Tax Controversies
Practice and Procedure

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TAX CONTROVERSIES: PRACTICE AND PROCEDURE
Leandra Lederman & Stephen W. Mazza
Fourth Edition
2019 Letter Update

This Letter Update replaces the 2018 Letter Update. It updates the 4th edition of the Tax Controversies: Practice and Procedure casebook through July 1, 2019. After two brief overviews of recent major legislative changes, this Letter Update provides updates organized by chapter and page number of the casebook.

Taxpayer First Act of 2019: A Brief Overview

On July 1, 2019, President Trump signed into law the Taxpayer First Act of 2019, Pub. L. No. 116-25, 133 Stat. 981 (2019) (the "Taxpayer First Act"). The bill may be best known for a provision that ultimately was not included in the enacted law—codification of the Free File program, potentially preventing the IRS from developing its own free software. *See* Jad Chamseddine, *Senate Clears IRS Reform Bill for Trump's Signature*, 163 TAX NOTES 1886, 1886-87 (2019). However, even without that provision, the Taxpayer First Act contains four titles and over 40 sections, virtually all of which focus on aspects of tax procedure. Individual changes that affect the material in the casebook are discussed below in connection with the updates to Chapters 1, 3, 4, 5, 6, 12, 14, 15, and 17. The discussion here provides a brief, broad overview, as many of the individual sections are too specific to warrant individual discussion in a casebook.

Title I of the Taxpayer First Act is entitled "Putting Taxpayers First." It includes provisions titled "Independent Appeals Process," "Improved [IRS] Service," "Sensible Enforcement," "Organizational Modernization," and "Other Provisions." Title II is called "21st Century IRS." It generally focuses on IRS cybersecurity and its electronic systems, with the sections it includes grouped under five subtitles.

Title III, "Miscellaneous Provisions" contains three subtitles: "Reform of Laws Governing Internal Revenue Service Employees," "Provisions Relating to Exempt Organizations," and "Revenue Provision." Title IV is brief, simply providing for computation of the budgetary effects of the law. For further reading that summarizes the principal provisions of the Act, see *Special Study on Taxpayer First Act of 2019*, Thomson Reuters Tax & Accounting (June 17, 2019), https://tax.thomsonreuters.com/news/special-study-on-taxpayer-first-act-of-2019/.

Tax Cuts and Jobs Act of 2017: A Brief Overview

As is well known, on December 22, 2017, the President signed into law the legislation known as the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (the "2017 Tax Act"). By that time, the fourth edition of the casebook was already in press. The 2017 Tax Act included significant changes to the individual and corporate tax, as well as to the rules relating to U.S. corporations with overseas operations. However, the 2017 Tax Act included only minor revisions to rules relating to tax practice and procedure. A couple of changes worthy of note are mentioned briefly in the material below relating to page 722 in Chapter 14.

In addition, several of the substantive tax law changes in the 2017 Tax Act have an indirect effect on some of the material in the casebook. For example, the 2017 Tax Act increased the standard deduction and eliminated the personal exemption for tax years 2018 through 2025. *See* I.R.C. §§ 63(c) (standard deduction); 151(d)(5) (personal exemption). Those revisions also affect the return-filing threshold for individual taxpayers, mentioned on page 97 in Chapter 3. During this time period, the filing thresholds for single individuals and married couples filing jointly is based on the applicable standard deduction amount, rather than the combined amounts of the standard deduction and personal exemption. I.R.C. § 6012(f).

Casebook Updates

Chapter 1

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The Taxpayer First Act of 2019 (the "Taxpayer First Act") includes several provisions that envision an overhaul of some of the IRS's operations. Depending upon the proposals released by the Treasury Department, we may see the first major set of changes to the IRS structure since the Internal Revenue Service Restructuring and Reform Act of 1998 ("IRS Reform Act") was enacted. The Taxpayer First Act requires the Secretary of the Treasury to submit a written IRS reorganization plan to Congress by September 30, 2020. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1302. The plan must "prioritize taxpayer services to ensure that all taxpayers easily and readily receive the assistance that they need"; "streamline the structure of the agency including minimizing the duplication of services and responsibilities within the agency"; and "best position the Internal Revenue Service to combat cybersecurity and other threats." *Id*. At the same time, the Taxpayer First Act repeals a mandate in the IRS Reform Act that requires the IRS to organize its operations around particular groups of taxpayers. *Id*. According to a House Committee report relating to an earlier version of the Taxpayer First Act:

> The Committee believes that the current IRS organizational structure is one of the factors contributing to the inability of the IRS to properly serve taxpayers. The Committee believes that the current structure needs to be modernized and streamlined to help enable the IRS to better serve taxpayers and provide the necessary level of services and accountability to taxpayers in an efficient manner. Accordingly, the Committee believes it appropriate to require the IRS to submit a comprehensive reorganization plan. The Committee believes that the revised structure should ensure taxpayers' rights are protected, information is kept secure, and that the IRS is approachable for taxpayers to ask questions and get assistance. Thus, the Committee seeks to provide flexibility to the IRS to reorganize its operations after the Commissioner determines that another organizational structure, different from past structures, would better serve taxpayers.

H.R. REP. NO. 116-1957, at 53-54 (2019). Compare this legislative history to that reproduced on pages 7 and 8 of the casebook relating to the IRS Reform Act. Both are heavily focused on taxpayer service.

A former IRS Commissioner has warned against a significant IRS reorganization, which he believes could interfere with the IRS's current projects and negatively impact enforcement. Allyson Versprille, *Tax Veterans Caution Mnuchin Against Major IRS Reorganization*, DAILY TAX REP. (BLOOMBERG LAW), Jul. 23, 2019. The task of drafting the reorganization plan may fall to the new IRS Commissioner, Charles Rettig, a tax lawyer from Beverly Hills, California. He was confirmed by the Senate in September of 2018. Robert Lee & Kaustuv Basu, *Ushering in the Rettig Era: What's Next for the IRS?*, 179 DAILY TAX REP. (BNA), at 6 (Sept. 14, 2018). According to one account, he is the first practicing lawyer to head the IRS in two decades. *Id*.

The Taxpayer First Act also mandates the IRS to submit a set of comprehensive customer service strategies within one year. The legislation envisions strategies that would create secure online and self-service options that taxpayers can access, as well as an improved system for responding to taxpayers' telephone calls. The IRS is also required to develop improved materials and training for IRS customer service employees. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1101.

Page 11:

Revenue Procedure 2019-2, 2019-1 I.R.B. 106, supersedes the 2018 updates to Revenue Procedure 2016-2, 2016-1 I.R.B. 102, cited in the casebook. The 2019 and 2018 updates do not contain significant revisions.

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On May 9, 2019, the House Ways and Means Committee held a hearing on "Understanding the Tax Gap and Taxpayer Noncompliance." Ways and Means Committee (May 9, 2019), https://waysandmeans.house.gov/legislation/hearings/understanding-tax-gap-and-taxpayer-noncompliance. Four witnesses testified—the Honorable J. Russell George, Treasury Inspector General for Tax Administration (TIGTA); James R. McTigue, Director, Tax Issues, Strategic Issues, Government Accountability Office (GAO); Benjamin Herndon, Chief Research and Analytics Officer, IRS; and Kenneth Wood, former IRS Deputy Associate Chief Counsel, Office of Chief Counsel (International)—and their testimony is linked there. *Id.* J. Russell George testified that the IRS's diminished resources have negatively affected tax compliance:

> Given the importance of audits to tax compliance, both because of the extent to which underreporting is the most significant component of the Tax Gap and because of the significant positive multiplier compliance effect from audits, it is important that the IRS has the resources to maintain or increase its audit coverage. However, due to diminished resources, IRS Examination personnel have decreased 38 percent from 13,138 examiners in FY 2010 to 8,205 examiners in FY 2017. The number of audits has also decreased by 32 percent from 1.6 million in FY 2013 to 1.1 million in FY 2017. Proposed assessments have steadily

declined over the last 10 years, from $44 billion in FY 2007 to $29 billion in FY 2017.

Understanding the Tax Gap and Taxpayer Noncompliance Before the H. Comm. On Ways and Means 3 (May 9, 2019), https://www.treasury.gov/tigta/congress/congress_05092019.pdf.

James McTigue and Benjamin Herndon both referred to the importance of third-party reporting, among other things, as important contributors. *See* U.S. Gov't Accountability Office, *GAO-19-558T, Tax Gap: Multiple Strategies Are Needed to Reduce Noncompliance, Statement of James R. McTigue, Jr., Director, Strategic Issues* 7 (2019), https://www.gao.gov/assets/700/698969.pdf [hereinafter GAO report] ("[o]ur past work has found that three important factors contributing to the tax gap are the extent to which income is reported to IRS by third parties, IRS's resource trade-offs, and tax code complexity."); *Written Testimony of Dr. Benjamin D. Herndon, Chief Research and Analytics Officer, Internal Revenue Service Before the House Ways and Means Committee On the Tax Gap* (May 9, 2019), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2019Final%20Herndon%20testimony%20HWM%20050919%20--%20written.pdf ("[S]tatistics [he cited] provide further confirmation that 'visibility' of income sources and financial transactions is a significant contributor to increasing the compliance rates, and enhanced information reporting is one of the few means of sizably increasing the compliance rate."). The GAO report also notes that "IRS's budget declined by about $2.6 billion (18.8 percent) from fiscal years 2011 through 2019, and IRS's budget for fiscal year 2019 is less than its fiscal year 2000 budget, after adjusting for inflation . . . ." *See* GAO Report, *supra*, at 9.

Page 18:

In November 2017, the IRS released an updated version of the Taxpayer Attitude Survey that was last administered by the IRS Oversight Board in 2014, and it produced another one in November 2018. *See* IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2018* (Nov. 2018), https://www.irs.gov/pub/irs-pdf/p5296.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2017* (Nov. 2017), https://www.irs.gov/pub/irs-soi/17ctas_report.pdf. The response to the question "What Is an Acceptable Amount to Cheat on Income Taxes?"—a very similar question to the one discussed in the casebook—was as follows:

	2018	2017
"A little here and there"	10%	9%
"As much as possible"	3%	3%
"Not at all"	85%	88%
"No opinion"	2%	<1%

IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2018*, *supra* at 12 ("Margin of error is +/- 2.2% for blended online/phone respondents."); IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2017*, *supra* at 4, 10 ("Margin of error: +/- 2.18% at 95% confidence level."). In 2017, the IRS stated, "There has been very little change in this attitude over the past six years." IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2017*, *supra* at 10. This reflects the margin for error, which, as the casebook states, was +/- 4% for the IRS Oversight Board results reported there.

Page 19:

The updated IRS audit rates for 2017 and 2018 are as follows:

Fiscal Year	Audit Rate for Individuals	Audit Rate for Corporations with Assets Under $10 Million	Audit Rate for Corporations with Assets $10 Million and Over
2017	0.60 percent	0.70 percent	7.90 percent
2018	0.60 percent	0.60 percent	8.10 percent

See INTERNAL REVENUE SERVICE DATA BOOK 23 tbl. 9a (2017), https://www.irs.gov/pub/irs-soi/17databk.pdf. *See* INTERNAL REVENUE SERVICE DATA BOOK 23 tbl. 9a (2018), https://www.irs.gov/pub/irs-soi/18databk.pdf. For further reading on the decline in IRS audit rates, see Jad Chamseddine, *IRS Audit Rate Continues to Drop*, 102 TAX NOTES 1436, 1436 (2019) ("The decline in audits can especially be seen in the business world, where the IRS examined 1.3 percent of all corporation returns in fiscal 2014 compare with 0.88 percent in fiscal 2018.").

Page 20:

The updated IRS enforcement statistics for 2016 are as follows.

Fiscal Year	Notices of Federal Tax Lien	Levies	Seizures
2016	464,000	869,000	436

TIGTA, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2016, at 43-44 (2017), https://www.treasury.gov/tigta/auditreports/2017reports/201730072fr.pdf. The 2018 report does not include those statistics. *See* TIGTA, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2017, at 44 (2018)**.**

Page 21:

The IRS budget statistics for 2017 and 2018 and all figures—including the 2009 through 2016 figures in the casebook—updated to 2019 dollars are as follows:

Fiscal Year	IRS Budget (absolute dollars, in thousands)	IRS Budget (2019 dollars, in thousands)
2009	$11,522,598	$13,757,220
2010	$12,146,123	$14,267,639
2011	$12,121,830	$13,803,395
2012	$11,816,696	$13,183,114
2013	$11,198,611	$12,313,199
2014	$11,290,612	$12,216,187
2015	$10,945,000	$11,828,203
2016	$11,235,000	$11,990,344
2017	$11,235,000	$11,740,236
2018	$11,158,703	$11,382,493

DEP'T OF TREASURY, BUDGET IN BRIEF 1 (2019), https://www.treasury.gov/about/budget-performance/budget-in-brief/bib19/16.%20irs%20fy%202019%20bib.pdf (reporting absolute dollar figures for 2018 and 2019). *See also id.* (reporting that IRS requested budget for 2019 is $11,135,000,000). Inflation calculations were performed using *U.S. Inflation Calculator*, http://www.usinflationcalculator.com.

Chapter 2

Pages 40-41:

Altera Corp. v. Commissioner, 145 T.C. 91 (2015) (reviewed by the court), is cited and briefly discussed on pages 40 to 41 of the casebook, including in footnote 5 on page 41.[1] As page 41 notes, in *Altera*, the Tax Court had held in a 14-0 opinion that cost-sharing regulations under Code section 482 were invalid under the Administrative Procedure Act because they "fail[ed] to satisfy *State Farm*'s reasoned decisionmaking standard." *Id.* at 133. In July 2018, the Court of Appeals for the Ninth Circuit reversed the Tax Court in a 2-1 decision. Altera Corp. v. Comm'r, 2018 U.S. App. LEXIS 20524 (9th Cir. Jul. 24, 2018) (opinion withdrawn). One of those two judges, Judge Stephen Reinhardt, had passed away several months before the opinion was published. *See* Chris Walker, *Nearly Four Months After His Death, Judge Reinhardt Casts the Deciding Vote in an Important Tax Exceptionalism Case: Altera v. Commissioner of Internal Revenue*, NOTICE & COMMENT BLOG (Jul. 24, 2018), https://yalejreg.com/nc/nearly-four-months-after-his-death-judge-reinhardt-casts-the-deciding-vote-in-an-important-tax-exceptionalism-case-altera-v-commissioner-of-internal-revenue/. On August 2, 2018, the Ninth Circuit substituted

[1] In addition to the July 2016 amicus brief mentioned in footnote 5 on page 41 of the casebook, Professor Lederman participated in a September 2018 amicus brief in *Altera*. *Supplemental Brief of Amici Curiae Reuven Avi-Yonah, Lily Batchelder, Joshua Blank, Noel Cunningham, Victor Fleischer, Ari Glogower, David Kamin, Mitchell Kane, Michael Knoll, Rebecca Kysar, Leandra Lederman, Zachary Liscow, Ruth Mason, Susan Morse, Daniel Shaviro, Stephen Shay, John Steines, David Super, Clinton Wallace, Bret Wells, in Support of Respondent-Appellant Commissioner* (brief filed Sept. 28, 2018), https://ssrn.com/abstract=3260082.

