek innocent spouse relief and did not allege innocent spouse relief, signed court documents, participated in settlement negotiations, and voluntarily agreed to income tax deficiencies and penalties was considered to have meaningfully participated in two prior Tax Court proceedings and was denied innocent spouse relief involving the same taxable years. Moore v. Commissioner, T.C. Memo 2007-156.

Page 74. Add the following to footnote 29:

The lack of knowledge requirement under section 6015(b) is satisfied where the requesting spouse was not involved with the preparation of the joint returns, signed the documents without reading them because she felt that she did not know enough to understand them, and satisfied her duty of inquiry by questioning her husband and receiving strong and repeated assurances from him that they had to file joint tax returns. Juell v. Commissioner, T.C. Memo 2007-219.

The requesting spouse's knowledge of the losses from her investment in a limited partnership with her husband gave her reason to know of the understatement. The requesting spouse knew of the investment, was a limited partner in the partnership, received annual reports from partnership listing her losses, was well-educated, had willingly signed tax returns without reviewing them, and balanced the couple's checkbooks. Golden v. Commissioner, T.C. Memo. 2007-299, *aff'd,* 548 F.3d 487 (6th Cir. 2008), *cert. denied,* 129 S. Ct. 1647 (2009).

Even though the requesting spouse had knowledge of the embezzlement income and knew that taxes would not be paid at the time the amended joint return was filed, the court granted relief because the requesting spouse did not have knowledge of the embezzlement income at the time the original joint

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return was filed and did not receive any significant benefit. Billings v Commissioner, T.C. Memo 2007-234.

Page 77. Add the following to footnote 41:

Even though the requesting spouse was involved in the business generating the tax liability, relief under section 6015(c) was appropriate because of the abuse present in her relationship with the non-requesting spouse. The non-requesting spouse physically and verbally abused the requesting spouse and her son. The abuse included threats against her and her son's lives, physical assaults, and manipulative and controlling behavior. Wilson v. Commissioner, T.C. Memo 2007-127.

Page 83. Add the following new paragraph after the first paragraph on the page:

Revenue Procedure 2003-61 has been superseded by Revenue Procedure 2013-34, 2013-2 C.B. 397. The new set of principles provides that typically no single fact or set of facts will be determinative of the availability of relief. The elements familiar under the 2003 revenue procedure remain relevant under the 2013 version. The general direction of the change is liberalization of relief. In particular, the presence of abuse has been given greater weight.

Page 83. Add new footnote 54.2 at the end of the sentence, "The paragraph 4.02 conditions…requesting spouse would suffer economic hardship if relief is not granted.":

[54.2] Even though the requesting spouse knew at the time she signed the return that the taxes were not being paid, the Tax Court held that relief would be equitable because she (1) was divorced when she sought relief, (2) received no significant benefit because her ex-husband had complete control over the money and business receipts and she had no direct access, (3) would suffer significant economic hardship because her liabilities exceeded her assets even though she had remarried, and (4) the tax underpayment was attributable only to her ex-husband. Farmer v. Commissioner, T.C. Memo 2007-74.

Page 83. Add new footnote 55.1 at the end of the sentence, "Other factors may also be considered, such as whether the requesting spouse was abused or was in poor mental or physical health.":

[55.1] Abuse factor weighed in the requesting spouse's favor since her husband was abusing drugs, stealing money from his clients, hot-tempered, and she feared that he would retaliate if she filed a claim for innocent spouse relief. Nihiser v. Commissioner, T.C. Memo 2008-135.

Page 84. Add the following to footnote 57:

The 90-day limit for filing a petition with the Tax Court is a jurisdictional limit and cannot be equitably tolled, even though there was a district court order stating that the requesting spouse had 30 days to file a petition with the Tax Court. Pollock v. Commissioner, 132 T.C. 21 (2009).

However, the ninety-day period did not begin to run when the IRS sent the notice of final determination to an incorrect address that three prior notices to that address had been returned as undeliverable. The IRS thus had a duty to exercise reasonable diligence to search for a correct address, a duty the IRS failed to satisfy. Terrell v. Commissioner, 625 F.3d 254 (5th Cir. 2010).

Page 84. Add the following to footnote 59:

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An automatic stay imposed by a former spouse's bankruptcy proceedings does not preclude the Tax Court from making a determination of whether an individual is entitled to innocent spouse relief when her former spouse filed a notice of intervention and then filed for bankruptcy. Kovitch v. Commissioner, 128 T.C. 108 (2007).

Page 84. Revise footnote 60 to read as follows:

60 Ewing v. Commissioner, 122 T.C. 32 (2004); Chief Counsel Notice 2004-026. The cited *Ewing* case *(Ewing II)* was preceded by Ewing v. Commissioner *(Ewing I)*, 118 T.C. 494 (2002), *rev'd,* 439 F.3d 1009 (9th Cir. 2006). *Ewing I* was part of a line of cases as to whether the Tax Court has jurisdiction to hear "stand alone" section 6015(f) cases. As a result of 2006 legislation, it is now clear that the Tax Court has such jurisdiction. Tax Relief and Health Care Act of 2006, Pub. L. 109-432, div. C, § 408, 120 Stat. 3061; *see* Alioto v. Commissioner, T.C. Memo 2008-185. In addition, the IRS now concedes that the standards of review for section 6015(f) cases is de novo and that the reviewing court is not confined to the administrative record. AOD 2012-07; Chief Counsel Not. CC-2013-011; *see also* Wilson v. Comm'r, T.C. Memo. 2012-134, *aff'd*, 705 F.3d 980 (9th Cir. 2013).

Page 88. Revise footnote 75 to read as follows:

75 The current version of the statute provides that the same results – freeze on collection and suspension of the running of the statute of limitations – also apply with respect to relief claims under section 6015(f). IRC § 6015(e)(1)(B) & (2).

Page 88. Add new subsection F:

F. Section 6015 and Community Property

Special issues arise when spousal relief under section 6015 is sought in a community property state. Section 6015 does not preempt state community property laws for refund purposes. Thus, a taxpayer qualified for section 6015 relief is not eligible for refund of taxes, interest, or penalties paid out of community funds to cover the other spouse's tax liability. In addition, certain tax benefits must be allocated between the spouses in community property states in spousal relief situations. Such allocation is effected by filing Form 8379 "Injured Spouse Allocation."[79]

79 *See* CCA 201108036 (Feb. 25, 2011).

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Chapter 4

EXAMINATION OF RETURNS

Page 94. Change the first paragraph to reflect the following:

Based on 2006 data, the IRS revised the estimated tax gap upwards to $450 billion. IR-2012-4; FS-2012-6 (Jan. 2012).

Page 94. Add the following to footnote 4:

> Donald C. Alexander, *The Tax Gap Is Understated*, Tax Notes, July 23, 2007, p. 300; Dustin Stamper, *"Optimistic" Tax Gap Data Are Boosting Audit Success*, Tax Notes, May 28, 2007, p. 810.

Page 98. Add the following paragraphs and new footnotes 16.1 and 16.2 before heading **IV. TYPES OF EXAMINATIONS***:*

(9) Attorneys and accountants tend to be a low-tax compliance sector. From time to time, the IRS launches efforts to detect filing failures by attorneys and accountants. In 2008, an IRS official announced that practitioners who file Form 2848 powers of attorney to represent clients will automatically undergo IRS checks to confirm that they have timely filed and paid their own taxes. The IRS similarly checks on those who apply for or renew enrolled agent status.

(10) The IRS is expanding its web of cooperative information-exchange arrangements with U.S. states and with other countries. A variety of such programs exist, and they are being strengthened.

Page 98. Add new footnote 16.4 at the end of the first sentence of the last paragraph:

> [16.4] Correspondence examinations constitute about 77% of the IRS's total audit coverage. *See* Amy S. Elliott, *IRS Use of Correspondence Exams Doubled over Past Eight Years*, Tax Notes, Nov. 3, 2008, p. 527.

Page 101. Add new footnote 18.1 at the end of the third full paragraph:

> [18.1] The IRS has reorganized its APA functions. They have been combined with other functions (including Competent Authority assistance for tax treaty disputes) to form the Advance Pricing and Mutual Assistance program within the LB & I Division. Notices 2013-78 & 2013-79, 2013-50 I.R.B. 633 & 653.

Page 101. Add the following at the end of footnote 20:

> The IRS has expanded the program for large corporate taxpayers and made it permanent. IR-2011-32 (Mar. 31, 2011).

Page 102. Add a new paragraph and new footnotes after the first paragraph:

LMSB later folded IIRP into a larger initiative: the Industry Issue Focus ("IIF") program. Part of IIF is a rejuvenated IIRP. The other part involves identifying, prioritizing in a tiered system, and coordinating "high risk" issues, that is, certain technical issues involving complex areas of tax law. The goals of IIF are enhancing consistency of issue resolution across industry lines, increasing oversight and

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accountability, faster audit resolutions, and better application of audit resources. Still later, the IRS signaled its intention to reinvigorate the IIRP – despite practitioner doubts about the program's efficacy.[21.1]

21.1 *See*, *e.g.*, David L. Click, *LMSB's Industry Issue Focus Initiative: What Does It Achieve?*, Tax Notes, May 28, 2007, p. 863; Jeremiah Coder, *IRS Industry Issue Resolution Program Faces Skeptics,* Tax Notes, Feb 21, 2011, p. 878.

Page 102. Add the following paragraphs and footnotes after the second paragraph:

Quality examination process ("QEP"): In mid-2010, LMSB (now LB&I) announced this new interactive examination approach to replace prior joint approaches. QEP sets out guidelines for planning, executing, and resolving audits of large taxpayers. The aims are to improve communication between taxpayers and revenue agents and to keep them actively engaged throughout.[23.1]

"Soft" notices: The IRS is testing "soft" notice techniques. That is, when the IRS has reason to believe that a return is inaccurate, the IRS – instead of launching an audit – may send a letter to the taxpayer directing attention to the item(s) in question and urging filing of an amended return if the original return is wrong.[23.2] The success of this approach caused the IRS to expand use of soft notices in 2010.

23.1 *See* IRM 4.46 "LMSB Guide for Quality Examinations"; IRS Pub. 4837 "Achieving Quality Examinations Through Effective Planning, Execution, and Resolution" (3-2010).

23.2 *See* Michael Joe & Crystal Tandon, *IRS Issuing New "Soft Notice" to Underreporting Taxpayers*, Tax Notes, Oct. 13, 2008, p. 138.

Page 103. Last sentence: Change "eighteen months" to "36 months."

Page 110. Add the following to footnote 45:

Taxpayers also often try to argue that the IRS issued the summons in bad faith, but this argument rarely succeeds. *E.g.,* United States v. Richey, 632 F.3d 559 (9th Cir. 2011); *see also* United States v. Clarke, 134 S. Ct. 2361 (2014) (holding that the person resisting the summons is not entitled to an evidentiary hearing without alleging specific facts plausibly raising an inference of bad faith).

Page 110. Add the following at the end of the first full paragraph:

In addition, the fact that the IRS violated its own procedural rules in issuing a summons does not prevent enforcement of the summons unless the taxpayer can show harm or prejudice or that the IRS acted in bad faith.[46.1]

46.1 Adamowicz v. United States, 531 F.3d 151 (2d Cir. 2008).

Page 110. Delete the last text sentence and footnote 49, replacing them with the following:

The cases have split.[49.1] However, summonses for tax accrual workpapers are rare. The returns of large corporations—especially Form 1120 Schedules M-3 and UTP (Uncertain Tax Positions)—usually give the IRS the clues it needs, obviating the audit significance of tax accrual workpapers.[49.2]

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49.1 *Compare* Wells Fargo & Co. v. United States, 112 AFTR 2d 5380 (D. Minn. 2013) (IRS victory) *with* United States v. Deloitte & Touche USA LLP, 610 F.3d 129 (D.C. Cir. 2010)(taxpayer victory).

49.2 *See, e.g.*, Charles Boynton *et al.*, *A First Look at 2010 Schedule M-3 Reporting and Schedule UTP*, Tax Notes, July 21, 2014, at 253.

Page 112. Add the following to footnote 52:

Courts sometimes have held violation of the 23-day requirement to be fatal to the summons. Applying "harmless error" analysis, however, most decisions are to the contrary. *See* Jewell v. United States, 749 F.3d 1295 (10th Cir. 2014).

Page 115. Add the following text and footnotes after the fourth paragraph:

In recent years, the IRS has substantially ramped up its efforts to obtain information about the international financial activities of taxpayers, including U.S. taxpayers' offshore bank accounts.[58.1] These efforts have included a voluntary disclosure program as to offshore assets and more John Doe summonses to identify taxpayers who do not voluntarily disclose.[58.2] One high-profile case involves district court litigation to enforce John Doe summonses served on UBS, a major Swiss bank.[58.3] Taxpayers' responses to John Doe summonses for offshore financial information have ranged from full or partial compliance, to inaction, to opposition in court or even through diplomatic channels.[58.4]

58.1 *See* Kathryn Keneally & Charles P. Rettig, *The End of an Era: The IRS Closes in on Offshore Bank Accounts*, J. Tax Prac. & Proc., Apr.-May 2009, p.11.

58.2 *See*, *e.g.*, Alison Bennett, *IRS Offers Guidance on How to Voluntarily Disclose Offshore Assets Under New Program*, Tax Management Weekly Rep., Apr. 20, 2009, p. 519; Charles Gnaedinger, *United States Seeks More John Doe Summonses*, Tax Notes, May 4, 2009, p. 527.

58.3 *See* David D. Stewart, *DOJ Seeks Enforcement of John Doe Summons Against UBS*, Tax Notes, Feb. 23, 2009, p. 945.

58.4 *See* Kristen A. Parillo, *Switzerland Asks United States to Drop UBS Summons*, Tax Notes, May 4, 2009, p. 528; William M. Sharp, Sr. & Hale E. Sheppard, *Discovery Defenses in IRS's International Tax Enforcement*, Tax Notes, Nov. 17, 2003, p. 889.

Page 117. Add a new paragraph and footnote after the first full paragraph:

However, in 2010, LMSB (now LB&I) created a Global High Wealth industry group to audit wealthy taxpayers. The group employs a "holistic audit" approach, which is similar to the economic reality approach, in spirit if not necessarily in specifics.[65.1]

65.1 *See generally* Charles P. Rettig, *IRS High-Wealth Industry Group: Evaluation of Wealth Squad IDR,* Tax Notes, Nov. 1, 2010, p. 607.

Page 117. Add new footnote 65.2 at the end of numbered item (4):

65.2 *See, e.g.,* Foundation for Human Understanding v. United States, 614 F.3d 1383 (Fed. Cir. 2010) (holding that section 7611 restrictions did not apply; the organization was not a "church" because it conducted traditional services only sporadically although it disseminated messages via radio and the internet), *cert. denied,* 131 S. Ct. 1676 (2011).

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Page 117. Add the following at the end of footnote 69:

Section 7525 cases include Valero Energy Corp. v. United States, 569 F.3d 626 (7th Cir. 2009) (rejecting section 7525 defense); United States v. Wealth & Tax Advisory Servs., Inc., 526 F.3d 528 (9th Cir. 2008) (rejecting section 7525 defense); Countryside Limited Partnership v. Commissioner, 132 T.C. 347 (2009) (upholding section 7525 defense). *See generally* Claudine v. Pease-Wingenter, *Lemons from Lemonade: The Courts Fumble the FATP Privilege,* Tax Notes, Nov. 29, 2010, p. 977.

Page 117. Add the following as a new paragraph after numbered paragraph (5):

Privileges can be waived by disclosure of the information outside the ring of confidentiality.[69.1] The danger has been mitigated somewhat by enactment of Federal Rule of Evidence 502 limiting the circumstances in which inadvertent disclosure constitutes subject matter waiver.

69.1 E.g., Schaeffler v. United States, 113 AFTR 2d 2246 (S.D.N.Y. 2014).

Page 118. Add the following text and footnotes immediately before heading **VII. INFORMATION GATHERING BY THE TAXPAYER***:*

F. Whistleblower Awards

As far back as Reconstruction, the Government has paid rewards to persons who inform on tax cheating by others. In 2006 legislation, Congress dramatically revised section 7623 to increase rewards.[70.1] The new program involved information provided as to tax violations by persons whose gross income exceeds $200,000 for the tax year in question when the tax, interest, and penalties involved exceed $2 million. The reward usually is between 15% to 30% of the amount collected by the IRS. The Tax Court has jurisdiction to decide disputes as to the amount of any reward due.[70.2] Treasury and the IRS have issued guidance.[70.3]

70.1 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2958 (2006); *see* Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblowers Program Thanks to the IRC Confidentiality Restrictions,* 29 Va. Tax Rev. 447 (2010).

70.2 IRC § 7623(b). In October 2008, the Tax Court added new Title XXXIII to its Rules to govern whistleblower cases. *See, e.g.,* Colman v. United States, 96 Fed. Cl. 633 (2011) (holding that the Court of Federal Claims lacks jurisdiction to review denials of whistleblower claims despite an IRS letter erroneously stating the contrary); Cooper v. Commissioner, 135 T.C. 70 (2010) (holding that the Tax Court has jurisdiction to hear appeal of an IRS whistleblower determination); Friedland v. Commissioner, T.C. Memo, 2011-90 (following *Cooper* but dismissing the appeal because it was untimely brought, *i.e.,* not within the 30-day petition period).

70.3 T.D. 9516, 2011-13 I.R.B. 575 (final regulations allowing the IRS to enter into contracts with whistleblowers and disclose information to them); REG-131151-10, 76 Fed. Reg. 2852 (Jan. 18, 2011) (proposed regulations clarifying and expanding definitions under the whistleblower program). The IRS reports to Congress annually on the program and posts the report on its website. The IRS's procedures as to the program have been criticized. Treasury Inspector General for Tax Administration, *Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims* (2009-30-114).

Page 119. Add new footnote 73.1 at the end of the first paragraph:

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73.1 Calling the Chief Counsel's National Office should be distinguished from another option. The IRS provides a toll-free telephone number for taxpayers who wish to ask questions, but it should not be considered a tool for sophisticated tax planning. Callers often experience frustrating delays and busy signals. Moreover, the advice given is too often incomplete, imprecise, or just plain wrong.

Page 119. Add the following to the end of footnote 74:

See generally Charles P. Rettig, *FOIA Requests: A Look into the IRS Examination File,* Tax Notes, Aug. 23, 2010, p. 877.

Page 122. First line: Change 'LMSB" to "LB & I."

Page 123. Add new footnote 87.1 at the end of the last text sentence:

87.1 Appeals receives about 25,000 docketed cases each year, a 68% increase from 2003 to 2009. Appeals resolves about 50% of these cases. Susan Simmonds, *Officials Discuss Settlement Issues in Tax Court Cases,* Tax Notes, May 17, 2010, p. 772 (reporting remarks of Diane Ryan, Chief of the IRS Office of Appeals).

Page 125. Add a new paragraph and footnote just before the last full paragraph:

The 1998 Act prohibited Appeals Officers from engaging in *ex parte* communications with other IRS personnel.[88.1] In general, this provision has produced more friction and wasted motion than genuine taxpayer protection, but it may be of use in some situations.

