TAX CONTROVERSIES: PRACTICE AND PROCEDURE (4TH ED.)
2020 CUMULATIVE SUPPLEMENT
Leandra Lederman & Stephen W. Mazza

This Cumulative Supplement to the Fourth Edition of the Tax Controversies: Practice and Procedure casebook replaces previous updates. It updates the casebook through July 1, 2020. After three brief overviews of recent major legislative changes since the Fourth Edition of the casebook was published, this Supplement provides more detailed updates, organized by chapter and page number of the casebook.

Coronavirus Aid, Relief, and Economic Security (CARES) Act: A Brief Overview

On March, 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act is primarily an economic relief package, but it does contain several tax provisions. For example, the legislation seeks to support small businesses by granting an employment tax credit equal to 50 percent of qualified wages paid to employees who are not working due to a full or partial cessation of business. CARES Act § 2301. The Act also grants recovery rebates for individual taxpayers, which represent advance refunds of credits against 2020 tax liability. *Id.* § 2201. Nothing in the CARES Act directly affects the procedural rules discussed in 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 FED. 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 the 2018 through 2025 time period, the filing thresholds for single individuals and married couples filing jointly are 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 overseeing the reorganization plan may fall to the current IRS Commissioner, Charles Rettig, who 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) (Sept. 14, 2018) , at 6. According to one account, he is the first practicing lawyer to head the IRS in two decades. *Id*.

To implement changes and draft reports mandated by the Taxpayer First Act, the IRS created a Taxpayer First Act Office (TFAO). Michael P. Dolan, *IRS Watch: Implementing the Taxpayer First Act*, J. TAX PRAC. & PROC., Dec. 2019-Jan. 2020, at 17. The TFAO has solicited feedback from practitioners and other interest groups about reorganization plans and customer service. *See* Allyson Versprille, *Carrying Out IRS Reforms Is Agency's Top Goal Heading Into 2020*, DAILY TAX REP. (BLOOMBERG LAW), Dec. 12, 2019. Because of disruptions created by the coronavirus (COVID-19), the IRS has not yet issued its reorganization plan. According to one report, the IRS is likely to push back the September 2020 deadline to the end of the year. *See* Alan K. Ota, *Place of Criminal Division At Center Of IRS Redesign Debate*, LAW360 TAX AUTH., Apr. 17, 2020.

The Taxpayer First Act also mandates the IRS to submit a set of comprehensive customer service strategies. 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. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1101. The original due date for the customer service report—July, 2020—has been delayed to "no later than December" amidst the IRS pivoting to implementing CARES Act provisions and responding to extended filing and payment deadlines. *See* Allyson Versprille, *Coronavirus Delaying, But Also Informing, IRS Reform Proposal*, DAILY TAX REP. (BLOOMBERG LAW), May 11, 2020.

Interestingly, the IRS's need to accommodate employees working remotely and interact with taxpayers during the COVID-19 outbreak has shaped some of its reform strategies. *Id.* For example, the pandemic has shown the IRS that it needs to increase its ability to interact with taxpayers online and provide more digital self-service options. *Id.*

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Revenue Procedure 2020-2, 2020-1 I.R.B. 107, supersedes Revenue Procedure 2016-2, 2016-1 I.R.B. 102, cited in the casebook. The updates do not contain material 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." *Understanding the Tax Gap and Taxpayer Noncompliance: Hearing Before the H. Comm. On Ways and Means*, 116th Cong. (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: Hearing Before the H. Comm. On Ways and Means, 116th Cong. 3 (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 7 (2019) (statement of James R. McTigue, Jr., Director, Strategic Issues), 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.

In September 2019, the IRS released new tax gap estimates based on the 2011 through 2013 tax years. *See* IRS Pub. 1415, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011–2013* (Sep. 2019), https://www.irs.gov/pub/irs-pdf/p1415.pdf; IRS Pub. 5364, *Tax Gap Estimates for Tax Years 2011–2013* (Sep. 2019), https://www.irs.gov/pub/irs-pdf/p5364.pdf; *see also* IRS Pub. 5365, *Tax Gap Estimates for Tax Years 2011–2013* (Sep. 2019), https://www.irs.gov/pub/irs-pdf/p5365.pdf (Tax Gap Map). The IRS explained: "Like the TY 2008–2010 tax gap estimates, these new estimates reflect an estimated average compliance rate and associated average annual tax gap covering a timeframe of three tax years." IRS Pub. 1415, *supra*, at 1.

The IRS's estimate for the gross tax gap for the 2011 to 2013 years is $441 billion annually. *Id.* at 8 fig. 1. However, "IRS Commissioner Charles Rettig said at a May [2019] conference the latest data doesn't account for a large portion of the 'underground economy,' such as tax evasion through the use of cryptocurrency. That is because the U.S. still had a heavily paper, rather than digital, economy during the time period covered by the estimate, he said." Allyson Versprille, *New IRS Estimate Shows 11% Increase in Annual Tax Gap*, DAILY TAX REP. (BLOOMBERG LAW), Sept. 26, 2019, https://news.bloombergtax.com/daily-tax-report/new-irs-estimate-shows-11-increase-in-annual-tax-gap.

For the 2011 through 2013 tax years, the IRS found an average rate of taxes timely and voluntarily paid of 83.6%. IRS Pub. 1415, *supra*, at 2. Because the IRS changed its methodology since its previous tax gap study, it also recalculated the rate for the 2008-2010 tax years. It reported that voluntary compliance was virtually unchanged. *Id.* at 2, 9 tbl. 1 (showing a revised estimate of 83.8% for 2008-2011). For further reading on the tax gap, see Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: Approaches and Revenue Potential*, 165 TAX NOTES FED. 1099 (2019).

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Starting in 2017, the IRS began releasing annual Taxpayer Attitude Surveys, which before that had most recently been administered by the IRS Oversight Board in 2014. *See* IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2019* (Mar. 2020), https://www.irs.gov/pub/irs-pdf/p5296.pdf; 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 is listed below. (For 2019, the IRS reported data for only one response.)

	2017	2018	2019
"A little here and there"	9%	10%	9%
"As much as possible"	3%	3%	3%
"Not at all"	88%	85%	87%
"No opinion"	<1%	2%	1%

INTERNAL REVENUE SERV. DATA BOOK viii (2019), https://www.irs.gov/pub/irs-pdf/p55b.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS)* 2019, *supra*, at 13 ("Margin of error is +/- 2.2% for blended online/phone respondents and +/- 3.1% for phone respondents only."); 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.

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The updated IRS audit rates for 2017 through 2019 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
2019	0.40 percent	0.50 percent	6.20 percent

INTERNAL REVENUE SERV. DATA BOOK (2019), *supra*, at 45 tbl. 17b; INTERNAL REVENUE SERV. DATA BOOK 23 tbl. 9a (2018), https://www.irs.gov/pub/irs-pdf/p55b.pdf; INTERNAL REVENUE SERV. DATA BOOK 23 tbl. 9a (2017), https://www.irs.gov/pub/irs-soi/17databk.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.").

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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
2017	446,378	590,249	323
2018	410,220	639,025	275
2019	543,604	782,735	228

INTERNAL REVENUE SERV. DATA BOOK (2019), *supra* at 60 tbl. 25; INTERNAL REVENUE SERV. DATA BOOK (2017), *supra*, at 41 tbl. 16; TIGTA, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2016, at 43-44 (2017), https://www.treasury.gov/tigta/auditreports/2017reports/201730072fr.pdf.

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The IRS budget statistics for 2017 through 2020 and all figures—including the 2009 through 2016 figures in the casebook—updated to 2020 dollars are as follows:

Fiscal Year	IRS Budget (absolute dollars, in thousands)	IRS Budget (2020 dollars, in thousands)
2009	$11,522,598	$13,770,702
2010	$12,146,123	$14,281,621
2011	$12,121,830	$13,816,921
2012	$11,816,696	$13,196,033
2013	$11,198,611	$12,325,265
2014	$11,290,612	$12,228,158
2015	$10,945,000	$11,839,793
2016	$11,235,000	$12,002,094
2017	$11,235,000	$11,751,740
2018	$11,158,703	$11,393,647
2019	$11,302,554	$11,335,137
2020	$11,510,054	$11,510,054

https://home.treasury.gov/system/files/266/19.-IRS-FY-2021-BIB.pdf (reporting absolute dollar figures for 2019 and 2020; also reporting that IRS requested budget for 2021 is $12,038,503,000); 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 (last visited June 19, 2020).

After the IRS released its 2018 Data Book, one commentator stated, "The book's biggest headline is that IRS enforcement activities—audits, levies, liens, seizures, and criminal investigations—continue to erode, especially for high-income individuals, giant corporations,

and passthrough businesses ….” Robert A. Weinberger, *Takeaways From the IRS Data Book*, 164 TAX NOTES FED. 503, 504 (2019). Another article commented:

> A comparison of the data provided in the 2011 IRS Data Book and the 2018 IRS Data Book reveals some of the effects of the reduced funding on the (i) IRS workforce, (ii) IRS examination and collection activities, (iii) IRS use of third-party information reporting, (iv) IRS penalty impositions and the initiation of IRS criminal investigations, (v) IRS Appeals Office performance, (vi) IRS Chief Counsel litigation activities, and (vii) taxpayer assistance.

John Keenan et al., *2018 IRS Data Book Reveals Insights into Impact of Reduced Funding on IRS Operations and Activities*, J. TAX PRAC. & PROC., June-July 2019, at 15.

The IRS budget did increase in absolute dollars from 2018 to 2019 and again from 2019 to 2020, after staying steady or dropping since 2016. One commentator argued:

> [T]here are signs of at least a modest turn-around. There is a new IRS Commissioner who does not have the baggage of his predecessors and who seems to be helping to restore morale among Service employees. Republicans in Congress have shifted somewhat from trying to punish the IRS to giving it funds to help implement the Tax Cuts and Jobs Act, a Republican priority. The latest Administration budget proposal increased funding for the IRS, from $11.1 billion to $11.5 billion, and proposed additional funds for technology upgrades.

Mark A. Luscombe, *Is the IRS Starting an Upturn in Enforcement and Customer Service?*, TAXES, Oct. 2019, at 3.

However, the IRS budget, even in absolute dollars, remains below its high point in 2010. And Congress continues to give the agency additional responsibilities. As a result of the CARES Act, the IRS was charged in spring 2020 with rapidly sending out “Recovery Rebates” (Economic Impact Payments) to eligible individuals. *See* I.R.C. § 6428. The IRS sent many payments out quickly, but the “Get My Payment” portal on the IRS’s website had numerous glitches. *See* Susan Tompor, *IRS ‘Get My Payment’ Stimulus Check Portal Hit By Early Glitches*, DETROIT FREE PRESS (Apr. 15, 2020), https://www.freep.com/story/money/personal-finance/susan-tompor/2020/04/15/irs-get-my-payment-stimulus-checks/5136179002/.

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As mentioned above, in September 2019, the IRS released new tax gap estimates based on the 2011 through 2013 tax years. *See* IRS Pub. 1415, *supra.* The report also included an update on the “Effect of Information Reporting on Individual Income Tax Reporting Compliance.” *Id.* at 14 fig. 3. The new figure shows the same general relationships as the one in the casebook, with the most recent figures and the previous ones as follows:

Type of Income	Net Misreporting Percentage 2011-2013	Net Misreporting Percentage 2008-2010
"Income subject to substantial information reporting and withholding"	1%	1%
"Income subject to substantial information reporting"	5%	7%
"Income subject to some information reporting"	17%	19%
"Income subject to little or no information reporting"	55%	63%

Id.; IRS, *Tax Gap Estimates for Tax Years 2008–2010*, at 5 fig.1 (2016).