Judge Susan Graber for Judge Reinhardt. Ninth Circuit General Order 3.2h, Altera Corp. & Subsidiaries v. Comm'r, No. 16-70496 (9th Cir. Aug. 2, 2018), https://appellatetax.com/wp-content/uploads/2018/08/Altera-Ninth-Circuit-order-substituting-Judge-Graber.pdf. On August 7, 2018 the court withdrew its July 2018 opinion. Altera Corp. v. Comm'r, 898 F.3d 1266 (9th Cir. 2018).

On June 7, 2019, the Ninth Circuit issued a new opinion. Altera Corp. v. Comm'r, No. 16-70496, 2019 U.S. App. LEXIS 17143 (9th Cir. June 7, 2019). The new opinion was also 2-1, reversing the Tax Court, with Judge Kathleen O'Malley again dissenting. *Id.* at *5. The majority found that the 482 regulations in question did have the force of law, stating:

> Ultimately, questions of deference boil down to whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218 . . . (2001). "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227 (quoting *Chevron*, 467 U.S. at 843-44).
>
> . . . Section 482 does not speak directly to whether the Commissioner may require parties to a QCSA [qualified cost-sharing arrangement] to share employee stock compensation costs in order to receive the tax benefits associated with entering into a QCSA. Thus, there is no question that the statute remains ambiguous regarding the method by which Treasury is to make allocations based on stock-based compensation.

Id. at *26-27. Altera has filed a petition for rehearing *en banc*. *See* Aysha Bagchi, *Altera Asks Ninth Circuit to Revisit Landmark Tax Case*, DAILY TAX REP. (BLOOMBERG LAW), Jul. 22, 2019.

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The *Altera* litigation discussed in the casebook and just above reflects a trend in tax controversy litigation to make challenges based on the Administrative Procedure Act (APA). *Cf.* Jasper L. Cummings, Chevron, *the APA, and Tax Regulations*, 162 TAX NOTES 1463, 1465 (2019) ("The number of *Chevron* and APA opinions issued just in the last 12 months, plus the 'scholarly' articles on those subjects published in the same period, would require at least a day to read, and longer to assimilate if that were possible.").

On March 5, 2019, the Treasury Department issued a "Policy Statement On the Tax Regulatory Process," DEPT. OF THE TREAS., POLICY STATEMENT ON THE TAX REGULATORY PROCESS (2019), https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf. In that statement, Treasury and the IRS "reaffirm[ed] their commitment to a tax regulatory process that encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law. Consistent with those important regulatory principles, the Department of the Treasury and the IRS hereby clarify and affirm their commitment to sound regulatory practices." *Id.* at 1. For example, the Policy Statement "commit[s] to includ[ing] a statement of good cause when issuing any future temporary regulations under the Internal Revenue Code." *Id.*

The Policy Statement also says that "[i]n litigation before the U.S. Tax Court, as a matter of policy, the IRS will not seek judicial deference under Auer v. Robbins, 519 U.S. 452 (1997) or Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to interpretations set forth only in subregulatory guidance." *Id.* at 2. The *Auer* issue is discussed further below.

As a further guide to its contents, the headings of the Policy Statement that reflect its principal contents are "Commitment to Notice-and-Comment Rulemaking"; "Limited Use of Temporary Regulations"; "Proper Scope of Subregulatory Guidance Documents"; and "Limit on Notices Announcing Intent to Propose Regulations." *Id.* at 1-3. For further discussion of the Policy Statement, see Jonathan Curry, *Treasury Tightens Tax Reg Procedural Guidelines*, 47 TAX NOTES 1224 (2019); Donald L. Korb et al., *Is Treasury's Policy Statement on the Regulatory Process Pro-Taxpayer?*, 163 TAX NOTES 565 (2019); Marie Sapirie, *Changes in IRS Guidance Practices Reflect APA Concerns*, 163 TAX NOTES 349 (2019).

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Recently, Supreme Court observers have wondered whether the Court was poised to overrule *Chevron.* For example, a November 2018 *Tax Notes* article reports:

> The *Chevron* deference doctrine got short shrift in a railroad tax case before the Supreme Court November 6, despite the Eighth Circuit decision that the IRS wasn't entitled to deference in this case.
>
> Chief Justice John G. Roberts Jr. was the only justice to touch on the topic during oral arguments, noting that the statute might not be ambiguous, which is the threshold for determining *Chevron* deference.

Stephanie Cumings, *Justices Give* Chevron *Little Deference in Railroad Tax Case*, 161 TAX NOTES 898, 898 (2018).

In March 2019, a *Tax Notes* article argued that "Federal courts may be less likely to defer to the IRS's interpretation of its own rules following one Supreme Court justice's searing critique of the practice." Stephanie Cumings, *Gorsuch Dissent Could Signal Beginning of the End for* Chevron, 162 TAX NOTES 1235, 1235 (2019).

> In his March 4 dissent, Justice Neil M. Gorsuch disagreed with the outcome in *BNSF Railway Co. v. Loos*, Sup. Ct. Dkt. No. 17-1042, but praised his fellow justices for not applying *Chevron* deference to the IRS's interpretation, which can be granted if the agency's reading of an ambiguous statute is reasonable. . . .

> "Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less."
>
> Patrick J. Smith of Ivins, Phillips & Barker Chtd. told Tax Notes that Gorsuch's dismissive reference to the Chevron doctrine and his questioning whether it retains any force are significant.
>
> "These comments are certainly a clear invitation to future litigants in the Supreme Court to mount a vigorous challenge to this doctrine, which, as [Gorsuch] notes, has been subject to mounting criticism by members of the Court," Smith said.

Id. However, it is worth noting, as discussed briefly below, that in June 2019, in *Kisor v. Wilkie*, 204 L. Ed. 2d 841 (2019), the Court declined to overrule *Auer* deference, partly for reasons of *stare decisis*. *Id.* at 866.

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As noted above, in a March 2019 Policy Statement, the Treasury Department said, "In litigation before the U.S. Tax Court, as a matter of policy, the IRS will not seek judicial deference under *Auer v. Robbins*, 519 U.S. 452 (1997) or *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to interpretations set forth only in subregulatory guidance." DEPARTMENT OF THE TREASURY, POLICY STATEMENT ON THE TAX REGULATORY PROCESS 2 (2019), https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf. One article explains, "The Treasury Department's new policy regarding Auer deference is issued in the context of growing criticism of such judicial deference, both inside and outside of the tax world." Carina C. Federico et al., *Treasury Issues Policy Statement that May Be the Death Knell for '*Auer*' Deference in Tax Cases and Zombie Notices*, DAILY TAX REPORT (BLOOMBERG LAW), Mar. 20, 2019.

In June 2019, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court declined to overrule *Auer* deference, stating, in part:

> If all that were not enough, *stare decisis* cuts strongly against Kisor's position. "Overruling precedent is never a small matter." *Kimble*v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___, . . . (2015)). . . . To be sure, *stare decisis* is "not an inexorable command." *Id*., at 828 . . . . But any departure from the doctrine demands "special justification"—something more than "an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 . . . (2014).
>
> And that is even more than usually so in the circumstances here. First, Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. . . . This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. Second,

> because that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.
>
> And third, even if we are wrong about *Auer*, "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 . . . (1989) (stating that when that is so, "[c]onsiderations of *stare decisis* have special force"). . . . It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. . . . Given that history—and Congress's continuing ability to take up Kisor's arguments—we would need a particularly "special justification" to now reverse *Auer*.
>
> Kisor offers nothing of that ilk. . . .

Id. at 2422-23. However, the Court did "take[] care . . . to reinforce the limits of *Auer* deference," *id.* at 2423, providing several parameters:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. . . .
>
> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. . . .
>
> If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable.". . .
>
> Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. . . .

Id. at 2415-16 (citations omitted).

Pages 67-84:

Revenue Procedure 2017-1, cited and excerpted on pages 67 through 84, was superseded in 2018, and has been superseded again in 2019, by Revenue Procedure 2019-1, 2019-1 I.R.B. 1. (The correct citation for Revenue Procedure 2017-1 is 2017-1 I.R.B. 1.) The casebook's citations to sections within the 2017 version of the Revenue Procedure remain the same as those in the 2019 version.

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Revenue Procedure 2017-2, 2017-1 I.R.B. 106, cited in the casebook, was superseded in 2018, and has been superseded again in 2019, by 2019-2, 2019-1 I.R.B. 106, without significant revision.

Revenue Procedure 2017-3, 2017-1 I.R.B. 130, cited in the casebook, similarly was superseded in 2018, and has been superseded again in 2019, without significant revision. *See* Rev. Proc. 2019-3, 2019-1 I.R.B. 130.

Chapter 3

Page 106:

The IRS made significant changes to the 2018 version of Form 1040, the individual income tax return, but they may not be longlasting. The 2018 Form 1040 is in the form of a two-sided "postcard." *See* https://www.irs.gov/pub/irs-pdf/f1040.pdf. While the 2018 version of the Form 1040 was reduced in size, it included an additional six schedules taxpayers may need to submit in order to report deductions, credits, and calculate tax. Because of the expansion of the standard deduction and the elimination of some itemized deductions in the 2017 Tax Act, the IRS estimated that the average time spent on completing the 2018 individual return would be 4 to 7 percent less than the previous tax year. It also expected that out-of-pocket cost to prepare the return would be 1 to 3 percent less than the year before. The IRS noted, however, that "given that 95 percent of individual taxpayers file using software or with the help of a paid preparer, [it] does not expect[] that the form redesigns [will] materially affect compliance burdens." Zoe Sagalow, *IRS Predicts New Tax Forms Will Cut Compliance Time and Costs*, 160 TAX NOTES 728 (2018).

In response to complaints from practitioners who found the 2018 form confusing because it required taxpayers to spread information across multiple attachments, the IRS announced that it will return to a Form 1040 that is two full pages for the 2019 filing season. Allyson Versprille, *Postcard-Sized Tax Form on Permanent Vacation After a Year*, DAILY TAX REP. (BLOOMBERG LAW), July 20, 2019.

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The Taxpayer First Act mandates an expansion of electronic tax return filing. Act section 2301 amends Code section 6011(e) to permit the IRS to require that, for calendar years before 2021, return preparers who file at least 100 returns during the calendar year (rather than 250) must file returns electronically. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 2301(b). After 2021, persons who file at least 10 returns during the calendar year must file returns electronically. An exception to the new requirements applies to preparers who can establish that they live in an area without adequate internet access. I.R.C. § 6011(d)(3)(D).

On another topic, a recent Ninth Circuit case upheld the validity of Treasury Regulation section 301.7502-1, which provides that, other than direct proof of actual delivery, a registered or certified mail receipt is the only prima facie evidence of delivery for purposes of the mailbox rule in Code section 7502. Baldwin v. United States, 921 F.3d 836 (9th Cir. 2019). The Baldwins claimed to have mailed their amended return to the IRS by first class mail but did not utilize either certified or registered mail. The return never arrived at the IRS office. *Id*. at 839-40. At the trial level, the District Court applied the common law mailbox rule, which provides that "proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." *Id*. at 840. Based on testimony provided by two of the taxpayers' employees, the lower court concluded that the testimony was sufficient to establish proof of mailing, therefore the presumption of delivery and, consequently, the mailbox rule applied. *Id*. at 842.

The Ninth Circuit reversed the District Court, finding that Treasury Regulation section 301.7502-1(e)(2) was a valid interpretation of the statute. The court's analysis represents a good review of the *Chevron* deference standard discussed in Chapter 2.

> [W]e employ the familiar two-step analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 . . . (1984). We ask first whether "Congress has directly spoken to the precise question at issue." *Id*. at 842. If it has, Congress' resolution of the issue controls and the agency is not free to adopt an interpretation at odds with the plain language of the statute. But if the statute is silent or ambiguous on the question at hand, we then ask whether the agency's interpretation is "based on a permissible construction of the statute." *Id*. at 843.
>
> At step one of the analysis, we conclude that IRC § 7502 is silent as to whether the statute displaces the common-law mailbox rule. In particular, with respect to the question relevant here, the statute does not address whether a taxpayer who sends a document by regular mail can rely on the common-law mailbox rule to establish a presumption of delivery when the IRS claims not to have received the document. The statute does afford a presumption of delivery when a taxpayer sends a document by registered mail, 26 U.S.C. § 7502(c)(1)(A), and it authorizes the creation of similar rules for certified mail, electronic filing, and private delivery services. § 7502(c)(2), (f)(3). But as to documents sent by regular mail, the statute is conspicuously silent.
>
> At step two of the *Chevron* analysis, the remaining question is whether Treasury Regulation § 301.7502-1(e)(2) is based on a permissible construction of the statute. We conclude that it is. As reflected by the circuit split that developed on this issue, Congress' enactment of IRC § 7502 could reasonably be construed in one of two ways: as intended merely to supplement the common-law mailbox rule, or to supplant it altogether. The Treasury Department chose the latter construction by interpreting IRC § 7502 to provide the sole means by which taxpayers may prove timely delivery in the absence of direct proof of actual delivery. That construction of the statute is reasonable in light of the principle that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of

> evidence of a contrary legislative intent." Hillman v. Maretta, 569 U.S. 483, 496 . . . (2013) (alteration omitted); *see also* Syed v. M-I, LLC, 853 F.3d 492, 501 (9th Cir. 2017). Given that the purpose of enacting IRC § 7502 was to provide exceptions to the physical-delivery rule, it is reasonable to conclude that "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." United States v. Johnson, 529 U.S. 53, 58 . . . (2000).
>
> In arguing that the Treasury Department unreasonably construed IRC § 7502 as having displaced the common-law mailbox rule, the Baldwins invoke a different principle of statutory interpretation, which provides that "the common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co., 464 U.S. 30, 35 . . . (1983) (alteration and internal quotation marks omitted). But the mere fact that dueling principles of statutory interpretation support opposing constructions of a statute does not prove, without more, that the agency's interpretation is unreasonable. The question remains whether the agency has adopted a permissible construction of the statute, taking into account all of the interpretive tools available. As is true in this case, an agency's construction can be reasonable even if another, equally permissible construction of the statute could also be upheld.
>
> Finally, our prior interpretation of IRC § 7502 in *Anderson* does not bar our decision to defer to the agency's conflicting, but nonetheless reasonable, construction of the statute. As noted above, before the relevant amendment of Treasury Regulation § 301.7502-1(e), we "decline[d] to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule." *Anderson*, 966 F.2d at 491. But "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 982 . . . (2005). We did not hold in *Anderson* that our interpretation of the statute was the only reasonable interpretation. In fact, our analysis made clear that our decision filled a statutory gap. Under *Brand X*, the Treasury Department was free to fill that gap by adopting its own reasonable interpretation of the governing statute.