Responding to criticisms of its impartiality and independence, Appeals has announced its Appeals Judicial Approach and Culture ("AJAC"), under which Appeals Officers (1) are to be less involved in developing information (instead deciding on whatever information is presented to them), (2) are discouraged from raising new issues, and (3) in some situations, should require more time before expiration of the statute of limitations on assessment as a condition of accepting a case.[88.2]

88.1 IRS Restructuring & Reform Act of 1998, § 1001(a)(4), 112 Stat. 689; *see* Rev. Proc. 2012-18, 2012-10 I.R.B. 455 (updated rules re *ex parte* communications).

88.2 *See* SBSE-04-0714-0024 (July 9, 2014); AP-08-0714-0004 (July 2, 2014); AP-08-0713-03 (July 18, 2013).

Page 127. Add the following at the end of footnote 94:

; *see also* IRS Announcement 2008-111, 2008-2 C.B. 1224, *extended by* IRS Announcement 2011-6, 2011-4 I.R.B. 433 (test of procedures for mediation and arbitration for Appeals Office consideration of offers in compromise and trust fund recovery penalty cases). The IRS Examination Division also is testing or using fast-track settlement devices. *E.g.*, IRS Announcement 2008-105, 2008-2 C.B. 1219 (Tax Exempt and Governmental Entities Division); IRS Announcement 2008-110, 2008-2 C.B. 1224 (Small Business/Self-Employed Division).

Page 127. Add the following at the end of footnote 95:

, *updated by* Rev. Proc. 2009-44, 2009-2 C.B. 462, *modified by* Ann. 2011-6, 2011-4 I.R.B. 433.

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Page 129. Substitute the following for the current contents of footnote 97:

97 IRM 1.2.17.1.2—Policy Statement P-8-2 (Jan. 5, 2007).

Page 130. Add the following paragraph and footnote 98.1 immediately before heading **IX. CONCLUSION OF EXAMINATION OR ADMINISTRATIVE APPEAL***:*

A related concern involves the degree of objectivity and neutrality that Appeals Officers can bring to bear. Practitioners sometimes state that, in particular situations, the independence of the Appeals Office from the rest of the IRS is compromised.[98.1] It is often difficult, however, to be sure whether such protestations are accurate, inaccurate but sincere, or calculated to secure strategic advantage.

98.1 *See*, *e.g.*, Allen Kenney, *IRS Wades into Murky Waters: Appeals' Independence*, Tax Notes, Mar. 26, 2007, p. 1201; Sam Young, *Former IRS Appeals Chiefs Question Independence*, Tax Notes, July 2, 2007, p. 29.

Page 131. Add this new footnote after the second sentence of the second paragraph:

99.1 For procedures as to closing agreements, see IRS Proc. Reg. § 601.202; Rev. Proc. 68-16, 1968-1 C.B. 770, *modified by* Rev Proc. 94-67, 1994-2 C.B. 800.

Page 131. Add this new footnote at the end of the second paragraph:

99.2 There can be nice issues as to who is the proper person to execute a section 7121 agreement on behalf of the taxpayer or the IRS, and improper execution can invalid the agreement. *See* Gregory J. Gawlik & LaVonda D. Napka, *Authority? Authority?! Of Course I Have Authority! Thoughts on Closing Agreements, Delegation Orders and Signature Authority,* J. Tax Prac. & Proc., June-July 2009, p. 29.

Both sides should pay close attention to how they word provisions of closing agreements. Courts cannot be counted on to rescue a party from sloppy drafting. *E.g.*, BMC Software, Inc. v. Commissioner, 780 F.3d 669, 676-78 (5th Cir. 2015); Dominion Resources, Inc. v. United States, 97 Fed. Cl. 239, 261 (2011).

Page 132. Add the following new last paragraph and new footnote 104.1:

From time to time, the IRS announces settlement initiatives, especially to resolve families of tax shelters or other issues.[104.1] These initiatives typically state which types of taxpayers are eligible to participate. If the IRS denies to particular taxpayers participation in a settlement initiative, the courts typically are unreceptive to complaints that the IRS improperly excluded them.[104.2] Similarly, the IRS cannot be forced to disclose under F0IA IRS decisions about acceptable settlement ranges and related matters in tax shelter litigation.[104.3]

104.1 *E.g.,* IR-2014-62 (May 8, 2014) (describing the Voluntary Classification Settlement Program under which eligible employers can obtain partial relief from federal employment taxes by agreeing to prospectively reclassify their workers as employees rather than independent contractors).

104.2 *E.g.*, Fears v. Commissioner, T.C. Memo. 2009-62.

104.3 Mayer Brown LLP v. IRS, 562 F.3d 1190 (D.C. Cir. 2009) (dealing with LILO (lease in/lease out) shelters).

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Chapter 5

ASSESSMENT PROCEDURES AND MATTERS RELATED TO THE STATUTES OF LIMITATION ON ASSESSMENT

Page 136. Add the following after the last full paragraph on the page:

Mechanically, an assessment is made when a duly authorized IRS official (an assessment officer) signs a summary record of assessment containing the following four elements: the identity of the taxpayer, the type of tax, the tax period, and the amount assessed. IRC § 6203; *see* United States v. Galletti, 541 U.S. 114, 122 (2004).

An assessment does not create a tax liability. Instead, its purpose is to facilitate collection of the tax. For an insightful discussion of the nature and role of assessments, see Principal Life Ins. Co. v. United States, 95 Fed. Cl. 786, 790-92 (2010).

Page 140. Revise footnote 20 to read as follows:

[20] IRC § 6065. According to the IRS, a valid return is "a document that: (1) purports to be a return, (2) is executed under penalties of perjury, (3) reports sufficient data to calculate the tax liability, and (4) most importantly, constitutes an honest and reasonable attempt to satisfy the requirements of the law." CCA 200651015 (Dec. 22, 2006) (citing Beard v. Commissioner, 82 T.C. 766 (1984), *aff'd,* 793 F.2d 139 (6th Cir. 1986)).

Page 141. Add a footnote at the end of the sentence, "Despite the misleading language …a SFR is the equivalent of no return for SOL purposes."[24.1].

[24.1] The section 6020(b) SFR is an exceedingly strange device. Despite the above quoted "good and sufficient for all purposes" language of the statute, the SFR:

- does not, as noted above, affect the statutes of limitations on assessment and collection;
- also does not affect the statute of limitations on filing refund claims, Healer v. Comm'r, 115 T.C. 316 (2000);
- cannot constitute an examination under section 7602, Chief Counsel Advisory CCA 200518001;
- does not affect the computation of a deficiency under section 6211(a), does not obviate the IRS's obligation to issue a notice of deficiency, and does not deprive the taxpayer of the opportunity for Tax Court review, Spurlock v. Comm'r, 118 T.C. 155 (2002); and
- is not a return for purposes of bankruptcy discharge, 11 U.S.C. § 523(a).

However, as described in chapter 11A, a properly prepared and executed SFR is a return for purposes of the section 6651(a)(2) late payment penalty.

Page 142. Add the following to footnote 30:

This can have implications in the bankruptcy context as well. In one case, a debtor sought Chapter 7 bankruptcy protection, seeking discharge of tax liability. Discharge depended on the validity of the return. The court held the return to be invalid because it did not represent an honest attempt to comply

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with the tax laws. Thus, discharge was denied. In re Smith, No. 13-CV-871 YGR (N.D. Cal. Apr. 29, 2014); *see also* In re Hatton, 220 F.3d 1057 (9th Cir. 2000).

Page 142. Add the following to footnote 33:

The amount of the section 6702 penalty for filing frivolous tax documents has been raised to $5000. The penalty applies to both (i) frivolous purported tax returns and (ii) frivolous CDP requests, installment agreement applications, offer in compromise applications, and taxpayer assistance order applications. IRC § 6702(a).

Page 144. Substitute the following for the current contents of footnote 41:

41 For description of the common law mailbox rule and development of the law in this area, see Maine Med. Center v. United States, 675 F.3d 110, 114-16 (1st Cir. 2012). In some cases, the common law rule may be broader than section 7502. The circuits have been split as to whether section 7502 is exclusive, *i.e.*, as to whether the common law rule survived enactment of section 7502. *See, e.g.,* Martinez v. United States, 101 Fed. Cl. 688, 692 (2012) (describing the circuit split). Reg. § 301.7502-1 supports the "section 7502 is exclusive" view. Hopefully, its promulgation will alleviate the judicial disagreement. There is (or was) a special "prison mailbox rule" for documents filed by inmates. *E.g.*, Hatch v. Comm'r, 364 Fed. Appx. 401 (10th Cir. 2010.) Under it, timeliness is/was measured by the date the document was given to prison officials for mailing.

Page 146. Add footnote 51.1 at the end of the third sentence of the first paragraph under heading **A. The Taxpayer Agreement/Waiver Exception***:*

51.1 Section 6501(c)(4) limits extensions of the SOL to any tax other than the estate tax. Because gift tax liability of a deceased individual becomes part of the deceased's estate, the personal representative cannot agree to extend the statute of limitations for either the gift or estate tax. E-mail Advice ECC 200848060 (July 30, 2008), 2008 TNT 232-45.

Page 146. *Add the following to footnote 53:*

A consent is invalid if the IRS coerced the taxpayer into signing it. The cases conflict as to what rises (or falls) to the level of coercion or duress for this purpose. One point of judicial dissension is whether the IRS threatening to take an action it is legally empowered to take can constitute coercion. Robert W. Wood & Dashiell C. Shapiro, *Tax Payments and Waivers Voided by Duress*, Tax Notes, Feb. 10, 2014, at 671; *see*, *e.g.*, Shasta Strategic Inv. Fund, LLC v. United States, No. 04-cv-04264 (N.D. Cal. 2004) ("A finding of duress simply cannot reasonably arise from Agent Doerr's position as an agent of the IRS or the fact that the Service might pursue lawful IRS action, even one that might result in serious financial implications for the taxpayer.").

Page 148. Add the following to the bridge sentence at the top of the page and replace the period with a comma after the word apply:

as the Supreme Court's decision in *United States v. Home Concrete & Supply, LLC,*[58.1] proved. In *Home Concrete*, the facts were quite similar to those in *Colony*. However, subsequent to *Colony*, Treasury promulgated regulation § 301.6501(e)–1(a)(1)(iii) that said "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income." The government posited that its regulation should be granted deference as an agency's interpretation of an ambiguous statute. Citing its opinion in *Colony*, the Supreme Court disagreed that the statute was ambiguous and held the regulation invalid.

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58.1 132 S. Ct. 1836 (2012).

Page 149. Add the following after the bridge example and before the paragraph starting with the phrase "As was true…":

A few cases have sought to extend this rule of section 6501(e)(1)(B)(i) to sales of property by a business. In other words, the argument goes, when a business sells an asset, gross income stated and omitted should be computed based on the sales price without diminution for the cost of the property, i.e., its basis. As one can see from the example above, this approach would oftentimes produce a better result for the taxpayer. Not surprisingly, the government has argued that this section only applies to sales of *goods*, not to sales of *investment assets* with the result being that the section 61(a)(3) definition of gross income, i.e., gains derived from dealings in property, is the correct measure. The government has been successful in these cases.[63.1]

In *United States v. Home Concrete & Supply, LLC,* [63.2] the government sought to use regulations it issued interpreting section 6501(e)(1)(B)(i) to exclude the cost of an asset, i. e., its basis, from the determination of income that was omitted. As presented above, the Supreme Court followed the reasoning laid out in *Colony* that section 6015(e) required a literal "omission." The Court stated that "Congress intended overstatements of basis to fall outside the statute's scope." [63.3] In so doing, the Court rejected the validity of a regulation promulgated in 2010 that sought to interpret omission differently. In its view, "*Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."[63.4]

63.1 Barkett v. Commissioner, 143 T.C. No. 6 (2014); Insulglass Corp. v. Commissioner, 84 T.C. 203 (1985).

63.2 132 S. Ct. 1836 (2012). For discussion of the decision, see Steve R. Johnson, *After the Cheering, Problems*, 31 ABA Sec. of Tax'n News Q. 1 (Summer 2012); William J. Wilkins, *Implications of* Home Concrete, 31 ABA Sec. of Tax'n News Q. 25 (Summer 2012).

63.3 132 S. Ct. at 1844 (*citing* Colony, 357 U.S. at 35-36).

63.4 132 S. Ct. at 1843.

Page 152. Change heading ***3.*** *to* **3. Third-Party Summons and Designated Summons** *and add the following as a new second paragraph under that heading:*

In addition, section 6503(j) gives the IRS the ability to issue a "designated summons" – no more than one per return – to a corporate taxpayer.[75.1] If the summons is challenged in court, the running of the statute of limitations on assessment is suspended during the period of the challenge (or another stated period).[75.2]

75.1 *See* IRC § 6503(j)(2) (setting out requirements for designated summonses).

75.2 Treasury has issued final regulations as to designated and related summonses. T.D. 9455, 2009-2 C.B. 239.

Page 155. Add footnote 83A after the first sentence of the example:

83A The IRS must take significant steps to determine taxpayer's correct mailing address and is generally required to conform its database with information that comes from the U.S. Postal Service National Change of Address database. CCA (Jan. 9, 2008), 2008 TNT 240-29.

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Chapter 6

EXAMINATION OF PARTNERSHIPS

Pages 161-162. Add the following at the end of bridge paragraph:

For the origins of the TEFRA regime, see Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 Fla. St. U. L. Rev. 205, 231-33 (2013); Jerome Kurtz, *Auditing Partnerships*, Tax Notes, Feb. 20, 2012, at 977; *Section of Taxation Proposal as to Audit of Partnerships*, 32 Tax Law. 551 (1979). For the IRS's position on nearly 50 TEFRA issues, see Chief Counsel Notice CC-2009-027 (Aug. 26, 2009).

A TEFRA-like regime once existed for S corporations in former Code sections 6241 to 6245. Most of that regime was repealed for 1997 and subsequent years. Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1307(c)(1), 110 Stat. 1781; *see*, *e.g.*, New York Football Giants, Inc. v. Comm'r, 117 T.C. 152 (2001).

Page 163. Add the following after the first paragraph:

Reg. § 301.6231(a)(3)-1 has an unsurprising partial list of partnership items. Other items continue to be litigated heavily. *See* Chad D. Nardiello, *Is It a Partnership Item?*, Tax Notes, Sept. 30, 2013, at 1557.

Sometimes a given item is a partnership item in one context but not in another context. Here are some developments:

- Whether a transaction is a sham or tax-motivated: partnership item. *E.g.*, Napoliello v. Comm'r, 655 F.3d 1060 (9th Cir. 2011); Prati v. United States, 603 F.3d 1301, 1309 (2010), *cert. denied*, 131 S. Ct. 940 (2011).
- Whether the section 6229 limitations period remained open: partnership item. *E.g.*, Alpha I, L.P. *ex rel.* Sands v. United States, 682 F.3d 1009 (Fed. Cir. 2012), *cert. denied*, 134 S. Ct. 784 (2013).
- Extent of gain or loss on disposition of bona fide partnership interest: an affected item requiring partner-level determinations if the amount could be affected by a partner-level facts. Greenwald v. Comm'r, 142 T.C. No. 18 (2014).
- Whether a given person is a partner: depends on the facts and circumstances. The usual approach is that partner identity is a partnership item if it affects the distributive shares of the other partners. *E.g.*, Blonien v. Comm'r, 118 T.C. 541, 551 (2002); *see* Nardiello, *supra* (discussing the cases).
- Amount at risk: affected item. *E.g.*, Merulo v. Comm'r, 80 Fed. Cl. 710 (2008), *aff'd*, 563 F.3d 1280 (9th Cir. 2009).
- Basis of property distributed by disregarded partnership: partnership item. Arbitrage Trading, LLC v. United States, 108 Fed. Cl. 588, 606-08 (2013).
- Extent of inside basis: partnership issue. 106 Ltd. v. Comm'r, 136 T.C. 67 (2011).
- Extent of partner's outside basis: The great majority of the cases hold that outside basis is an affected item. But the regulations provide it "is an affected item to the extent it is not a partnership item." Reg. § 301.6231(a)(5)-1(b); *see also* Reg. § 301.6231(a)(3)-1(a)(3) (providing that a transferee's outside basis is a partnership item when the partnership has made a section 754 election).

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The Tax Court has held several times that outside basis can be a partnership item under special circumstances, but has been reversed. Tigers Eye Trading, Ltd v. Comm'r, 138 T.C. 67 (2012) (holding that when the court holds the partnership to be a sham, the court can in the same proceeding set the outside basis at zero); Petaluma FX Partners LLC v. Comm'r, 135 T.C. 581 (2010) (same), *rev'd,* 591 F.3d 649 (D.C. Cir. 2010). For discussion of the Tax Court's *Tigers Eye* decision, see Karen C. Burke & Grayson M.P. McCouch, *Reflections on Penalty Jurisdiction in* Tigers Eye, Tax Notes, Sept. 24, 2012, at 1581.

Page 163. Add the following new paragraph and new footnotes after the first full paragraph:

Recent cases have held that partnership items include: whether partnership transactions were shams or lacked economic substance,[12.1] the extent of a partner's pre-contribution basis in property contributed to the partnership,[12.2] the partnership's release of a partner's deficit restoration obligation,[12.3] and the applicable statute of limitations.[12.4] The following are not partnership items: the identity of a partner in the partnership,[12.5] the amount a partner has at risk under section 465,[12.6] and the tax treatment by an affiliated group on a consolidated return of the parent corporation's payment to a partnership in which the parent is not a partner.[12.7] Because of the difficulty of determining whether a court will find an item to be a partnership item, the IRS often proceeds protectively on both TEFRA and non-TEFRA tracks.[12.8]

[12.1] *E.g.*, Keener v. United States, 551 F.3d 1358 (Fed. Cir. 2009), *cert. denied,* 130 S. Ct. 153 (2009); Petaluma FX Partners, LLC v. Commissioner, 131 T.C. 84 (2008), *aff'd in part & rev'd in part,* 591 F.3d 649 (D.C. Cir. 2010), *supplemented by* 135 T.C. No. 29 (2010).

[12.2] *E.g.*, Nussdorf v. Commissioner, 129 T.C. 30 (2007); Bausch & Lomb Inc. v. Commissioner, T.C. Memo. 2009-112, *appeal dismissed,* 106 AFTR2d 2010-7399 (2d Cir. 2010).

[12.3] Bassing v. United States, 563 F.3d 1280 (Fed. Cir. 2009).

[12.4] Prati v. United States, 81 Fed. Cl. 422 (2008), *aff'd,* 603 F.3d 1301 (Fed. Cir. 2010), *cert. denied,* 131 S. Ct. 937 (2011).

[12.5] Alpha I, L.P. *ex rel*. Sands v. United States, 86 Fed. Cl. 126 (2009).

[12.6] Russian Recovery Fund Ltd. v. United States, 81 Fed. Cl. 793, *dismissed*, 315 Fed. Appx. 246 (Fed. Cir. 2008).

[12.7] Rev. Rul. 2006-11, 2006-1 C.B. 635.

[12.8] *See*, *e.g.*, Chief Counsel Notice CC-2009-011 (Mar. 11, 2009).