Note that the top figure in the chart above (1%) is the same as it was in the prior report, and all but the last figure are quite similar. The net misreporting percentage of 55% for "Income subject to little or no information reporting" is not as high as the estimate in the previous study. However, the main point remains the same: according to IRS estimates, increased information reporting correlates with greatly reduced noncompliance.

Former IRS Commissioner Charles Rossotti, a technology expert, recently proposed a plan to narrow the tax gap. *See* Charles O. Rossotti, *Recover $1.6 Trillion, Modernize Tax Compliance and Assistance*, 166 TAX NOTES FED. 1411 (2020). The plan focuses on the single largest component of the tax gap: individuals' unreported business income. *Id.* at 1413. His proposal is called "Tax Compliance and Assistance 2020 (TCA 2020)" and he argues that it would "recover[] an estimated $1.6 trillion over the first 10 years while also improving service to all taxpayers." *Id.* at 1412. The plan makes use of both a new third-party reporting requirement and a taxpayer reconciliation statement. *See id.* at 1415. It would also draw heavily on technology to analyze taxpayer returns. *See id.* at 1418.

As a threshold matter, "[t]axpayers with more than $25,000 of business income would be required to report to their bank and on their returns the bank account or accounts in which their business income is deposited." *Id.* at 1414. The new third-party reporting requirement would apply to banks: "The banks that were designated by taxpayers as receiving their business income would be required at year-end to provide the taxpayer and the IRS with a summary report of deposits received and disbursements made in these accounts, including those from credit card payments." *Id.* at 1415. Taxpayer reconciliation would work as follows:

> The taxpayer would attach a schedule to the tax return reconciling the total amounts reported by the bank with the income and expenses reported on the tax return. For example, if the cash received in the bank account was greater than the

> amount reported on the return, the schedule would itemize the difference. The IRS would design a form for this reconciliation schedule that any bookkeeper could complete.

Id. Jasper Cummings has pointed out that this is akin to the bank deposits method of reconstructing unreported income, but here it would be applied in advance of any audit. Jasper L. Cummings, Jr., *The Bank Deposits Method on Steroids*, 167 TAX NOTES FED. 469, 469 (2020) ("[T]he proposal involves putting technology to work on the bank deposits method for auditing recalcitrant taxpayers, a method that is over 90 years old. Problem is the audit method will not be limited to noncompliant taxpayers ….") (footnote omitted).

Based on past experience, Rossotti persuasively argues that "[i]nstituting this increased bank and taxpayer reporting would alone improve the accuracy with which taxpayers report business income." *Id.* at 1415. But the proposal goes beyond that to leverage technology in a novel way: "TCA 2020 proposes that over time, the IRS would make use of available modern technology to go beyond scoring tax returns and simple data matches by analyzing every return as it is filed, using all applicable data sources and advanced analytical models." *Id.* at 1418. This would be a dramatic shift. It would also require some additional technology and personnel. *Id.* at 1421. In particular, "[o]ver an initial five-year period, the technology budget would be about doubled, the budget for enforcement and taxpayer assistance increased by 50 percent, and the base budget increased annually to keep up with inflation. Regular but smaller percentage increases would be required in the subsequent five-year period." *Id.* at 1423. This may not be politically feasible, as Jasper Cummings points out. Cummings, *supra*, at 471. Cummings raises other potential problems with the proposal, as well. *See id.* at 472 (stating, for example, that "the black box of the magic technology that will make this plan work is yet to be defined.").

Yet, "[w]hen a former IRS commissioner with vast experience in the technology industry goes to the trouble of creating a researched, thought out, and written prescription for substantially reducing the federal tax gap, everyone reading Tax Notes should want to know what he is thinking." *Id.* at 469. While the plan would pose numerous implementation issues, it both targets the single largest component of the tax gap and would make use of third-party reporting to reach hard-to-tax cash-based and other small businesses. Rossotti notes in his report that "it's not necessary to have perfectly accurate reporting to make a big difference in compliance accuracy. Of income that is subject to little or no [third-party information] reporting, 55 percent is not reported, while only 17 percent of income that is subject to some reporting is not reported." Rossotti, *supra*, at 1414. For further reading about the effectiveness of information reporting, including a synthesis of studies in which an individual reports on a firm (an unusual institutional arrangement), see Leandra Lederman & Joe Dugan, *Information Matters in Tax Enforcement*, 2020 B.Y.U. L. REV. __ (forthcoming). That article responds to Wei Cui, *Taxation Without Information: The Institutional Foundations of Modern Tax Collection*, 20 J. BUS. L. 93 (2017), which takes the contrarian position that it is not information reporting but rather the use of a firm as the third-party reporter that increases tax compliance.

Chapter 2

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Jasper Cummings has forcefully argued against an apparent trend in the courts of finding all Treasury regulations legislative and thus invalid if they weren't issued with notice and comment:

> The force and effect of law issue is following a familiar pattern that occurs in the tax law and in law generally: An erroneous idea gets floated, is picked up by persons who find the idea useful for their own purposes, is repeated in some court opinions, and becomes "the law." The erroneous idea is that all Treasury tax regulations have the force and effect of law, are binding, and are entitled to *Chevron* deference either because they are issued with notice and comment under APA procedures or they are specifically authorized by section 7805. And if, by chance, notice and comment was not used, the regulation is invalid.
>
> This is nuts. There are legislative (substantive) regulations and there are interpretive regulations, using the precise words of the APA. The legislative regulations have the force and effect of law when issued with proper APA procedures because Congress properly delegated to an agency the power to make law, in a sense.

Jasper L. Cummings, Jr., *Conjuring Up the 'Force And Effect' of Tax Law*, 154 TAX NOTES149, 161 (2017). He explained in another article:

> [A]ll regulations do not have the "force and effect of law" simply by being published in the *Federal Register* after the notice and comment process. Rather, the Administrative Procedure Act (APA) requires the notice and comment process only for legislative regulations that Congress ordered the agency to write (think of section 385). If an agency like the IRS chooses (1) to issue interpretive guidance as regulations rather than revenue rulings, and also (2) voluntarily chooses to use the notice and comment process, those choices cannot convert an interpretation of the code into a legislative regulation that can be called a rule of law.

Jasper L. Cummings, Jr., *Deep State Revenue Rulings*, 166 TAX NOTES FED. 545, 546 (2020).

In line with this concern, a recent District Court opinion went beyond regulations in finding a Revenue Procedure to be a legislative rule and thus to require notice and comment. *Bullock v. IRS*, 401 F. Supp. 3d 1144, 1158 (D. Mont. 2019) ("Revenue Procedure 2018-38, 2018-31 I.R.B. 280, as a legislative rule, requires the IRS to follow the notice-and-comment procedures pursuant to the APA."). The background is that "Revenue Procedure 2018-38 … eliminated the IRS's previous requirement contained at 26 C.F.R. § 1.6033-2 that exempt organizations report donor information." *Id.* at 1149. The District Court further stated that "[t]he IRS's promulgation of Revenue Procedure 2018-38, 2018-31 I.R.B. 280 appears to represent a[n]

… attempt to 'evade the time-consuming procedures of the APA'" by not promulgating a regulation. *Id.* at 1158. The court concluded:

> Plaintiffs ask simply for the opportunity to submit written data and opposing views or arguments, as required by the APA's public notice-and-comment process, before it changes the long-established reporting requirements. A proper notice-and-comment procedure will provide the IRS with the opportunity to review and consider information submitted by the public and interested parties. Then, and only then, may the IRS act on a fully-informed basis when making potentially significant changes to federal tax law.

An article by Marie Sapirie discusses this case and includes the following comment:

> "What a case like *Bullock* does is give the IRS a shot across the bow that they need to be more attentive to the kinds of things they are putting into subregulatory guidance," said professor Kristin E. Hickman of the University of Minnesota. She said the IRS should recognize that labeling guidance subregulatory doesn't mean a court won't declare it to be a legislative rule. The district court's opinion isn't, however, a categorical claim that every piece of subregulatory guidance should be considered a legislative rule, she said.

Marie Sapirie, *Entering the Next Frontier of Tax and Administrative Law*, 164 TAX NOTES FED. 994, 995 (2019). This issue will be one to watch.

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 Judge Susan Graber for Judge Reinhardt. Ninth Circuit General Order 3.2h, Altera Corp. &

[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* et al., *in Support of Respondent-Appellant Commissioner* (Sept. 28, 2018), https://ssrn.com/abstract=3260082. In addition, Professor Lederman co-authored the *Altera* amicus brief mentioned in footnote 2, *infra*.

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, 926 F.3d 1061 (9th Cir. 2019). The new opinion was also 2-1, reversing the Tax Court, with Judge Kathleen O'Malley again dissenting. *Id.* at 1087. 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 1075-76.

Altera subsequently filed a petition for rehearing *en banc*. One argument that was raised was that the Ninth Circuit's reversal of the Tax Court created something akin to a circuit split because the Tax Court is a national court. *See* Ryan Finley, *Ninth Circuit's Altera Decision Didn't Cause a Circuit Split*, 165 TAX NOTES FED. 1051 (2019) ("'Some in the practitioner community have suggested there is a circuit split, but the fact of the matter is there is not currently. The final regulations are the law of the land until proved otherwise,' [Eli] Hoory [, Special Counsel (international), IRS Office of Chief Counsel] said. 'The Ninth Circuit is the only circuit that's ruled on them, [and] they've held them to be valid.'").

The Court of Appeals denied the petition for rehearing, with ten judges recused and three judges dissenting.[2] Altera Corp. v. Comm'r, 941 F.3d 1200, 1202 (9th Cir. 2019). For an

[2] In addition to the July 2016 amicus brief mentioned in footnote 5 on page 41 of the casebook and the September 2018 amicus brief mentioned in footnote 1 of this Cumulative Supplement, Professor Lederman participated in another amicus brief in *Altera*. In conjunction with Susan Morse, Stephen Shay, and Clinton Wallace, she co-authored an amicus brief opposing rehearing en banc. *See* Leandra Lederman

argument in favor of rehearing that was made before the denial of rehearing, see George M. Gerachis, David C. Cole & Juliana D. Hunter, *Ninth Circuit Grapples With Agency Positions First Raised in Litigation*, 164 TAX NOTES FED. 1889 (2019).

Altera filed a petition for certiorari. Altera Corp. v. Comm'r, 941 F.3d 1200 (9th Cir. 2019), *petition for cert. filed* (U.S. Feb. 10, 2020) (No.19-1009). On June 22, 2020, the Supreme Court denied certiorari. Altera Corp. & Subsidiaries v. Comm'r, No.19-1009, 2020 U.S. LEXIS 3288 (June 22, 2020), https://www.supremecourt.gov/orders/courtorders/062220zor_mjn0.pdf. The IRS and Treasury have thus won the battle, though no doubt taxpayers will continue to bring APA challenges in other cases.