Id. at 842-43.

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The IRS recently released guidance regarding when taxpayers should file an amended return. *See* IRS Tax Tip 2019-70 (June 4, 2019), at https://content.govdelivery.com/accounts/USIRS/bulletins/2492287. According to the announcement, taxpayers who need to change their filing status or add previously omitted income should file an amended return. *Id.* In addition, "[t]axpayers who claimed deductions or credits they shouldn't have claimed or didn't claim deductions or credits they could have claimed may need to file an amended return." *Id*. The IRS further stated that taxpayers who make mathematical or clerical errors on the return or who fail to submit necessary forms typically do not need to file an amended return. *Id.* In those cases, the IRS will make the correction or contact the taxpayer by mail if additional information is needed. *Id.* The guidance also provides that taxpayers who are already due a refund should wait to get it before filing an amendment that increases the amount of their reported refund. *Id.* The IRS advised those who amend a return that will result in additional tax should pay the tax and file the amendment as soon as possible, so as to limit penalties and interest. *Id.*

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The Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 24, made several changes to Code section 7623 relating to whistleblower awards under section 7623(b). For example, the legislation expanded the base upon which the whistleblower award will be determined to include not just tax, penalties, interest, and additions to tax, but also "any proceeds arising from laws for which the Internal Revenue Service is authorized to administer, enforce, or investigate, including—(A) criminal fines and civil forfeitures, and (B) violations of reporting requirements." I.R.C. § 7623(c)(2). The inclusion of criminal fines conflicts with guidance included in Treasury Regulation section 301.7623-2(d), cited on page 115 of the casebook. Legislative history to the Bipartisan Budget Act of 2018 confirms that penalties arising from violations of reporting requirements, such as the Foreign Bank and Financial Accounts requirement, should be included in the definition of proceeds that are subject to a whistleblower award. H. R. REP. NO. 115-466, at 336-339.

On another topic, the Taxpayer First Act includes modified procedures relating to whistleblower claims and protections for those who provide information. Act section 1405 gives the IRS more leeway to disclose information to the whistleblower during the course of the investigation. It amends Code section 6103(k) to permit the IRS to exchange information with whistleblowers to the extent that the disclosure is necessary to obtain information that is not otherwise reasonable available. I.R.C. § 6103(k)(13)(A). The IRS maintains that, in certain cases, ongoing interaction with whistleblowers during the audit can be beneficial, as the whistleblower may have information about sources and connections that are not otherwise available. Allyson Versprille, *IRS 'Black Hole' Swallows Whistleblower Against Koch, Walmart*, DAILY TAX REP. (BLOOMBERG LAW), Jul. 1, 2019. Act section 1405 also requires the IRS to notify whistleblowers about the status of their cases within 60 days of the case being referred to audit or when taxpayers make tax payments to settle liabilities relating to information that the whistleblower provided. I.R.C. § 7623(a) (as amended). In order to protect taxpayer confidentiality, the whistleblower who receives otherwise confidential taxpayer information is subject to criminal penalties for disclosing that information. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1405 (amending Code § 7213(a)(2)).

The Taxpayer First Act also amends section 7623 by adding subsection (d), which grants whistleblowers protections against retaliation from an employer. Legislative history relating to an earlier version of the bill explains the provision as follows:

> The provision adds to section 7623, anti-retaliation whistleblower protections for employees. A person who alleges discharge or other reprisal by

> any person in violation of these protections may file a complaint with the Secretary of Labor (within 180 days after the date on which the violation occurs), and if the Secretary of Labor has not issued a final decision on such complaint within 180 days (and the delay is not due to bad faith of the claimant), an action may be brought in the appropriate district court. The remedies are consistent with those currently available under the False Claims Act, including compensatory damages or reinstatement, 200 percent of back pay and all lost benefits, with interest, and compensation for other special damages including litigation cost, expert witness fees, and reasonable attorney fees.

H.R. REP. NO. 116-1957, at 61 (2019).

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The post-TEFRA partnership audit procedures enacted in 2015 and effective for returns filed after December 31, 2017 continue to raise questions for both taxpayers and tax advisors. Congress passed a set of technical corrections in 2018, Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, and the IRS has issued several sets of proposed regulations that seek to clarify the scope of the new audit regime and how items should be netted against one another to determine the total amount of the adjustment. *See, e.g.*, 82 Fed. Reg. 27334 (June 14, 2017) (creating Proposed Regulation section 301.6221(a)); 83 Fed. Reg. 4868 (Feb. 2, 2018) (creating Proposed Regulation section 301.6225). The IRS has since issued final regulations in section 301.6221(b)-(f), describing how eligible taxpayers can opt out of the new audit regime. T.D. 9892, 83 Fed. Reg. 24 (Jan. 2, 2018). In February of 2019, the IRS issued another set of final regulations that, among other changes, amends § 301.6222-1 relating to consistency requirements, and § 301.6241-1 relating to calculating the imputed underpayment. T.D. 9844, 84 Fed. Reg. 6468 (Feb. 27, 2019). The regulations came shortly before the IRS announced that partnership audits under the post-TEFRA procedures would likely begin during the summer of 2019. Kelly Zegers, *Partnership Audits May Being This Summer, IRS Official Says*, DAILY TAX REP. (BLOOMBERG LAW), June 6, 2019.

The issues addressed in the Consolidated Appropriations Act and the updated final regulations are beyond the casebook's scope. For those interested in an in-depth analysis of the new regime, see *IRS Releases Final Regulations Under Centralized Partnership Audit Regime, Announces New Planned Proposed Regulations*, 130 J. OF TAX'N 185 (June 2019); Keith C. Durkin, *A Comprehensive Explanation of New Partnership Tax Audit Rule*s, 159 TAX NOTES 973 (2018); Warren P. Kean, *What to Know and Do About the New Partnership Audit Rules Now*, 156 TAX NOTES 471 (2017).

Chapter 4

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The Taxpayer First Act tightens the notification provisions in Code section 7602(c), which require the IRS to provide advance notice to the taxpayer before contacting third parties as part of an investigation of the taxpayer. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1206. Code section 7602(c)(1), as amended, now requires 45-day advance notice (rather than "reasonable" advance notice), that the IRS intends to contact third parties. Moreover, as a general rule, the period of contact cannot be greater than one year. I.R.C. § 7602(c)(1) (as amended).

Code section 7602(c)(1) now includes the following language: "A notice shall not be issued under this paragraph unless there is an intent at the time such notice is issued to contact persons other than the taxpayer during the period specified in such notice." This amendment appears to prevent the IRS from seeking to satisfy the section 7602(c) notification requirement by providing a general, broad notice to the taxpayer at the beginning of an audit.

Earlier in 2019, the Ninth Circuit Court of Appeals struck down the IRS's claim that by providing taxpayers with a copy of IRS Publication 1 at the commencement of an audit, it satisfied the advance notification requirement. J.B. v. United States, 916 F.3d 1161, 1164 (9th Cir. 2019). Publication 1 explains the audit process and includes language that the IRS may contact other persons to obtain information necessary to perform the audit. According to the court, the IRS fails to satisfy the "reasonable advance notice" requirement in section 7602(c)(1) "unless it provides notice reasonably calculated, under all relevant circumstances, to apprise interested parties of the possibility that the IRS may contact third parties, and that affords interested parties a meaningful opportunity to resolve issues and volunteer information before those third-party contacts are made." *Id*. at 1173 (*citing* Jones v. Flowers, 547 U.S. 220, 226 (2006). The general notice included in Publication 1 did not satisfy this requirement.

Note that the amendments to section 7602(c)(1) remove the "reasonable" modifier and do not specify what type of notice would satisfy the mandate. For example, does the IRS have to provide in the notice a list of specific third-party contacts it plans to make? The Ninth Circuit in *J.B*. did not go so far as to require a list specifying the names of the third parties. Adequate notice, according to the court, depends on the relevant facts. *Id*. at 1169; *see also* Highland Capital Management L.P. v. United States, 626 F. App'x 324, 327 (2d Cir. 2015) (ruling that section 7602(c) does not require separate notice before each third-party contact or advance notice of the specific documents that will be requested).

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The Taxpayer First Act limits the IRS's authority to issue John Doe summonses. In addition to the existing limitations in section 7609(f) that must be considered in a prior court hearing, the legislation adds an additional requirement: "The Secretary shall not issue any [John Doe] summons . . . unless the information sought to be obtained is narrowly tailored to information that pertains to the failure (or potential failure) of [taxpayers] . . . to comply with one or more provisions of the internal revenue laws which have been identified." Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1204(a). The legislative history of a prior version of the bill fleshes out, to some degree, the intended purpose of the amendment:

> The Committee believes that the John Doe summons is a useful tool, but that it is important that the information sought in the summons be at least potentially relevant to the tax liability of an ascertainable group.
>
> The Committee also believes that the use of this important tool has at times potentially exceeded its intended purpose. A John Doe summons is not intended to be an opening bid for information from the party being served nor is it intended to be used for the purposes of a fishing expedition. Given the IRS's past use of this authority, the Committee feels it is necessary to clarify its intended usage.

H.R. REP. NO. 116-1957, at 41-42 (2019).

It is unclear whether the new provision will help the Texas law firm of Taylor Lohmeyer, which received a John Doe summons seeking client lists and client account records of those who may have failed to report income from unidentified offshore accounts. The firm sought to quash the summons, claiming that information is protected by the attorney-client privilege. The District Court for the Western District of Texas rejected the firm's challenge, noting that, as a general rule, the identity of a client is not privileged information. Taylor Lohmeyer Law Firm PLLC v. United States, 2019 U.S. Dist. LEXIS 81809, at *17 (W.D. Tex. 2019). The attorney-client privilege is discussed in more detail in Section 4.03[A][1] of the casebook, and the issue of enforceability of a summons seeking the names of a law firm's clients is raised in Problem 3.

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As explained on pages 165-66 of the casebook, the U.S. Supreme Court in *United States v. Clarke* ruled that the taxpayer, Dynamo Holdings, had a right to an evidentiary hearing to challenge the IRS's summons if the taxpayer could identify facts that raised an inference of bad faith on the part of the IRS when it issued the summons. United States v. Clarke, 537 U.S. 248, 254 (2014) (cited as 134 S. Ct. 2361 in the casebook).

On remand, the Eleventh Circuit Court of Appeals affirmed the District Court's order to enforce the summonses and deny an evidentiary hearing to the taxpayer because the taxpayer's allegations of retaliation were mere conjecture and did not support an inference of improper motive. United States v. Clarke, 816 F.3d 1310, 1318-19 (11th Cir. 2016). Dynamo Holdings petitioned the Supreme Court for a second time, claiming that on remand the lower courts unfairly denied without any explanation its efforts to amend its pleadings to provide additional facts showing bad faith on the IRS's part. *See* Matthew Beddingfield, *Supreme Court Rejects Dynamo Holdings' IRS Summons Case*, DAILY TAX REP. (BNA), at K-1 (Jan. 10, 2017). The Supreme Court denied certiorari, leaving "open a legal procedure issues concerning a taxpayer's ability to provide new allegations on remand to meet a new court standard." *Id*.

Page 169:

In *SEC v. Alderson*, No. 18-CV-4930 (VEC), 2019 U.S. Dist. LEXIS 97241 (S.D.N.Y Jun. 10, 2019), the court distinguished *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015), and found that the taxpayer and its accounting firm were not engaged in a "common legal enterprise." *Id.* at *22. Accordingly, the court found that privilege was waived when the company's CEO transferred to its accounting firm, BDO USA, LLP (BDO) two tax opinions written by the company's counsel "so that James Cassidy, BDO's Senior Tax Director, could incorporate the opinions' conclusions into BDO's advice to clients." *Id.* at *9, *18.

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In *United States v. Sanmina Corp*., No. C 15-00092 WHA, 2018 U.S. Dist. LEXIS 172137 (N.D. Cal. Oct. 4, 2018), the court "affirm[ed] Judge Grewal's finding that [certain] memoranda are protected by the attorney-client privilege and attorney work-product doctrine but finds that privilege was waived when Sanmina disclosed the memoranda to DLA Piper to obtain an opinion on value, then turned over the valuation report to the IRS." *Id.* at *3.

Chapter 5

Page 227:

The Taxpayer First Act codifies a requirement for an "Internal Revenue Service Independent Office of Appeals." Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1001 (amending Code § 7803). According to the new legislation, "It shall be the function of the Internal Revenue Service Independent Office of Appeals to resolve Federal tax controversies without litigation on a basis which—(A) is fair and impartial to both the Government and the taxpayer, (B) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and (C) enhances public confident in the integrity and efficiency of the Internal Revenue Service." I.R.C. § 7803(e)(3). The new legislation also provides for the appointment of a "Chief of Appeals" who will report directly to the IRS Commissioner. I.R.C. § 7803(e)(2).