Page 164. Add the following after the first full paragraph:

The TEFRA rules were supposed to increase efficiency, but the necessity of trying partnership and partner-level defenses to the same penalty in two separate actions is the antithesis of efficiency. *E.g.*, Tigers Eye Trading, LLC v. Comm'r, T.C. Memo. 2009-121, at 81-82 (TEFRA "makes it necessary, in cases in which the partnership-level determinations are sustained, to educate two different courts (or at least two different judges) in the operation of the same complex set of transactions").

The "classification of items" issues and the penalties issues are linked in important but not always obvious ways. For example, two circuits held that, because outside basis is an affected item requiring partner-level determinations, not a partnership item, the section 6662 penalty for overstatement of outside

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basis cannot be considered in a partnership-level proceeding. Jade Trading, LLC v. United States, 598 F.3d 1372, 1380 (Fed. Cir. 2010); Petaluma FX Partners, LLC v. Comm'r, 591 F.3d 649, 655-56 (D.C. Cir. 2010). The Supreme Court unanimously rejected this view, stating:

> We hold that TEFRA gives courts in partner-level proceedings jurisdiction to determine the applicability of any penalty that could result from an adjustment to a partnership item, even if imposing the penalty would also require determining affected or non-partnership items such as outside basis. The partnership-level applicability determination, we stress, is provisional: the court may decide only whether adjustments properly made at the partnership level have the potential to trigger the penalty. Each partner remains free to raise, in subsequent, partner-level proceedings, any reasons why the penalty may not be imposed on him specifically.

United States v. Woods, 134 S. Ct. 557, 564 (2013). For discussion of the Supreme Court's *Woods* decision, see Karen C. Burke & Grayson M.P. McCouch, Woods*: A Path Through the Penalty Maze*, Tax Notes, February 24, 2014, at 829.

Page 164. Add the following just before heading 3:

As noted above, Congress repealed the bulk of the TEFRA-like S corporation audit rules beginning in 1997. The part that survives is a consistency rule: on her individual return, the shareholder of an S corporation must treat all "Subchapter S items" consistently with how the S corporation treated the items on its Form 1120S – unless the shareholder files a statement notifying the IRS of the inconsistency. *See* IRC § 6037(c); Winter v. Comm'r, 135 T.C. No. 12 (2012); Elliot Pisem & Jason K. Binder, *Lack of Consistency in S Corporation Reporting – How Onerous Are the Results?*, J. Tax'n, Dec. 2010, at 354.

Page 164. Add the following at the end of footnote 15:

; *e.g.,* Domulewicz v. Commissioner, T.C. Memo. 2010-177 (legal expenses paid by a partnership disregarded as a tax shelter sham held to be an affected item).

Page 164. Add the following text and footnotes at the end of the first full paragraph:

This issue has been litigated frequently in recent years in tax shelter TEFRA cases. Despite some contrary cases law,[17.1] most cases have upheld the piecemeal litigation result[17.2] and the regulation which commands it has been upheld by the courts.[17.3]

[17.1] Klamath Strategic Inv. Fund, LLC v. United States, 472 F. Supp. 2d 885 (E.D. Tex. 2007), *aff'd,* 568 F.3d 537 (5th Cir. 2009).

[17.2] *E.g.*, Jade Trading, LLC v. United States, 80 Fed. Cl. 11 (2007), *aff'd in part & rev'd in part,* 598 F.3d 1372 (Fed. Cir. 2010); Fears v. Commissioner, 129 T.C. 8 (2007); *see* Elliot Pisem, *What Happened to My Prepayment Forum? The Penalty Problem in TEFRA Partnership Audit Cases*, J. Tax'n, May 2008, p. 269.

[17.3] *E.g.*, Murfam Farms, LLC v. United States, 102 AFTR2d 2008-6866 (Ct. Fed. Cl. 2008); New Millenium Trading, L.L.C. v. Commissioner, 131 T.C. 275 (2008); Tigers Eye Trading LLC v. Commissioner, T.C. Memo. 2009-121.

Page 164. Add the following bridge paragraph at the top of the page:

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Prop. Reg. § 301.6231(c)-9, 2009-9 I.R.B. 638, was proposed in 2009, and remains in proposed status.

Page 165. Add the following to footnote 22:

In one audit, the IRS encountered a situation in which the company's operating agreement required consent of the Board of Directors in order for a statute of limitations extension to be executed. The board had not yet given its approval. Nonetheless, the IRS Chief Counsel's Office advised the Examination Division that the TMP still had authority to sign the Form 872-P. FAA 20111701F (2014).

The IRS takes the position that state law controls which persons are permitted to act on behalf of an LLC as TMP. ECC 201418051 (Apr. 16, 2014); CCA 200952051 (Dec. 7, 2009); CC-2009-027 (Aug. 26, 2009).

Page 166. Add the following before heading 4:

As a result of all these rules, experienced practitioners often disagree in particular cases as to which party is the TMP.

Moreover, it can be difficult to determine whether a given person is even a partner. In one case, the partnership claimed to have contributed some of its assets to "Illinois common law business trusts," which then formed sub-trusts. Investors contributed cash to the trusts and sub-trusts in exchange for interests in them. One such investor sought to intervene in the Tax Court case between the partnership and the IRS. The court denied the intervention on the ground that the investor was neither a direct partner nor an indirect partner for TEFRA purposes. Sugarloaf Fund LLC v. Comm'r, 141 T.C. 214 (2013).

All this complexity creates ethical as well as procedural challenges. "When an attorney represents a partnership, an individual partner or both, it may be difficult to identify which client is owed the primary duty of loyalty when the interests of the partners differ." Michael R.H. Post, *Representing a Tax Matters Partner: Who Is the Client?*, 6 Geo. J. Legal Ethics 527, 527 (1993).

Page 166. Add the following to footnote 31.

See also Barbados #7 v. Comm'r, 92 T.C. 804 (1984) (holding that a TMP terminated as a result of bankruptcy could not automatically be redesignated as TMP for the same year under the "largest profits interest" rule of section 6231(a)(7)(B)); Chief Counsel Advisory CCA 201109019 (Mar. 3, 2011) (addressing issues as to the effect of bankruptcy on TEFRA procedures).

Page 166. Add the following to footnote 32:

However, "there is no automatic termination of TMP status by virtue of [a criminal] investigation." Phillips v. Comm'r, 272 F.3d 280, 288 (2d Cir. 2002); *see also* Madison Recycling Assoc v. Comm'r, 295 F.3d 280, 288 (2d Cir. 2002) (disqualification is a fact-based inquiry); Shasta Strategic Investment Fund, LLC v. United States, No. 04-cv-04262 (N.C. Cal. July 31, 2013) (holding against disqualification).

Page 166. At the end of the second sentence under heading 4, add the following as footnote 33.1:

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[33.1] The partnership must clearly notify the IRS of the intent to make the election. The intent must be apparent from the face of the return, and the IRS is not required to stitch together hints and snippets to infer the intent.

When there is conflicting evidence as to whether the election has been made, the courts are called upon to resolve the conflict. *E.g.*, Nehrlich v. Commissioner, T.C. Memo. 2007-88, *aff'd*, 327 Fed. Appx. 712 (9th Cir. 2009); Wadsworth v. Commissioner, T.C. Memo. 2007-46; *see* Burgess J.W. Raby & William L. Raby, *TEFRA Partnerships vs. Small Partnerships*, Tax Notes, June 4, 2007, p. 921.

Page 166. Add new footnote 35.1 at the end of the last text paragraph:

[35.1] When the partnership misrepresented that it was not subject to the TEFRA rules, thus leading the IRS to initially issue a no-change letter, the IRS was allowed to issue a second FPAA. NPR Investments LLC v. United States, 732 F. Supp. 2d 676 (E.D. Tex. 2010).

Page 166. Add the following after the last paragraph.

The TEFRA rules can be "fiendishly complicated," Tigers Eye Trading LLC v. Comm'r, 138 T.C. 67, 94 n. 29 (2012), indeed sometimes entails "unanswerable questions," Michael J. Desmond, *quoted by* Shamik Trivedi & Jeremiah Coder, *TEFRA Raises Complex Jurisdictional Issues, Judge Says*, Tax Notes, May 21, 2012, at 985, 985. The IRS has often failed to accurately predict how courts would interpret TEFRA. For that reason, some partnerships which would otherwise be within the "ten or fewer" exception elect into TEFRA status. They reason that even if the IRS has a substantively good adjustment, it may fail to assert it through the right procedures. Of course, this is a double-edged tactic. It may be the taxpayer, not the IRS, which misapplies TEFRA, hoisting itself on its own election petard.

Page 167. Add the following at the end of footnote 38:

Because doubts sometimes exist as to the proper addresses of various parties, the IRS often sends multiple copies of the FPAA to various addresses. *E.g.*, Stone Canyon Partners v. Commissioner, T.C. Memo. 2007-377, *aff'd sub nom.* Bedrosian v. Commissioner, 358 Fed. Appx. 868 (9th Cir. 2009).

Page 167. Add the following to footnote 44:

The IRS's duty in this regard arises only when the IRS is furnished such identifying information in readily available form, either on the return itself or a written statement satisfying Reg. § 301.6223(c)-IT. *E.g.*, Murphy v. Comm'r, 129 T.C. 82, 86 (2007); Estate of Simon v. Comm'r, T.C. Memo. 2013-174.

Page 170. Replace current footnote 56 with the following:

[56] IRC § 6231(b)(1)(C). Only the items covered by the settlement are converted. Schell v. United States, 84 Fed. Cl. 159 (2008), *aff'd,* 589 F.3d 1378 (Fed. Cir. 2009), *cert. denied,* 131 S. Ct. 346 (2010).

Page 170. Add the following at the end of footnote 57:

; *see*, *e.g.*, Bush v. United States, 78 Fed. Cl. 76 (2007) (notice of deficiency not required to be sent to partners because assessments were made as computational adjustments after settlement with the

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partnership), *aff'd,* 599 F.3d 1352 (Fed. Cir. 2010) (holding that the IRS's failure to issue the notice was harmless error).

Page 171. Add new footnote 63.1 at the end of the first sentence of the first paragraph under heading ***5. Requests for Consistent Treatment****:*

[63.1] "No statute requires the IRS to treat identically two or more entities just because they have some partners in common." Cemco Investors LLC v. United States, 515 F.3d 749 (7th Cir.), *cert. denied*, 129 S. Ct. 131 (2008).

Page 172. Add the following after the first full paragraph under heading ***III****:*

Once the IRS mails an FPAA, it may not issue a second FPAA with respect to the same year of the same partnership absent "a showing of fraud, malfeasance, or misrepresentation of a material fact." IRC § 6223(f).

In one case, the IRS issued a "no change" letter, then changed its mind and issued an FPAA making adjustments. The partnership's section 6223(f) argument was rejected. The trial court concluded that the "no change" conclusion had been induced by fraud or misrepresentation. NPR Investments LLC v. United States, 732 F. Supp. 2d 676 (E.D. Text. 2010); *see* Hale E. Sheppard, *Court Grants IRS Major Mulligan in TEFRA Partnership Case: Three Novel Rulings Enable IRS to Avoid One-FPAA-Only Restriction*, Taxes, Jan. 2011, at 47.

The circuit court affirmed this holding. It also noted, but did not decide, the alternative argument that a "no change" letter does not constitute a first FPAA. The circuit court reversed the district court's holding that the penalties asserted by the IRS were inapplicable. 2014-1 USTC ¶ 50,153 (5th Cir. 2014).

Pages 172-173. Add the following to the bridge paragraph:

Issues have emerged as to TEFRA actions in the traditional refund forums.

Page 173. Add the following at the end of the first sentence in footnote 72:

; *e.g.*, Kislev Partners, L.P. *ex rel.* Bahar v. United States, 84 Fed. Cl. 385, *reconsideration denied*, 84 Fed. Cl. 378 (2008).

Page 173. Add the following at the end of footnote 77:

; *see*, *e.g.*, PCMG Trading Partners XX LP v. Commissioner, 131 T.C. No. 14 (2008).

Page 174. Add new footnote 82.1 at the end of the last sentence of the first full paragraph:

[82.1] For discussion of the spousal relief rules (see chapter 3) in the TEFRA context, see Andrews v. Commissioner, T.C. Memo. 2010-230.

Page 174. Add the following sentence and footnote at the end of the first full paragraph:

However, as discussed in chapter 9, the TEFRA rules do allow for a type of refund claim, called an administrative adjustment request.[82.2]

[82.2] *See*, *e.g.*, Jewell v. United States, 548 F.3d 1168 (8th Cir. 2008) (a partner did not have standing to sue for refund of part of a tax penalty paid by the partnership pursuant to a closing agreement);

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Samueli v. Commissioner, 132 T.C. 336 (2009) (an amended return did not constitute an administrative adjustment request; it omitted required information and was not accompanied by Form 8082 "Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR)").

Page 174. Add the following to footnote 83:

Nonpetitioning partners are nonetheless parties to the case under section 6226(d). Accordingly, if the IRS loses in a partnership refund proceeding, all partners – petitioning or not – are entitled to refunds. CCA 201030030 (July 30, 2010).

Page 174. Add the following before heading IV:

If the IRS prevails in court in part or in full, the IRS will look to the partners for payment of the additional tax. The IRS will have to follow one of two routes. First, as to affected items requiring partner-level determinations, the IRS must issue a notice of deficiency to the partner, allowing the partner the pre-assessment rights attaching to any notice of deficiency. IRC § 6230(a)(2). Second, most of the time, no such additional determinations are required, allowing the IRS to directly assess against the partner without the need to issue a notice of deficiency. IRC § 6230(a)(1). *See*, *e.g.*, Napoliello v. Comm'r, 655 F.3d 1060 (9th Cir. 2011) (holding that the IRS properly sent the partner an affected-item notice of deficiency because partner-level determination was necessary, so rejecting the partner's argument that the notice was invalid because the IRS should instead have made a direct computational adjustment).

Page 176. Replace the current content of footnote 97 with the following:

[97] 67 Fed. Cl. 657 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007). The trend of the case law is in this direction. *E.g.*, Grapevine Imports, Ltd. v. United States, 71 Fed. Cl. 324 (2006); Kligfeld v. Commissioner, 128 T.C. 192 (2007); Curr-Spec Partners, L.P. v. Commissioner, T.C. Memo. 2007-289, *aff'd,* 579 F.3d 391 (5th Cir. 2009), *cert. denied,* 130 S. Ct. 3321 (2010). *See generally* Richard M. Lipton, Robert S. Walton & Jenny A. Austin, *Courts Interpret the TEFRA Audit Rules on the Statute of Limitations and Partnership Items*, J. Tax'n, Nov. 2007, p. 286.

Page 176. Add the following to footnote 98:

The controversy is over. It is now settled that section 6229 operates only to extend the section 6501 limitations period, never to contract it. Nothing in TEFRA demands that the FPAA be issued within a certain period of time. When it is issued, it is effective for the partnership items and affected items of any partners whose limitations periods remain open either because of section 6229 or otherwise. *E.g.*, Russian Recovery Fund Ltd. v. United States, 101 Fed. Cl. 498 (2011); Blak Investments v. Comm'r, 133 T.C. 431, 437-38 (2009); ECC 201420018 (May 16, 2014).

Page 177. Add the following after the next-to-last paragraph:

Strictly speaking, the TEFRA partnership is not a party to the Form 872-P. Instead, the TMP executing the 872-P is extending the limitations periods of the partners, acting as their agents. ECC 201431030 (Aug. 1, 2014).

If the TMP is an entity that has dissolved, its dissolution terminates the entity's TMP status. Reg. § 301.6231(a)(7)-1(L).

Depending on the negotiations, it may be possible to execute a restricted consent, *i.e.*, a consent limited as to time, parties, or issues. Such limitations will be enforced pursuant to their terms. *E.g.*,

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Candyce Martin 1999 Irrevocable Trust v. United States, 739 F.3d 1204 (9th Cir. 2014) (restricted as to certain items of lower-tier partnership); Russian Recovery Fund Ltd. v. United States, 101 Fed. Cl. 498 (2011) (restricted as to indirect partner).

Page 177. Add the following at the bottom of the page as "V, The Future of TEFRA":

"It is the rare statute – even in the world of Federal taxation – that continues to spawn jurisdictional disputes nearly thirty years after its enactment. But as many recent cases would attest, TEFRA is among that uncommon breed." Prestop Holdings, LLC v. United States, 96 Fed. Cl. 244, 244 (2010). More than a few have concluded that TEFRA creates more problems than it alleviates. E.g., Burgess J.W. Raby & William L. Raby, *TEFRA Partnership Rules: The Solution Becomes the Problem*, Tax Notes, Aug. 7, 2000, at 795. Some have proposed particular changes. *E.g.*, N. Jerold Cohen & William E. Sheumaker, *When It's Broke, Fix It! It's Time for TEFRA Reform*, Tax Notes, Aug. 13, 2013, at 815.

Others urge outright repeal. *E.g.*, Johnson, 41 Fla. St. U. L. Rev., *supra*, at 258-267; Steve R. Johnson, *TEFRA: No Fix Possible, Just Get Rid of It*, Tax Notes, at 964; Steve R. Johnson, *The E.L. Wiegand Lecture: Administrability-Based Tax Simplification*, 4 Nev. L.J. 573, 596-600 (2004); Peter A. Prescott, *Jumping the Shark: The Case for Repealing the TEFRA Partnership Audit Rules*, 11 Fla. Tax Rev. 503 (2001).

Both the Administration and the then-Chairman of the Ways and Means Committee have proposed significantly modifying TEFRA. *See* Amy S. Elliott, *Camp Draft Forgoes Unified Passthrough Regime*, Tax Notes, Mar. 3, 2014, at 886. The anti-TEFRA campaign received a boost when, in mid-2014, the GAO reported that, for various reasons including the complexity of TEFRA, the IRS audits only 1% of the returns filed by partnerships whose assets exceed $100 million. Government Accountability Office, *Large Partnerships: Growing Population and Complexity Hinder Effective IRS Audits* (GAO-14-746T) (July 22, 2014); *see Sen. Levin Calls for Partnership Audit Reform on Eve of Hearing*, 2014 TNT 140-2 (July 22, 2014); Senate Comm. on Homeland Security & Governmental Affairs, Permanent Subcomm. on Investigations, *Abuse of Structured Financial Products: Misusing Basket Options to Avoid Taxes and Leverage Limits* 8 (July 22, 2014) (urging Treasury to "revamp [TEFRA] to reduce impediments to audit of larger partnerships like hedge funds, and Congress [to] consider amendments to TEFRA to facilitate those audits").

Page 177. Add the following new sentence and new footnote 100.1 after the first sentence of the second full paragraph:

The courts are split as to whether a conflict of interest on the TMP's part disqualifies the TMP from validly extending the limitations period.[100.1]

[100.1] *Compare* United States v. Martinez, 564 F.3d 719 (5th Cir. 2009) (upholding the consent) *to* Leatherstocking 1983 Partnership v. Commissioner, 296 Fed. Appx. 171 (2d Cir. 2008) (not upholding the consent).