For those interested in further reading about this stage of the *Altera* litigation, two professors who spearheaded amicus briefs have blogged about the parties' briefs to the Supreme Court. *See* Susan Morse & Stephen Shay, *Pending Cert Petition in Altera: Tax Law in an Administrative Law Wrapper*, PROCEDURALLY TAXING (May 22, 2020), https://procedurallytaxing.com/pending-cert-petition-in-altera-tax-law-in-an-administrative-law-wrapper/; Susan Morse & Stephen Shay, *In Altera Reply Brief, Taxpayer Doubles Down on Flawed Argument That the Government Changed Its Tune*, PROCEDURALLY TAXING (June 11, 2020), https://procedurallytaxing.com/in-altera-reply-brief-taxpayer-doubles-down-on-flawed-argument-that-the-government-changed-its-tune/.

Page 41:

The *Altera* litigation discussed in the casebook and just above reflects a trend in tax controversy litigation to challenge Treasury and IRS guidance using administrative law, including the Administrative Procedure Act (APA). An important pending case is *CIC Servs., LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019), *reh'g en banc den.*, 936 F.3d 501 (9th Cir. 2019), in which the U.S. Supreme Court has granted certiorari. CIC Servs., LLC v. IRS, No. 19-930, 2020 U.S. LEXIS 2605 (2020). That case challenges Notice 2016-66, 2016-47 I.R.B. 745, which identifies certain transactions, including "micro-captive transactions" as "reportable transactions" under Code section 6707A. *CIC Servs.*, 925 F.3d at 249-50. The plaintiff challenged the Notice under the APA and moved for a preliminary injunction. *Id.*at 250. The IRS prevailed in its argument that the suit "was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (collectively, the "AIA"), which divest federal district courts of jurisdiction over suits 'for the purpose of restraining the assessment or collection of any tax.'" *Id.* (footnote omitted). In a 2-1 decision, the Court of Appeals affirmed the district court's dismissal for lack of jurisdiction. *Id.* at 259. It found that plaintiff's suit was both a suit "'for the purpose of restraining the assessment or collection of any tax,'" *id.* at 257 (citation omitted), and that the case did not fall within any exception to the AIA, *id.* at 258. It remains to be seen how the U.S. Supreme Court will rule.

CIC Servs. is just one high-profile example of administrative law challenges to tax guidance. Another recent example is *Assoc. for Community Affiliated Plans et al. v. U.S. Dept. of*

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et al., *Ninth Circuit Brief of Law Academics and Professors as Amici Curiae in Opposition to the Petition for Rehearing En Banc in Altera v. Commissioner* (Sept. 6, 2019), https://ssrn.com/abstract=3450553.

Treas. et al., 392 F. Supp. 3d 22 (D.D.C. 2019), a case in which the IRS prevailed against an APA challenge. That case is on appeal to the D.C. Circuit. *See* Stephanie Cumings, *Government Doesn't Invoke Chevron in Insurance Regs Appeal*, 166 TAX NOTES FED. 644 (2020). There have been many other APA-based challenges. *See* 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."). Jasper Cummings has further explained that "[t]he musty procedural issues around tax regulations have become hot topics, both politically and in tax litigation. Even continuing legal education programs now teach how to attack tax regulations." Jasper L. Cummings, Jr., *Conjuring Up the 'Force And Effect' of Tax Law*, 154 TAX NOTES 149, 150 (2017).

Another recent article looks beyond the APA for sources of procedural challenges:

> Much has been written about the ability (or inability) to challenge Treasury regulations in court based on the Administrative Procedure Act. However, two other laws—the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA)—have gone under the radars of thought leaders and practitioners for decades, even though these laws can provide meaningful judicial oversight of Treasury conduct in issuing regulations.

Monte Silver, *So You Want to Challenge a Treasury Regulation Issued Under the TCJA?*, 166 TAX NOTES FED. 1137, 1137 (2020). Mr. Silver brought a case, *Silver v. IRS*, No. 1:19-cv-00247 (D.D.C. 2019), under these provisions. *Id.* He argues that "[t]his case could have a few outcomes. It could (1) force Treasury to adopt RFA and PRA processes; (2) pressure Treasury to grant relief to small businesses in this case; and (3) open the door for other similar challenges, starting with regulations issued under the TCJA." *Id.* at 1141. The government lost its motion to dismiss but it has continued to press numerous arguments. Andrew Velarde, *DOJ Doubles Down on Spurned Arguments in* Silver, *Offers New Ones*, 166 TAX NOTES FED. 1201, 1201 (2020).

On a distinct but related topic, in a March 2019 Policy 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." DEPT. OF THE TREAS., POLICY STATEMENT ON THE TAX REGULATORY PROCESS 1 (2019), https://www.millerchevalier.com/sites/default/files/resources/General_Alerts/2019-03-04_Policy-Statement-on-the-Tax-Regulatory-Process.pdf. 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.

In September 2019, the IRS flagged the Policy Statement for its attorneys in CC-2019-006 (Sept. 17, 2019), https://www.irs.gov/pub/irs-ccdm/cc-2019-006.pdf. As a further guide to its contents, the headings of the March 2019 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*, 162 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).

Page 51:

Recently, Supreme Court observers have wondered whether the Court is 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). Another *Tax Notes* article titled "Gorsuch Dissent Could Signal Beginning of the End for *Chevron*" states:

> 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 *Chevro*n 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.

Stephanie Cumings, *Gorsuch Dissent Could Signal Beginning of the End for* Chevron, 162 TAX NOTES 1235, 1235 (2019). However, it is worth noting, as discussed briefly below, that in June

2019, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court declined to overrule *Auer* deference, partly for reasons of *stare decisis*. *Id.* at 2406.

For an argument that "Recent Supreme Court [o]pinions [u]rge [c]ourts to [r]igorously [a]nalyze the [s]tatute at Step One," see Joseph B. Judkins, *The Rise of Footnote 9 (And Why Some TCJA Regulations Fail Chevron Step One)*, TAXES, Mar. 2020, at 41, 47. For further reading on deference trends, see Stephanie Cumings, Chevron *May Lack Teeth In a Post*-Kisor *World*, 164 TAX NOTES FED. 409 (2019) ("The Supreme Court appears reluctant to overturn *Chevron* soon, but the doctrine may not have as much sway over courts as it once did, according to some practitioners."); Jasper L. Cummings, Jr., *What Is Anti-Deference Really About?*, 164 TAX NOTES FED. 2075, 2076 (2019) (arguing in part that "[a]nti-deference to legal interpretation (not fact finding) is about U.S. two-party politics.").

Page 55:

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." DEPT. OF THE TREAS., POLICY STATEMENT ON THE TAX REGULATORY PROCESS , *supra*, at 2**.** 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 REP. (BLOOMBERG LAW), Mar. 19, 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 with annual updates in 2018 through 2020. The current version is Revenue Procedure 2020-1, 2020-1 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 2020 version.

Page 69:

Revenue Procedure 2017-2, 2017-1 I.R.B. 106, cited in the casebook, was superseded in 2018 through 2020, without significant revision. *See* Rev. Proc. 2020-2, 2020-1 I.R.B. 107.

Revenue Procedure 2017-3, 2017-1 I.R.B. 130, cited in the casebook, similarly was superseded in 2018 through 2020, without material revisions. *See* Rev. Proc. 2020-3, 2020-1 I.R.B. 131.

Chapter 3

Pages 106-07:

The IRS made significant changes to the 2018 version of Form 1040, the individual income tax return. The 2018 Form 1040 was in the form of a two-sided "postcard." *See* https://www.irs.gov/pub/irs-prior/f1040--2018.pdf. While the 2018 version of the Form 1040 was reduced in size, it included an additional six schedules taxpayers needed to submit in order to report deductions, credits, and calculate tax. In response to complaints from practitioners who found the 2018 form confusing because it required taxpayers to spread information across multiple attachments, the IRS returned 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. The 2019 Form 1040 has only three schedules, which taxpayers use to report sources of income that are not included on the face of the Form 1040, as well as most deductions and credits. *See* https://www.irs.gov/pub/irs-pdf/f1040.pdf (last visited June 20, 2020).

In response to the COVID-19 pandemic, the IRS postponed certain 2019 filing and payment deadlines for some taxpayers. *See* Notice 2020-18, 2020-15 I.R.B. 1. For example, the filing and payment deadline for the individual federal income tax return was extended automatically from April 15 to July 15. (Notice 2020-18 supersedes an earlier notice that extended only the payment date to July 15 but not the filing date. Notice 2020-17, 2020-15 I.R.B. 1.) Taxpayers are not required to submit an application for extension in order to take advantage of the July 15, 2020 deadline for filing a return or paying tax. For any return or payment automatically postponed, no interest, penalty, or addition to tax for failure to file or failure to pay tax (discussed in Chapter 12) will accrue for the period between April 15 and July 15. *Id*. Subsequent IRS Notices extended other deadlines. *See*, *e.g.*, Notice 2020-20, 2020-16 I.R.B. 660 (extending filing and payment deadlines for federal gift and generation-skipping tax); Notice 2020-23, 2020-18 I.R.B. 742 (extending deadlines for certain estate tax returns and payments and some tax-exempt organization submissions); Notice 2020-35, 2020-25 I.R.B. 1 (postponing the deadline for some employment taxes).

Further details about filing and payment extension are posted on the IRS's website at https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers. The post clarifies that if a taxpayer wishes to extend the filing deadline beyond July 15 to October 15 (the typical 6-month extension date), the taxpayer must submit an extension request by July 15.

Page 109:

The Taxpayer First Act mandates an expansion of electronic tax return filing. Section 2301 of the Act 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 use 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. The Supreme Court denied the Baldwins' certiorari petition in February of 2020. Baldwin v. United States, 2020 U.S. LEXIS 1359 (Feb. 24, 2020).

Page 110:

The IRS released guidance in 2019 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.*

More recently, the IRS announced that, for the first time, taxpayers may begin filing amended returns electronically. IRS Tax Tip 2020-69 (June 11, 2020). Taxpayers will only be able to file amended returns electronically for tax year 2019. Taxpayers will still have the option to file a paper version of Form 1040-X.

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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 336-39.

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. Subsequently, the IRS Appeals Office released detailed guidance to its employees on partnership audit procedures. *See* Memorandum for Appeals Employees, AP-08-1019-0013 (Oct. 18, 2019), at https://www.irs.gov/pub/foia/ig/appeals/ap-08-1019-0013.pdf.

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*, J. TAX'N., June 2019, at 40; 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).

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Former IRS Commissioner Charles Rossotti recently proposed a plan to narrow the tax gap that makes use of the methodology of the bank deposits method. *See* Jasper L. Cummings, Jr., *The Bank Deposits Method on Steroids*, 167 TAX NOTES FED. 469, 469 (2020). Taxpayers reporting "more than $25,000 of business income …. would attach a schedule to the tax return reconciling the total amounts reported by the bank with the income and expenses reported on the tax return. For example, if the cash received in the bank account was greater than the amount reported on the return, the schedule would itemize the difference." Charles O. Rossotti, *Recover $1.6 Trillion, Modernize Tax Compliance and Assistance*, 166 TAX NOTES FED. 1411, 1415 (2020). The proposal is discussed in greater detail in connection with Chapter 1 of this Supplement.

Chapter 4

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The Taxpayer First Act tightened 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 in 2019 by Pub. L. No. 116-25).

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 Court of Appeals for the Ninth Circuit 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)). According to the court, the general notice included in Publication 1 did not satisfy this requirement.

Note that the amendments to section 7602(c)(1) removed 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).