The practical effect of the new legislation on the Appeals process is unclear at this point. *See* Kristen A. Parillo, *IRS Reform Bill Won't Make 'Sea Change' to Appeals Process*, 163 TAX NOTES 2049 (2019). The legislation envisions the Appeals function continuing to be part of the IRS's operations, not a separate entity. According to the legislative history of an earlier version of the bill, "Independent Appeals is intended to perform functions similar to those of the current Appeals." H.R. REP. NO. 116-1957, at 30 (2019). Moreover, "cases of a type that are referred to Appeals under present law remain eligible for referral to Independent Appeals." *Id.* at 31.

The legislation does include several components that could affect how the Appeals process operates. For example, the legislation requires that Appeals provide the taxpayer access to nonprivileged portions of the taxpayer's case file no later than 10 days before a scheduled Appeals conference. I.R.C. § 7803(e)(7)(A). Access must be granted to individuals with adjusted gross income not exceeding $400,000 and entities with gross receipts not exceeding $5 million for the taxable year to which the dispute relates. I.R.C. § 7803(e)(7)(C). Previously, taxpayers who were denied access to their case files were required to file FOIA requests, as discussed below and in the casebook in connection with Page 282 in Chapter 6.

The new legislation also adds Code section 7803(e)(6): "The Chief of Appeals shall have authority to obtain legal assistance and advice from the staff of the Office of the Chief Counsel. The Chief Counsel shall ensure, to the extent practicable, that such assistance and advice is provided by staff of the Office of the Chief Counsel who were not involved in the case with respect to which such assistance and advice is sought and who are not involved in preparing such case for litigation." Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1001(a). This provision appears to be aimed at concerns that the IRS has skirted the *ex parte* communication limitations, discussed on pages 228-30 of the casebook, by allowing Chief Counsel attorneys to become involved in audits and Appeal cases. *See* H.R. REP. NO. 116-1957, at 29 (2019). According to this Committee report, which relates to a prior version of the bill, "to the extent practicable, staff assigned to answer inquiries from Independent Appeals should not include those involved in advising the IRS employees working directly on the case prior to its referred to Independent Appeals or in preparation of the case for litigation." *Id*. at 30.

Finally, the legislation also includes provisions that envision greater access to the Appeals process. First, Code section 7803(e)(4) mandates that access to Appeals "shall be generally available to all taxpayers." Subsection (e)(5) goes further, requiring that Appeals provide a taxpayer who receives a notice of deficiency and who is denied a requested Appeals conference a detailed written explanation explaining why the denial took place. I.R.C. § 7803(e)(5). The legislation grants a taxpayer who was denied an Appeals conference the right to protest the denial to the IRS Commissioner. I.R.C. § 7803(e)(5)(C). It also requires the IRS to report to Congress each year the number of requests for an Appeals conference that were denied and the basis for these denials. I.R.C. § 7803(e)(5)(B).

Although not mentioned in the legislative history, a recent case involving Facebook Inc.'s ongoing dispute with the IRS may be part of what prompted the provisions relating to Appeals access. The case also raises interesting questions about the extent to which the Taxpayer Bill of Rights, discussed in Section 1.02[B] of the casebook, creates enforceable obligations on the IRS's part. *See* Leandra Lederman, *Is the Taxpayer Bill of Rights Enforceable?*, Indiana Legal Studies Research Paper No. 404 (April 4, 2019), https://ssrn.com/abstract=3365777 (discussing this issue and the *Facebook* case).

The *Facebook* case involves a transfer-pricing dispute. After receiving a notice of deficiency alleging that it had undervalued intangible assets transferred to an Irish subsidiary and asserting a $1.73 million deficiency for 2010, Facebook filed a petition in Tax Court contesting the deficiency. Facebook requested a conference with the Appeals Office, which the IRS denied. The dispute over the right to an IRS Appeal went before a U.S. magistrate judge, who ruled that Facebook did not have a legally protected right to an Appeals conference in a tax deficiency case. Facebook Inc. & Subsidiaries v. IRS, No. 17-cv-06490-LB, 2018 U.S. Dist. LEXIS 81986 (N.D. Cal., May 14, 2018).

Facebook based its claim on the Administrative Procedure Act ("APA"), alleging that the "IRS acted arbitrarily, capriciously, and in violation of law, in refusing to refer its tax case to IRS Appeals." The IRS maintained that its decision not to grant an Appeals conference in a dispute over tax liability is not reviewable under the APA. *Id*. at *3-4. The magistrate judge agreed that the IRS's decision was not reviewable, and also ruled that Facebook did not have standing to challenge the IRS's decision because "the deprivation of a nonexistent right to access IRS Appeals does not constitute an injury in fact." *Id*. at *4.

As part of her analysis, the magistrate judge noted that while the IRS Reform Act grants taxpayers an absolute right to an Appeals conference in certain collection cases, that absolute right does not exist in other contexts. *Id*. at *5. That remains true even after the IRS adopted in 2014 the Taxpayer Bill of Rights ("TBOR"), mentioned on pages 8-9 of the casebook, which includes "the right to appeal an IRS decision to an independent forum." The Taxpayer Bill of Rights was signed into law in 2015 as part of the Protecting Americans from Tax Hikes Act, Pub. L. No. 114-113, Div Q, Title IV, Subtitle A, § 401(a), 129 Stat. 3117 (2015) (adding I.R.C. § 7803(a)(3)). Relying on legislative history, the judge concluded that the statutory TBOR did not create new enforceable taxpayer rights, but merely obligated the IRS Commissioner to ensure that IRS employees are familiar with and act in accordance with preexisting taxpayer rights established by other Code provisions. *Id*. at *23. And even if TBOR did create an enforceable right to appeal a decision to an independent forum, Facebook failed to establish that the right related to the IRS Appeals Office, as opposed to the right to contest the deficiency in an independent forum such as the Tax Court. *Id*. at *25.

The magistrate judge also ruled that Facebook failed to make a case under the APA because the decision not to grant an Appeal did not represent a "final agency action for which there is no adequate remedy at law." *Id*. at *30 (citing 5 U.S.C. § 704). According to the judge:

> The IRS's decision not to refer Facebook's tax case to IRS Appeals similarly is not a final agency action because it is not an action "by which rights or obligations have been determined, or from which legal consequences will flow." Facebook retains its right to challenge the IRS's tax-deficiency determination before the Tax Court (or to try to negotiate a settlement with the IRS Counsel), and it is Facebook's and the IRS's litigation (and/or negotiation) going forward that will ultimately determine the parties' rights, obligations, and legal consequences. . . . Again, Facebook's argument to the contrary depends on its assumption that it had an enforceable right to take its tax case to IRS Appeals, and that the IRS's decision not to refer its case to IRS Appeals foreclosed that right. But as described above, Facebook does not have this right. The IRS's decision not to refer Facebook's tax case to IRS appeals did not alter this non-right or otherwise determine any rights, obligations, or legal consequences. It therefore is not a final agency action that is reviewable under the APA.

Id. at *31-32.

Note that, in response to Facebook's request for an IRS Appeal, the IRS had sent a letter to Facebook stating that a referral to Appeals "is not in the interest of sound tax administration." *Id*. at *29-30. This and the ensuing litigation occurred prior to the Taxpayer First Act. Newly enacted Code section 7803(e)(5) would not necessarily have granted Facebook an Appeals conference as a matter of right, but presumably the IRS would have had to justify its refusal with a more detailed explanation. Section 7803(e)(5)(C) would also give Facebook the right to appeal the denial to the IRS Commissioner. At this point, the Commissioner has not prescribed procedures for protesting denial of an Appeals conference request. For further reading on the *Facebook* case and the TBOR, see Lederman, *supra*, and the articles that come out of the October 2018 *Temple Law Review* symposium, "Taxpayer Rights: All the Angles," https://www2.law.temple.edu/events/tlrsymposium2018/.

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In response to concerns from practitioners, an IRS official announced that the decision over whether an Appeals conference will take place in person or by telephone will be at the discretion of the taxpayer. This position reverses guidance issued in Internal Revenue Manual section 8.6.1.4.1., cited in the casebook, which places the discretion to grant an in-person conference with the Appeals Office. According to an IRS announcement in November of 2018:

> [I]f a taxpayer or representative requests an in-person conference and the assigned Appeals employee's office cannot accommodate in-person conferences, the case will be sent to an Appeals office that can accommodate the request. This guidance provides that Appeals will use its best efforts to schedule the in-person conference at a location that is reasonably convenient for both the taxpayer and Appeals. Appeals' ability to hold the conference in the taxpayer's preferred location may be limited due to regulatory requirements or resource constraints, including the availability of Appeals employees with appropriate subject matter expertise and the level of case inventories at the preferred location.

AP-08-1118-0013 (Nov. 28, 2018), at https://www.irs.gov/pub/foia/ig/spder/ap-08-1118-0013.pdf. The IRS has updated Internal Revenue Manual section 8.6.1.4.1 to reflect these changes.

Chapter 6

Page 282:

The casebook explains that "if a taxpayer wishes to obtain materials that were prepared by the IRS during an investigation of the taxpayer's own return, the taxpayer may have to make an individual FOIA request." The Taxpayer First Act has amended Code section 7803 to add new subsection (e), which includes the following:

> In any case in which a conference with the Internal Revenue Service Independent Office of Appeals has been scheduled upon request of a specified taxpayer, the Chief of Appeals shall ensure that such taxpayer is provided access to the nonprivileged portions of the case file on record regarding the disputed issues (other than documents provided by the taxpayer to the Internal Revenue Service) not later than 10 days before the date of such conference. . . .

Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1001(a) (new paragraph 7803(e)(7)). The new provision limits the definition of "specified taxpayer" by adjusted gross income for individuals and gross receipts for everyone else. *Id.* A recent article explains further:

> In the past, taxpayers needed to request the administrative file directly from the Exam Team or file a Freedom of Information Act (FOIA) request. These methods of obtaining taxpayer information are often burdensome and time consuming for taxpayers. Although the changes to access to the administrative file are welcome, the right to access is limited to individuals whose adjusted gross income does not exceed $400,000 for the year at issue and to entities whose gross receipts do not exceed $5 million for the year at issue. Thus, this provision will not provide any benefit to taxpayers who are audited by the IRS's Large Business & International division.

Andrew R. Roberson & Kevin Spencer, *Taxpayer First Act: Changes to the IRS Appeals Process*, NAT'L L. REV. (Jul. 2, 2019), https://www.natlawreview.com/article/taxpayer-first-act-changes-to-irs-appeals-process.

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The Taxpayer First Act has amended Code section 6103(c), as well as several other subsections of 6103. *See, e.g.*, Taxpayer First Act of 2019, Pub. L. No. 116-25 §§ 1405(a) (amending section 6103(k) to add a new paragraph relating to "Disclosure To Whistleblowers"), 2003 (amending section 6103(k) to add a new paragraph relating to "Disclosure of Return Information For Purposes of Cybersecurity and the Prevention of Identity Theft Tax Refund Fraud"), 2004(a) (amending section 6103(p) to add a new paragraph relating to "Disclosure To Contractors and Other Agents"), 2202(a), (b) (amending section 6103(c) and (a)(3)). The amendment to section 6103(c) adds the following language:

> Persons designated by the taxpayer under this subsection to receive return information shall not use the information for any purpose other than the express purpose for which consent was granted and shall not disclose return information to any other person without the express permission of, or request by, the taxpayer.

Id. § 2202(a). The Act also adds subsection (c) to the list in section 6103(a)(3). *Id.* § 2202(b).

A recent event brought section 6103 to the attention of the general public. In recent months, the House Ways and Means Committee, which is chaired by Rep. Richard Neal, has sought to obtain President Trump's 2013 through 2018 tax returns under the authority of Code section 6103(f). Rep. Neal sent a letter to IRS Commissioner Charles Rettig on April 3, 2019 seeking those returns. Debbie Lord, *Trump's Tax Returns: What is 6103 and How Will It Be Used to Get Trump's Returns?,* DAYTON DAILY NEWS (Apr. 9, 2019), https://www.daytondailynews.com/news/national/trump-tax-returns-what-6103-and-how-will-used-get-trump-returns/ySwIPaFbjWrAN2L0nVtkxJ/ (linking Rep. Neal's letter). Section 6103(f)(1), which is not discussed in the casebook, provides:

> *Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives*, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, *the Secretary shall furnish such committee with any return or return information specified in such request*, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

I.R.C. § 6103(f)(1) (emphasis added). Rep. Neal's letter explained in part that "the Committee is considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the tax laws against a President." *Letter from the Hon. Richard E. Neal to the Hon. Charles Rettig Before the H. Comm. On Ways & Means*, 116 Cong. (Apr. 3, 2019), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Neal%20Letter%20to%20Rettig%20(signed)%20-%202019.04.03.pdf.

The major events in this dispute to date include the following: On April 5, 2019, President Trump's wrote a letter to the Treasury Department's General Counsel "challenging Neal's request for the returns, saying that to grant the request would set a 'dangerous precedent.'" Lord, *supra*. The letter further stated that "Even if Ways and Means had a legitimate purpose for requesting the President's tax returns and return information, that purpose is not driving Chairman Neal's request. His request is a transparent effort by one political party to harass an official from the other party because they dislike his politics and speech." *Letter from William S. Consovoy to Brent J. McIntosh* (Apr. 5, 2019), https://www.wsj.com/public/resources/documents/4.5.2019_Letter_from_WConsovoy_to_BMcIntosh.pdf. On April 10, "Treasury Secretary Steven Mnuchin informed Congress . . . that his department would be unable to comply with House Democrats' deadline . . . ." Lauren Fox & Caroline Kelly, *Mnuchin Says Treasury Unable to Comply with Deadline for Trump's Tax Returns*, CNN (Apr. 10, 2019), https://www.cnn.com/2019/04/10/politics/trump-tax-returns-house-deadline/index.html. On April 13, 2019, Rep. Neal sent another written request to Commissioner Rettig. Lauren Fox & Donna Borak, *House Committee Sends New Letter to IRS Demanding Trump's Tax Returns*, CNN (Apr. 13, 2019), https://www.cnn.com/2019/04/13/politics/trump-tax-returns-house-letter-irs/index.html (linking to the letter).