Page 177. Add the following at the end of footnote 103:

; *see* Gingerich v. United States, 77 Fed. Cl. 231 (2007) (assessments were time barred since they were made more than a year after the Tax Court settlement), *further opinion,* 78 Fed. Cl. 164 (2007), *appeal dismissed*, 269 Fed. Appx. 971 (Fed. Cir. 2008), *judgment amended sub nom.* Liebovich v. United States, 104 AFTR2d 2009-5976 (Fed. Cl. 2009).

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Chapter 7

TERMINATION AND JEOPARDY ASSESSMENTS

*Page 190. Add the following new paragraph just before heading **III**:*

The normal sequence is jeopardy assessment followed by jeopardy levy. However, in appropriate circumstances, jeopardy levy may be made after assessment has been effected through normal processes. *E.g.,* Prince v. Commissioner, 133 T.C. 270 (2009). *Prince* has other interesting aspects as well, including discussion of the harmless error doctrine, standing, and the interplay of tax and bankruptcy.

Page 191. Add a new footnote 31.1 at the end of the second sentence of the first full paragraph:

> [31.1] Section 7429 review is available only as to termination and jeopardy assessments, not other types of IRS actions. *E.g.*, Israel v. Everson, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,319, at 87,778 (S.D. Iowa 2005), *aff'd per curiam without publish op.*, 210 Fed. Appx. 549 (8th Cir. 2007). For discussion of the origins of section 7429, see Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 Fla. St. U.L. Rev. 296, 229-31 (2013).

Page 192. Add a new footnote 31.2 at the end of the first sentence in the bulleted paragraph:

> [31.2] "Reasonable under the circumstances means something more than not arbitrary and capricious [but] something less than supported by substantial evidence." Pircher v. United States, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,138, at 87,151 (W.D. Tex 2008) (internal quotation marks omitted) (upholding both the reasonableness and the amount of the jeopardy assessment).

Page 191. Add the following to the second bullet point:

The 30-day period is not amenable to equitable tolling. Abraitis v. United States, 709 F.3d 641 (6th Cir. 2013).

Page 193. Make the following change to the second sentence of the second paragraph:

Change "courts have almost uniformly rejected this argument" to "courts have usually rejected this argument." *See* Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 Duke L.J. 1771, 1806-08 (2014).

*Page 197. Add the following new heading and text at the end of the text under heading **C. Stay of Sale**:*

D. Collection Due Process Rights

In 1998, Congress added the Collection Due Process ("CDP") rights provisions – sections 6320 and 6330 – to the Code. These provisions are described in Chapter 13. Under these provisions, taxpayers may obtain administrative and judicial review when the IRS determines to levy against property, including jeopardy levies pursuant to jeopardy assessments. *E.g.,* Bussell v. Commissioner, 130 T.C. 222 (2008).

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Chapter 8

TAX COURT LITIGATION

Page 208. Insert the following text as a new bullet after the 4th bullet:

- Congress also has granted the Tax Court the power to render declaratory judgments as to a variety of matters, including qualification of certain retirement plans, valuation of gifts, tax-exempt status of state and local bonds, eligibility for deferred payment of estate tax, and tax-exempt status of organizations.**[0.1]**

[0.1] A matter of increasing importance in declaratory judgment cases involves the point at which the IRS has made a determination that is sufficient for judicial review. *Cf.* 5 U.S.C. § 704 (Administrative Procedure Act provision declaring: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). For example, section 7436(a) empowers the Tax Court to review IRS decisions as to classification of workers as employees or independent contractors. The Tax Court has held that, although there must be an IRS determination for the court to review, that determination need not be set out in only one particular type of IRS document bearing a particular title or in a particular format. SECC Corp. v. Comm'r, 142 T.C. No. 12 (2014)

Page 211. Insert the following text before section D:

Section 6212(a) provides that a notice of deficiency "shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office."

In some cases, the deficiency notice omitted the address and phone number of the local taxpayer advocate's office and instead invited the taxpayer to visit an IRS website entitled "Contact a Local Taxpayer Advocate." On a harmless error theory, the courts have held the omission not to be fatal to the notice, at least as to taxpayers who have computers. *E.g.*, John C. Hom & Assoc. Inc. v. Comm'r, 140 T.C. 210 (2013). The Tax Court also applies a harmless error approach to errors as to its own procedures. *See* Tax Ct. R. 160 ("The Court at every stage of a case will disregard any error or defect which does not affect the substantial rights of the parties.").

Page 212. Add footnote 11.1 at the end of the sentence straddling pages 211 and 212:

[11.1] Rev. Proc. 2010-16, 2010-1 C.B. 664, explains how to notify the IRS of a change of address.

Page 214. Insert the following text at the end of the page:

What if the taxpayer regularly resides outside the United States but happens to be here when the notice of deficiency is mailed to her? The 150-day period applies. Smith v. Comm'r, 140 T.C. 48 (2013) (majority opinion); Hamilton v. Comm'r, 13 T.C. 747 (1949).

What happens when the 150-day petition period interacts with the section 7502 "timely mailed is timely filed" rule? In one case, a taxpayer abroad mailed his petition to the Tax Court on the 145th day after issuance of the notice of deficiency. The taxpayer used the registered mail service of the foreign country. The envelope containing the petition entered U.S. domestic mail service on the 147th day. The

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Tax Court received it on the 153rd day. The Tax Court held that the petition was timely. Boultbee v. Comm'r, T.C. Memo. 2011-11.

Page 216. Insert the following text before Section III:

The decision of the Tax Court is res judicata as to the entire tax year at issue. Section 6512(a) bars a refund suit for a year as to which the taxpayer filed a Tax Court deficiency action. In one case, a taxpayer sued in the Court of Federal Claims for refund of interest and late-payment penalties, items which were not, of course, included in the notice of deficiency that precipitated a prior Tax Court case. The court dismissed the refund suit because the Tax Court's jurisdiction, once invoked "extends to the entire subject of the correct tax for the particular year." The Cheesecake Factory, Inc. v. United States, 111 Fed. Cl. 686 (2013).

Page 216. Add the following text just after the title ***III. OVERVIEW OF A TAX COURT CASE****:*

The Tax Court recently initiated its electronic access system, which provides taxpayers and practitioners with electronic access to their case filings through the Internet. Access to case filings is currently limited to parties and their counsel. The general public is allowed only remote access to the Tax Court's online docket record, court opinions, and orders. Furthermore, privacy concerns resulting from the large amount of personal information contained within case filings has led the Tax Court to adopt new amendments regarding its practice and procedure rules. Specifically, Rule 27 has been amended to direct taxpayers to redact their taxpayer identification numbers, dates of birth, names of minor children, and financial account numbers from their filings with the court. Tax Ct. R. 27.

Page 216: Add new paragraphs and footnotes just before heading ***B. Discovery****:*

Consistent with modern pleading practice, Tax Court pleadings may be amended, sometimes by right and other times by leave of the court, which "leave shall be granted freely when justice so requires." Tax Ct. R. 41(a). The main exception is attempted amendment that raises a matter requiring factual development when the amendment is so near the trial date that the other party's ability to prepare its case would be unduly prejudiced.

In general, the pleadings and additional information filed with the Tax Court are matters of public record, allowing anyone to inspect tax returns and other potentially sensitive information.[30.1] The problems this can cause are potentially exacerbated by the fact that, in response to the legislation,[30.2] the records in Tax Court cases are now available on the Internet through the Tax Court's website, search engines, and databases.

It is difficult to balance such privacy concerns against our long held belief in transparency in judicial administration. The system has developed a variety of responses although they are only partial. First, as noted in Chapter 3, a taxpayer who has been the victim of domestic violence will receive some privacy protections in a spousal relief case. Second, Tax Court rules allow limiting disclosure when harm can be shown.[30.3] Third, in extraordinary cases, the Tax Court may allow a taxpayer to litigate anonymously.[30.4]

30.1 IRC § 7461(a).

30.2 E-Government Act, Pub. L. 107-347, 116 Stat. 2899 (2002) (codified at 44 U.S.C. § 3501).

30.3 *See* Alison Bennett, *IRS Concerned by Tax Court Proposal to Allow Redacted Petitions, Official Says,* Tax Management Weekly Rep., Apr. 23, 2007, p. 583.

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[30.4] *E.g.,* Anonymous v. Commissioner, 127 T.C. 89 (2006); *see* Note, *The Anonymous Taxpayer: What the Tax Court Failed to Reveal in* Anonymous v. Commissioner, 61 Tax Law. 999 (2008).

Page 216. Under the heading ***B. Discovery,*** *insert footnote 30.5 following the first sentence*:

[30.5] Under Rule 70, electronically stored information is subject to discovery in Tax Court proceedings, and Rule 104 permits the Tax Court to issue sanctions for failing to provide such information. For discussion of Rule 70 and other rules, see Jeremiah Coder, *Tax Court Proposes Numerous Rules Changes,* Tax Notes, Apr. 6, 2009, p. 33.

Page 216. Add the words "electronic information" in the second sentence of the final paragraph to read as follows:

". . . the Tax Court requires that the parties exchange information informally to the extent possible before resorting to the more formal methods of discovery, like interrogatories, depositions, requests for production of documents, electronic information,[30.6] and things, and requests for admissions."

[30.6] Rule 70(b)(3) of the Tax Court provides limitations on the discovery of electronically stored information to alleviate unnecessary burden on parties subject to discovery obligations. *See generally* CC-2010-008 (May 4, 2010) (updating guidance on complying with new electronic discovery rules).

Page 217. Insert the following text before section C:

In 2010, Federal Rule of Civil Procedure 26(b)(4) was amended to provide that drafts of expert witness reports and some communications between attorneys and experts are not discoverable. The Tax Court likes its rules to correspond to the Federal Rules of Civil Procedure when possible. Accordingly, Tax Court Rule 70(c) was amended in 2012 to largely mirror new FRCP 26(b)(4).

Page 217. Insert the following text at the end of section C:

The Tax Court has an arbitration program, but unlike many other federal courts, the Tax Court's program is not mandatory. Rule 124 of the Tax Court allows voluntary binding arbitration between taxpayers and the IRS on factual issues, which may be handled before a Tax Court judge or an outside party. The order of the arbitrator is considered final unless a stipulated decision document is filed. The parties rarely agree to Rule 124 arbitration.

Page 218. Footnote 34. Change the citation to "Tax Ct. R. 143(g)."

Page 220. Insert the following text at the bottom of the page:

In general, the grounds warranting reconsideration of an opinion – prior to the decision becoming final – include "an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000).

Page 221. Insert the following text at the end of section B:

Once a Tax Court decision has become final, there are only a few narrow grounds on which it can be vacated: (1) the court lacked jurisdiction to enter the decision, (2) there has been a fraud upon the court, and possibly (3) the decision was based on a stipulation which both parties acknowledge was mistakenly entered into. According to the Tax Court, even the third of these grounds is questionable, and no grounds

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beyond the three (or two) suffice. For example, the Tax Court states that it cannot vacate a final decision because of newly discovered evidence, intervening change in the law, or excusable neglect. Snow v. Comm'r, 142 T.C. No. 23 (2014); *see also* Seven W. Enterprises, Inc. v. Comm'r, 723 F.3d 857 (7th Cir. 2013). Thus, the grounds for vacating a final decision are much narrower than the grounds on which reconsideration of a not-yet-final decision may be sought.

Page 222. Add the following text to footnote 44:

> In a collection due process case (CDP) under section 6330, if the aggregate liability for the years at issue before the Tax Court exceeds $50,000, the taxpayer cannot seek an S case designation, notwithstanding the fact that the $50,000 requirement is met for any single year at issue. Schwartz v. Commissioner, 128 T.C. 6 (2007).

Page 223. Insert the following text at the end of the page:

The fact that one party presents unopposed testimony on a matter does not guarantee that the court will find that testimony credible. The court is entitled to disregard evidence it finds unreliable. *E.g.,* Olive v. Comm'r, 139 T.C. 19, 30 (2012).

As a result of section 7491's various conditions, the burden of proof usually does not shift to the IRS or the shift is of little practical significance. *See*, *e.g.*, Rigas v. United States, 2011-1 USTC ¶ 50,372 (S.D. Tex. 2011) (in the same order, granting the taxpayer's motion to shift the burden of proof to the IRS, then granting the government's motion for summary judgment). Because the "preponderance of the evidence" standard is met by even a slight shift from equipoise, the burden of proof matters little in cases in which the evidence has been fully developed. Many judges defer ruling on motions as to the burden of proof until after the trial. This dodge is intensely frustrating to trial counsel and underlines the practical insignificance of section 7491.

Page 224. Insert the following text at the end of the page:

In some cases, the Collection Due Process regime discussed in Chapter 13 offers a fourth route by which to achieve judicial review of IRS deficiency determinations. Administrative routes also exist, including requesting audit reconsideration and submitting an offer in compromise based on doubt as to liability.

Page 225. Add footnote 58.1 at the end of the third sentence under heading ***A. Breadth of Jurisdiction****:*

> [58.1] In *Porter v. Commissioner*, 130 T.C. 115 (2008), the Tax Court held that the de novo standard of review applies in equitable innocent spouse cases under section 6015(f), rather than the abuse of discretion standard. The court based its decision on the fact that it is asked to make a determination in these cases and, to decide otherwise, might lead to inconsistent results on the underlying liability. In so doing, the court continued to follow its holding in *Ewing v. Commissioner*, 122 T.C. 32 (2004).

Page 225. Add the following to footnote 59:

> A taxpayer may not challenge his underlying tax liability in the Tax Court in a collection due process (CDP) case when he has already challenged it with the Appeals Office. Lewis v. Commissioner, 128 T.C. 6 (2007). Under section 6330(d)(1) as amended by the Pension Protection Act of 2006, Pub. L. 109-280, § 855, 120 Stat. 1019 (2006), the taxpayer may challenge and the Tax Court has jurisdiction to review the government's notice of determination when the underlying tax liability consists solely of frivolous return penalties. Callahan v. Commissioner, 130 T.C. 44 (2008).

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Page 231. Insert the following text at the end of section 3:

This consideration may be affected by the fact that district courts sometimes require mediation, which may protract resolution of the dispute.

Page 231. Add new subsection 6:

6. APA Issues

Chapter 1 demonstrated that an important trend in tax law is the growing significance of general administrative law, particularly issues under the Administrative Procedure Act ("APA").[69.1] The Court of Federal Claims lacks jurisdiction to review IRS actions on APA grounds.[69.2] The district courts historically have displayed greater interest in and sophistication as to the APA than has the Tax Court.[69.3] Accordingly, if the situation permits, a taxpayer wishing to make an APA argument should consider bringing the case in federal district court unless there are compelling reasons to the contrary.

69.1 5 U.S.C. §§ 551 *et seq.*

69.2 *E.g.,* Martinez v. United States, 333 F.3d 1295, 1313 (Fed. Cir. 2003); Strategic Housing Finance Corp. v. United States, 86 Fed. Cl. 518, 552 (2009) (calling this principle "well-settled"), *aff'd,* 608 F.3d 1317, 1332 (Fed. Cir. 2010).

69.3 *See, e.g.,* Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence when Acting as a Reviewing Court?,* 58 Clev. St. L. Rev. 603, 604 (2010) (arguing that the Tax Court should apply the APA more rigorously).

Page 232. Add the following at the end of footnote 76:

Because of the requirement, it is very difficult to obtain reimbursement in cases presenting novel issues. *See* Hale E. Sheppard, *Seeking Cost Reimbursement in Cases of First Impression: Zealous Advocacy or Pushing Your Luck?,* Practical Tax Law., Spring 2007, p. 15. Similarly, reimbursement usually will not be granted simply because the IRS proceeded in bad faith. Centex Corp. v. United States, 486 F.3d 1369 (Fed. Cir. 2007). *But see* Dixon v. Commissioner, 132 T.C. 55 (2009) (allowing attorneys' fees and interest as sanctions under section 6673 for egregious IRS conduct).

Page 232. Add new footnote 76.1 at the end of the last bullet point:

76.1 Individuals with net worth over $2 million and entities with net worth over $7 million are excluded from eligibility for reimbursement. IRC § 7430(c)(4)(A)(ii) & 28 U.S.C. § 2412(d)(2)(B). All assets of the taxpayer are included in this calculation. Smith v. United States, 107 AFTR2d 2011-1228 (D. Conn. 2011).

Page 234. Third full paragraph. There is a typographical error in the fourth line. The reference should be to "2005" rather than "2003."

Page 236. Question 6(b). The failure-to-file fraud penalty is in section 6651(f), not section 6663. Section 6663 involves fraud on a filed return.

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Chapter 9

OVERPAYMENTS – CLAIMS FOR REFUNDS

Pages 237-238. Add the following after bridge paragraph:

In Fiscal Year 2012, the IRS received over 4 million amended returns. Based on a sampling, the Treasury Inspector General for Tax Administration ("TIGTA") thinks the IRS error rate in processing amended returns may be as high as 17%, potentially causing erroneous refunds of over $400 million per year. TIGTA, *Amended Tax Return Filing and Processing Needs to Be Modernized to Reduce Erroneous Refunds, Processing Costs, and Taxpayer Burden* (TIGTA 2014-40-028) (July 9, 2014).

Page 238. Add the following after the first full paragraph:

The complexity of this area results in part from the principle of sovereign immunity. The government cannot be sued without its consent, and statutes conferring such consent are read strictly. *E.g.*, United States v. Mitchell 463 U.S. 206, 212 (1983); United States v. Testan, 424 U.S. 392, 399 (1976). The party challenging the government bears the burden of showing that sovereign immunity has been waived. *E.g.,* Tri-State Hosp. Supply Corp. v. United States, 341 F.3d 571, 525 (D.C. Cir. 2003).

Page 238. Add the following after the second full paragraph:

There are many more Tax Court cases than refund cases, but refund cases tend to be larger on average. As of September 30, 2013, there were 28,455 Tax Court cases of all types, in which the total tax and penalty amounts at issue were almost $22 billion. There were 1004 refund cases (both district court and Court of Federal Claims) totaling nearly $9 billion. 2013 *IRS Data Book* at 61.

Page 238. Add the following after the third full paragraph:

Under the Delinquent Return Refund Hold Program, the IRS may delay paying a refund for up to six months while it investigates whether the taxpayer was delinquent in filing returns in prior years. In 2012, the program collected over $240 million, which was applied to amounts due with respect to such prior years. Treasury Inspector General for Tax Administration, *Expansion of the Delinquent Return Refund Hold Program Could Improve Filing Compliance and Help Reduce the Tax Gap* (T1GTA No. 2014-30-023) (June 3, 2014).

The filing of mass numbers of bogus returns claiming bogus refundable credits is a major problem. In 2013, the IRS "protected $17.8 billion from refund fraud, we initiated 1400 investigations, and we obtained over 1000 indictments and 400 convictions" related to refund fraud and identity theft. Prepared remarks of Commissioner of Internal Revenue John Koskinen before National Press Club (Washington, D.C.), Apr. 2, 2014, at 7. The IRS has responded in many ways, including slowing the speed of paying claimed refunds in some situations (to allow operation of multiple levels of anti-fraud screening), limiting to three per year the number of refunds electronically deposited into the same bank account, and cracking down on personal accounts held by tax return preparers into which multiple refunds are deposited. *See* Written Testimony of Commissioner John A. Koskinen, 2014 Filing Season and Improper Payments, Before Subcomm. on Oversight of House Ways & Means Comm. (May 7, 2014); Written Testimony of Commissioner John A. Koskinen, IRS Actions to Reduce Improper Payments, Before Subcomm. on Government Operations of House Oversight & Government Reform Comm. (July 9, 2014).