Interim guidance issued in the summer of 2019 to the Commissioners of the four IRS operating divisions included sample third-party notification letters (Letter 3164: Third Party Contact Letter) that reflect the revisions to section 7602(c). The following is an excerpt from one of the sample letters:

> We're writing to tell you that we intend to contact other persons such as a neighbor, a bank, an employer, or employees. When we contact other persons, we generally need to tell them limited information, such as your name.
>
> The law prohibits us from disclosing more information than is necessary to obtain or verify the information we're seeking. We will make contact beginning 45 days from the date of this letter, on [fill in beginning date], and ending one year later, on [fill in ending date]. You have a right to request a list of those contacted. You can make your request by telephone, in writing, or during a personal interview.

Memorandum for Commissioners, LB&I, SBSE, TEGE, and W&I, SBSE-04-0719-0034 (July 26, 2019), https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0719-0034.pdf.

The updates included in the Memorandum are to be incorporated into various portions of the Internal Revenue Manual. In June of 2020 the IRS released revisions to Internal Revenue Manual section 5.9.3.12.1, incorporating the new requirements. IRM Procedural Update, New Third Party Contact Requirements, sbse-05-0520-0639 (May 26, 2020), https://www.irs.gov/pub/foia/ig/sbse/sbse-05-0520-0639.pdf. Revisions to other affected provisions within the Internal Revenue Manual, including the Third-Party Contact Program provisions in IRM 25.27.1, do not appear to have been released.

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The Taxpayer First Act limited 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), 133 Stat. 981, 988 (2019) (codified as amended at 26 U.S.C. § 7609(f)). 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).

The amendments to section 7609(f) were not at issue in a case that has drawn significant attention, *Taylor Lohmeyer Law Firm PLLC v. United States*, 385 F. Supp. 3d 548 (W.D. Tex. 2019). The Texas law firm of Taylor Lohmeyer 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 their clients' identities are 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. *Id*. at 555. The court also found that the firm failed to present sufficient evidence to rebut the presumption that the summons was enforceable. *Id*. at 557.

The law firm appealed, and the District Court stayed enforcement of the John Doe summons while the appeal was decided. Taylor Lohmeyer Law Firm LLC v. United States, 2019 U.S. Dist. LEXIS 194033. On appeal, the Fifth Circuit rejected the firm's privilege argument. 957 Fed. 3d 505 (5th Cir. 2020):

> "[A]s [another] general rule, client identit[ies] and fee arrangements are not protected as privileged". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (*Reyes-Requena II*) (citation omitted). That said, a "narrow exception" exists "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication". *Id.* (citation omitted). This "limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-to-case basis", recognizes that "[u]nder certain circumstances, an attorney must conceal even the identity of a client, not merely his communications, from inquiry". *United States v. Jones (In re Grand Jury Proceedings)*, 517 F.2d 666, 671 (5th Cir. 1975) (citation omitted).
>
> The exception, however, does not expand the scope of the privilege; it does not apply "*independent of* the privileged communications between an attorney and his client". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1124 (5th Cir. 1990) (emphasis added). Rather, a client's identity is shielded "only where revelation of such information would disclose other privileged communications such as the confidential motive for retention". *Id.* at 1125 (citation omitted). In that regard, the privilege "protect[s] the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are *connected inextricably* with a privileged communication—the confidential purpose for which [the client] sought legal advice". *Reyes-Requena II*, 926 F.2d at 1431 (emphasis added).

Id. at 510.

The Fifth Circuit concluded that the narrow exception to the general rule that client identities are not protected by privilege did not apply because the IRS did not purport to know that the clients had engaged in misconduct:

> [C]ontrary to the Firm's contention, [the IRS Agent's] declaration did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does. . . . Rather, it outlined evidence providing a "reasonable basis", as required by 26 U.S.C. § 7609(f), "for concluding that the clients of [the Firm] are of interest to the [IRS] because of the [Firm's] services directed at concealing its clients' beneficial ownership of offshore assets". The 2018 declaration also made clear that "the IRS is pursuing an investigation to develop information about other unknown clients of [the Firm] *who may have* failed to comply with the internal revenue laws by availing themselves of similar services to those that [the Firm] provided to [a client of the firm who had already been audited and agreed to a deficiency arising from an offshore transaction]". (Emphasis added.) . . . . [N]either of the Agent's declarations in this case identified specific, substantive legal advice the IRS considered improper and then supported the Government's effort to receive the identities of clients who received that advice. . . .
>
> Instead, the John Doe summons at issue seeks, *inter alia*: documents "reflecting *any* U.S. clients at whose request or on whose behalf [the Firm] ha[s] acquired or formed *any* foreign entity, opened or maintained *any* foreign financial account, or assisted in the conduct of *any* foreign financial transaction"; "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to setting up offshore financial accounts"; and "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to the acquisition, establishment or maintenance of offshore entities or structures of entities". (Emphasis added.) As the Government asserted, this broad request, seeking relevant information about *any* U.S. client who engaged in *any one of a number* of the Firm's services, is not the same as the Government's knowing whether any Does engaged in allegedly fraudulent conduct, or the content of any specific legal advice the Firm gave particular Does, and then requesting their identities.

Id. at 511.

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 to 166 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, 573 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), Jan. 10, 2017, at K-1. 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*.

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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.

For further reading on the attorney-client privilege, see William D. Elliott, *Tax Practice and the Attorney-Client Privilege*, J. TAX PRAC. & PROC., Dec. 2019-Jan. 2020, at 35, 37 (stating in part that "[i]dentifying the [c]lient is the [c]rucial [q]uestion").

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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. That case has been appealed to the Court of Appeals for the Ninth Circuit. *United States v. Sanmina Corp.* 2018 U.S. Dist. LEXIS 172137 (N.D. Cal. Oct. 4, 2018), *appeal docketed*, No. 18-17036 (9th Cir.). "The Ninth Circuit is entertaining the possibility that a district court conflated work product and attorney-client privilege when finding privilege waived on legal memoranda provided to outside counsel to prepare a valuation report." Andrew Velarde, *Oral Arguments in Privilege Waiver Appeal Focus on Work Product*, 166 TAX NOTES FED. 1203, 1203 (2020).

Microsoft recently lost a privilege dispute in district court. *See* United States v. Microsoft Corp., No. C15-102RSM, 2020 U.S. Dist. LEXIS 8781, at *1 (W.D. Wash. Jan. 17, 2020). "The court spared only a fraction of the 174 documents claimed by Microsoft to be protected by the FATP privilege, work product doctrine, or attorney-client privilege, ordering most of them to be produced within a week." Amanda Athanasiou, *Microsoft Loses Years-Long Privilege Dispute*, 166 TAX NOTES FED. 656, 656 (2020).

Chapter 5

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The Taxpayer First Act codified a requirement for an "Internal Revenue Service Independent Office of Appeals." Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1001, 133 Stat. 981, 983 (codified as amended at 26 U.S.C. § 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 IRS Commissioner made that appointment in May of 2020. William Hoffman, *Keyso Named Chief of Independent Offices of Appeals*, 167 TAX NOTES FED. 1474 (2020).

The practical effect of the new legislation on the Appeals process remains unclear at this point. *See* Kristen A. Parillo, *IRS Reform Bill Won't Make 'Sea Change' to Appeals Process*, 163 TAX NOTES FED. 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 statute generally 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 on Page 282 of Chapter 6 of the casebook.

Officials within the IRS Appeals Office are concerned about how the IRS will implement the new requirement, which becomes effective in July 2020. A lack of personnel to process requests and redact privileged information are among their concerns. *See* Allyson Versprille, *IRS Appeals Seeks More Staff to Deal with New Case-File Access*, DAILY TAX REP. (BLOOMBERG LAW) (Oct. 22, 2019).

The new legislation also added 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), 133 Stat. 981, 984. This provision appears to be aimed at concerns that the IRS has skirted the *ex parte* communication limitations, discussed on pages 228 to 230 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.

The pilot program that allows IRS exam personnel and representatives from the IRS Chief Counsel's Office to participate in certain Appeals conferences has drawn criticism. The IRS maintains that the goal of the program "is to narrow the scope of the dispute and not to force taxpayers into mediation." Kristin A. Parillo, *IRS Appeals Conference Pilot Designed to Narrow Scope of Dispute*, 165 TAX NOTES FED. 1515 (2019). However, taxpayer representatives and other officials, including the National Taxpayer Advocate, maintain that the program threatens the independence of the IRS Appeals Office and is inconsistent with legislative changes included in the Taxpayer First Act. Stephanie Cumings, *IRS Appeals is Thwarting Congress, Taxpayer Advocate Says*, 166 TAX NOTES FED. 307 (2020). The 2020 National Taxpayer Advocate Report proposes amendments to Code section 7803 that would require that taxpayers consent to the participation of exam and counsel representatives in an Appeals Conference before that participation takes place. National Taxpayer Advocate 2020 Purple Book, at 67 (Dec. 31, 2019), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2019-ARC/ARC19_PurpleBook_05_StrengthTPRappeals_2.pdf.

The Taxpayer First Act 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). The IRS does not appear to have released the first report, but an IRS official maintains that, in the period since Congress enacted section 7803(e)(5), the IRS has denied access to Appeals to only a "handful" of docketed cases. Kristen A. Parillo, *'Handful' of Taxpayers Denied Access to Appeals*, 166 TAX NOTES FED. 1037 (2020).

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).

In *Facebook*, 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, 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 to 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 other adequate remedy in a court." *Id*. at *48 (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 *27-28. This and the ensuing litigation occurred prior to the enactment of 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) also provides that "The Commissioner of Internal Revenue shall prescribe procedures for protesting to the Commissioner of Internal Revenue a denial of a request described in subparagraph (A)." Such procedures would seem to give a future taxpayer in Facebook's position an opportunity to protest 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 in the *Temple Law Review* symposium, "Taxpayer Rights: All the Angles" (Vol. 91, No. 4, Summer 2019).

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As discussed in Section 7.03[D] of the casebook, a taxpayer may be asked, but cannot be forced, to extend the statute of limitations on assessment in order to give the IRS examining agent more time to complete an audit. *See* I.R.C. § 6501(c)(4)(B) (stating that the IRS "shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent"). According to some experienced practitioners, "solicitation of consents to extend the limitation period on assessment has become the norm rather than the exception." Frank Agostino & Valeria Vlasenko, *Consents to Extend the State of Limitations on Assessment: How to Protect a Taxpayer's Rights to Finality and Quality Service and Avoid Hardship*, J. TAX PRAC. & PROC., Apr.-May 2019, at 5, 6. *See also* Hale E. Sheppard, *Clarifying Misconceptions About Extending Assessment-Periods and "Cooperating" During IRS Audits*, J. TAX PRAC. & PROC., Aug.-Sept. 2019, at 41, 42 ("The norm in modern times is for the IRS to seek one or more Forms 872 from taxpayers in essentially every audit.")

The decision of whether to extend voluntarily the limitations period can have significant consequences. If the taxpayer refuses to grant an extension, the IRS agent generally will conclude the audit and issue a Notice of Deficiency, meaning that the taxpayer will be pressured to decide quickly whether to pursue the case in Tax Court and negotiate with Appeals on a docketed basis. Sheppard, *supra* at 40. Giving up the opportunity to negotiate with Appeals on a nondocketed basis may also affect whether the burden of proof on factual issues shifts to the IRS under section 7491 and whether the taxpayer can recoup fees under section 7430. *Id*. at 43-44. If the IRS asks the taxpayer to extend the statute of limitations on assessment, Agostino and Vlasenko suggest the following:

> 1) [I]dentify the contested issues; 2) limit the scope of the consent to such issues using simple unambiguous language; 3) ask for suspension of interest under Code Sec. 6404(g); 4) request that no penalties be assessed; and 5) send the request in writing to the Revenue Agent. Practitioners should stress that consent to extend the limitations period on assessment is a unilateral waiver of a fundamental right. Accordingly, the government should suspend interest and avoid asserting penalties in consideration of such a waiver.