On May 6, 2019, "Treasury Secretary Steven Mnuchin . . . told House Democrats he would not furnish President Trump's tax returns . . . ." Damian Paletta & Jeff Stein, *Mnuchin Rejects Democrats' Demand to Hand Over Trump's Tax Returns, All but Ensuring Legal Battle*, WASH. POST (May 6, 2019), https://www.washingtonpost.com/business/economy/mnuchin-rejects-democrats-demand-to-hand-over-trumps-tax-returns-all-but-ensuring-legal-battle/2019/05/06/5483f8ac-7022-11e9-9eb4-0828f5389013_story.html?utm_term=.d25ede5546b9 (linking Mnuchin's letter). On May 10, 2019, "Neal subpoenaed six years of the president's personal tax returns along with six years of returns from eight Trump companies. The subpoenas were sent to both Mnuchin and IRS

Commissioner Charles Rettig, requiring them to deliver the documents to committee offices by 5 p.m. May 17." Doug Sword, *Mnuchin Refuses to Comply with Subpoenas for Trump Tax Returns*, ROLL CALL (May 17, 2019), https://www.rollcall.com/news/congress/trump-tax-returns-battle-could-head-to-court-as-early-as-next-week. Mnuchin refused to comply with the subpoena. Kevin Breuninger, *Treasury Secretary Steven Mnuchin Defies House Democrats' Subpoena for Trump's Tax Returns*, CNBC (May 17, 2019), https://www.cnbc.com/2019/05/17/mnuchin-says-will-defy-house-democrats-subpoena-for-trumps-tax-returns.html (stating that "[i]n a letter sent about an hour before the subpoena's 5 p.m. ET deadline, Mnuchin said that he would not authorize the IRS to give Trump's personal and business tax returns to Congress" and linking the letter).

On July 2, 2019, the House Ways and Means Committee filed suit in the U.S. District Court for the District of Columbia "ask[ing] this Court to order Defendants to comply with Section 6103(f) and the subpoenas by producing the requested information immediately." Comm. on Ways & Means v. U.S. Dep't of Treas., No. 1:19-cv-1974 (D.D.C. filed Jul. 2, 2019), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/As%20filed%20Complaint.pdf. It will be interesting to see the outcome of this high-profile case.

Chapter 7

Page 353:

Finnegan v. Commissioner, No. 17-10676, 2019 U.S. App. LEXIS 17390 (11th Cir. 2019), is a recent case applying the Tax Court's *Allen* decision employing the unlimited statute of limitations for fraud where the fraud was committed by the return preparer, not the taxpayer. The Court of Appeals affirmed the Tax Court's application of *Allen* (thus ruling in favor of the IRS). *Id.* at *3-4. However, like the Tax Court, the Court of Appeals found that the taxpayers "waived this argument. They knew that the IRS was relying on *Allen* and its holding, and they chose not to challenge it. They didn't challenge it before, during, or after trial. In fact, they explicitly told the Tax Court they admitted to *Allen* and were not challenging it." *Id.* at *17-18. Thus, the Court of Appeals for the Eleventh Circuit did not face the issue of whether it agreed with the holding of *Allen*, and it did not substantively engage with *BASR Partnership v. United States*, 795 F.3d 1338 (Fed. Cir. 2015), a case the IRS brought to the Tax Court's attention about a year after the trial in *Finnegan* (and which the casebook discusses on pages 353-54).

Chapter 8

Page 385:

In the past year, the U.S. Tax Court has made a number of changes in its Rules of Practice and Procedure, which are available online at https://ustaxcourt.gov/rules.htm and note there which rules have been amended. *See Press Releases*, UNITED STATES TAX COURT, https://ustaxcourt.gov/press.htm (announcing several amendments to the Rules). In particular, the court made November 30, 2018 and July 15, 2019 amendments. *See id.* The November 30, 2018 amendments include changes to Rules 3, 11, 13, 20, 22, 23, 25, 34, 143, 280, and 281. U.S. Tax Ct. Notice (Nov. 30, 2018), https://ustaxcourt.gov/rules/Notice_113018.pdf, at 1. They also include new Title XXXIV (Certification and Failure to Reverse Certification Action with Respect to Passports), which contains Rules 350 through 354. *Id.* at 2. For explanations of the rule changes, see *Press Release*, UNITED STATES TAX COURT Appendix (Nov. 30, 2018), https://ustaxcourt.gov/press/113018.pdf.

The Tax Court's July 15, 2019 amendments include changes to Rules 13, 20, 25, 34, 38, 60, 61, 74, 230, 233, 240, and 310. *Notice*, UNITED STATES TAX COURT 1 (Jul. 15, 2019), https://ustaxcourt.gov/rules/Notice_071519.pdf. They also include new Title XXIV.A (Partnership Actions Under BBA [Bipartisan Budget Act of 2015] Section 1101), containing Rules 255.1 through 255.7. For explanations of these changes, see *Press Release*, UNITED STATES TAX COURT Appendix (Jul. 15, 2019), https://ustaxcourt.gov/press/071519.pdf.

In addition, on May 10, 2019, "Chief Judge Foley announced . . . that the United States Tax Court has adopted procedures to permit admitted practitioners in good standing to enter a limited appearance at scheduled trial sessions. The procedures will take effect at the beginning of the 2019 Fall Term." *Press Release*, UNITED STATES TAX COURT (May 10, 2019), https://www.ustaxcourt.gov/press/051019.pdf. For the procedure, see *Admin. Order No. 2019-01*, UNITED STATES TAX COURT (May 10, 2019), https://ustaxcourt.gov/rules/limited_eoa/Admin_Order_No_2019-01.pdf.

Page 390:

The chart on page 390 of the casebook shows how the volume of Tax Court cases pending and the aggregate dollar amounts in dispute have varied between 2004 and 2016. The chart below adds the 2017 and 2018 figures. *See SOI Tax Stats —Chief Counsel Workload: Tax Litigation Cases, by Type of Case—IRS Data Book Table*, IRS 27 (Jul. 1, 2019), https://www.irs.gov/statistics/soi-tax-stats-chief-counsel-workload-tax-litigation-cases-by-type-of-case-irs-data-book-table-27.

Fiscal Year	**2016**	**2017**	**2018**
Number of cases pending (dockets in thousands)	27.6	24.9	24.0
Dollars in Dispute in Cases Pending (in billions)	$22.5	$21.2	$18.4

Chapter 9

Page 423:

Along the lines of taxpayers who challenge a notice of deficiency or other aspect of tax controversy procedure using the Administrative Procedure Act, some taxpayers have been using the Taxpayer Bill of Rights ("TBOR"), which was codified in 2015, to support similar arguments. (In that vein, the *Facebook* case was discussed in connection with page 227 of Chapter 5, above.) In the notice of deficiency context, *Moya v. Commissioner*, 152 T.C. No. 11 (2019), 2019 U.S. Tax Ct. LEXIS 12, provides an example. In that case, the taxpayer argued that "[t]here are no deficiencies in tax for any of the examination years because the notice was unlawfully issued. The notice was unlawfully issued because, in conducting his examination for the examination years, respondent deprived her of rights guaranteed to all taxpayers by the TBOR." *Id.* at *9. The Tax Court found that that did not invalidate the notice of deficiency or warrant looking behind it:

> [W]e conclude that, even if we were to credit petitioner's claims that, in examining her returns, respondent violated her rights to be informed, to challenge the IRS position and be heard, and to a fair and just tax system (all rights found in the IRS TBOR) and, also, that he failed to afford her an interview near her home in California before he issued the notice, we would neither invalidate the notice, relieve petitioner of any portion of the burden of proof, nor take any other action to remediate those violations or failure. The simple reasons are that (1) the IRS TBOR did not add to petitioner's rights and (2) even if everything she says is true, respondent's missteps that petitioner complains of would not in this de novo proceeding cause us to either lift or lighten her burden of proving error in respondent's determinations of deficiencies in her tax. See Greenberg's Express, Inc. v. Commissioner, 62 T.C. [324,] at 327-328.

Id. at *16.

Page 428:

Nelson v. Commissioner, T.C. Memo. 2018-95, 2018 Tax Ct. Memo LEXIS 95, raises the question of what constitutes a "naked assessment." In *Nelson*, the Tax Court found that the taxpayer had been employer for a short time by a company called Empire and had received wages from that company. "At trial, petitioner did not deny receiving wages of $1,678, but asserted, referring to Empire, that he 'did not know who these guys are.'" *Id.* at *6. The Tax Court did not find that testimony credible. On the naked assessment issue, the court found a sufficient link between the taxpayer and the wages:

> For 2014 the IRS received from Empire a Form W-2 reporting that it had paid petitioner during 2014 wages of $1,678. Respondent also introduced two relevant documents that confirm this information: (1) a copy of the notice of deficiency issued to petitioner for 2014 and (2) petitioner's Wage and Income Transcript for

> 2014. We find that these documents sufficiently connect petitioner to an income-producing activity.

Id. at *5-6.

The Tax Court's analysis in *Nelson* is surprising. As Bryan Camp explains in a blog post discussing this case, "[o]nly one of the items—the information return—is a genuine piece of evidence. The other two items are just bootstraps: recitations of conclusions based on that single W-2." Bryan Camp, *Lesson From the Tax Court:* Naked Assessments!, TAXPROF BLOG ¶ 19 (Jul. 9, 2018), https://taxprof.typepad.com/taxprof_blog/2018/07/lesson-from-the-tax-court-naked-assessments.html. Where the IRS is required to provide evidence connecting the taxpayer to an income-producing activity, it should not be able to make one piece of evidence into several by repeating the information in its own records or documents.

The *Nelson* opinion cites a 2008 Tax Court case, *Banister v. Commissioner*, T.C. Memo. 2008-201, 2008 Tax Ct. Memo LEXIS 197, as "holding that a notice of deficiency indicating third-party payers paid the taxpayer specific amounts in question satisfied the minimal evidentiary burden." *Nelson v. Comm'r*, 2018 Tax Ct. Memo LEXIS 95, at *6. However, *Banister* is part of a line of cases addressing situations in which courts found that although the record did not contain direct evidence connecting te taxpayer to an income-producing activity, the documents in the record (generally IRS-created documents) indicated that the IRS was in possession of the direct evidence.

In *Banister*, the Tax Court stated that "the notice of deficiency indicates that the third-party payers paid petitioner the amounts in question and reported those payments to respondent. Although direct evidence of the payments is not in the record, the notice of deficiency alone suggests, as in *Rapp* and *Curtis*, that respondent possessed such evidence." *Banister*, 2008 Tax Ct. Memo LEXIS 197, at *5 (*citing* Rapp v. Comm'r, 774 F.2d 932, 935 (9th Cir. 1985); Curtis v. Comm'r, T.C. Memo 2001-308, *affd. in part and revd. on another issue*, 73 Fed. Appx. 200 (9th Cir. 2003)). This line of cases would therefore be applicable if, for example, the IRS in *Nelson* no longer had the W-2 but had a document, such as the notice of deficiency, that it had prepared based on the W-2. That is not the case, and *Banister* does not hold that a notice of deficiency alone is sufficient to preclude a naked assessment. Importantly, in *Banister*, the Tax Court immediately goes on to state that, "petitioner does not deny receiving the income and instead argues that respondent 'failed to recognize, determine and/or make allowance for Petitioner expenses, losses and deductions, and exclusions (both business and non-business).' We view that position as an implicit acknowledgment that he received at least some income during his 2002 tax year." *Banister*, 2008 Tax Ct. Memo LEXIS 197, at *5.

Nelson is discussed further below in connection with page 469. For additional reading, see Bryan Camp, *Lesson From the Tax Court*, *supra*, https://taxprof.typepad.com/taxprof_blog/2018/07/lesson-from-the-tax-court-naked-assessments.html.

Page 439:

For recent Court of Appeals cases discussing what constitutes new matter, see *Blau v. Commissioner*, 924 F.3d 1261, 1279 (D.C. Cir. 2019) (affirming the Tax Court and finding that, where the IRS changed from finding a substantial valuation misstatement penalty to a gross valuation misstatement penalty, "although the IRS may theoretically have had the burden of proof as to the increase in penalty, there was no additional fact to which that burden applied") and *Feinberg v. Commissioner*, 916 F.3d 1330, 1334 (10th Cir. 2019) (holding that the Tax Court erred and should have placed the burden of proof on the IRS because substantiation of business expenses requires different evidence from finding that the business involved unlawful marijuana trafficking such that the expenses were disallowed by Code section 280E).

Page 469:

Nelson v. Commissioner, T.C. Memo. 2018-95, 2018 Tax Ct. Memo LEXIS 95, a case discussed above in connection with page 428, is in a case in which, like *Portillo v. Commissioner*, 932 F.2d 1128 (1991), the IRS relied on a third-party information return. In *Nelson*, it was a W-2. The court also referred to the notice of deficiency and the IRS's Wage and Income Transcript, but, as discussed above, those are simply documents the IRS based on the W-2.

Can the Tax Court simply rely on a W-2? In a footnote in *Nelson*, the Tax Court states:

> Section 6201(d) provides that, "if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return * * * and the taxpayer has fully cooperated with the Secretary," the IRS may not rely solely on the information return to satisfy its burden of production. Petitioner has not alleged a "reasonable dispute" concerning the Form W-2, and he wholly failed to cooperate with IRS representatives during the examination and trial preparation. See Parker v. Commissioner, T.C. Memo. 2012-66, 103 T.C.M. (CCH) 1321, 1323 (finding section 6201(d) inapplicable where the taxpayer "did not bring any factual dispute over any item of income to the IRS' attention within a reasonable time" but instead raised frivolous arguments).

As Bryan Camp explains, "From that language Judge Lauber infers the opposite: if the taxpayer either does not dispute an information return or does not cooperate with the IRS during the examination, then the IRS decision to rely solely on the third party return is the 'ligament of fact' necessary to connect the taxpayer to the alleged income." Camp, *Lesson From the Tax Court*, *supra*, at ¶ 20.

Portillo predates Code section 6201(d) (as mentioned on page 469 of the casebook), so it did not address the application of that section. In *Nelson*, appeal would lie to the Second Circuit. *Nelson*, 2018 Tax Ct. Memo LEXIS 95 at *6. We only found one opinion of the Court of Appeals for the Second Circuit that cites section 6201(d): *Mayer v. Commissioner*, 29 Fed. Appx. 706 (2d Cir. 2002). That case involved interest income reported on a Form 1099. *Id.* at 707. In that case, on appeal, as in the Tax Court, the taxpayer argued "that the IRS failed to meet its burden, imposed by 26 U.S.C. § 6201(d) . . . ." *Id.*; *see also* Mayer v. Commissioner, T.C. Memo. 2000-295, 2000 Tax Ct. Memo LEXIS 345, *4. The court found that because the taxpayer, Mr. Mayer, had not cooperated with the IRS, "the burden with respect to Mayer's receipt of the $22,192 did not shift to the IRS, which remained entitled to rely on the presumption created by the Form 1099 information return reflecting that that interest was paid to Mayer." *Mayer*, 29 Fed. Appx. at 708. It does not appear that the taxpayer argued that the IRS had made a naked assessment.