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The IRS requires that amended returns be filed on paper, not electronically. As a result, amended returns are not subject to the same automated filters and verification processes as are original returns filed electronically. IRS employees reviewing amended returns must manually check math computations and otherwise determine eligibility for claimed refunds. This increases the chance of the IRS issuing erroneous refunds. The IRS agrees with TIGTA's recommendation that e-filing should be expanded to include amended returns. Treasury Inspector General for Tax Administration, *Amended Tax Return Filing and Processing Needs to Be Modernized to Reduce Erroneous Refunds, Processing Costs, and Taxpayer Burden* (TIGTA No. 2014-40-028) (Apr. 25, 2014).

Page 238. Add the following text after the first full paragraph (following "…extended, suspended, or re-opened."):

A taxpayer seeking a refund may not look outside the procedural structure provided in the Code to some other statute that may have a longer statute of limitations for recovery, even when the claim stems from unconstitutionally collected taxes.[8.1]

[8.1] United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. 1511 (2008) (taxpayer suing for refund of taxes collected in violation of Export Clause of United States Constitution could not proceed under the Tucker Act when his suit did not meet time limits for refund actions in the Internal Revenue Code).

Page 238. Add the following text at the end of the second full paragraph (following "…it finds that an overpayment has been made."):

Additionally, a taxpayer who has had his claim rejected by a bankruptcy court is barred by res judicata from seeking a refund.[9.1]

[9.1] Isley v. United States, 272 Fed. Appx. 640 (9th Cir. 2008).

Page 240. Add the following after the second full paragraph:

In the tax field, the distinction between deposits and payments was a judicial creation. *See* Rosenman v. United States, 323 U.S. 658, 662-63 (1945). Congress enacted section 6603 in 2004 in an attempt to bring order to the "patchwork of judicial decisions and IRS pronouncements" in the decades after *Rosenman. See* Principal Life Ins. Co. v. United States, 95 Fed. Cl. 786, 796-98 (2010).

Page 241. Add the following just before heading B:

It can be difficult in particular situations to determine whether an item is a deposit or a payment. "In determining whether a remittance is a deposit or a tax payment, the court applies a 'facts-and-circumstances' test, considering (1) when the tax liability is defined, (2) the taxpayer's intent in remitting the money, and (3) how the IRS treats the remittance upon receipt." Syring v. United States, 2013-2 U.S.T.C. ¶ 50,469 (W.D. Wis. 2013); *see* also Ewing v. United States, 914 F.2d 499, 503 (4th Cir. 1990) (similar); Principal Life Ins. Co. v. United States, 95 Fed. Cl. 786, 796-807 (2010) (discussing when a deposit converts into a payment).

Page 242. Add the following at the end of footnote 23:

; *see also* R.H. Donnelley Corp. v. United States, 107 AFTR2d 2011-1503 (4th Cir. 2011) (applying *Lewis* in the context of credit carrybacks).

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Page 242. Add the following at the end of footnote 24:

; Strategic Housing Finance Corp. v. United States, 608 F.3d 1317 (Fed. Cir. 2010), *cert. denied,* 131 S. Ct. 1513 (2011); RadioShack Corp. v. United States, 566 F.3d 1358 (Fed. Cir. 2009).

Page 242. Amend text of footnote 25:

[25] Add CCA 201110011 (Mar. 11, 2011) after citation of § 6514(a). Also, change "within four years" to "within five years" after first full sentence of footnote. IRC § 6532(b).

Page 243. Add the following at the end of footnote 26:

; John Keenan, Rona Hummel & Whitney Lessman, *Supplemental Claims: Acceptable Amendment or New Claim?,* Tax Adviser, Mar. 2011, p. 149.

Page 243. Add the following text at the end of footnote 27:

See also Estate of Wilshire v. United States, 2008 U.S. Dist. LEXIS 91920 (S.D. Ohio 2008) (written and oral communications between executor and IRS constituted informal refund claim); Stevens v. United States, 2007 U.S. Dist. LEXIS 65049 (N.D. Cal. 2007) (numerous phone calls and written communications between taxpayer and IRS stating basis for claim clear example of informal claim doctrine); ILM 200736027, 2007 TNT 175-13 (informal claim considered valid where taxpayer sent a single letter to the IRS stating the basis for his refund); CCA 201116017 (Apr. 22, 2011) (documents filed with Taxpayer Advocate Service and TAOs do not constitute informal refund claims).

Page 243. Add the following after the second paragraph:

"It is immaterial that the size of the refund sought … substantially exceeds the amount originally sought… As long as the nature of the claim was timely given, differences in amount – even large differences – are immaterial." Parker Hannifin Corp. v. United States, 71 Fed. Cl. 231, 234-35 (2006).

Page 243. Add the following after the third paragraph:

When a taxpayer timely makes an informal refund claim but then fails to perfect it by filing a formal claim, refund of the overpayment will be denied. Pennoni v. United States, 86 Fed. Cl. 351 (2009).

Page 244. Add the following at the end of heading B:

In *Windsor's* wake (see item in chapter 2 *supra*), the IRS provided guidance as to filing amended returns and refund claims for same-sex married couples for still open tax periods. Rev. Rul. 2013-17, 2013-2 C.B. 201; Notice 2013-61, 2013-2 C.B. 432.

Page 245. Add the following after the second full paragraph:

There are numerous nuanced exceptions and special rules. So much so that the IRS acknowledges: "The section 6511 rules are so complicated that the system cannot currently be programmed to figure out every situation." Chief Counsel Advisory CCA 201321022 (May 2, 2013).

However, numerous special rules can apply. That being the case, counsel for a taxpayer should independently and carefully calculate the RSED (refund statute expiration date).

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Page 246. Substitute the following for footnote 33:

[33] Extension under section 6511(c) of the period for filing a refund claim depends upon the proper execution of the extension as to the period for assessment. To be valid, a Form 872 must be executed by both the taxpayer and the IRS before the assessment limitations period expires. *E.g.*, King v. Comm'r, T.C. Memo. 2006-112. In one case, the IRS received within the assessment limitations period a Form 872 duly signed by the taxpayer, but the IRS itself did not sign until after that period had expired. Since the 872 was invalid, section 6511(c) did not operate to extend the period available to the taxpayer for later filing a refund claim. Chief Counsel Advisory CCA 201402003 (Oct. 31, 2013).

Page 246. Add the following at the end of footnote 34:

In e-mailed advice, the Service provided a general overview of protective claims that are filed to preserve the taxpayer's right to claim a refund when the right is contingent on future events and may not be determinable until after the limitations period expires, noting that the Service has discretion in deciding how to process such claims. IRS E-Mail Chief Counsel Advice ECC 200848045 (July 17, 2008), 2008 TNT 232-54.

Page 248. Add footnote 42.1 after second full paragraph, second sentence (…originally granted for filing the return.[42.1]):

[42.1] The IRS considers a refund claim included on a late-filed return to be filed the same day as the return. ILM 200751025, 2007 TNT 247-18.

Pages 248-249. Add the following at the end of the bridge paragraph:

There is a question as to whether the section 6511(b)(2)(A) three-year "look back" period is a "statutory time limitation" or a "substantive limitation[ ] on the amount of recovery." *See, e.g.,* Boeri v. United States, 724 F.3d 1367 (Fed. Cir. 2013) (holding that the statute sets out only a "substantive limitation," thus is not jurisdictional).

Page 249. Add the following text at the beginning of footnote 49:

[49] The IRS considers a current liability to arise no later than the date on which a notice of deficiency is issued. Consequently, the Service says it may credit an overpayment or a decrease in tax resulting from a tentative carryback adjustment against unassessed internal revenue tax liabilities that have been determined in a notice of deficiency sent to the taxpayer. Rev. Rul. 2007-51, 2007-2 C.B. 573.

Page 250. Add new footnote 49.1 at the end of the sentence straddling pages 249 and 250:

[49.1] The IRS also may apply an individual's overpayment against a proposed but not yet assessed deficiency. Perry v. Commissioner, T.C. Memo. 2010-219; Rev. Rul. 2007-51, 2007-2 C.B. 573; *see* Note, *Revenue Ruling 2007-51: Why the IRS Is Keeping Your Money?,* 59 Syracuse L. Rev. 311 (2008).

Page 250. Add footnote 55.1 after "5. Any future liability in respect of an internal revenue tax.":

[55.1] The Service takes the position that it may credit an overpayment or a decrease in tax resulting from a tentative carryback adjustment against unassessed internal revenue tax liabilities when the liabilities are identified in a proof of claim filed in a bankruptcy case. Rev. Rul. 2007-52, 2007-2

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C.B. 575; *see also* Nichols v. Birdsell, 491 F.3d 987 (9th Cir. 2007) (refund is an asset of the bankruptcy estate to be applied to the taxpayers' future tax obligations).

Page 252. Add the following at the end of footnote 61:

For detailed discussion of *Flora* and a proposal to overturn it, see Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 Fla. St. U. L. Rev. 205, 219-22 & 267-71 (2013).

Page 252. Add new footnote 65.3 at the end of the first sentence of the second full paragraph:

[65.3] Thus, the conventional wisdom is that, if the IRS never sends the notice, there is an unlimited period for filing the refund suit. *E.g.,* Detroit Trust Co. v. United States, 130 F. Supp. 815 (Ct. Cl. 1955) (holding a refund suit timely when brought nearly thirty years after the refund claim had been filed because the IRS had not denied the claim). However, there is some authority that the suit must be commenced within the six-year general federal limitation statutes: 28 U.S.C. §§ 2401(a) & 2501. *E.g.,* Finkelstein v. United States, 943 F. Supp. 425 (D.N.J. 1996); see Nancy T. Bowen, *A Trap for the Unwary: Is the Six-Year General Statute of Limitation an Outside Limit for Refund Suits?,* Practical Tax Law., Spring 2009, p. 5. The IRS rejects the idea that the six-year limitation statutes limit refund suits. CCA 201044006 (Nov. 5, 2010).

Page 252. Add the following at the end of footnote 66:

However, a Form 872 agreement to extend the time to assess tax does not extend the time to file a refund suit. Brach v. United States, 107 AFTR2d 2011-1242 (Fed. Cl. 2011).

Page 254. Add the following at the end of footnote 79:

The above rules as to Administrative Adjustment Requests are summarized in Rigas v. United States, 2011-1 USTC ¶ 50,372 (S.D. Tex. 2011).

Page 254. Add the following text to second full paragraph after second sentence (…or claim of right adjustment occurred."):

The IRS must still meet this 90-day deadline to process the tentative refund even if it selects the taxpayer's Form 1045 for audit.[80]

[80] Field Att'y Adv. 20075001F (Dec. 14, 2007), 2007 TNT 242-21.

Page 254. Add text after last sentence of final paragraph ("…to request abatement."):

The IRS may also decrease the amount of any tentative carryback adjustment by the amount of any unassessed liabilities the IRS has identified in a proof of claim filed in a bankruptcy proceeding,[81] or against unassessed internal revenue tax liabilities that have been determined in a notice of deficiency sent to the taxpayer.[82]

[81] Reg. § 1.6411-2T; Reg. § 1.6411-3T; Rev. Rul. 2007-52, 2007-2 C.B. 575; Rev. Rul. 2007-53, 2007-2 C.B. 577.

[82] Rev. Rul. 2007-51, 2007-2 C.B. 573.

Page 254. Add the following new section at the end:

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IX. PENALTY

2007 legislation enacted section 6676, effective for claims made after May 25, 2007. [83] A 20% penalty is imposed if a taxpayer makes a claim for an income tax refund or credit for an "excessive amount," *i.e.,* the amount by which the refund or claim exceeds the amount allowable under the Code. [84] The taxpayer can avoid the penalty by showing that there was a reasonable basis for the claim, [85] but there is no full blown reasonable cause defense.

There are rules coordinating section 6676 with other sections that could apply, such as the accuracy-related, reportable transactions understatement, and fraud penalties of sections 6662, 6662A, and 6663, respectively (all discussed in chapter 11). [86] The section 6676 penalty is immediately assessable; the IRS need not issue a notice of deficiency.

[83] Small Business and Work Opportunity Tax Act of 2007, § 8247, Pub. L. 110-28.

[84] IRC § 6676(a) & (b).

[85] The statute does not define "reasonable basis." It remains to be seen whether the section 6662 sense of the term will be imported into section 6676.

[86] IRC § 6676(c).

Page 255. Second paragraph:

The Problem refers to the taxpayer receiving "a four-month extension of time … to file his 2001 income tax return." The extension period granted as a result of filing a proper Form 4868 is now six months, but it was four months for tax year 2001. As a result, the Problem and its Answer require no adjustment.

Page 257. Problem g:

The Problem states that the taxpayer signed the Form 872 on "May 2, 2005," which was within the assessment limitations period. The Problem is silent, however, about whether the IRS also signed the 872 within the limitations period. Please assume that the IRS also executed the Form 872 within the limitations period (see discussion of CCA 201402003 above).

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Chapter 10

JUDICIAL AND STATUTORY RULES THAT OVERRIDE THE STATUTES OF LIMITATION

Page 262. Add the following after the second full paragraph:

A taxpayer's attempt to use equitable recoupment was rejected in Karagozian v. Comm'r, T.C. Memo. 2013-164. Although FICA taxes "paid in the time-barred years were paid on the same type of transaction (i.e., compensation…) as in 2008, … the overpaid FICA taxes from 2002 through 2007 are separate transactions, separate items, and separate taxable events from [the petitioner's] 2008 tax deficiency."

Page 263. Add the following before the last paragraph:

A taxpayer is entitled to a refund only when the amount paid exceeds proper tax liability. The taxpayer's obligation to pay the correct amount of tax arises at the time of required filing, and it persists whether or not the IRS assesses the tax. Thus, the failure of the IRS to assess an unpaid amount does not prevent the IRS from retaining an amount the taxpayer paid as to the liability before expiration of the limitations period for assessment. Principal Life Ins. Co. v. United States, 95 Fed. Cl. 786 (2010). The IRS cannot, however, retain and set off amounts paid or collected after expiration of that period. IRC § 6401(a).

Page 263. Add new footnote 18.1 at the end of the first full paragraph that ends with the words, " . . . and the . . . Court of Federal Claims.":

> [18.1] *See, e.g.*, Menard, Inc. v. Commissioner, 130 T.C. 54 (2008) (holding that the Tax Court may apply equitable recoupment to offset Medicare tax overpayments against income tax liabilities even though the Tax Court has no subject matter jurisdiction as to the Medicare tax). *But see* CCA 201033030 (Aug. 20, 2010), 2010 TNT 162-18 (despite section 6214(b), the IRS cannot apply equitable recoupment or other judicial doctrines to recoup gift tax that was not timely assessed and so was not paid, but used in calculating deduction on estate tax return for gift tax paid or payable; this would be an affirmative collection of tax, not defensive use).

Page 264. Add the following just before heading III:

There also may be a duty of consistency on the IRS, but its status is unclear and its contours differ from those of the taxpayer duty of consistency. The governmental duty (if it exists) involves the principle of horizontal equity, *i.e.*, treating similarly those taxpayers who are similarly situated. For example, if Damon and Pythias engage in identical transactions which they report identically on their returns, can the IRS be forced to accord to Pythias the same treatment it gave to Damon? A few courts have said "yes," but the weight of authority is to the contrary. *See* Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution,* 77 Tenn. L. Rev. 563 (2010).

For statutory consistency rules as to partnerships, see Chapter 6.

The doctrine of judicial estoppel can be used against either party. It can apply in tax or non-tax cases. Under the doctrine, a party may be precluded from taking a position in court that is inconsistent with another position that party previously took in court. *E.g.*, Galin v. IRS, 563 F. Supp. 2d 332 (D. Conn. 2008) (a woman asserted an interest in property the IRS seized and sold to pay tax debts of the woman's ex-husband; summary judgment awarded to IRS; in a prior bankruptcy case, she had asserted that she had

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no interest in the property; she was judicially estopped from now maintaining that she had such an interest even though her contrary position in the prior bankruptcy case was a good faith error). *See generally* Zedner v. United States, 547 U.S. 489, 503-06 (2006); Steve R. Johnson, *The Doctrine of Judicial Estoppel*, Nev. Law., Dec. 2003, at 8.

Page 266. Add a new footnote 33.1 at the end of the last sentence of the first full paragraph.

> [33.1] The party asserting the mitigation provisions bears the burden of proof as to the elements. *E.g.,* O'Brien v. United States, 766 F.2d 1038, 1042 (7th Cir. 1995).

Page 268. Add the following to footnote 44 after IRC § 7122:

> Reg. § 301.7122-1. The IRS, however, is not permitted to enter into an offer in compromise when a case is still controlled by the Justice Department. For example, if a taxpayer is paying restitution as part of a criminal tax conviction, the IRS may not enter into a compromise with the taxpayer.

Page 272. Add the following to footnote 45:

> This one-year limitations period was at issue in El Paso CGP Co., L.L.C. v. United States, 748 F.3d 225 (5th Cir. 2014) (using the statutory mitigation rules to allow the IRS to net a corporation's deficiencies from closed years against its overpayment in a prior year); *see* Robin Greenhouse & R. Christy Vouri, *Riding the Mitigation Train Through El Paso*, Tax Notes, May 12, 2014, at 693.

Page 276. In the last paragraph, add the following sentence after the sentence, "Also, penalties and interest 'wrongfully collected' and traced to the error are included in the amount of the adjustment.":

Any overpayment, though, may be applied to a taxpayer's agreed upon but unassessed liabilities.[56.1]

> [56.1] CCA 200727015 (Mar. 27, 2007).

Page 277. Add the following after the first paragraph and before Problem 1:

G. Section 6521

Sections 1311 through 1314 are the mitigation provisions of general application. However, Congress sometimes writes narrower rules as well. Section 6521 sets out such a narrower rule. It operates when (1) an amount is erroneously treated as self-employment income or wages, (2) correcting the error would require assessing one tax and refunding or crediting a different tax, and (3) some rule of law (other than compromises under section 7122) would prevent one of the correcting adjustments.[58]

> [58] *See, e.g.,* CCA 200918021 (May 1, 2009).

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Chapter 11

PENALTIES

Page 287. Add the following at the end of the first paragraph:

In FY 2012, the IRS assessed nearly 38 million civil tax penalties of all kinds, totaling amounts assessed of nearly $26 billion. By far the largest category involved income taxes of individuals, estates, and trusts, constituting about 28.5 million penalties totaling nearly $14 billion. Next came employment taxes, with about 7.3 million penalties totaling just over $5 billion. Other categories included business income tax, excise tax, estate and gift tax, and non-return penalties (including penalties as to tax return preparers and information returns and reports). The most frequently assessed civil penalty was failure to pay, representing about 57% of assessed return penalties. Staff of Joint Committee on Taxation, *Present Law and Background Information Related to Selected Tax Procedure and Administration Issues* (Apr. 15, 2013) (JCX-9-13). For additional information as to the types and numbers of civil tax penalties assessed and abated, see 2013 IRS *Data Book* at 42.