Agostino & Vlasenko, *supra* at 7.

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In response to concerns from practitioners, an IRS official announced (prior to the COVID-19 pandemic) 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

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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 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 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 the spring of 2019, the House Ways and Means Committee, which is chaired by Rep. Richard Neal, 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, 116th 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 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." Complaint for Declaratory and Injunctive Relief, 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. There have been two opinions issued so far in this case. The first one, Comm. on Ways & Means v. U.S. Dep't of Treas., No. 1:19-cv-1974, 2019 U.S. Dist. LEXIS 147260, at *3 (D.D.C. Aug. 29, 2019), denied the Ways and Means Committee's motion to expedite and denied the Committee's motion for summary judgment as premature. The second one, Comm. on Ways & Means v. U.S. Dep't of Treas., No. 1:19-cv-1974, 2019 U.S. Dist. LEXIS 171609, at *4 (D.D.C. Sep. 4, 2019), denied as lacking standing the motion to intervene of Duane Morley Cox. Mr. Cox apparently is a member of the public. *See generally id.*

It will be interesting to see the ultimate outcome of this case. In a related development, on July 9, 2020, the U.S. Supreme Court decided a pair of cases relating to access to President Trump's financial documents. Both were 7 to 2 decisions authored by Chief Justice Roberts. In *Trump v. Vance*, 2020 U.S. LEXIS 3552 (July 9, 2020), the Court refused to grant categorical

relief from a subpoena issued by the New York County District attorney's Office to the President's accounting firm, seeking information that included tax returns. *Id.* at *10-11, *39. The Court affirmed the Court of Appeals and remanded the case to the lower court, where the President can make further arguments. *Id.* at *39.

Trump et al. v. Mazars USA, LLP, et al., 2020 U.S. LEXIS 3553 (July 9, 2020), involved three House committees' subpoenas, including one that encompassed tax returns:

> The House Committee on Financial Services issued a subpoena to Deutsche Bank seeking any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. It issued a second subpoena to Capital One for similar information. The Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank that mirrored the subpoena issued by the Financial Services Committee. And the House Committee on Oversight and Reform issued a subpoena to the President's personal accounting firm, Mazars USA, LLP, demanding information related to the President and several affiliated businesses.

Id. at *1 (case Syllabus). In this case, the court held that the subpoenas did not exceed the House Committees' constitutional authority but remanded the case for further consideration of separation of powers issues. *Id.* at *18-25, *37. Note that the *Trump v. Mazars* case did not involve the House Ways and Means Committee.

For further reading on this pair of Supreme Court decisions, see Paul Caron, *Perspectives On The Supreme Court's Trump Tax Return Decision*, TAXPROF BLOG (July 10, 2020), https://taxprof.typepad.com/taxprof_blog/2020/07/perspectives-on-the-supreme-courts-trump-tax-return-decision.html. For further reading on the question of whether the President's returns can and/or should be kept confidential, see, *e.g.*, Lawrence Gibbs, *INSIGHT: Let's Not Forget There's a Reason for Keeping Tax Returns Private*, DAILY TAX REP. (BLOOMBERG LAW) (Aug. 14, 2019), https://news.bloombergtax.com/daily-tax-report/insight-lets-not-forget-theres-a-reason-for-keeping-tax-returns-private; Joseph J. Thorndike, *Lawmakers Have a Right to Trump's Returns—Or Do They?*, 163 TAX NOTES FED. 1141 (2019); James W. Wetzler, *Trump's Taxes and the Erosion of Norms*, 164 TAX NOTES FED. 1069 (2019).

Chapter 7

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The casebook discusses *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012), which held that Code section 6501(e)'s six-year statute of limitations does not apply to overstatements of basis. *Beverly Clark Collection, LLC v. Commissioner*, T.C. Memo. 2019-150 involves the application of *Home Concrete* to an alleged sham transaction.

In a 2010 opinion in *Beverly Clark Collection*, the U.S. Tax Court decided the case based on an overstatement of basis argument. *Id.* at *4. The IRS appealed the 2010 decision but abandoned its "overstatement of basis argument after the U.S. Supreme Court decided *United States v. Home Concrete & Supply* …." *Id.*at *5-6. In 2014, the Court of Appeals for the Ninth Circuit vacated the Tax Court decision so that the court could consider the IRS's "sham transaction" argument. *Id.* at *6. In its 2019 opinion, the Tax Court found the two arguments to be a distinction without a difference:

> [R]espondent's theory here is that a sham sale, not an overstatement of basis, gave rise to the omission. So we must decide whether that distinction makes any difference. We conclude that it does not; we are bound to the Supreme Court's analysis. That is, even if we assume that the basis was not wrong but the sale . . . was a sham, the Clarks did not omit an item of gain entirely; they just reported an incorrect amount of gain.

Id. at *12.

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Finnegan v. Commissioner, 926 F.3d 1261 (11th Cir. 2019), affirmed the Tax Court decision cited in the casebook. *Finnegan* applied the Tax Court's decision in *Allen v. Commissioner*, 128 T.C. 37 (2007), which, as discussed in the casebook, applied the unlimited statute of limitations for fraud where the fraud was committed by the return preparer, not the taxpayer.

In *Finnegan*, the Court of Appeals affirmed the Tax Court's application of *Allen* (thus ruling in favor of the IRS). *Finnegan*, 926 F.3d at 1264. 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 1270. 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

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One of the issues where the U.S. Tax Court differs from other federal courts is how the documents filed in its cases can be accessed by non-parties. Because the Tax Court is not subject to the Administrative Office of U.S. Courts, its documents are not available online from Public Access to Court Electronic Records (PACER), https://www.pacer.gov/. Instead, the Tax Court makes available for free on its own website some documents, notably opinions and orders. *See* U.S. Tax Court, Opinions Search, https://www.ustaxcourt.gov/UstcInOp/OpinionSearch.aspx; U.S. Tax Court, Orders, https://www.ustaxcourt.gov/InternetOrders/TodaysOrders.aspx (providing a search tool). However, before the COVID-19 pandemic, other filings typically were only available from the Tax Court's offices in Washington, D.C. or by mail. *See* Maggie Goff & T. Keith Fogg, *Nonparty Remote Electronic Access to Tax Court Records*, 167 TAX NOTES FED. 771, 773 (2020) ("Although Tax Court reports and orders are available online free of charge, all other documents, such as briefs and motions, cannot be remotely accessed by nonparties online.")

The Tax Court's exclusion from PACER not only impedes access, it increases private costs.

> In the words of the PACER website, "PACER hosts millions of case file documents and docket information for all district, bankruptcy, and appellate courts. These are available immediately after they have been electronically filed." PACER thus facilitates quick electronic access to numerous documents in a case file. PACER also has a fee schedule that is significantly below 50 cents per page:
>
> "Access to case information costs $0.10 per page. The cost to access a single document is capped at $3.00, the equivalent of 30 pages. The cap does not apply to name searches, reports that are not case-specific, and transcripts of federal court proceedings.
>
> By Judicial Conference policy, if your usage does not exceed $15 in a quarter, fees are waived."

Leandra Lederman, *Increased Transparency in the U.S. Tax Court: Has the Moment Arrived?*, SURLY SUBGROUP BLOG, https://surlysubgroup.com/2018/11/01/increased-transparency-in-the-u-s-tax-court-has-the-moment-arrived/ (Nov. 1, 2018).

In contrast with PACER, the Tax Court's photocopy fee is 50 cents per page. *See Press Release*, U.S. TAX COURT (Jan. 15, 2020) (Fee Schedule, page 1), https://ustaxcourt.gov/press/01152020.pdf. This can be cost-prohibitive even for those in the Washington, DC area. The court prohibits cell phone or other photography of documents (which would help lower costs for those able to access the court in person). Goff & Fogg, *supra*, at 792. Professor Keith Fogg has blogged about this set of issues issue on Procedurally Taxing, and he has also co-authored an article laying out the concern. *See generally id.*

The Goff and Fogg article also observes that the Tax Court closed for a period of time due to the COVID-19 pandemic, eliminating access to many documents during the period of closure. *Id.* at 772. More specifically, the Tax Court closed to visitors on March 13, 2020 and announced that it would not process requests for photocopies. *Press Release,* U.S. TAX COURT 1 (Mar. 13, 2020), https://www.ustaxcourt.gov/press/03132020.pdf. At the end of May, the Tax Court announced that on June 1, 2020, it would "resume accepting requests for copies of Court records from non-parties (copy requests)." *Press Release*, U.S. TAX COURT 1 (May 29, 2020), https://www.ustaxcourt.gov/press/05292020_copies.pdf. That Press Release announced several changes: "Until further notice, all copy requests must be made by telephone and will be fulfilled electronically by email. The Court's fees with respect to these copy requests will be $0.50 per page, with a per-document cap of $3.00." *Id.*

That per-document cap is in line with PACER's approach. The Tax Court's use of email should also make the process much easier for requesters. Keith Fogg praised the changes in a blog post. *See* Keith Fogg, *What Information Should the Tax Court Make Available Electronically to Non-Parties*, PROCEDURALLY TAXING (Jun. 2, 2020), https://procedurallytaxing.com/what-information-should-the-tax-court-make-available-electronically-to-non-parties/. In part, he stated:

> Wealth should not control access to justice. Pro se litigants and low income taxpayer clinics lack the resources to go to DC and sit in the Tax Court's clerk's office to look at documents and generally lack the ability to pay $.50 per page to obtain briefs and other documents that might assist in their cases. Big firms do not face the financial barriers and the IRS has access to everything as an institutional player. The new cost structure announced in the press release discussed above will go a long way toward breaking down the barrier created by wealth and, because of email delivery, helps to break down a timing barrier as well.

Id.

It would be very helpful if the Tax Court were included in PACER or could offer a similar online system, but changes along those lines do not seem likely anytime soon.

> In 2018 the Tax Court announced that it had signed a one-year contract with a software developer to build an electronic filing and case management system. People were hopeful that the new system would provide the "first-ever public Internet access to U.S. Tax Court briefs," but a recent announcement from the chief judge indicates the Tax Court "does not yet envision changing its policy regarding posting material online."

Goff & Fogg, *supra*, at 773-74 (footnotes omitted). The Tax Court upgraded its website on July 17, 2020. *See* Keith Fogg, *Tax Court Website*, PROCEDURALLY TAXING (July 21, 2020). However, the court has not issued a press release about its planned new system. *See Press Releases*, U.S. TAX COURT, https://www.ustaxcourt.gov/press_releases.html (last visited July 22, 2020).

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Since the casebook's publication in 2018, 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.html. The Tax Court's website indicates which rules have been amended. *See Press Releases*, U.S. TAX COURT, https://www.ustaxcourt.gov/press_releases.html (announcing several amendments to the Rules). In particular, the court made November 30, 2018; July 15, 2019; and January 15, 2020 amendments, and the court also proposed amendments on April 21, 2020. *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/resources/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*, U.S. 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*, U.S. TAX COURT 1 (Jul. 15, 2019), https://ustaxcourt.gov/resources/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,* U.S. 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*, U.S. TAX COURT (May 10, 2019), https://www.ustaxcourt.gov/press/051019.pdf. For the procedure, see *Admin. Order No. 2019-01,* U.S. TAX COURT (May 10, 2019), https://ustaxcourt.gov/resources/rules/limited_eoa/Admin_Order_No_2019-01.pdf.