With respect to the *Nelson* case's citation of section 6201(d), Bryan Camp comments:

> What §6201(d) does NOT say is the IRS can just ignore *Portillo* and its progeny. But Judge Lauber's reading of §6201 would seem to undo *Portillo*. That is, the concern of the Fifth Circuit (and other courts) was that applying the presumption of correctness in unreported income cases forced the taxpayer to prove a negative. Judge Lauber's reading of §6201 seems to allow the IRS to say to the taxpayer during audit: "We believe the W-2. Prove the negative." I do not think that is the right procedure to establish the presumption of correctness, yet for all I can tell, that is what the IRS did here.

Camp, *Lesson From the Tax Court:* Naked Assessments!, *supra*, at ¶ 22.

The Tax Court's opinion in *Nelson* does not cite *Portillo*, perhaps because *Portillo* is a Fifth Circuit case. As noted above, appeal in *Nelson* lies to the Second Circuit. *Nelson*, 2018 Tax Ct. Memo LEXIS 95 at *6. The Second Circuit cited *Portillo* in *Matthews v. Commissioner*, but only for the proposition that "A tax court's determination that a taxpayer failed to substantiate deductions must be sustained unless clearly erroneous." Matthews v. Comm'r, 1995 U.S. App. LEXIS 39838, *10 (2d Cir. 1995).

As this discussion suggests, the intersection of Code section 6201(d) with *Portillo* and other naked assessment cases involving information returns remains an interesting question. For further reading, Bryan Camp, *Lesson From the Tax Court:* Naked Assessments!, TAXPROF BLOG (Jul. 9, 2018), https://taxprof.typepad.com/taxprof_blog/2018/07/lesson-from-the-tax-court-naked-assessments.html.

Chapter 10

Page 489:

The U.S. District Court for the Middle District of Florida recently decided an interesting case on the variance doctrine. In *Ginsburg v. United States*, Case No: 6-17-cv-1666-Orl-41DCI, 2019 U.S. Dist. LEXIS 66166 (M.D. Fla. Mar. 11, 2019), the taxpayer/plaintiff argued "that summary judgment should be granted in his favor regarding the gross valuation misstatement penalty because the IRS failed to comply with section 6751(b) of the Internal Revenue Code prior to assessing the penalty." *Id.* at *9. The problem was that he did not allege such IRS noncompliance in his refund claim. *Id.* at *10. "He argue[d] that the variance doctrine does not apply in this instance because Defendant bears the burden of demonstrating compliance with section 6751(b)." *Id.* The court disagreed and found that "[n]othing precluded Plaintiff from raising the IRS's alleged noncompliance in his refund claim, and Plaintiff's failure to do so prevents this Court from considering it." *Id.* at *11.

This case and others underscore one of the perils of the refund route—the variance doctrine and the pressure it puts on the content of the refund claim. *See, e.g.*, Logan v. United States, 2018 U.S. Dist. LEXIS 103654 *8-9, Case No. 2:18-cv-99-FtM-29MRM (M.D. Fla. June 21, 2018) (rejecting the taxpayer's argument that two new claims "do not substantially vary from the Original Claim because the IRS is required to investigate all possible grounds for recovery upon receiving a refund claim"). For further reading on the *Ginsburg* case, see Keith Fogg, *Variance Doctrine Trumps IRS Failure to Obtain Administrative Approval of Penalty*, PROCEDURALLY TAXING (May 6, 2019), https://procedurallytaxing.com/variance-doctrine-trumps-irs-failure-to-obtain-administrative-approval-of-penalty/.

Page 513:

In *Borenstein v. Commissioner*, 919 F.3d 746 (2d Cir. 2019), the Court of Appeals for the Second Circuit interpreted the flush language in section 6512(b)(3), which is quoted in the casebook: "In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years." I.R.C. § 6512(b)(3). In *Borenstein*, the taxpayer had overpaid her 2012 taxes and received a six-month extension of time to file, expiring October 15, 2013. She failed to file before she received a notice of deficiency the IRS sent on June 19, 2015—during the third year after the original due date of the return but during the second year after the extended due date. *Borenstein*, 919 F.3d at 748. On August 29, 2015, the taxpayer finally filed her 2012 return, claiming a refund. *Id.* The question before the court was whether a two-year or three-year lookback period applied, which in turn depended on the meaning of the flush language quoted above: was "the date of the mailing of the notice of deficiency . . . during the third year after the due date (with extensions) for filing the return of tax"? The Tax Court said that it was not. Borenstein v. Comm'r, 149 T.C. 263, 264 (2017). It found that the "with extensions" parenthetical modified the phrase "due date." *Id.* at 272 ("A modifying phrase is normally read to modify the nearest plausible antecedent. This rule is typically referred to as the 'last antecedent' rule.").

The Second Circuit reversed. It found that "[w]hile the Tax Court determined that '(with extensions)' modifies the noun 'due date,' it is at least as plausible that '(with extensions)' modifies the phrase 'third year after the due date,' thereby extending the third year." *Borenstein*, 919 F.3d at 750. Given the ambiguity the Second Circuit had identified, it consulted legislative history. It determined that it "appears that the amendment to 26 U.S.C. § 6512(b)(3) was intended to expand the jurisdiction of the Tax Court to order refunds for taxpayers who failed to file a return prior to the mailing of a notice of deficiency, and thereby eliminate an unwarranted differential in treatment." *Id.* at 751. It observed that "[t]he Tax Court's interpretation of 26 U.S.C. § 6512(b)(3) results in differential treatment of taxpayers that the statute's flush language was intended to eliminate: it would have had jurisdiction to grant Borenstein a refund if she had not been granted an extension for the filing of her return, but lacks jurisdiction because she obtained an extension that was not used."

For further reading on the *Borenstein* litigation, see Stephanie Cumings, *Second Circuit Closes Tax Court's Refund 'Black Hole'*, 163 TAX NOTES 300 (2019) (discussing the two decisions); Keith Fogg, *Borenstein Case Leaves Taxpayer Bare on Refund Claim*, PROCEDURALLY TAXING (Dec. 14, 2017), https://procedurallytaxing.com/boresntein-case-leaves-taxpayer-bare-on-refund-claim (discussing the Tax Court case and the amicus brief submitted by the Harvard Tax Clinic).

Chapter 11

Page 558:

The inflation-adjusted recovery amount for attorney's fees under section 7430 remains at $200 per hour for 2018 and 2019. Rev. Proc. 2018-57, 2018-49 I.R.B. 827 § 3.60 (2019 amount); Rev. Proc. 2017-58, 2017-45 I.R.B. 489 § 3.54 (2018 amount).

Chapter 12

Page 601:

A recent report by the Treasury Inspector General for Tax Administration found that for fiscal years 2015 through 2017, the Large Business & International Division, which examines business taxpayers with assets in excess of $10 million, assessed accuracy-related penalties in only 6% of the 4600 returns that it examined. TIGTA, *Few Accuracy-Related Penalties Are Proposed in Large Business Examinations and They Are Generally Not Sustained on Appeal*, Rep. 2019-30-036, May 31, 2019, at 4, 7. When the IRS did propose accuracy-related penalties, large business taxpayers usually were successful in having those penalties reduced or eliminated on appeal. According to the report, which focused on 195 cases closed by Appeals as of December 2018, the IRS Appeals Office reduced proposed penalty amounts totaling $773 million by $765 million, a reduction of nearly 99 percent. *Id*. at 3-4. By comparison, the report found that the IRS assesses accuracy-related penalties against 25% of returns filed by smaller businesses. *Id*. at 7. What explains the disparity between penalties assessed against large versus small businesses? How do the low penalty rate and the penalty reduction rate for those who appeal impact voluntary compliance by large business taxpayers? The new IRS Commissioner has pushed back against the TIGTA report, claiming that the IRS will not increase or decrease penalties based on "reports that come from outside the system." Eric Vauch, *Rettig Says TIGTA Report Won't Affect Penalty Decisions*, 163 TAX NOTES 2045 (2019).

Page 603:

The Taxpayer First Act increased the minimum penalty for failure to file an income tax return within 60 days of the due date. Effective for returns filed after December 31, 2019, the minimum penalty may not be less than the lesser of $330 (adjusted for inflation) or 100 percent of the amount required to be shown as tax on the return. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 3201 (amending Code section 6651(a)).

Page 629:

Revenue Procedure 2019-9, 2019-2 I.R.B. 292, updates Revenue Procedure 2016-13, 2016-4 I.R.B. 290, cited in the casebook, without significant revisions to the material discussed in the casebook.

Page 649:

A long-overlooked Code provision has taken on new significance after a 2017 decision by the U.S. Tax Court. The Tax Court's holding in *Graev v. Commissioner*, 149 T.C. 485 (2017), involves Code section 6751(b), enacted as part of the IRS Reform Act. Section 6751(b) mandates that "no penalty . . . shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." I.R.C. § 6751(b)(1). The requirement of written supervisory approval does not apply to the delinquency penalties in section 6651 or the penalty for failure to pay estimated tax in sections 6654 and 6655. I.R.C. § 6751(b)(2)(A).

The taxpayers in *Graev* received a notice of deficiency asserting a 40-percent gross valuation misstatement penalty relating to noncash charitable contribution deductions. After the IRS filed an answer to the taxpayers' Tax Court petition, the IRS amended its answer to concede the 40-percent penalty and instead impose a 20-percent accuracy-related penalty arising from different contributions made by the taxpayers. In an earlier opinion involving the same set of facts, a divided Tax Court had sustained the 20-percent penalty, ruling that the taxpayers' argument that the IRS failed to comply with section 6751 was premature in a pre-assessment deficiency proceeding. Graev v. Comm'r, 147 T.C. 460, 2016 U.S. Tax Ct. LEXIS 33 (Nov. 30, 2016) (referred to by the Tax Court as "*Graev II*"). However, in *Chai v. Commissioner*, the Court of Appeals for the Second Circuit agreed with the dissent in *Graev II* and ruled that the section 6751(b) written approval requirement is an element of the penalty claim and that written approval of an initial penalty determination must occur "before the issuance of the notice of deficiency, or the date of the filing of the answer by the IRS, or the date of the filing of an amended answer by the IRS." Chai v. Comm'r, 851 F.3d 190, 221-22 (2d Cir. 2017).

In response to the Second Circuit's decision, a divided Tax Court vacated its ruling in *Graev II* and reversed its prior holding that consideration of whether the IRS complied with section 6751(b) was premature in a deficiency case. *Graev*, 149 T.C. 485, 483. Writing for the majority, Judge Thornton ruled as follows:

> Under section 7491(c) the Commissioner bears the burden of production with respect to the liability of an individual for any penalty. To satisfy this burden the Commissioner must present sufficient evidence to show that it is appropriate to impose the penalty in the absence of available defenses. *See* Higbee v. Commissioner, 116 T.C. 438, 446 (2001). In light of our holding that compliance with section 6751(b) is properly at issue in this deficiency case, we also hold that

> such compliance is part of respondent's burden of production under section 7491(c).

Id. at 493-94. Based on the unique facts of the case, the majority ultimately found that the IRS had satisfied the approval requirement and sustained the 20-percent penalty, *id*. at 498.

Judge Holmes, who concurred in the result, disagreed with his colleagues over the issue of whether compliance with the written approval requirement should be considered in deficiency cases. According to Judge Holmes:

> Section 6751 has been in the Code for nearly twenty years. Adopting [the Second Circuit's] reading as our own, and rolling it out nationwide, amounts to saying that we have been imposing penalties unlawfully on the tens of thousands—perhaps hundreds of thousands—of taxpayers who have appeared before us in that time. It is quite a counterintuitive result to those with a working knowledge of tax vocabulary and procedure; it will have unintended and irrational consequences unless corrected by additional appellate review or clarifying legislation; it is contrary to the text of the Code, whether viewed by itself or in light of a seemingly applicable canon of construction—and I predict it will even end up harming taxpayers unintentionally.

Id. at 503.

As a result of the decision, tax practitioners reportedly have been taking a closer look at penalty assessments and arguing that penalties should be dismissed if the IRS did not follow the requirements of section 6751(b). Caroline Vargas & Courtney Rozen, *Jump in 'Graev' References Pressures IRS on Penalty Assessment*, DAILY TAX REP. (BNA), at 6 (July 9, 2018). As evidence of the increasing importance of the issue, the same article reports that the Tax Court cited *Graev* in 28 decisions during the second quarter of 2018, compared with only 10 decisions in the first quarter of the same year. *Id*. In fact, the Tax Court has found taxpayers not liable for applicable penalties even though the facts before the court revealed that the taxpayers should have been penalized. *See*, *e.g*., J.C. Becker v. Comm'r, T.C. Memo 2018-60, 2018 Tax Ct. Memo LEXIS *69 (civil fraud penalty not imposed because of IRS's failure to comply with supervisory approval requirement); Azam v. Comm'r, T.C. Memo 2018-72, 2018 Tax Ct. Memo LEXIS *73 (negligence penalty not imposed).

Guidance from the IRS's Chief Counsel's Office advises IRS attorneys to submit evidence of compliance with section 6751(b) even if the taxpayer does not raise the issue. Chief Counsel Advice, CC-2018-006 (June 6, 2018), https://www.irs.gov/pub/irs-ccdm/cc%202018%20006.pdf. As a general rule, "[a]ttorneys should not argue that approval of a penalty appearing in a statutory notice of deficiency may be obtained from the Internal Revenue Service after the statutory notice is mailed." *Id*. at 2. If the IRS attorney cannot obtain proof of proper supervisory approval then the attorney should concede the penalty. *Id*.