Page 292. In the first full paragraph, add the following text after "If a taxpayer does not have the information needed to complete the return by its due date, an extension of time to file can be requested."

Reg. sections 1.6081-4 and -2T were amended to allow an automatic six-month extension without a signature or an explanation for individuals who must file an individual income tax return if they submit a timely, completed application for extension on Form 4868 "Application for Automatic Extension of Time To File a U.S. Individual Income Tax Return" and a five-month automatic extension period with no additional extensions for certain pass-through entities. T.D. 9407, Extension of Time for Filing Returns, 73 Fed. Reg. 37362-01 (July 1, 2008).

Page 293. Modify footnote 18 as follows:

[18] The "$100 or 100%" minimum is now "$135 or 100%." IRC § 6651(a) (flush language).

Page 296. Substitute the following for the current contents of footnote 28:

[28] However, for the penalty to apply, the substitute for return must be properly prepared and executed. *E.g.,* Cabirac v. Comm'r, 120 T.C. 163 (2003), *aff'd without published opinion,* No. 03-3157 (3d Cir. 2004). The requisite procedures are described in Reg. § 301.6020-1(a) & (b); Chief Counsel Notice CC-2007-005 (Feb. 4, 2007).

*Page 297. Add to end of third paragraph under heading **B**:*

The section 6651(a)(3) penalty need not be included in a notice of deficiency. The IRS may proceed to collection if the penalty is not paid after notice and demand. Burke v. Comm'r, T.C. Memo. 2009-282.

*Page 298. Add to end of second paragraph under heading **V**:*

A taxpayer wishing to assert the reasonable cause defense as to section 6651 penalties must submit to the IRS a written statement under penalties of perjury explaining why the taxpayer has reasonable cause for the delinquency. Reg. § 301.6651-1(c)(1). "Failure to submit such a written statement to the IRS precludes a [taxpayer] from making a 'reasonable cause' showing for the first time in federal court."

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Brown v. United States, 43 Fed. Cl. 463, 467 (1999) (quoted by Kuretski v. Comm'r, 113 AFTR 2d 2614 (D.C. Cir. 2014)).

*Page 303. Add the following at the end of paragraph **"6. Constitutional Objections and Religious Beliefs"**:*

Presenting only tax protester arguments in a court may result in imposition of a frivolous argument penalty under section 6673. Hawkins v. Commissioner, T.C. Memo 2008-168.

Page 310. After the first paragraph under section II, add the following:

There now are 7 bases of the § 6662 penalty, not 5. The new bases involve tax benefits disallowed because of the economic substance doctrine and similar rules (§ 6662(b)(6)) and understatements involving undisclosed foreign financial assets (§ 6662(b)(7)). Unlike other bases, there is no reasonable cause defense as to § 6662(b)(6). *See* § 6664(c)(2).

Page 312. Add the following to footnote 70:

A number of cases have explored the meaning of "underpayment" for purposes of §§ 6662 and 6663. *E.g.*, Snow v. Comm'r, 141 T.C. No. 6 (2013) (holding that "underpayment" includes the difference between the amount stated on the return as withheld from the taxpayer's wages and the amount actually withheld); May v. Comm'r, 137 T.C. 147 (2011) ("underpayment" includes overstated withholding credits), *aff'd*, 111 AFTR2d 2013-1126 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 682 (2013); Feller v. Comm'r, 135 T.C. 497 (2010) (upholding Reg. §§ 1.6664-2(c)(1) & (g) (Example 3)). Most recently, the Tax Court held that the amount shown as tax on a return is reduced by refundable credits, but not below zero. Rand v. Comm'r, 141 T.C. No. 12 (2013) (en banc). The IRS will follow *Rand*. Chief Counsel Notice CC-2014-007 (July 31, 2014).

Page 313. Correct the first footnote 73 to read 72 and then add the following text:

Reg. section 1.6664-2 has been amended to describe additional circumstances limiting the time period to file a qualified amended return (QAR). The period for filing a QAR is terminated once the IRS has served a summons on a third party concerning the would-be filer's tax liabilities. For taxpayers who have claimed tax benefits from undisclosed listed transactions, the QAR filing period is terminated once the IRS requests information about the transaction from anyone who made a tax statement for the benefit of the taxpayer or gave material aid, assistance, or advice to the taxpayer. The date of a settlement initiative announcement for a listed transaction in which penalties are compromised or waived is the date by which a QAR must be filed. T.D. 9309, Qualified Amended Returns, 72 Fed. Reg. 902-01 (Jan. 9, 2007) .

Page 317. Add the following to footnote 89:

The IRS has updated the circumstances under which disclosure on a return constitutes adequate disclosure for purposes of the substantial understatement base of the § 6662 penalty. Rev. Proc. 2015-16, 2015-7 I.R.B. 596.

Page 320. Before Heading B, add the following:

Resolving a circuit split, the Supreme Court has held that absence of economic substance can constitute a basis misstatement for purposes of the substantial valuation/basis misstatement base of the §

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6662 penalty. United States v. Woods, 134 S. Ct. 557 (2013); *see also* NPR Invs., L.L.C. v. United States, 740 F.3d 998 (5th Cir. 2014) (discussing *Woods*).

Page 322. In the first paragraph in section A, add the following text after the sentence ("Where civil fraud is established, the statute of limitations on assessment is unlimited."):

In a fraud penalty case, the court may assess a penalty against one of the spouses for understatement of couple's tax attributable to his or her fraudulent intent while declining to impose an accuracy-related penalty against the innocent spouse.[112.1]

112.1 Black v. Commissioner, T.C. Memo 2007-364. The extended limitations period of section 6501(c)(1) for assessing taxes based on a fraudulent return applies even if the evasion is attributable to his tax return preparer and not his own. Allen v. Commissioner, 128 T.C. 37 (2007).

Page 324. Add the following after the second paragraph:

The reasonable cause defense has met the cyberspace age. In one case, the court rejected the taxpayer's argument that his Google search provided reasonable cause for his failure to report his IRA distributions.[117.1] Famously (or infamously), Treasury Secretary Tim Geithner in his confirmation hearing implausibly explained his tax derelictions by blaming his tax preparation software. Unsurprisingly, later taxpayers have asserted the "Geithner defense" against accuracy-related penalties. Thus far, none of these taxpayers has succeeded.[117.2]

117.1 Woodard v. Commissioner, T.C. Summ. Op. 2009-150 (nonprecedential).

117.2 *E.g.,* Au v. Commissioner, T.C. Memo. 2011-247; Parker v. Commissioner, T.C. Summ. Op. 2010-78 (nonprecedential).

Page 325. Footnote 125: Change "§ 6664(c)(3)(C)" to "§ 6664(c)(3)."

Page 325. Add the following new subsections at the end of ***Part B, VII THE REASONABLE CAUSE EXCEPTION****:*

C. Preparer and Advisor Penalties

Penalties on taxpayers get the bulk of attention, but penalties on their return preparers and advisors are an increasingly important part of our tax system. If their conduct falls below the prescribed standards of care, penalties may be imposed on persons who prepare returns; those who advise taxpayers on return positions, whether or not they prepare returns; and those who facilitate tax transactions, such as appraisers and tax shelter promoters or sales personnel.

The most frequently asserted of these penalties is section 6694. Subsection (a) imposes a penalty on those who prepare returns or refund claims when they know or should have known that the return or claim contains an unreasonable position. The penalty amount is the greater of $1,000 or 50% of the income the preparer derives with respect to the return or claim.[128]

There are three types of unreasonable positions. First, in general, a position is unreasonable unless it is supported by substantial authority (about a 40% probability of success were the matter litigated). Second, if a position (other than a tax shelter or reportable transaction) is adequately disclosed, it is unreasonable unless there is a reasonable basis for it (about a 15% to 20% probability of success). Third, if the position involves a tax shelter or a reportable transaction, it is unreasonable unless it is reasonable to

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believe that it would more likely than not be sustained on the merits if litigated.[129] A reasonable cause defense exists.[130]

Section 6694(b) raises the stakes when the preparer's conduct is worse. It imposes a penalty of the greater of $5,000 or 50% of the income derived if the preparer's conduct entails a willful attempt to understate liability or reckless or intentional disregard of tax rules and regulations. The penalty amount is reduced by any section 6694(a) penalty paid.[131]

Special procedural rules exist as to both of the section 6694 penalties. The IRS may assess the penalties without issuing a notice of deficiency. If the target, within 30 days after the IRS makes notice and demand, pays at least 15% of the penalty and files a refund claim, he may file a refund suit in district court within 30 days after the denial of the refund claim or passage of six months. Following this procedure stops collection of the remainder of the penalty and suspends the running of the limitations period on collection.[132] The IRS has authority to abate the assessment.[133]

In addition to section 6694, a number of other preparer and advisor penalties exist. They include sections 6694 (failure to comply with enumerated identification and administrative requirements), 6695A (valuation misstatements by appraisers), 6700 (promoting abusive tax shelters), 6701 (aiding and abetting understatement of tax liability), and 7408 (injunctions to restrain abusive tax shelter promotion). In addition, section 6707A, described in Chapter 2, penalizes failures to disclose information as required by section 6011. In extreme cases, willful participation or collaboration by a return preparer or advisor in tax evasion can be subject to criminal prosecution.[134]

[128] IRC § 6694(a)(1). "Return preparer" is defined in Section 7701(a)(36).

[129] IRC § 6694(a)(2). *See generally* Michael J. Desmond & Christopher P. Murphy, *Shifting Sands Under Preparers' Feet: Waiting for the Last Word on Tax Return Preparer Penalties,* Taxes, July 2009, p. 45; Scott A. Schumacher, *Section 6694 Preparer Penalties and Tax Advice: The Latest on the Constantly Moving Target,* Practical Tax Law., Winter 2009, p. 19; Robert W. Wood, *Ten Things You Need to Know About Return Preparer Penalties,* Tax Management Weekly Rep., June 1, 2009, p. 712.

[130] IRC § 6694(a)(3).

[131] IRC § 6694(b)(3).

[132] IRC § 6694(c).

[133] IRC § 6694(d).

[134] *E.g.,* IRC §§ 7201 & 7206(2); 18 U.S.C. §§ 2 (aiding and abetting) & 371 (conspiracy); *see* John A. Townsend, Larry A. Campagna, Steve Johnson & Scott A. Schumacher, *Tax Crimes* (2008).

D. New Penalty Horizons

Penalties are part of major new tax and tax-related regulatory regimes, such as FATCA (Foreign Account Tax Compliance Act), FBAR (Foreign Bank Account Reporting), and the Affordable Care Act. These complex and specialized regimes are generally beyond the focus of this course. The IRS website contains extensive information as to the reporting and penalty aspects of these regimes. These regimes will produce numerous important cases for decades to come.

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As to FBAR penalties, in May 2014, a jury returned a verdict in a civil action brought by the Department of Justice to collect FBAR penalties assessed against Carl R. Zwerner. Under the Bank Secrecy Act, the penalty for willfully failing to file required FBARs is 50% of the balance in the account. The penalty is applied each year. Since the jury held against Zwerner for several years, the penalty turned out to be about $2.2 million – an amount above the apparent high balance in the account of about $1.7 million. See DOJ Tax Press Release 14-575 (May 28, 2014). Further proceedings are anticipated as to whether this outcome violates the Excessive Fines Clause of the Eighth Amendment.

As to the Affordable Care Act, final regulations have been issued as to the "employer shared responsibility" provisions. T.D. 9655, 78 Fed. Reg. 8544-01 (Fed. 12, 2014). As to the individual mandate, compare Jordan M. Barry & Bryan T. Camp, *Is the Individual Mandate Really Mandatory*?, 132 Tax Notes 1633 (June 25, 2012), with Ajay Gupta, *ACA Penalty: Toothless? Hardly! Corporate Raiders Fare Better,* 141 Tax Notes 877 (Nov. 25, 2013).

*Page 325. Change the heading of the last part to "***IX. CONCLUSION***" and insert before it the following new part:*

VIII. TAX SHELTER PENALTIES

Stiff penalties are an important part of the attack on tax shelters. Earlier, we noted that the defenses to the substantial understatement basis of the section 6662 penalty are weaker as to tax shelters. Yet Congress concluded that even sterner measures were required. The measures Congress enacted in 2004 and 2010 are described below.

A. Penalty as to Reportable Transactions

The American Jobs Creation Act of 2004[127] added to the rules applicable to tax shelters a new accuracy-related penalty that applies to listed transactions and reportable transactions with a significant tax avoidance purpose (hereinafter referred to as a "reportable avoidance transaction"). The penalty rate and defenses available to avoid the penalty vary depending on whether the transaction was adequately disclosed.

Disclosed transactions. In general, a 20-percent accuracy-related penalty is imposed on any understatement attributable to an adequately disclosed listed transaction or reportable avoidance transaction. The only exception to the penalty is if the taxpayer satisfies a more stringent reasonable cause and good faith exception (hereinafter referred to as the "strengthened reasonable cause exception"), which is described below. The strengthened reasonable cause exception is available only if the relevant facts affecting the tax treatment are adequately disclosed, there is or was substantial authority for the claimed tax treatment, and the taxpayer reasonably believed that the claimed tax treatment was more likely than not the proper treatment.

Undisclosed transactions. If the taxpayer does not adequately disclose the transaction, the strengthened reasonable cause exception is not available (i.e., a strict-liability penalty applies), and the taxpayer is subject to an increased penalty equal to 30 percent of the understatement.

Determination of the understatement amount. The penalty is applied to the amount of any understatement attributable to the listed or reportable avoidance transaction without regard to other items on the tax return. For purposes of this provision, the amount of the understatement is determined as the sum of (1) the product of the highest corporate or individual tax rate (as appropriate) and the increase in taxable income resulting from the difference between the taxpayer's treatment of the item and the proper

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treatment of the item (without regard to other items on the tax return), and (2) the amount of any decrease in the aggregate amount of credits which results from a difference between the taxpayer's treatment of an item and the proper tax treatment of such item.

Except as provided in future regulations, a taxpayer's treatment of an item shall not take into account any amendment or supplement to a return if the amendment or supplement is filed after the earlier of when the taxpayer is first contacted regarding an examination of the return or such other date as specified by the IRS.

Coordination with other penalties. Any understatement upon which a penalty is imposed is not subject to the accuracy-related penalty under section 6662. However, such understatement is included for purposes of determining whether any understatement (as defined in sec. 6662(d)(2)) is a substantial understatement as defined under section 6662(d)(1). The penalty shall not apply to any portion of an understatement to which a fraud penalty is applied under section 6663.

Reasonable cause defense. A penalty is not imposed under §6662A with respect to any portion of an understatement if it shown that there was reasonable cause for such portion and the taxpayer acted in good faith. Such a showing requires (1) adequate disclosure of the facts affecting the transaction in accordance with the regulations under section 6011, (2) that there is or was substantial authority for such treatment, and (3) that the taxpayer reasonably believed that such treatment was more likely than not the proper treatment. For this purpose, a taxpayer will be treated as having a reasonable belief with respect to the tax treatment of an item only if such belief (1) is based on the facts and law that exist at the time the tax return (that includes the item) is filed, and (2) relates solely to the taxpayer's chances of success on the merits and does not take into account the possibility that (a) a return will not be audited, (b) the treatment will not be raised on audit, or (c) the treatment will be resolved through settlement if raised.

A taxpayer may (but is not required to) rely on an opinion of a tax advisor in establishing its reasonable belief with respect to the tax treatment of the item. However, a taxpayer may not rely on an opinion of a tax advisor for this purpose if the opinion (1) is provided by a "disqualified tax advisor," or (2) is a "disqualified opinion."

Disqualified tax advisor. A disqualified tax advisor is any advisor who (1) is a material advisor and who participates in the organization, management, promotion or sale of the transaction or is related (within the meaning of section 267(b) or 707(b)(1)) to any person who so participates, (2) is compensated directly or indirectly by a material advisor with respect to the transaction, (3) has a fee arrangement with respect to the transaction that is contingent on all or part of the intended tax benefits from the transaction being sustained, or (4) as determined under regulations prescribed by the Secretary, has a disqualifying financial interest with respect to the transaction.

A material advisor is considered as participating in the "organization" of a transaction if the advisor performs acts relating to the development of the transaction. This may include, for example, preparing documents (1) establishing a structure used in connection with the transaction (such as a partnership agreement), (2) describing the transaction (such as an offering memorandum or other statement describing the transaction), or (3) relating to the registration of the transaction with any federal, state or local government body. Participation in the "management" of a transaction means involvement in the decision-making process regarding any business activity with respect to the transaction. Participation in the "promotion or sale" of a transaction means involvement in the marketing or solicitation of the transaction to others. Thus, an advisor who provides information about the transaction to a potential participant is involved in the promotion or sale of a transaction, as is any advisor who recommends the transaction to a potential participant.

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Disqualified opinion. An opinion may not be relied upon if the opinion (1) is based on unreasonable factual or legal assumptions (including assumptions as to future events), (2) unreasonably relies upon representations, statements, finding or agreements of the taxpayer or any other person, (3) does not identify and consider all relevant facts, or (4) fails to meet any other requirement prescribed by the IRS.

B. Strict Liability Penalty

To help finance expanded medical care spending, Congress in 2010 codified the economic substance doctrine, under which tax benefits may be denied, even if the transactions comply with the literal provisions of the Code, if they lack sufficient economic effect and non-tax business purpose.[128]

To enforce the newly codified doctrine, Congress enacted new subsection 6662(b)(6), under which claiming tax benefits from transactions lacking economic substance exposes the taxpayer to the 20% penalty. Moreover, under new subsection 6662(i), the penalty rate rises to 40% if the relevant facts as to the transaction were not adequately disclosed on the return.

This is a "strict liability" penalty – the reasonable cause defense under section 6664 is not available in section 6662(b)(6) cases. The penalty can apply to deficiencies and also, under section 6676, to erroneous claims for refunds and credits. As one would expect, both the codified economic substance doctrine and the accompanying strict liability penalty have been sharply criticized by taxpayers and their representatives. They will continue to generate controversy in the years to come.[129]

[127] Pub. L. 108-357, Title VIII, § 812(a), 118 Stat. 1577 (2004).

[128] IRC § 7701(o), enacted by the Health Care and Education Affordability Reconciliation Act of 2010.

[129] *See generally* Jt. Comm. on Tax'n, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Health Care Act," available at* http://www.jct.gov/publications.html; Martin J. McMahon, *Living with the Codified Economic Substance Doctrine,* Tax Notes, Aug. 16, 2010, p. 738.

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Chapter 12

INTEREST

Page 331. Add the following to the end of footnote 14:

For example, according to *IR-2015-4,* the rates for the second calendar quarter of 2015 will remain the same as prior quarters, as follows:

- overpayment rate generally is 3 percent (2 percent in the case of a corporation);
- overpayment rate for the portion of a corporate overpayment exceeding $10,000 is .5 percent;
- **underpayment** rate generally is 3 percent (3% in the case of a corporation); and
- **underpayment** rate for large corporate **underpayments** is 5 percent.