The Tax Court's January 15, 2020 amendments include changes to Rules 11, 12, and 200. In part, the amendments "replaced Appendix II, Fees and Charges, with a Fee Schedule." *Press Release*, U.S. TAX COURT 1 (Jan. 15, 2020), https://ustaxcourt.gov/press/01152020.pdf. The amendments are explained in that press release. *See generally id.* (Appendix). Although the fee schedule authorizes a periodic fee for Tax Court bar membership, Professor Keith Fogg has explained that the authorization does not necessarily mean that the Tax Court will impose one. Keith Fogg, *Tax Court Proposes New Rules*, PROCEDURALLY TAXING (Dec. 2, 2019), https://procedurallytaxing.com/tax-court-proposes-new-rules/.

The Tax Court's proposed amendments of April 21, 2020 include changes to Rules 21, 24, 260, 261, and 262. *Press Release*, U.S. TAX COURT 1 (Apr. 21, 2020), https://ustaxcourt.gov/press/04212020_1.pdf. The Tax Court invited comments by May 31, 2020. *Id.* at 1; *Press Release*, U.S. TAX COURT 1 (May 18, 2020),

https://www.ustaxcourt.gov/press/05182020.pdf (requesting emailed comments due to disruption in mail delivery caused by the COVID-19 pandemic).

The Tax Court has also issued a series of press releases addressing temporary changes due to the COVID-19 pandemic. *See Press Releases*, U.S. TAX COURT, https://www.ustaxcourt.gov/press.htm. The first one was on March 11, 2020. *See id.* As one example, on May 29, 2020, the Tax Court announced that it would conduct all proceedings remotely until further notice. *Press Release*, U.S. TAX COURT (May 29, 2020), https://www.ustaxcourt.gov/press/05292020_proceedings.pdf. As the situation is changing rapidly and is, we hope, a temporary one, we will not include further detail here.

In the past couple of years, the Tax Court has also issued a few press releases to announce Tax Court judge retirements. *See Press Releases*, U.S. TAX COURT, https://www.ustaxcourt.gov/press_releases.html (listing press releases).

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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 through 2019 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 (last visited July 22, 2020).

Fiscal Year	**2016**	**2017**	**2018**	**2019**
Number of cases pending (dockets in thousands)	27.6	24.9	24.0	25.4
Dollars in Dispute in Cases Pending (in billions)	$22.5	$21.2	$18.4	$21.8

In late 2019, the Tax Court reportedly was deciding cases more rapidly than new ones were filed. *See* Aysha Bagchi, *Tax Court Closing More Cases Than Are Filled, Decreasing Backlog*, BLOOMBERG TAX (Oct. 5, 2019), https://news.bloombergtax.com/daily-tax-report/tax-court-closing-more-cases-than-are-filed-decreasing-backlog ("'The U.S. Tax Court is making progress in reducing its case backlog,' U.S. Tax Court Special Trial Judge Carluzzo told Bloomberg Tax at the American Bar Association tax section meeting … on Oct. 5. 'We are closing more cases every month than get filed.'"). However, that was before the court closed for a period of time during the COVID-19 pandemic.

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. 182 (2019), 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 188. 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 192.

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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 employed 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 the 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, *aff'd in part and rev'd 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*.

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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 445:

Williams v. Commissioner, 795 F. App'x 920, 925 (5th Cir. 2019) applies the Revenue Procedure cited in the casebook regarding "clear and concise notification" of a new address, Rev. Proc. 2010-16, 2010-1 C.B. 664. In *Williams*, the Fifth Circuit upheld the Tax Court's decision finding the taxpayer's notification insufficient:

> [IRS Settlement] Officer West refused to consider the October 1, 2014 notification because it did not include proof of mailing. The Tax Court acknowledged that Williams must have sent some notification of change of address because the IRS mailed subsequent notices to the Bedford P.O. Box in 2015. However, the letter was not addressed to any of the departments of the IRS identified in the Revenue Procedure. Assuming Williams mailed the letter on October 1, that was only 43 days before the Notice of Deficiency, not the 45 days described by the Revenue Procedure….
>
> We need not decide whether the Commissioner is automatically entitled to 45 days to process a change-of-address notification based on its Revenue Procedure or whether the regulations and Revenue Procedure entitle the IRS to more time to process notifications. There is doubt as to when Williams mailed his clear and concise notice of change of address. Officer West did not act arbitrarily or capriciously when she found Williams's evidence insufficient. Accordingly, the Tax Court did not err in affirming the IRS Office of Appeals' decision and there is not sufficient evidence to overturn the Tax Court's finding that Williams's last known address had not changed by November 12, 2014.

Id. at 925-26.

Page 469:

Nelson v. Commissioner, T.C. Memo. 2018-95, 2018 Tax Ct. Memo LEXIS 95, which was discussed above in connection with page 428, is 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).

Id. at *6 n.3.

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. 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. Appeal in *Nelson* would lie 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, see Camp, *Lesson From the Tax Court:* Naked Assessments!, *supra*.

Page 470:

The "determination" issue continues to spur controversy. In a recent court-reviewed Tax Court case, it was the *IRS* that argued it had failed to make a determination in a notice of deficiency—the first of two notices of deficiency the IRS had sent the taxpayer. *See* U.S. Auto Sales, Inc. v. Commissioner, 153 T.C. 94 (2019) (reviewed by the court). The key facts are as follows:

> On May 15, 2012, respondent issued a set of documents purporting to be a notice of deficiency (May notice). The May notice encompasses: (1) *a cover letter dated May 15, 2012, addressed to petitioner* and stating that respondent determined deficiencies in petitioner's Federal income tax accounts of $24,480 and $30,668 for TYE June 30, 2003 and 2007, respectively; (2) *a Form 4089, Notice of Deficiency—Waiver, also addressed to petitioner,* listing identical deficiencies for TYE June 30, 2003 and 2007, and no deficiency for TYE June 30, 2008; (3) *a Form 5278, Statement—Income Tax Changes, showing U.S. Auto Finance, not petitioner, as the taxpayer* and stating the same deficiencies for TYE June 30, 2003 and 2007, and zero deficiency for TYE June 30, 2008; and (4) *a Form 886-A, Explanation of Adjustments, showing U.S. Auto Finance as the taxpayer* and purporting to explain the adjustments shown on the Form 5278. The Form 886-A within the May notice states that respondent disallowed part of U.S. Auto Finance's claimed $748,314 and $1,063,792 deductions for rent expense for TYE June 30, 2007 and 2008, respectively.
>
> On August 2, 2012, respondent issued to petitioner a second purported notice of deficiency (August notice). The August notice determines the following deficiencies and section 6662(a) penalties:

		Penalty
TYE [(Tax Year Ended)] 6/30	**Deficiency**	**sec. 6662(a)**
2007	$3,371,690	$674,338
2008	2,995,911	599,182

Id. at 95-96 (emphasis added). Thus, the IRS sent a total of five documents, including two that accompanied the May notice and referred to "U.S. Auto Finance" instead of "U.S. Auto Sales." The August notice referred to 2008 instead of 2003 and contained much higher deficiencies than the May notice.

The taxpayer filed a separate petition in response to each notice. In the petition responding to the May Notice, the taxpayer stated "that proposed deficiencies 'on their face are applicable to U.S. Auto Finance Inc., a separate and distinct corporation.'" *Id.* at 96. The taxpayer also "alleged that the May notice was erroneous, arbitrary and capricious, and that respondent should bear the burden of proof as to all items." *Id.* The IRS responded by alleging

that the May notice of deficiency did not make a determination, and moved to dismiss the case for lack of jurisdiction. *Id.* at 95. This is likely because the IRS wanted to litigate the case based on the August notice of deficiency. Recall that Code section 6212 states in part that "[i]f the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year," I.R.C. § 6212(c)(1), which would seem to apply to the taxpayer's 2007 tax year if the May notice of deficiency was valid.

To decide the validity question, the Tax Court majority applied *Dees v. Commissioner*, 148 T.C. 1 (2017), which is quoted in the casebook. In the first step of its analysis, the Tax Court found the May notice ambiguous on its face. *Id.* at 99 ("Although the documents making up the May notice indicate that a determination has been made, it is not possible to ascertain from the documents which entity would owe the determined deficiencies—petitioner or its related entity, U.S. Auto Finance."). The majority therefore found that "the party asserting that this Court has jurisdiction—here petitioner—must prove the relevant jurisdictional facts." *Id.* The majority agreed with the IRS: "Petitioner admits that the May notice reflects determinations with respect to U.S. Auto Finance, and it is clear that petitioner has not been prejudiced by the erroneous notice. Moreover, the evidence in the record—particularly the tax returns—cannot be ignored…. That evidence is unambiguous and confirms that the May notice reflected a determination with respect to U.S. Auto Finance and not petitioner. The May notice is thus invalid, and we lack jurisdiction." *Id.* at 101-02.

Eight additional judges joined Judge Marvel's opinion for the court. *Id.* at 95, 104. Judge Marvel also filed a separate concurrence, in which two other judges joined. *Id*. Judge Buch filed a separate concurrence. *Id.* at 108.

Judge Foley dissented, joined by Judges Ashford and Urda. *Id.* at 111. His dissent argued that the case was governed by the Tax Court's opinion in *Scar v. Commissioner*, 81 T.C. 855 (1983), *rev'd*, 814 F.2d 1363 (9th Cir. 1987), not *Dees. Id.* at 111, 112 (Foley, J., dissenting). His dissent concluded: "Both the savvy and, far more numerous, unsophisticated taxpayers will be subject to this newly devised standard. It is inequitable, unreasonable, and a bit disconcerting to force *taxpayers* to jump through judicially imposed analytical and evidentiary hoops to prove the *IRS's* intent. Not every mistake mandates invalidating a notice of deficiency. John C. Hom & Assocs., Inc. v. Commissioner, 140 T.C. 210, 213 (2013) (citing Elings v. Commissioner, 324 F.3d 1110 (9th Cir. 2003)). The prudent course of action is to hold the notice valid, freely allow amendments to respondent's answer, and permit the Court to resolve the issues. Unfortunately, the opinion of the Court ignores precedent, endorses a jury-rigged analytical construct, and puts the onus on taxpayers to divine the meaning of the IRS's slapdash gobbledygook."

Judge Ashford filed a separate dissent, as well. *Id.* at 116. Her dissent stated in part, "It continues to be my view—as I explained in my concurring opinion in *Dees*—that such a test (with both objective and subjective elements) is, at best, unnecessary, and at worst, improper." *Id.*

This case raises an issue in the category of procedural errors courts may treat as eliminating subject matter jurisdiction. There is discussion in another such context in Chapter 10 of this Supplement, below. Should procedural errors of this kind eliminate the Tax Court's jurisdiction to decide the case? Would a different procedural remedy be fairer to the parties? Note that, in this case, the IRS won its motion to dismiss, and presumably the parties will litigate the matter with respect to the August notice of deficiency. However, in a case in which the IRS did something similar but did not catch its error and sent a new notice of deficiency before the statute of limitations on assessment expired, an invalid notice of deficiency would mean that the taxpayer won the case. For further reading on this case, see James A. Beavers, *Imprecise Notice of Deficiency Does Not give Tax Court Jurisdiction*, THE TAX ADVISER, Jan. 2020, at 69.