What if the IRS raises a penalty assertion for the first time after it issues the notice of deficiency or raises a penalty different from that included in the notice? Would the IRS be able to satisfy the approval requirements in section 6751(b) or is the notice of deficiency its "initial determination"? The taxpayers in *Roth v. Commissioner*, 922 F.3d 1126 (10th Cir. 2019), made the argument that the notice of deficiency represented the IRS's initial determination of all penalties, suggesting that any penalty raised later—in the IRS's answer to a Tax Court petition, for example—would necessarily fail to satisfy the prior approval requirements. In that case, the notice of deficiency sent to the taxpayers asserted a 20% valuation misstatement penalty. The taxpayers filed a petition in Tax Court, and, in its answer, the Chief Counsel attorney, after receiving supervisory approval, asserted a 40% gross valuation misstatement penalty. *Id*. at 1129-30.

The Tenth Circuit rejected the taxpayers' arguments that the notice of deficiency represented the initial penalty assertion. In doing so, the court noted the ambiguity inherent in the statutory language of section 6751(b). *Id*. at 1132. The statute prohibits a penalty assessment unless the "initial determination of such assessment" is approved. As students who have studied Chapter 9 know, the IRS determines deficiencies, not assessments. And a deficiency determination is a perquisite for an assessment. Acknowledging this ambiguity, the court went on to conclude that neither the statutory language nor the legislative history to section 6751(b) requires the IRS to include its initial determination in the notice of deficiency. *Id*. at 1132-33.

The court also found support for its conclusion in the language of section 6214(a), which explicitly allows the Tax Court to redetermine a deficiency and any additional penalties stated in the notice if the IRS asserts the claim at or before a Tax Court hearing or rehearing. According to the Tenth Circuit:

> [Section] 6214(a) expressly contemplates the IRS's ability to bring claims for "any addition" to a taxpayer's deficiency in a proceeding before the Tax Court. I.R.C. § 6214(a). After the IRS asserts such a claim, . . ., the Tax Court has "jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined" exceeds that in the "notice . . . mailed to the taxpayer," including "any additional amount, or any addition to the tax." *Id.* Numerous cases decided before and after the passage of § 6751 have upheld the Tax Court's "jurisdiction to consider a claim by the Commissioner for an increased deficiency and penalties asserted at or before the hearing or a rehearing." *Kramer v. Comm'r*, T.C. Memo 2012-192, 104 T.C.M. (CCH) 38 (T.C. 2012); *see, e.g., Powell v. Comm'r*, 581 F.3d 1267, 1271 (10th Cir. 2009); *Ferrill v. Comm'r*, 684 F.2d 261, 265 (3d Cir. 1982); *Henningsen v. Comm'r*, 243 F.2d 954, 959 (4th Cir. 1957). We agree with the IRS that adopting the [taxpayers'] proposed interpretation of § 6751(b) would effectively repeal the Tax Court's well-settled jurisdiction to consider claims for new penalties asserted by the IRS in a deficiency proceeding.

Id. at 1134-35.

Instead of asserting a penalty after issuing a notice of deficiency, what if the IRS asserts a penalty in the 30-day letter, before it issues the notice? Must the IRS agent who drafts the 30-day letter seek prior approval for the penalty assertion before issuing the 30-day letter? According to a recent Tax Court decision, the answer is yes. *Clay v. Commissioner*, 152 T.C. No. 13, 2019

U.S. Tax Ct. LEXIS 14, involved a group of taxpayers who failed to include in income casino distributions from their tribe. The Tax Court found the distributions taxable but refused to impose an accuracy-related penalty for failing to report the amounts. The IRS agent who audited the taxpayers asserted in the 30-day letter a substantial understatement penalty. The facts revealed that the agent did not receive prior supervisory approval before issuing the 30-day letter. *Id*. at *15-16.

The Tax Court in *Clay* framed the argument as follows: "[W]hether approval can come after the agent sends the taxpayer proposed adjustments that include penalties. In other words, must an agent secure penalty approval before sending to the taxpayer written notice that penalties will be proposed, in this case in the form of a notice of proposed adjustment that gives the taxpayer right to appeal the proposed penalties with Appeals." *Id*. at *38-39. According to the court:

> The determinations made in a notice of deficiency typically are based on the adjustments proposed in an RAR [Revenue Agent's Report, eds.]. *See* Branerton Corp. v. Commissioner, 64 T.C. at 194-195; Globe Tool & Die Mfg. Co. v. Commissioner, 32 T.C. 1139, 1141 (1959) ("[R]espondent sent to petitioner by registered mail a notice of deficiency determining deficiencies in income tax for the taxable years 1951 and 1952. * * * Said determination by respondent was based on the adjustments contained in the revenue agent's report[.]"); Fitzner v. Commissioner, 31 T.C. 1252, 1255 (1959) ("[I]t is obvious that petitioner * * * is relying upon the revenue agent's report of examination upon which respondent based his determination of deficiency."). And when those proposed adjustments are communicated to the taxpayer formally as part of a communication that advises the taxpayer that penalties will be proposed and giving the taxpayer the right to appeal them with Appeals (via a 30-day letter), the issue of penalties is officially on the table. *See* Palmolive Bldg Inv'rs, LLC v. Commissioner, 152 T.C. _, __, 2019 U.S. Tax Ct. LEXIS 4 at *4-5 (Feb. 28, 2019). Therefore, we conclude that the initial determination for purposes of section 6751(b) was made no later than September 13, 2010, when respondent issued the RAR to petitioners proposing adjustments including penalties and gave them the right to protest those proposed adjustments.

Id. at *39-40. Because supervisory approval took place after the 30-day letter was issued, the penalty assertions were barred by section 6751(b).

Code section 6751(b) contains two exceptions. As noted above, the prior supervisory approval requirement does not apply to the delinquency penalty or the failure to pay estimated tax penalties. I.R.C. § 6751(b)(2)(A). It also does not apply to "any . . . penalty automatically calculated through electronic means." I.R.C. § 6751(b)(2)(B). A recent Tax Court decision examined the scope of that latter exception. *Walquist v. Commissioner*, 152 T.C. No. 3 (Feb. 25, 2019), 2019 U.S. Tax Ct. LEXIS 2, involved taxpayers who received a computer-generated 30-day letter that proposed a deficiency due to unreported income. The IRS's computer-generated letter included a substantial understatement penalty, which was determined to be due and calculated mathematically based on the amount of the proposed tax understatement. Because the taxpayers did not respond to the 30-day letter, the taxpayers received a computer-generated notice of deficiency that also included the penalty *Id*. at *2-3. The question before the court was whether an accuracy-related penalty produced by an IRS computer program without human involvement falls within the exception in section 6571(b)(2)(B). *Id*. at *12.

The Tax Court concluded that the penalty was not subject to supervisory approval. In doing so, the court relied on the plain language of the statute as well as an analogy to the exception in section 6751(b)(2)(A), which permits the IRS to assess delinquency penalties for failure to pay income and estimated taxes without prior supervisory approval. According to the court:

> Substantial understatement penalties, when computer-determined by the [IRS's computer] program, resemble additions to tax under sections 6651, 6654, and 6655. The penalty is determined mathematically according to a formula derived from the statutory text. *See* sec. 6662(a), (b)(2), (d)(1)(A). And the penalty is mandatory, subject to statutory exceptions including "reasonable cause." . . .
>
> Computer-determined penalties likewise resemble additions to tax in that they typically do not raise the concern that prompted Congress to enact the supervisory-approval requirement. Congress' goal in enacting section 6751(b)(1) was to ensure that penalties are "only * * * imposed where appropriate and not as a bargaining chip." *See* S. Rept. No. 105-174, at 65 (1998), 1998-3 C.B. 537, 601. "The statute was meant to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." Chai, 851 F.3d at 219 (citing legislative history). Where, as here, a penalty is determined by a computer software program and never reviewed by a human being, it could hardly be considered a "bargaining chip." Rather, like an addition to tax under section 6651, 6654, or 6655, it is added to the tax automatically according to a predetermined mathematical formula.

Id. at *16-17.

A commentator has pointed out the limited scope of the holding in *Walquist*. Had the taxpayers responded to the computer-generated 30-day letter and brought the matter to the attention of an actual IRS employee, the supervisory approval requirement would likely have applied and would have required supervisory review before the IRS employee sent a notice of deficiency. Bryan Camp, *Lessons From the Tax Court: No Human Review Needed for Automated Penalties?*, TAXPROF BLOG, https://taxprof.typepad.com/taxprof_blog/2019/03/lesson-from-the-tax-court-no-human-review-needed-for-automated-penalties.html (Mar. 4, 2019).

Chapter 13

– No significant updates –

Chapter 14

Page 693:

The private debt collection program remains controversial. A Treasury Inspector General for Tax Administration Report released in September of 2018 faulted private debt collection agencies that participate in the program for failing to protect taxpayer privacy and for possible violations of the Fair Debt Collection Practices Act. TIGTA, *The IRS and Private Debt Collectors Took Some Action for 16 Potential Violations of Fair Tax Collection Practices During Fiscal Year 2017*, Rep. 2018-30-079 (Sept. 25, 2018), at 3-8. The National Taxpayer Advocate has criticized the program for targeting low-income and elderly taxpayers whose cases might otherwise have been placed in currently not collectible status, which would defer any collection efforts. National Taxpayer Advocate, Vol. 1 *Annual Report to Congress* (Feb. 12, 2019), at https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1.pdf. Supporters of the program, on the other hand, claim that the program has been successful in terms of collecting revenue that might otherwise have been avoided. William Hoffman, *Private Tax Collections Seeing Uptick So Far in Fiscal 2019*, 162 TAX NOTES 1397 (2019).

The Taxpayer First Act includes several provisions relating to the private debt collection program. The new law exempts taxpayers from private collection activity if their income consists substantially of disability benefits or they have an adjusted gross income less than 200 percent of the poverty level. The new law also extends the maximum length of installment agreements that private debt collectors can offer taxpayers from five to seven years. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1205(a), (c) (amending Code section 6306(d)(3), (b)(1)(B)). According to a House Committee Report relating to an earlier version of the Taxpayer First Act of 2019, "The Committee intends that by eliminating certain low-income taxpayers from the private debt collection program efforts can be focused on collecting debt from taxpayers with an ability to pay and higher dollar debts." H.R. REP. NO. 116-1957, at 43 (2019).

Page 720:

As noted in the casebook, Code section 6334(a) list classes of property exempt from levy. One of those levy exemptions includes a minimum amount of wage income, the amount of which is based upon the taxpayer's standard deduction and the taxpayer's personal and dependency exemptions. *See* I.R.C. § 6334(b) (before repeal). During those years in which the personal and dependency exemptions are repealed (2018-2025), the amount of the levy exemption for wage income is based upon the sum of the taxpayer's standard deduction plus the total of $4,150 (adjusted for inflation after 2018) multiplied by the number of the taxpayer's dependents for the tax year in which the levy takes place. I.R.C. § 6334(d)(4).

Page 722:

Among the few revisions included in the 2017 Tax Act that relate to tax procedure are changes to the levy and sale procedures. As noted in the casebook, a person other than the delinquent taxpayer whose property was seized by the IRS may bring a civil action in district court for wrongful levy and in the suit seek return of the property or, if the property has already been sold, payment of an amount equal to the value of the property or the sale proceeds, whichever is greater. I.R.C. §§ 7426, 6343(b). The 2017 Tax Act extended the time period by which the wrongly levy action may be filed from 9 months after the date of levy to two years. I.R.C. § 6532(c). Correspondingly, the period of time the IRS has to return proceeds from the sale of wrongfully levied property was also extended from 9 months to two years. I.R.C. § 6343(b).

Chapter 15

Page 760:

In February of 2019, the IRS released an updated Form 433-F. The updated form is substantially similar to the earlier version that appears in the casebook. Revised Form 433-F now requires taxpayers to list cryptocurrency ("*e.g.*, Bitcoin, Ethereum, Litecoin, Ripple") among the taxpayer's assets. IRS Form 433-F (Collection Information Statement) 1 (Feb. 2019), https://www.irs.gov/pub/irs-pdf/f433f.pdf.

Page 765:

The Taxpayer First Act codifies the existing exceptions granted low-income taxpayers with respect to processing fees for submitting an offer in compromise request and the upfront down payment requirement. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1103 (adding Code section 7122(c)(3)).

Page 766:

Under recently revised guidance, the IRS will now return to the taxpayer the application fee the taxpayer submitted with the offer in compromise request if the IRS determines that the application is not processable. I.R.M. 5.8.2.4.1.1 (revised May 25, 2018). As a general rule, the IRS will also return any down payment the taxpayer submitted with the offer request if the IRS cannot process the application. I.R.M. 5.8.2.6.5 (revised February 9, 2018). However, if the offer is not processable because the taxpayer failed to file previous years' returns, the IRS will retain the down payment and apply it to any outstanding assessed liabilities. I.R.M. 5.8.2.4.1.2 (revised May 25, 2018).

Page 767:

In March of 2019, the IRS released an updated Form 656-B, the "Form 656 Booklet: Offer in Compromise" that contains Form 656 (starting on page 767 of the casebook) and Form 433-A(OIC) (starting on page 774 of the casebook). The booklet is available at https://www.irs.gov/pub/irs-pdf/f656b.pdf. The updated forms are substantially similar to the earlier versions that appear in the casebook. Revised Form 656 includes updated figures relating to low-income certification (which allow low-income taxpayers to avoid user fees and down payments) and information about electronic fund transfers.

Chapter 16

Page 811:

The citation to Revenue Procedure 2012-14, 2012-1 C.B. 455, should instead be to Revenue Procedure 2012-18, 2012-1 C.B. 455.

Page 812:

As noted in Section 16.02[D][1], a taxpayer who raises an issue in a post-lien Collection Due Process (CDP) hearing generally is not permitted to raise the same issue during a pre-levy CDP hearing. I.R.C. § 6330(c)(4). The same holds true in the reverse situation: In general, if a taxpayer raises an issue in a CDP hearing under section 6320 and meaningfully participated in that hearing, the taxpayer may not raise the same issue in a CDP hearing under section 6330. I.R.C. § 6320(c) (providing that section 6330(c) applies to section 6320). According to Treasury Regulation section 301.6320-1(e)(1), a "taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6330 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceedings." The scope of what constitutes a prior administrative proceeding was at issue in *Loveland v. Commissioner*, 151 T.C. 78 (2018).