See Rev. Rul. 2015-5, 2015-13 I.R.B. 788.

Page 331. Add the following to the end of footnote 17:

In the event a corporation's overpayment exceeds $10,000, section 6621(a)(1) provides a reduction in the interest rate. The reduction is from two points above the Federal short term rate to one-half point above the rate. The Ninth Circuit held that section 6621(a)(1) also applies to interest payable to a corporate taxpayer involved in a wrongful levy. Steven N.S. Cheung, Inc. v. United States, 545 F.3d 695 (9th Cir. 2008).

Page 332. Add a new sentence and footnote at the end of the next-to-last paragraph:

Netting is not permitted when the limitations period for filing refund claims under section 6621(d) had expired. [24.1]

[24.1] *E.g.,* Federal National Mortgage Ass'n v. United States, 469 F.3d 968 (Fed. Cir. 2006).

Page 332. Add the following to the second paragraph:

A bank acquired other banks by merger. Multiple entities were involved which had multiple tax overpayments and underpayments from pre- and post-merger years. This created considerable confusion as to what netting of interest was allowable. The taxpayer and the IRS litigated test claims based on three merger-related scenarios. The court held for the taxpayer as to all three test claims. Holding that the surviving corporation and the acquired corporations were the same taxpayer for section 6621(d) purposes, the court allowed full interest netting. Wells Fargo & Co. v. United States, 117 Fed. Cl. 30 (Ct. Fed. Cl. 2014).

Page 332. Add the following after the second full paragraph:

The legislation created a transitional rule allowing netting for some pre-1999 years. Courts have disagreed as to the scope of the transitional rule. One case read the rule narrowly, on the ground that waivers of sovereign immunity should be strictly construed. Federal Nat'l Mortgage Ass'n v. United States, 379 F.3d 1303, 1310-11 (Fed. Cir. 2004), *further opinion*, 469 F.3d 968 (Fed. Cir. 2006), *cert. denied*, 552 U.S. 1139 (2008). Disagreeing with the prior case's sovereign immunity analysis, a later case read the transitional rule broadly. Exxon Mobil Corp. v. Comm'r, 689 F.3d 191 (2d Cir. 2012).

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Most practitioners will not have pre-1999 interest netting cases. Nonetheless, the above cases matter for three reasons. First, the issue may still be alive for some large corporations. Second, the cases' discussion of the history and purposes of the interest netting rules may be useful in other controversies as to section 6621(d). Third, transitional rules abound in federal tax. The above cases underline the need for careful drafting of such rules.

Page 334. Add to beginning of Section b. Change the first sentence to read as follows:

Section 6404(g) suspends interest, certain penalties, additions to tax, and additional amounts, if the IRS does not notify an individual taxpayer, who filed his return on time, of both the amount of his liability and the basis therefor within thirty-six months (eighteen months for notices sent prior to November 26, 2007) after the later of the date on which the return is filed or the due date of the return without regard to extensions.[32]

[32] Treasury has issued final regulations setting out specific rules as to suspension of interest and penalties under section 6404(g). T.D. 9545, 76 Fed. Reg. 52259 (Aug. 22, 2011) (Treas. Reg. § 301.6404-4); T.D. 9488, 75 Fed. Reg. 33992 (June 16, 2010) (Treas. Reg. § 1.6404-4(b)(f)).

Page 334. Add the following to the end of footnote 34:

The Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, § 8242, 121 Stat. 200 (2007), changed the period from eighteen months to thirty-six months effective for notices provided after November 25, 2007; *see also* Reg. § 301.6404-4.

Page 335. Replace the first full paragraph with the following:

Regulation section 301.6404-4(a) provides guidance on applying section 6404(g) to amended returns and other signed documents that show increased tax liability, as well as to amended returns that show decreased tax liability. If, on or after December 21, 2005, a taxpayer provides to the IRS an amended return or other signed written document showing an additional tax liability, then the eighteen-month period (or thirty-six month period) does not begin to run with respect to the items that gave rise to the additional tax liability until that return or other signed written document is provided to the IRS.[37.1] Except as provided in GOZA § 303(b), the filing of an amended return has no effect on the running of the thirty-six month period (or eighteen months for notices sent prior to November 26, 2007) under section 6404(g). Accordingly, if a taxpayer files an amended return or other signed written document showing a decrease in tax liability and the IRS at any time proposes to adjust the changed item or items, any interest, penalty, addition to tax, or additional amount with respect to the changed item or items on the amended return or other signed written document will not be suspended.[37.2]

[37.1] This rule is mandated by Gulf Opportunity Zone Act of 2005 (GOZA), Pub. L. 109-135, § 303, 119 Stat. 2577 (2005).

[37.2] REG-149036-04, Application of Section 6404(g) of the Internal Revenue Code Suspension Provisions, 72 Fed. Reg. 34199-01 (June 21, 2007).

Page 336. At the end of the page, add the following:

As discussed as to section 6404(e) on text pages 338-339, section 6404(h) grants the Tax Court jurisdiction to review IRS decisions as to interest abatement. The IRS took the position that this jurisdiction applies only as to section 6404(e) and not as to section 6404(g). Rev. Proc. 2005-38, 2005-2

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C.B. 81. The Tax Court held that this revenue procedure is entitled to no deference and is wrong. Corbalis v. Comm'r, 142 T.C. No. 46 (2014).

The Tax Court's interest abatement jurisdiction depends upon the IRS having made a final determination. The *Corbalis* court held that IRS Letters 2289 sent to the taxpayers were final determinations. Although the letters stated that the IRS's decision was not final and administrative proceedings were still in progress, the court concluded the letters had finality as a matter of practical effect. *See also* Gray v. Comm'r, 138 T.C. 295 (2012), *aff'd*, 723 F.3d 790 (7th Cir. 2013); Cooper v. Comm'r, 135 T.C. 70 (2010).

Corbalis also discussed aspects of the net worth requirements for interest abatement review. It did not resolve the issue, however, because additional facts remained to be established.

Page 336. Add the following at the end of footnote 43:

Section 6404 also can allow suspension of penalties. *See* T.D. 9488, 75 Fed. Reg. 33,992 (June 16, 2010) (final regulations); *see also* Rev. Proc. 2007-21, 2007-1 C.B. 613 (guidance for challenging penalties under sections 6707 and 6707A); CCA 201021021 (Apr. 20, 2010) (guidance as to sections 6111 and 6707).

*Page 337. Add new footnote 43.1 to the end of the first sentence in the first paragraph of section **3**:*

[43.1] The Tax Court has only limited jurisdiction to address issues related to statutory interest. Jurisdiction under section 6404(h) for the court to review the Commissioner's determination under section 6404(e) is lacking unless and until an assessment of interest has occurred and the Secretary has mailed the "final determination not to abate such interest." Williams v. Commissioner, 131 T.C. 54 (2008).

Page 337. Add a new subsection **d***:*

d. Sec. 6603. Deposits made to suspend running of interest on potential underpayments

Section 6603(a) provides that a taxpayer may make a deposit with the Service that may be used to pay certain taxes. Section 6603(b) provides that, to the extent that a deposit is used by the Service to pay tax, the tax shall be treated as paid on the date the deposit is made for purposes of computing interest on underpayments under section 6601.

Section 6603(c) provides that the Service will return to the taxpayer any amount of a deposit that the taxpayer requests in writing be returned unless the amount has previously been used to pay tax or the Service determines that collection of tax is in jeopardy. Section 6603(d) authorizes the payment of interest on a deposit that is returned to the taxpayer to the extent (and only to the extent) that the deposit is attributable to a disputable tax, defined in section 6603(d)(2) and (3). Section 6603(d)(4) provides that the rate of interest is the Federal short-term rate determined under section 6621(b), compounded daily.

To receive interest under section 6603, a taxpayer must comply with the provisions of Revenue Procedure 2005-18.[43.1] To the extent that a deposit properly identified exceeds the proposed liability for which it was deposited, that amount may be returned to the taxpayer, with interest under section 6603, without the need for a taxpayer to file a claim for refund. Any excess deposit will generally be returned only if tax collection is not otherwise in jeopardy.[43.2]

[43.1] 2005-1 C.B. 798.

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[43.2] See W. Scott Rogers, *Section 6603 Cash Deposits to Stop the Running of Interest on a Deficiency: Factors to Consider Before Remitting a Deposit,* Tax Management Weekly Rep., Sept. 13, 2010, p. 1221.

Page 337. Add the following to footnote 46:

; Matthews v. Commissioner, T.C. Memo. 2008-126.

Page 338, footnote 50:

The updated citation for *Hinck v. United States* is 550 U.S. 501 (2007).

Page 341. Add the following to footnote 69:

Under section 6611(e)(2), the IRS has concluded that no interest is owed on refunds paid within 45 days of the filing of an amended tax return. Prog. Mgr. Tech. Assist. (July 1, 2008), 2008 TNT 240-9.

Page 342. Add new footnote 73.1 at the end of the first paragraph:

[73.1] *But see* Coca-Cola Co. v. United States, 87 Fed. Cl. 253 (2009) (notwithstanding the 45-day rule, requiring the IRS to pay interest on an overpayment after the IRS examined and adjusted a carryback claim). This case is discussed by Michael J. Grace, Joseph M. Persinger & Gilbert M. Polt, Coca-Cola Company v. U.S.: *6411 Versus 6611 and Other Adventures of Deficiency and Statutory Interest,* 2010 Tax Management Memorandum 243.

Page 343. Add the following to the end of footnote 80:

The word "taxes" includes the accrued interest related to one's income tax. As such, the Tax Court found it has jurisdiction under section 6015(e)(1), as amended by the Tax Relief and Health Care Act of 2006, Pub. L. 109-432, div. C, § 408, 120 Stat. 3061 (2006), to review the government's denial of equitable relief under section 6015(f) from the taxpayer's liability for the accrued interest. Kollar v. Commissioner, 131 T.C. 191 (2008). Likewise, when a taxpayer executes an agreement to extend the statute of limitations on assessment, such as on a Form 872-A, the agreement applies not only to taxes but also to interest. Estate of Greenfield v. Commissioner, 297 Fed. Appx. 858 (11th Cir. 2008).

Page 343. Add a new sentence and footnote at the end of the last text paragraph:

The Tax Court also may hear interest abatement questions as part of the Collection Due Process procedures.[81.1]

[81.1] *E.g.,* Wright v. Commissioner, 571 F.3d 215 (2d Cir. 2009), *rev'g* T.C. Memo 2006-273.

Page 344. First paragraph:

The first sentence of the Problem refers to an automatic "four-month extension of time to file." The automatic extension period is now six months when an individual files a proper Form 4868 or a corporation files a proper Form 7004. Treas. Reg. §§ 1.6081-3(a) & 1.6081-4(a). This change, however, does not affect the Problem.

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Chapter 13

COLLECTION OF TAX

Page 353, footnote 33: Change the last two words from "Chapter 7" to "Chapter 15." Also add the following at the end of the footnote:

Even in the case of real transfers, transfer of the property after the federal tax lien has attached does not remove the lien. "[N]o matter into whose hands the property goes, it passes *cum onere*." United States v. Avila, 88 F.3d 229, 233 (3d Cir. 1996)(quoting United States v. Bess, 357 U.S. 51, 57 (1958)).

Page 353. Add the following text and new footnote 34.1 after the first sentence of the last paragraph:

IRS liens which are not filed in accordance with section 6323(f) are ineffective against third parties. There has been an increase in controversies in recent years as to whether the IRS properly filed its liens in particular cases.[34.1]

34.1 *E.g.*, Tracey v. United States, 394 B.R. 635 (1st Cir. B.A.P. 2008) (IRS proved by preponderance of the evidence that it had properly filed its lien); In re: Crystal Cascades Civil LLC, 398 B.R. 23 (Bankr. D. Nev. 2008) (liens did not provide constructive notice to third parties because they were filed under the name "Crystal Cascades, LLC, a corporation" rather than the correct name "Crystal Cascades Civil, LLC, a Nevada limited liability company").

Page 357. Add new footnote 46.1 at the end of the paragraph straddling pages 356 and 357:

46.1 Priority cases include Rich Financial LLC v. United States, 103 AFTR2d 2009-399 (Utah 2009) (IRS lien as to settlement fund had priority over creditor's security interest arising at the same time); Industrial Bank N.A. v. United States, 583 F. Supp. 2d 44 (D.D.C. 2008) (IRS lien had priority over bank's judgment lien); Harris N.A. v. United States, 2008-2 U.S. Tax Cas. (CCH) ¶ 50,546 (N.D. Ill. 2008) (bank's security interest had priority over IRS lien).

Page 358. Add the following at the end of the first sentence of footnote 53:

CCA 201028034 (July 16, 2010) (concluding that the IRS may continue to receive payments even after expiration of the collection limitations period when it timely levied on a determinable stream of payments); CCA 200836002 (Sept. 5, 2008) (concluding that, under certain circumstances, the IRS may make a continuous levy on a tax delinquent lawyer's income or draws from his single-member LLC).

Page 358. Add new footnote 52.1 at the end of the second sentence of the first paragraph:

52.1 Thus, the range of property subject to levy is broad. For example, (1) the IRS may levy on an IRA which the taxpayer has refused to liquidate. CCA 201030026 (July 30, 2010). However, the IRS's policy is generally not to levy on retirement accounts. CCA 201030027 (July 30, 2010). (2) The IRS may levy on both incentive stock options and non-qualified stock options. CCA 200926001 (June 26, 2009). (3) The IRS may levy on health savings accounts. CCA 200927019 (July 2, 2009). (4) The IRS may levy on Thrift Savings Plan accounts of federal employees. DOJ Office of Legal Counsel, Memorandum Opinion for Chief Counsel Internal Revenue Service (May 3, 2010).

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Page 358. Revise footnote 57 to read as follows:

[57] *See, e.g.,* Treasury Inspector General for Tax Administration, *Fiscal Year 2009 Review of Compliance with Legal Guidelines When Conducting Seizures of Taxpayers' Property* (2009-30-077) (June 8, 2009), *available at* http://www.ustreas.gov/tigta/auditreports/2009reports/200930077fr.html.

Page 362. Add new footnote 82.1 after "writs of ne exeat republica" in the last line of text:

[82.1] *See* Anthony E. Rebollo, *The Civil Arrest and Imprisonment of Taxpayers: An Analysis of the Writ of Ne Exeat Republica*," 7 Pitt. Tax Rev. 103 (2010).

Page 364. Replace the first sentence of footnote 92 with the following:

Treasury has issued final regulations under sections 6325, 6503, and 7426 as to the release of liens and discharge of property from liens. T.D. 9378, Release of Lien or Discharge of Property, 2008-1 C.B. 720.

Page 366. Add the following at the end of footnote 96:

See also Vinatieri v. Commissioner, 133 T.C. 392 (2009) (holding that the IRS abused its discretion by not releasing levy as to taxpayer in extreme economic hardship); CC-2011-005 (Nov. 22, 2010) (following *Vinatieri*).

Page 367. Revise footnote 101 to read as follow:

[101] If the unpaid amount exceeds $50,000, the IRS cannot accept an offer without first obtaining a written opinion from the IRS Chief Counsel's Office. Counsel does not have a veto power. Counsel's opinion may be negative, but the written opinion must be in the case file. IRC § 7122(b). If the IRS refers the case to the Department of Justice for prosecution or defense, the IRS loses the ability to compromise the liabilities (Justice now has exclusive compromise authority) until Justice releases the case back to the IRS. IRC § 7122(a).

Page 367. Revise footnote 102 to read as follows:

[102] *See, e.g.*, IRC §§ 7122(e)(1) (requiring independent administrative review before communicating a rejection to the taxpayer), 7122(e)(2) (allowing taxpayers to obtain review by the Appeals Office of rejections of their offers) & 7122(f) (deeming accepted any offer not rejected by the IRS within 24 months after its submission).

Page 369. Add the following new paragraph and new footnote 110.1 after the second paragraph:

The information the IRS uses to compute reasonable collection potential comes primarily from the forms the taxpayer submits with the offer. Lying on these forms can have serious consequences. Not only will the offer likely be denied but also, in egregious cases, the taxpayer may be criminally charged, convicted, and imprisoned.[110.1]

[110.1] IRC § 7201 (evasion of payment); 18 U.S.C. § 1001 (false statements made to a federal official); *see*, *e.g.*, United States v. Miller, 520 F.3d 504 (5th Cir.), *cert. denied*, 555 U.S. 876 (2008) (upholding section 7201 conviction for lying on offer).

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Page 371. Add new footnote 121.1 at the end of the second sentence of the first full paragraph:

121.1 *See*, *e.g.*, Cox v. Commissioner, 514 F.3d 1119 (10th Cir. 2008), *rev'g* 126 T.C. 237 (2006) ("no prior involvement is interpreted broadly; Appeals Officer who had considered a prior year of the taxpayer's is disqualified from considering a later year). Appeals Officers conducting CDP hearings are not "Officers of the United States" and so need not be appointed subject to the Appointments Clause of Article II, Section 2 of the Constitution. Tucker v. Commissioner, 135 T.C. 114 (2010).

Page 371. Add the following text and new footnote 121.2 after the second sentence of the first full paragraph:

To further promote impartiality, the Appeals Officer is required to avoid *ex parte* contacts with other IRS personnel as to the case.[121.2]

121.2 *E.g.*, Industrial Investors v. Commissioner, T.C. Memo. 2007-93; Moore v. Commissioner, T.C. Memo. 2006-171, *nonacq.* 2007-1 C.B. 804.

Page 371. Add the following new sentences after the second sentence of the second full paragraph:

Although "abuse of discretion" is usually considered a deferential standard, taxpayers have "won" many CDP cases. However, "won" often means only that the case is remanded to Appeals, where the taxpayer may or may not get a better result the second time around.

Page 372. Add the following at the end of footnote 134:

The Chief Counsel's Office has updated the Handbook. IRS attorneys are instructed to argue that the standard of review generally is abuse of discretion (but is de novo as to liability issues), that review should be based on the administrative record, and that remand is the appropriate remedy if the record is inadequate. Chief Counsel Notice 2014-002 (May 5, 2014).

The Tax Court, however, takes the position that its CDP review is not limited to the administrative record. *E.g*., Robinette v. Comm'r, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). In addition, the Tax Court's conception of "abuse of discretion" is notably less deferential than that of the generalist courts. *See* Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 Duke L.J. 1771, 1808-11 (2014).

Dalton v. Comm'r, 682 F.3d 149 (1st Cir. 2012), *rev'g* T.C. Memo. 2008-165, illustrates the diverging approaches. The IRS rejected an offer in compromise on the ground that the taxpayer owned valuable real estate omitted from the offer. The Tax Court acknowledged that the general standard of review is abuse of discretion, but concluded that it could review de novo whether the taxpayer owned the property. Finding that the taxpayer did not own the property, the Tax Court directed the IRS to accept the offer and to pay the taxpayer's attorneys' fees.

The circuit court thought the Tax Court's approach to be inconsistent with congressional intent. It held that "a court's role in the CDP process is simply to confirm that the IRS did not abuse its wide discretion," thus that the court should "consider whether the factual and legal conclusions reached at a CDP hearing are reasonable, not whether they are correct." 682 F.2d at 154 & 156.