Chapter 10

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It is worth noting that the percentage of returns filed claiming refunds dropped in 2019. *See* Laura Davison, *About 2.7 Million Fewer People Got Tax Refunds After Law Change*, DAILY TAX REP. (BLOOMBERG LAW), Oct. 17, 2019 ("About 2.7 million fewer people got tax refunds this year under the tax law overhaul that altered rates and paycheck withholding starting in 2018, according to new figures from the Internal Revenue Service."). This is due to changes made by the 2017 Tax Act. "About 80% of filers received a tax cut under the new law, but changes in withholding rates meant that many got the tax cut in small chunks in their paychecks throughout the year, rather than in one large check after filing their tax return." *Id.*

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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 general rule in that subsection is 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 or such higher level official as the Secretary may designate." I.R.C. § 6751(b)(1).

The problem for the taxpayer was that he did not allege such IRS noncompliance in his refund claim. *Ginsburg*, 2019 U.S. Dist. LEXIS 66166, 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 (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 495:

As mentioned in the casebook, Code section 7422(a) provides that no refund suit can be filed without first filing a claim for refund. Is that requirement jurisdictional, meaning that if it is

not met, the court lacks subject matter jurisdiction over the case? A recent opinion from the Court of Appeals for the Federal Circuit argues that although it is considered jurisdictional under current law, it should not be:

> The Claims Court concluded that, because Walby's 2014 administrative refund claim was untimely, pursuant to 26 U.S.C. § 7422(a), it lacked subject matter jurisdiction over that claim. Although this conclusion is correct under our existing case law, *see, e.g.*, *Stephens v. United States*, 884 F.3d 1151, 1156 (Fed. Cir. 2018), it may be time to reexamine that case law in light of the Supreme Court's clarification that so-called "statutory standing" defects—i.e., whether a party can sue under a given statute—do not implicate a court's subject matter jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4, … (2014); *see also Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1235 (Fed. Cir. 2019) (recognizing that, following *Lexmark*, it is incorrect to classify "so-called" statutory-standing defects as jurisdictional).
>
> The Supreme Court has not addressed § 7422(a) following *Lexmark*. We note, however, that the Court's most recent discussion of § 7422(a) does not describe it as "jurisdictional." *See Clintwood Elkhorn Mining Co.*, 553 U.S. 1 at 4-5, 11-12 [(2008)] …. And, although our court has continued to refer to this statute as jurisdictional following *Lexmark*, we have not yet addressed the implications of that case and the many Supreme Court cases applying it.
>
> In view of the Supreme Court's guidance in *Lexmark*, it may be improper to continue to refer to the administrative exhaustion requirements of § 7422(a) and § 6511 as "jurisdictional pre-requisites." That these provisions concern the United States' consent to be sued would not seem to change this conclusion. The Supreme Court has "made plain that most time bars are nonjurisdictional." United States v. Kwai Fun Wong, 575 U.S. 402, 410 … (2015). …
>
> Accordingly, although the Claims Court properly dismissed Walby's 2014 refund claim because she did not meet the prerequisite for bringing such a claim, we think that, under *Lexmark*, *Arbaugh* [*v. Y&H Corp.*, 546 U.S. 500 (2006)], and their progeny, the court likely did not lack subject matter jurisdiction over this claim.

Walby v. United States, 957 F.3d 1295, 1299-1300 (Fed. Cir. 2020) (footnotes omitted). For further discussion of this case and an explanation of why the jurisdictional aspect of the issue may matter, see Carlton Smith, *Federal Circuit Panel Calls For Reconsidering the Court's Precedent Holding Refund Claim Filing and Timing Requirements Jurisdictional to a Refund Suit*, PROCEDURALLY TAXING (May 13, 2020), https://proceduralltaxing.com/federal-circuit-panel-calls-for-reconsidering-the-courts-precedent-holding-refund-claim-filing-and-timing-requirements-jurisdictional-to-a-refund-suit/ (pointing out that subject matter jurisdiction requirements are not waivable).

Pages 509-10:

The recent case of *Harrison v. United States*, 2020 U.S. Dist. LEXIS 14335 (W.D. Wisc. Jan. 29, 2020), illustrates the changes that have occurred over time in when a refund claim made on a delinquent return is deemed filed and the perils of being unaware of a Treasury regulation. The background is that after the taxpayer won on this issue in *Weisbart v. U.S. Dep't of Treas.*, 222 F.3d 93 (2d Cir. 2000) (discussed on page 510 of the casebook), the IRS announced a change in its litigating position: "the Service will apply the timely mailing/timely filing rule of section 7502(a) in such cases and treat claims for refund included on delinquent original returns as filed on the date of mailing for purposes of section 6511(b)(2)(A)." IRS Chief Counsel Notice CC-2001-019 (Mar. 22, 2001). Also in 2001, the Treasury Department published a regulation reflecting this pro-taxpayer position. The regulation states in part:

> (1) … If section 7502 would not apply to a return (but for the operation of paragraph (f)(2) of this section) that is also considered a claim for credit or refund because the envelope that contains the return does not have a postmark dated on or before the due date of the return, section 7502 will apply separately to the claim for credit or refund if -
>
> > (i) The date of the postmark on the envelope is within the period that is three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid (see section 6513), and the claim for credit or refund is delivered after this three-year period; and
> > (ii) The conditions of section 7502 are otherwise met….

Treas. Reg. § 301.7502-1(f)(1). That provision "applies to any claim for credit or refund on a late filed tax return described in paragraph (f)(1) of this section except for those claims for credit or refund which (without regard to paragraph (f) of this section) were barred by the operation of section 6532(a) or any other law or rule of law (including res judicata) as of January 11, 2001." *Id.* § 301.7502-1(g)(2).

In *Harrison*, the government (surprisingly, in light of this history) argued that section 7502 did not apply to the refund claim included in the delinquent return. In its first opinion, the court agreed. Harrison v. IRS Comm'n Sic of Internal Revenue, 2020 U.S. Dist. LEXIS 6036 (W.D. Wis. Jan. 9, 2020), *vacated*, 2020 U.S. Dist. LEXIS 14335 (W.D. Wisc. Jan. 29, 2020). *Id.* at *5-6, *9. The court did not cite *Weisbart* or the regulation in that opinion. *See id.*

Carlton Smith blogged about the error. *See* Carlton Smith, *District Court Gets Timely Mailing Is Timely Filing Rule of Section 7502 Wrong as Applied to Refund Claim Lookback Period of Section 6511(b)(2)(A)*, PROCEDURALLY TAXING (Jan. 15, 2020), https://procedurallytaxing.com/district-court-gets-timely-mailing-is-timely-filing-rule-of-section-7502-wrong-as-applied-to-refund-claim-lookback-period-of-section-6511b2a/ ("[S]adly, the court got the upshot wrong. The exact issue in the case was definitively resolved the other way in regulations adopted in 2001 that followed a once-controversial Second Circuit opinion. Neither the DOJ nor the district court in *Harrison* seems to be aware of the Second Circuit opinion or the relevant regulation."). Smith wrote in part:

> Before berating the district judge, who is no doubt not a tax procedure specialist, I would point out that the parties' briefing on the motion did not mention either the Second Circuit's opinion in Weisbart or the regulation under section 7502. The brief accompanying the motion is here, the taxpayers' brief is here, and the government's reply brief is here. I am quite dismayed, though, that the DOJ Trial Section attorney did not know of the relevant authority. I have sent an e-mail to the Harrisons' counsel suggesting a motion for reconsideration or an appeal to the Seventh Circuit.

Id.

The taxpayers did file a motion for reconsideration, which the District Court granted. *Harrison v. United States*, 2020 U.S. Dist. LEXIS 14335 *6 (W.D. Wisc. Jan. 29, 2020). The court vacated its previous order. *Id.* It also excoriated the government:

> Regrettably, not only did plaintiff [taxpayer] fail to bring this case and the regulations to the court's attention in their previous briefing on defendant's motion to dismiss or for summary judgment, but the IRS and the U.S. Department of Justice, whose respective jobs include promulgating and enforcing the applicable regulation, also did not. Still, presented with the regulations, defendant concedes it has no basis to oppose the motion for reconsideration, and the IRS has confirmed that it is prepared to issue a refund in the amount sought in plaintiffs complaint, plus statutory interest. …While there is no question that this is the appropriate response and course of action, the court remains troubled by defendant's failure to alert the court to the *Weisbart* case and even more the regulations. In its submission, defendant represents that the IRS did not identify the *Weisbart* case, the Chief Counsel's Notice or the regulations, but acknowledges that counsel for defendant did identify the *Weisbart* case in their own research, and chose not to disclose it in their briefing because it is not "controlling" in the Seventh Circuit…. This might be a viable defense if: (1) the failure to cite *Weisbart* were the only failure and; (2) the U.S. Department of Justice's and IRS's aspirations only were not to fall below the bare minimum ethical threshold….
>
> More critically, however, the *Weisbart* court relied on a Treasury Regulation, which is controlling authority on both the IRS and this court. Defendant explains that the Chief Counsel's Notice announcing a change in its litigation position and the amendment to 26 C.F.R. § 301.7502-1(f) occurred after the *Weisbart* opinion, but the language in 26 C.F.R. § 301.6402-3(a)(5), on which the Second Circuit in part relied, remains in place today, and defendant failed to alert the court of this regulation. Thus, the conduct of defendant's counsel here falls below even a bare minimum ethical standard, something counsel would have discovered by reading *Weisbart* and the current versions of the regulations cited in that case closely, rather than dismissing it as an inconvenient contrary authority that they were not ethically required to cite to the court. …

> [T]he court will require defendant to circulate this opinion and order, along with the Chief Counsel's Notice and 26 C.F.R. §§ 301.7502-1(f) and § 301.6402-3(a)(5) to all attorneys in the IRS Office of Chief Counsel and to the Tax Division of the U.S. Department of Justice in hopes that these actions will prevent future opposition to meritorious claims for refunds, as well as any instinct to ignore the duty of candor to the court by burying precedent no matter how well reasoned, helpful or directly on point it may be simply because one is not ethically bound to disclose it.

Id. at *2-6 (citations omitted). Thus, the court did not blame the government for failing to identify the 2001 Treasury regulation, which is controlling, but did blame it for failing to bring to its attention *Weisbart* and a regulation under section 6402 that the *Weisbart* court cited in support of its decision. For further reading on the ethics issue in this case, see Carlton Smith, *District Court Reverses Its Section 6511(b)(2)(A) Ruling and Excoriates IRS and DOJ for Not Citing Relevant Authority*, PROCEDURALLY TAXING (Jan. 31, 2020), https://procedurallytaxing.com/district-court-reverses-its-section-6511b2a-ruling-and-excoriates-irs-and-doj-for-not-citing-relevant-authority/ and the Comments on this blog post.

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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." Professor Keith Fogg has observed, "[t]he Second Circuit opinion makes sense to me. I think it achieves the intent of Congress in 'fixing' the statute after *Lundy*. It also avoids what seems like an absurd result the IRS interpretation achieves by avoiding the six month black hole or donut hole." *Second Circuit Reverses Tax Court in Borenstein*, PROCEDURALLY TAXING (Oct. 11, 2019), https://procedurallytaxing.com/second-circuit-reverses-tax-court-in-borenstein/.

For further reading on the *Borenstein* litigation, see, *e.g.*, Stephanie Cumings, *Second Circuit Closes Tax Court's Refund 'Black Hole'*, 163 TAX NOTES 300 (2019) (discussing the two decisions); Philip N. Jones, *Second Circuit Fills Black Hole in Refund Statute of Limitations*, J. TAX'N., June 2019, at 33; 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).