The taxpayers in *Loveland* received a Notice of Intent to Levy. The taxpayers did not request an Appeals hearing but instead submitted an offer in compromise and negotiated the request with a collections officer, who eventually denied the offer request. After the IRS filed a Notice of Federal Tax Lien, the taxpayer requested a CDP hearing under section 6320 and asked the Appeals officer to consider their earlier offer in compromise application. *Id*. at 79-81. The Appeals officer refused to reconsider the previously rejected offer. The question before the Tax Court was whether negotiations with a collections officer constitute a previous "administrative proceeding" within the meaning of regulation section 301.6320-1(e)(1). *Id*. at 85.

The Tax Court ruled that the Appeals Officer abused her discretion by not considering the previously rejected offer in compromise request during the CDP hearing.

> Whether a previously rejected collection alternative can be raised at a CDP hearing does not hinge on whether the taxpayer had a prior opportunity to challenge the rejection; it hinges on whether the rejected collection alternative was actually considered at a previous administrative or judicial proceeding. In other words it is not a question of whether there was a *prior opportunity*, but whether there was a *prior proceeding*.
>
> . . . T]he standard for whether a collection issue can be raised at a CDP hearing is whether the issue was actually considered in a previous administrative or judicial proceeding. Sec. 301.6320-1(e)(1), Proced. & Admin. Regs. The Lovelands had a prior opportunity for a CDP hearing regarding their offer-in-compromise, but they never availed themselves of that opportunity. Because they only negotiated with the collections officer and did not have a CDP hearing regarding her rejection of their offer-in-compromise, they never had a prior

> hearing. Accordingly, they may request consideration of the same offer-in-compromise in a subsequent CDP hearing on the same tax for the same period.

Id. at 86 (emphasis in original).

The Tax Court noted that, had the taxpayers sought to challenge the existence or amount of their underlying liability (and not just a collection alternative), their failure to request a CDP hearing when first contacted would prevent them from raising the issue in a CDP hearing relating to the same tax and the same tax year. *Id*. at 86-87 (citing Treas. Reg. § 301.6320-1(e)(3) Q&A-E7). But that is not what happened here, and the taxpayers prevailed. For further reading on the importance of the *Loveland* decision, see Keith Fogg, *What is a Prior Administrative Hearing?*, PROCEDURALLY TAXING (Oct. 2, 2018), https://procedurallytaxing.com/what-is-a-prior-administrative-hearing/.

Page 819:

For a nice overview of recent issues in CDP litigation, see Keith Fogg, *Trends and Tactics in Collection Due Process Litigation During 2018*, PROCEDURALLY TAXING (Dec. 28, 2018), https://procedurallytaxing.com/trends-and-tactics-in-collection-due-process-litigation-during-2018/.

Page 824:

In *Melasky v. Commissioner*, 151 T.C. No. 8 (2018), 2018 U.S. Tax Ct. LEXIS 50, the Tax Court considered the standard of review on the following unusual facts:

> On January 27, 2011, the Melaskys walked into an IRS office with a check for $18,000. They asked to apply it to their 2009 tax liability. They assert that this would've paid their entire income tax liability for that year, and the IRS admits that it got this check. IRS records show that it posted the $18,000 payment to the Melaskys' 2009 tax liability on that same day. These records then show a reversal of that same amount because the check bounced. Why did it bounce? Here we have an unusual, but undisputed, fact—on January 31, the IRS sent a notice of levy to the Melaskys' bank. This notice froze their entire balance, and either that or the IRS's execution of the levy sometime after January 31 made the Melaskys' check bounce. The IRS then applied the entire balance that it got with the levy to the Melaskys' 1995 tax liability on February 28. The IRS also charged the Melaskys $360 as a penalty for writing a bad check.

Id. at *1-2. The parties actually agreed that the Tax Court should "review the determination for tax year 2009 *de novo* because the Melaskys argue that they had no 2009 tax liability." *Id.* at *4. However, the court held that abuse of discretion review applied because the taxpayer was not challenging the underlying tax liability for 2009 but rather entailed "a question of whether the liability remains *unpaid*." *Id.* at *4. This case also had a second opinion issued the same day, Melasky v. Commissioner, 151 T.C. No. 9 (2018), 2018 U.S. Tax Ct. LEXIS 51. The *Melasky* litigation is discussed in four posts on the Procedurally Taxing blog. *See* https://procedurallytaxing.com/?s=Melasky (providing search results).

Page 830:

In *Atl. Pac. Mgmt. Grp., LLC v. Commissioner*, 152 T.C. No. 17 (2019), 2019 U.S. Tax Ct. LEXIS 19, the Tax Court held that it lacked jurisdiction over the case because the taxpayer had not received a determination letter. *Id.* at *7. The taxpayer's CDP request was untimely made and it never received a CDP hearing. *Id.* The taxpayer tried invoking the Taxpayer Bill of Rights, arguing that "section 7803(a)(3), which provides a statutory taxpayer bill of rights (TBOR), gives it a right to be heard and to appeal decisions of respondent to an independent forum." *Id.* However, the court found that:

> [S]ection 7803(a)(3) itself does not confer any new rights on taxpayers; it merely lists "taxpayer rights as afforded by other provisions of" the Code. Further, section 7803(a)(3) imposes an obligation on the Commissioner to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with" such rights. It does not independently establish a basis for jurisdiction in this Court.

Id. at *7-8. For further discussion of this case, see Keith Fogg, *Taxpayer Bill of Rights Does Not Confer Tax Court with Jurisdiction in Collection Due Process*, PROCEDURALLY TAXING (Jul. 8, 2019), https://procedurallytaxing.com/taxpayer-bill-of-rights-does-not-confer-tax-court-with-jurisdiction-in-collection-due-process/.

Chapter 17

Page 887:

The Taxpayer First Act of 2019 made an important change in the scope of review in innocent spouse cases. In *Demeter v. Commissioner*, T.C. Memo. 2014-238, 2014 Tax Ct. Memo LEXIS 236 (Nov. 24, 2014), which is reproduced in the casebook starting on page 879, the court says on page 882 of the casebook, "In determining whether petitioner is entitled to section 6015(f) relief we apply a de novo standard of review as well as a de novo scope of review." *Id.* at *9 (citing cases). The Taxpayer First Act added a provision on the standard and scope of review:

> (a) IN GENERAL.—Section 6015 is amended—
>
> > (1) in subsection (e), by adding at the end the following new paragraph:
> >
> > "(7) STANDARD AND SCOPE OF REVIEW.—Any review of a determination made under this section *shall be reviewed de novo by the Tax Court and shall be based upon*—
> >
> > > "(A) the *administrative record established at the time of the determination*, and

> "(B) *any additional newly discovered or previously unavailable evidence*."

Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1203(a)(1) (adding new paragraph 6015(e)(7)) (emphasis added). The new provision provides a *de novo* standard review, consistent with *Demeter*. However, the scope of review differs. The scope of review is not limited to the administrative record, but it is not fully *de novo*, either. It is limited to the administrative record plus "any additional newly discovered or previously unavailable evidence." I.R.C. § 6015(e)(7).

Carlton Smith wrote a letter to the Editor of *Tax Notes*, stating, "the courts have uniformly held that the scope of the subsection (e) stand-alone innocent spouse proceeding considering relief under all subsections of section 6015 (including subsection (f) equitable relief) is a trial *de novo* as to evidence. The IRS no longer even argues otherwise." Carlton M. Smith, Letter to the Editor, *Review of Innocent Spouse Cases Less Taxpayer-Friendly Under Bill*, 163 TAX NOTES 583, 583 (2019) (footnotes omitted).

Page 888:

The casebook explains on page 888 that section 6015(f) did not have a statutory deadline but that the IRS and Treasury Department had taken the approach that "section 6015(f) relief can be requested during: (1) the 10-year statute of limitations on collections under section 6502 or (2) the two- or three-year limitation period on refund claims under section 6511, whichever is applicable" (citations omitted). The Taxpayer First Act essentially has codified this approach. It adds the following time limitation as a new paragraph in section 6015(f):

> (2) LIMITATION—A request for equitable relief under this subsection may be made with respect to any portion of any liability that—
>
> > (A) has not been paid, provided that such request is made before the expiration of the applicable period of limitation under section 6502, or
> >
> > (B) has been paid, provided that such request is made during the period in which the individual could submit a timely claim for refund or credit of such payment.

Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1203(a)(2) (new I.R.C. § 6015(f)(2)). Section 6502 is the statute of limitations on collections.

Pages 890-91:

As predicted in the casebook, there has been more litigation on the important issue of whether the Tax Court has exclusive jurisdiction over innocent spouse claims. Some district courts have held that they lack jurisdiction to consider innocent spouse claims made there, apparently misunderstanding Code section 6015(e). *See* Keith Fogg, *Litigating Innocent Spouse Cases in District Court – Does the Department of Justice Tax Division Trial Section Talk to Its Appellate Section?*, PROCEDURALLY TAXING (Nov. 1, 2018), https://procedurallytaxing.com/litigating-innocent-spouse-cases-in-district-court-does-the-department-of-justice-tax-division-trial-section-talk-to-its-appellate-section/. Note that section 6015(e) does not purport to provide the Tax Court with exclusive jurisdiction, and, as the casebook explains, Congress tried to clarify that its innocent spouse jurisdiction is not exclusive. District courts do not yet seem to be clear on this point, however. For recent cases finding a lack of refund-court jurisdiction, see, *e.g.*, Chandler v. United States, 338 F. Supp. 3d 592 (N.D. Tex. 2018) (Horan, Mag. J., *adopted by* Scholer, J.); Hockin v. United States, No. 3:17-cv-1926-JR (D. Ore. May 1, 2019) (Russo, Mag. J.), http://procedurallytaxing.com/wp-content/uploads/2019/05/Hockin-Magistrate-Recommendation.pdf.

Page 891:

Several appellate cases have held that Code section 6015(e) 90-day filing period is not subject to equitable tolling because it is jurisdictional, affirming the Tax Court. For a recent case, see Nauflett v. Commissioner, 892 F.3d 649, 653, 655 (4th Cir. 2018). *See also* Matuszak v. Commissioner, 862 F.3d 192, 197-98 (2d Cir. 2017); Rubel v. Commissioner, 856 F.3d 301, 306 (3d Cir. 2017).

Chapter 18

Pages 908-09:

While not included in the Taxpayer First Act, a provision that would grant the Treasury Department the authority to regulate unlicensed tax return preparers is still being pursued by some lawmakers. Protecting Taxpayers Act, S. 3278, 115th Cong. § 202 (2018). In response to the *Loving* decision, discussed in the casebook, the IRS created the "Annual Filing Season Program", a voluntary return-preparer program that provides a certification for otherwise unregulated practitioners who complete the requisite training. Practitioners who participate must complete an IRS refresher course, acquire CLE credits, and agree to the duties included in Circular 230. Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

In a recent case, the Court of Appeals for the District of Columbia rejected a claim by the American Institute of Certified Public Accountants that the voluntary program exceeded the Treasury's authority. AICPA v. IRS, 746 Fed. Appx. 1, 2018-2 USTC ¶ 50,375 (D.C. Cir. 2018). The Court of Appeals found that, because the program is voluntary, it did not remove existing rights that unenrolled preparers have to practice before the IRS. *Id.* at 3-4.

The Court of Appeals for the District of Columbia also ruled in a separate case that the IRS has the authority to charge a user fee for issuing and renewing a preparer tax identification number (PTIN). Montrois v United States, 916 F.3d 1056 (D.C. Cir. 2019). Anyone who prepares or assists in the preparation of a federal tax return for compensation must obtain a valid PTIN. *See* I.R.C. § 6109(a)(4); Treas. Reg. § 1.6109-2(a). The court remanded the case to the district court to determine whether the IRS's proposed fee (most recently $33) was reasonable. *Id*. at 1068.

Chapter 19

Page 942:

While small talk can be used to bridge gaps between the lawyer and the client, a recent article emphasizes the importance of avoiding "racially charged words." Suzanne Rowe, *The Elephant in the Room: Responding to Racially Charged Words*, 15 LEGAL COMM. & RHETORIC: JALWD 263, 265 (2018). The article provides as an example of such words, "In meeting new clients, an attorney might try to make small talk by asking, 'No, where are you *really* from?'—assuming from the clients' appearance that they aren't Americans." *Id.* at 268.

Page 943:

A recent article focused on the engagement of new clients by criminal defense attorneys suggests requesting that the client turn off her mobile phone. *See* Denis deVlaming, *How to Engage the New Client*, 43 CHAMPION 34, 34 (2019) (stating that "[a] client information form should be given to the client upon arrival. . . . [T]he form should include a note in bold letters asking the client to 'turn off your cellphone when the appointment begins.'").

Page 949:

For additional reading regarding predicting the outcome of legal proceedings, see Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PA. ST. L. REV. 41 (2018).

Page 955:

For additional reading regarding topics to address in an engagement letter, see Allison C. Shields, *What Should Your Engagement Agreement Include?,* 90 N.Y. ST. B.J. 22 (2018).

Page 960:

When delivering bad news to a client, a recent article suggests the following:

> [T]he best advice is to be proactive. Don't let your client find out bad news from someone else, and don't be unprepared. Whenever you deliver bad news, I can guarantee that you'll be asked some version of "what now?" You need to have a good answer at the ready.
>
> Before I deliver bad news, I take a couple of minutes to identify all possible impacts of the news and potential routes that can be taken to resolve the issue. Have a preferred plan of action, but also identify alternatives so that your client is empowered through a feeling of choice and control over the situation. Make sure that your plan is specific and detailed. No one wants to hear "I'm working on it." Once you have a list of action steps, ask yourself if any of them can be done quickly and immediately. Nothing softens the blow of bad news

> better than finding out that concrete steps have already been taken to right the wrong.

Jordan L. Couch, *Communicating with Clients Five Conversations You Must Get Right*, 35 GPSOLO 16, 19 (2018).

Page 962:

A recent article on the analytical skills that lawyers use in negotiations points out that "[d]etermining whether a negotiation is zero sum is important because your negotiation tactics might be more competitive when fighting over a fixed pie." George J. Siedel, *Developing Four Essential Analytical Skills for Your Negotiating Team*, BUS. L. TODAY 1, 3 (Aug. 2018). It also provides the following advice:

> [D]on't be trapped by what researchers call the "Mythical Fixed Pie Assumption." The assumption that every negotiation is zero sum, while prevalent in settlement negotiations, also arises during transactional negotiations. To avoid the assumption, you should ask questions designed to identify the interests of the other side and match those interests with those of your client to develop opportunities that benefit both sides.

Id.

Chapter 20

– No significant updates –