Page 373. Add the following new subsection after the first paragraph:

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H. Collection During Recession

The economic downturn that began in 2008 has had an impact on federal tax collection. Many taxpayers found it difficult to meet their obligations. The IRS had to balance tax collection against the imperatives of compassion, economic recovery, and political acceptability. This led the IRS to relax the rigors of some collection approaches.[135.1] For example, under some circumstances, the IRS (1) facilitated lien discharges or subordinations for homeowners trying to refinance their mortgages or sell their homes,[135.2] (2) raised the dollar thresholds that would trigger filing notices of tax liens, (3) made it easier to obtain lien withdrawals after payment, and (4) increased the availability of installment agreements to struggling businesses.[135.3]

The IRS expanded this Fresh Start Initiative in 2012 and 2013, facilitating penalty relief, installment agreements, and offers in compromise.[135.4] In addition, the IRS raised the minimum tax debt needed in order to file notice of the tax lien from $5000 to $10,000 or more in many cases.[135.5]

135.1 *See* William D. Elliott, *IRS Collection in the Current Recession,* Taxes, Mar. 2011, p. 9.

135.2 IR-2008-141 (Dec. 16, 2008).

135.3 IR-2011-20 (Feb. 24, 2011).

135.4 IR-2012-31 (Mar. 7, 2012).

135.5 SBSE-05-0313-014 (Mar. 2013); SBSE-05-0314-0016 (Mar. 18, 2014).

Page 374. Add the following at the end of footnote 139:

> *See generally* Kovacs v. United States, 614 F.3d 666 (7th Cir. 2010) (holding that each improper attempt by the IRS to collect is an independent violation of section 7433).

Page 380. Add the following after the paragraph straddling pages 380 and 381:

In 2009, controversy attending the program led to its abandonment, at least temporarily. The rationales stated for abandonment include that IRS personnel have greater flexibility in handling cases and that IRS collection is more cost effective than private collection. Legislation was introduced in 2014 to revive the program. Although the proposal had supporters on both sides of the political aisle, it was not enacted.

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Chapter 14

THE SECTION 6672 "TRUST FUND RECOVERY PENALTY"

Page 384. Replace footnote 4 with the following text:

[4] Reg. *section 301.7701-2*(c)(2)(iv) was added to treat disregarded entities, such as single-member LLCs as separate corporations for the purposes of employment tax liability (though not for income tax purposes). T.D. 9356, Disregarded Entities; Employment and Excise Taxes, 72 Fed. Reg. 45,891 (Aug. 16, 2007). This rule only applies to wages paid on or after January 1st, 2009. For wages paid prior to January 1, 2009, the sole owner of an LLC that did not elect to be taxed as a corporation is individually liable for all unpaid employment taxes. McNamee v. Department of the Treasury, 488 F.3d 100 (2d Cir. 2007); Littriello v. United States 484 F.3d 372 (6th Cir. 2007). If state law provides that the owner of a single-member LLC is not liable for the debts of the business, the IRS may not pursue the member individually except to the extent the owner might be liable under section 6672. *See* United States v. Galletti, 541 U.S. 114 (2004) (general partners liable for partnership's employment tax liability because general partners jointly and severally liable for partnership's obligations under state law).

Page 385. Add the following at the end of footnote 10:

The government may also seek to have criminal charges filed against a person for failing to pay assessed trust fund recovery penalties. IRC §§ 7201 & 7202. Based on the number of recently reported cases, it is apparent the government is pursuing this avenue with added zeal. See, e.g. United States v. Easterday, 539 F.3d 1176 (9th Cir. 2008).

Page 385. Add the following at the end of footnote 11:

Section 6656(a) establishes a penalty to be imposed upon "failure … to deposit (as required by this title or by regulations...) on the date prescribed therefor any amount [required to be deposited]." Reg. § 31.6302-1(h)(2)(ii) requires that deposits over $200,000 be made by electronic funds transfer. In several cases, taxpayers have deposited required amounts (over $200,000) timely and in correct amount, but did so manually, not by electronic funds transfer. The courts have upheld imposing the section 6656(a) penalty in such cases. *E.g.*, Commonwealth Bank & Trust Co. v. United States, 114 AFTR 2d 5091 (W.D. Ky. 2014).

Page 388. Add the following text to footnote 24, after "(1st Cir. 2000),":

; in Savona v. United States, 2007 U.S. Dist. LEXIS 76795 (S.D. Cal. 2007), the government was denied summary judgment on whether a CEO was a responsible person as a matter of law even though he had check signing authority and had ability to hire and fire employees. The court noted he did not have *significant* control over the businesses' financial affairs because the founder of the business (and former CEO) was the only person able to direct which creditors would get paid.

Page 389. Add the following at the end of footnote 27:

The defense is much harder to assert when the target is a high-level person. For example, a president and chief operating officer of an airline argued that the company's board of directors had ordered him to pay only those debts needed to keep planes in the air and had divested him of authority to pay taxes. This contention was rejected on both the facts and the law. Ferguson v. United States, 484

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F.3d 1068 (8th Cir. 2007) (distinguishing United States v. Bisbee, 245 F.3d 1001 (8th Cir. 2001), on the ground that the *Bisbee* involved an individual who had never had the requisite authority in the first place).

Page 390. Add after last sentence of page (". . . made no effort to deal with the situation.") the following text:

Even if the responsible person did not have notice that taxes were past due, knowledge of prior failures to pay payroll taxes (even if corrected) will support a finding of reckless disregard or gross negligence if the director fails to take additional steps to guard against such failures in the future.[36.1]

36.1 Verret v. United States, 542 F. Supp. 2d 526 (E. D. Tex. 2008), *aff'd,* 2009 U.S. App, LEXIS 3966 (5th Cir. 2009).

Page 391. Add the following text after last sentence of page (". . . the tax had already been paid."):

Reasonable cause may also be shown if the business was suffering financial hardships and was unable to pay tax if the business exercised ordinary care and prudence in attempting to pay the tax liability. While a court considers all the facts and circumstances, favoring other creditors over the government weighs against a finding of reasonable cause but a willingness to decrease expenses and personnel in an attempt to pay obligations weighs in favor of finding reasonable cause.[44.1]

44.1 Staff It, Inc. v. United States, 482 F.3d 792 (5th Cir. 2007) (no reasonable cause when business paid all creditors except the government and expanded operations despite failure to pay trust fund taxes); East Wind Industries Inc. v. U.S., 196 F.3d 499 (3d Cir. 1999) (reasonable cause to abate trust fund recovery penalty found when business scaled back operations, and only paid debts/employees necessary to stay in business long enough to pay unpaid employment taxes).

Page 393. Add the following text just before heading IV:

A related argument is that there cannot be willfulness if the funds of the business are encumbered. The prevailing view is that "funds are encumbered only where the taxpayer is legally obligated to use the funds for a purpose other than satisfying the preexisting employment tax liability and if that legal obligation is superior to the interest of the IRS in the funds." Honey v. United States, 963 F.2d 1083, 1090 (8th Cir. 1992); *see also Nakano, supra*, 742 F.3d at 1211-12 (holding that the business's assets were not encumbered as a result of bankruptcy).

Page 394. Correct the third sentence of paragraph 2 to read as follow and add footnote 55.1 at end:

"In addition to the sixty-day letter, the IRS encloses a Form 2751that provides the specifics of the proposed assessments and allows the taxpayer to consent to the penalty assessment."[55.1]

55.1 The execution of a Form 2751 does not necessarily act as a waiver of the sixty-day preliminary notice requirement for a valid tax assessment even though the form states that the taxpayer waives the privilege of filing a claim for abatement after assessment. United States v. Seidel, 2008 U.S. Dist. LEXIS 61799 (N.D. Cal. 2008).

Page 394. Add the following at the end of the second paragraph:

It is enough that the IRS properly mails the notice. If it does so, it is immaterial whether the responsible person actually receives the notice. [56.1]

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[56.1] Mason v. Commissioner, 132 T.C. No. 14 (2009).

Page 396. Add the following after the second full paragraph of the page and as a new paragraph:

In Announcement 2008-111, 2008-2 C.B. 1224, the IRS declared that it would conduct a two-year test of arbitration and mediation procedures for Trust Fund Recovery Penalty Cases in Appeals, starting December 1, 2008. Mediation and arbitration may be requested either by the taxpayer or by Appeals to mediate or arbitrate unresolved issues at the conclusion of an appeals procedure. Mediation and arbitration may not be used to resolve legal issues, such as whether a taxpayer was required to collect, account, and pay over employment taxes or whether a taxpayer willfully attempted to evade or defeat payment of such taxes, but may be used to resolve:

- Factual determinations whether a person was required to collect, account for, and pay over employment taxes, such as whether the taxpayer was an officer, director, or shareholder of the business; had the authority to sign checks; exercised significant control over the corporation's financial affairs; and other factors.

- Factual determinations whether the person willfully failed to collect such tax or to evade such taxes, such as whether the taxpayer was aware of the failure to pay over the tax, or was aware of payments to other creditors.

If a taxpayer moves for mediation or arbitration, the taxpayer should submit a written request stating the taxpayer's position and explanations for its position. The new arbitration/mediation program will initially be available only in Atlanta, Chicago, Cincinnati, Houston, Indianapolis, Louisville, Phoenix and San Francisco. After a two-year trial, Appeals will evaluate the program for necessary adjustments and determine whether the program should be made permanent.

Page 396. Add the following at the end of the page:

CDP hearings in Tax Court are increasingly emerging as important vehicles for challenging section 6672 assessments on procedural grounds, as opposed to the underlying liability. *E.g.*, Moosally v. Comm'r, 142 T.C. No. 10 (2014) (Appeals Officer was not impartial as required by section 6320(b)(3));, Conway v. Comm'r, 137 T.C. 209 (2011), *aff'd*, 552 Fed. Appx. 724 (9th Cir. 2014), *cert. denied*, 82 U.S.L.W. 3657, 3684 & 3685 (May 27, 2014) (notices were not validly issued).

The merits of section 6672 assessments can be challenged in CDP hearings only if the taxpayer had not previously had the opportunity to contest the merits. This happened, for example, in Lepore v. Comm'r, T.C. Memo. 2013-135 (in which the notice was properly delivered to the taxpayer's residence but misplaced by the taxpayer's teenage son, who did not tell the taxpayer about arrival of the notice), but not in Giaquinto v. Comm'r, T.C. Memo. 2013-150 (in which the taxpayer knew of and deliberately failed to claim delivery of the appropriately mailed notice).

Page 398. Add the following text after the last sentence of the first full paragraph (". . . unless the taxpayer waives this restriction or there is a jeopardy."):

In addition, the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, P. L. 110-28, § 8243(a), (b), 121 Stat. 200 (2007), amended section 6330(f) and (h) (applicable to levies served on or after Sept. 22, 2007) to allow a pre-hearing levy when the IRS has served a "disqualified employment tax levy." A disqualified employment tax levy is a levy connected to the collection of employment taxes "for any taxable period if the person subject to the levy . . .

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requested a hearing . . . with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served."

Page 402. Add new footnote 91.1 after the last sentence of the second full paragraph "until they have been fully satisfied.[91.1]*")*:

> **91.1** The IRS has confirmed that it will allow businesses to designate that their payments be applied to the trust fund liability and that the IRS will credit the payments to the trust fund liability even though money is still owed on the non-trust fund liability. I.R.S. Off. Mem. 200838027 (Sept. 9, 2008), *available at* http://www.irs.gov/pub/irs-wd/0838027.pdf.

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Chapter 15

TRANSFEREE AND FIDUCIARY LIABILITY

Page 412: Replace first paragraph with the following:

In this spirit, a number of defenses have been recognized at least by some courts. The cases are divided as to whether reliance on the advice of counsel and the fiduciary's lack of actual or constructive knowledge of the IRS's claim obviate fiduciary liability.[18] Liability will not be imposed if the debts paid by the fiduciary had higher priority than the government's tax claims.[19]

[18] *Compare* McCourt v. Commissioner, 15 T.C. 734 (1950) (no liability) *with* United States v. Renda, 709 F.3d 472, 484 (5th Cir. 2013) (liability).
[19] *See* United States v. Weisburn, 48 F. Supp. 393 (E.D. Pa. 1943).

*Page 413. Add the following as a new paragraph after the paragraph under heading **2. Federal Non-fraudulent-conveyance Statute**:*

Other provisions can come into play in particular situations. For example, transferee liability can arise in certain situations involving transfer of assets between private foundations.[26.1] The IRS has ruled that distributions of assets from one private foundation to another which were part of a court-approved settlement did not give rise to such transferee liability.[26.2] In addition, there is the successor liability doctrine, a state law rule under which a legal entity which, in substance, is a continuation of a prior entity may be liable for that prior entity's unpaid tax liabilities.[26.3]

[26.1] IRC § 507(b)(2), (c).

[26.2] PLR 200808043 (Feb. 22, 2008), 2007 PLR LEXIS 2486.

[26.3] For example, one corporation – after an IRS levy – discontinued its operations and transferred its contracts to a newly formed corporation. The new corporation began operating the same business as the prior corporation, with the same equipment, customers, and employees. The IRS has ruled that the new corporation is liable for the old corporation's unpaid taxes under the successor liability doctrine. No further assessment and no additional CDP notices are required. The actions taken as to the old corporation carry over to the successor. ILM 200847001, 2008 TNT 227-13 (applying the law of Puerto Rico).

Page 414. Add the following new sentence and footnote at the end of the second paragraph:

Similar issues may arise from the sales of assets in the context of receiverships.[27.1]

[27.1] For example, in Whelco Industrial, Ltd. v. United States, 526 F. Supp. 2d 819 (N.D. Ohio 2007), the taxpayer had purchased assets from another party in a receivership sale. The IRS had a lien against the seller, and the taxpayer brought a quiet title action to remove the liens against the transferred property. The court concluded that state, not federal, law controlled and that the taxpayer was not a successor corporation under the applicable state law. Nonetheless, the court refused to disturb the liens because the IRS was not a party to the receivership proceeding as required by section 7425(a).

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Page 415. Add new footnote 30.1 at the end of the second complete paragraph:

30.1 *E.g.,* United States v. Weisman, 102 AFTR2d 2008-6874 (M.D. Fla. 2008) (rejecting the government's constructive fraud theory on summary judgment because the transferor was not insolvent but allowing the government's actual fraud theory to proceed to trial).

Page 415. Add the following new paragraph just before heading 1:

The importance of the particulars of state law was underlined by litigation as to so called Midco tax shelters used to avoid paying corporate income tax on some sales of business assets. The government has attacked such shelters on fraudulent conveyance grounds. *E.g.,* Diebold Foundation, Inc. v. Commissioner, 736 F.3d 172 (2d Cir. 2013), *vacating & remanding* Salus Mundi Foundation v. Commissioner, T.C. Memo. 2012-61; Julia R. Swords Trust v. Commissioner, 142 T.C. 317 (2014). The results have been mixed, in part because of state law differences.

Page 416. Add the following at the end of footnote 33:

; *see also* Rubenstein v. Commissioner, 134 T.C. 266 (2010) (holding that care rendered for many years by a transferee son for his aged transferor father did not constitute adequate consideration; also rejecting the transferee's equitable estoppel argument based on the IRS's previous decision not to attempt to effect collection as to the property).

Page 421. Add new footnote 57.1 at the end of the last sentence of the paragraph under heading ***E. Privity***:

57.1 *E.g.*, United States v. Davenport, 484 F.3d 321 (5th Cir.), *cert. denied*, 552 U.S. 1076 (2007) (holding that a transferee contesting transferee liability for gift tax was bound by a Tax Court decision as to gift tax liability of the transferor). *But see* United States v. Botefuhr, 309 F.3d 1263 (10th Cir. 2002) (holding that a transferee was not bound by stipulations made by the transferor in a prior proceeding).

Page 422. Add the following at the end of footnote 62:

Also compare United States v. Marshall, 771 F.3d 854 (5th Cir. 2014) (interest not capped) *with* Poinier v. Commissioner, 858 F.2d 917 (3d Cir. 1988) (interest is capped).

Page 423. Add the following to the end of footnote 65:

See also Schussel v. Commissioner, 758 F.3d 82 (1st Cir. 2014); IRS Email Advice ECC 200848068 (Aug. 19, 2008), 2008 TNT 232-46.

Page 423: Add the following new paragraph and footnotes after the current last paragraph:

Fraudulent conveyance actions are equitable in nature. Thus, jury trial is not available. [68.1] Neither state nor section 6901 statutes of limitation control. Instead, a fraudulent conveyance action with respect to assessed but unpaid federal taxes is timely if brought within the ten-year limitation period under section 6502(a). [68.2]

68.1 *E.g.*, United States v. Harrison, 273 Fed. Appx. 315 (5th Cir.), *cert. denied*, 129 S. Ct. 469 (2008).

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68.2 *E.g.*, United States v. Holmes, 727 F.3d 1230 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1938 (2014).

Page 424. Add new footnote 68.1 at the end of the second sentence of the first paragraph:

68.3 *E.g.*, United States v. Lena, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,403 (S.D. Fla. 2008). For defensive measures, see William D. Elliott, *Coping with a Nominee Lien,* Taxes, May 2011, p. 13.

Page 424: Add the following at the beginning of footnote 69 (erroneously given as footnote 60):

Dalton v. Commissioner, 682 F.3d 149 (1st Cir. 2012), *rev'g* 135 T.C. 393 (2010);

Page 424. Add the following paragraph and footnotes after the first paragraph:

The general federal tax lien attaches to all of the tax delinquent's property, including property held by a third party as the taxpayer's nominee or alter ego. [69.1] "A nominee is one who holds bare legal title to property for the benefit of another." [69.2] State law, not federal law, provides the substantive rules as to who is a nominee or an alter ego. [69.3] However, state law and federal common law as to nominees typically are "so similar that the distinction is of little moment." [69.4]

69.1 *E.g.,* G.M. Leasing Corp. v. United States, 429 U.S. 338, 350-51 (1977).

69.2 Scoville v. United States, 250 F.3d 1198, 1202 (8th Cir. 2001) (citations omitted).

69.3 *E.g.,* Aquilino v. United States, 363 U.S. 509, 512-13 (1960); Fourth Inv. LP v. United States, 720 F.3d 1058, 1067 (9th Cir. 2013).

69.4 Shades Ridge Holding Co., Inc. v. United States, 888 F.2d 725, 728 (11th Cir. 1989).

Page 424. Add the following new last sentence at the end of the second paragraph:

Fraudulent conveyances may also be attacked under the Bankruptcy Code although not always to the benefit of the IRS.[70.1]

70.1 In one case, the bankruptcy trustee, under the bankruptcy fraudulent-transfer provision, 11 U.S.C. § 548(a)(1)(B), was permitted to avoid the debtor's election to waive an NOL carryback that would have produced a tax refund. The Government unsuccessfully argued that an NOL is not a property right, that waiver of an NOL is not a transfer to the IRS, and that waiver under section 172(b)(3) is irrevocable such that waiver cannot be avoided. United States v. Kapila, 402 B.R. 56 (S.D. Fla. 2008).