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The statutory "mailbox rule" of section 7502 does not apply to refund *suits*. *See* Patel v. IRS, 2019 U.S. Dist. LEXIS 126321 (D. N.J. July 29, 2019); I.R.C. § 7502(d)(1) ("This section shall not apply with respect to … the filing of a document in, or the making of a payment to, any court other than the Tax Court ….). That is because the statute provides that "[t]his section shall not apply with respect to … the filing of a document in, or the making of a payment to, any court other than the Tax Court …." I.R.C. § 7502(d)(1).

Page 520:

In *Carter v. United States*, 2019 U.S. Dist. LEXIS 181266 (N.D. Ala. Aug. 9, 2019), a district court held the equitable tolling rule of Code section 6511(h) does not apply to an estate, only to an individual, even if the personal representative of the estate is suffering from a financial disability. *Id. a*t *14 ("Unfortunately for Carter, estates do not constitute 'individuals' subject to § 6511(h)'s provisions. Estates, while able to conduct their affairs only through personal representatives, exist separately from their personal representatives."). The court also held that the expiration of the statute of limitations poses a jurisdictional bar to hearing the case. *Id.* at *11, 18 though it raised questions about that in footnote, *id.* at *18 n.7.

For further discussion of the *Carter* case, including the subject matter jurisdiction issue, see Keith Fogg, *An Estate Cannot Use the Financial Disability Provisions to Toll the Statute of Limitations for Filing a Refund Claim*, PROCEDURALLY TAXING (Sep. 12, 2019), https://procedurallytaxing.com/an-estate-cannot-use-the-financial-disability-provisions-to-toll-the-statute-of-limitations-for-filing-a-refund-claim/. The subject matter jurisdiction issue is also mentioned above in connection with *Walby v. United States*, 957 F.3d 1295 (Fed. Cir. 2020).

Chapter 11

Pages 555-56:

A recent case illustrates the difficulty associated with recovering costs and fees under section 7430. The taxpayer in *Klopfenstein v. Commissioner*, T.C. Memo. 2019-156, 2019 Tax Ct. Memo LEXIS 163, entered into a settlement with the IRS Appeals Office under which the IRS agreed to abate 90% of the section 6707 reportable transaction penalties that the IRS originally proposed. In response to the taxpayer's claim for administrative costs, the IRS agreed that, given the settlement, the taxpayer substantially prevailed with respect to the amount in controversy. *Id*. at *7. The taxpayer was still denied any recovery because, according to the Tax Court, the IRS did not take a position contrary to the taxpayer's, meaning that the taxpayer could not be a prevailing party:

> [A] taxpayer will not be treated as the prevailing party if the IRS "establishes that the position of the United States in the proceeding was substantially justified." Sec. 7430(c)(4)(B)(i).
>
> With respect to an administrative proceeding, the "position of the United States" means the position taken by the United States "as of the earlier of—(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or (ii) the date of the notice of deficiency." Sec. 7430(c)(7)(B). The IRS "is not considered as having taken any position in an administrative proceeding prior to the issuance of an Appeals Office decision or a notice of deficiency." *Rathbun v. Commissioner*, 125 T.C. 7, 13 (2005); *see Fla. Country Clubs, Inc. v. Commissioner*, 122 T.C. 73, 86 (2004) ("[W]e interpret section 7430(c)(7) to limit recovery of administrative costs to those situations in which a notice of deficiency or Appeals Office decision has been issued."), aff'd, 404 F.3d 1291 (11th Cir. 2005).

Id. at *5-6.

Because the section 6707 penalty is an assessable penalty and not subject to the deficiency procedures, the IRS did not issue a Notice of Deficiency. And because the taxpayer settled the case early in the Appeals process, the IRS did not issue a Notice of Determination. Because it had not issued either notice, the IRS was not treated as having taken a position contrary to the taxpayer's; therefore, the taxpayer could not be treated as a prevailing party. *Id*. a *9. The *Klopfenstein* case is discussed in Linda Galler, *Logic Loses in Taxpayer's Effort to Recover Attorney's Fees*, PROCEDURALLY TAXING (Feb, 11, 2020), http://procedurallytaxing.com/logic-loses-in-taxpayers-effort-to-recover-attorneys-fees/.

Page 558:

The inflation-adjusted recovery amount for attorney's fees under section 7430 is $210 per hour for 2020. Rev. Proc. 2019-44, 2019-47 I.R.B. 1093 § 3.60. That represents an increase from

levels set in 2018 and 2019. Rev. Proc. 2018-57, 2018-49 I.R.B. 827 § 3.60 ($200 for 2019); Rev. Proc. 2017-58, 2017-45 I.R.B. 489 § 3.54 (same for 2018).

When it comes to recovering cost and fees, how much is too much? In *Tolin v. Commissioner*, T.C. Memo. 2018-29, 2018 Tax Ct. Memo LEXIS 57, the Tax Court rejected the taxpayer's claim that his lawyer's experience in the thoroughbred industry justified an enhanced attorney fee award (in excess of the statutory rate), in a case involving deductions for horse breeding activities. *Id*. at *48-49. The Eighth Circuit affirmed the Tax Court's determination, noting that the results of the case turned on the extent of the taxpayer's phone calls and business trips and not on any "equine-related" issues. Tolin v. Commissioner, 929 F.3d 548, 552-53 (8th Cir. 2019).

The Tax Court also reduced the number of hours for which the taxpayer could recover. In total, the taxpayer had sought to recover over $250,000 for 642 hours of work on the case. This included an amount equivalent to four and a half weeks of full-time work on the post-trial brief, which was 36 pages in length. *Tolin*, 2018 Tax Ct. Memo LEXIS at *43-44. The Tax Court reduced that number of hours to 88.2. *Id*. at *45. The Eight Circuit found that the Tax Court's reductions were not an abuse of discretion:

> [T]the government's initial notice of deficiency sought about $60,000 in additional taxes and penalties from Tolin. Tolin's requested attorney's fees, just for the 280 hours submitted for post-trial briefing, would have exceeded $50,000, even at the lower statutory rate of $180 per hour. "'[B]illing judgment' is an important component in fee setting. . . . Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Hensley*, 461 U.S. at 434 (internal quotation omitted).

Tolin, 929 F.3d at 554 (emphasis in original).

One commentator has taken exception to the Eighth Circuit's use of the quotation from the Supreme Court's decision in *Hensley*, noted above. Robert Kantowitz, *Three Important Summer Cases on 'Collateral' Tax Issues*, 164 TAX NOTES FED. 1749 (2019):

> [*Hensley*] does not support, the broader proposition that the very size of a dispute can place it outside the ambit of resolution for the sole reason that it is incapable of being resolved without an inordinate expenditure of attorney fees. That prospect is troublesome enough in a dispute between private parties, but it is downright unacceptable when a private party is fighting the government in a context like tax, in which the normal antidote to the problem—a class action—is rarely, if ever, available. If the government unjustifiably asserts an additional tax due of $60,000, and it legitimately takes $50,000 (or even 10 times that amount) to defend a position that is not just eminently reasonable but for which the government had no basis, the government should be reimbursing the lawyer and the taxpayer for the fees.

Id. at 1752. Do you agree?

Chapter 12

Page 601:

A 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 Commissioner of the IRS 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 FED. 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 615:

One increasingly interesting question as it relates to the "bright line" rule laid out in *United States v. Boyle*, 469 U.S. 241 (1985), is whether or not the Court's holding applies to returns filed electronically by a third-party preparer. The plaintiffs in *Intress v. United States*, 404 F. Supp. 3d 1174, 1176-77 (M.D. Tenn. 2019), challenged the applicability of *Boyle* in these circumstances. The taxpayers in *Intress* were out of the country when their 2014 tax return was due, so they sought to obtain a filing extension through their tax return preparer. *Id*. at 1176. The tax preparer completed the Form 4868 extension request on April 15th around 7:01 p.m., queued the document in her electronic filing software, but failed to hit "send." As a result, the extension request was not timely filed. *Id.* The error did not become apparent until October of 2015. *Id.*

The IRS assessed a failure-to-file penalty of $120,607.27 against the taxpayers, which they contested administratively. After the IRS denied their request for abatement, the couple paid the penalty and filed a refund suit in district court. *Id.* At trial, the taxpayers argued that they

qualified for abatement because their reliance on a third-party tax preparer to file the extension request constituted reasonable cause. *Id.* at 1177. They further claimed that the Court's holding in *Boyle* should not apply to e-filed returns. To hold otherwise, they argued, would be incompatible with past IRS efforts to encourage e-filing, which "now necessarily involves use of specialized software that a taxpayer cannot employ totally independently." *Id.* at 1177-78.

The District Court, while noting that their argument was "worthy of analysis," dismissed it. *Id.* at 1178. The court found that *Boyle* applied to the taxpayers because, like the taxpayers in *Boyle*, they were not required to use tax preparation services. *Id.* at 1177. Consequently, they were not required to e-file the extension request. Moreover, "[t]he decision to use such a service is within the taxpayer's control. The taxpayer is amply capable of either using a tax preparer who is still permitted to paper-file or preparing his return himself." *Id.* at 1179-80. The court further held that, even if *Boyle* did not apply to e-filed returns, the taxpayers would still have to prove they used "ordinary business care and prudence." *Id.* at 1181. The court went on to hold that "it would never be reasonable to blindly take someone's word that he will timely file your taxes." *Id.* The court added a caveat, however, noting that the taxpayers' theory would be "much more plausible if and when the IRS requires all returns to be e-filed or paper filing process becomes so cumbersome as to transcend 'ordinary business care and prudence.'" *Id.*

Practitioners have been quick to criticize the decision in *Intress*. For example, one commentator maintains that the ruling in *Intress* "fl[ies] in the face" of congressional efforts to encourage e-filing and fails to understand the reality of e-filing and its role in tax filings today. *See* Kristen A. Parillo, *Reasonable Cause Standard Unchanged by E-Filing*, 164 TAX NOTES FED. 1147, 1148 (2019).

Another practitioner has pointed out the inconsistency between the government's position in *Intress* and Treasury regulations defining reasonable cause for failure to file an information return. Hale E. Sheppard, *Clarifying the Reasonable-Reliance Defense to Penalties in an E-Filing Era: An Analysis of* Boyle, Haynes, Intress, *and More*, J. TAX'N., Jan. 2020, at 13. For example, regulation section 301.6724-1 provides that an information reporting penalty will be waived under Section 6724 when the violation is due to reasonable cause if (i) "[t]here are significant mitigating factors with respect to the failure" or (ii) "the failure arose from events beyond the filer's control." Treas. Reg. § 301.6724-1(a)(2). One of the events listed as "beyond the taxpayer's control" for section 6724 purposes include actions or inactions by the taxpayer's agent after the taxpayer "exercised reasonable business judgment in contracting with the agent to file timely" and accurate returns. Treas. Reg. § 301.6724-1(c)(1)(iv), (5)(i). According to this practitioner, the concept of "imputed reasonable cause"—the idea that reasonable cause on the part of the taxpayer's agent should be extended to the taxpayer herself—should apply not just to a failure to file information returns but should be extended to income tax returns as well. Sheppard, at 18.

Page 616:

Because of confusion stemming from the 2017 Tax Act, the IRS announced that it would revise the estimated tax penalty standards for 2018 returns. Under the guidance, individual taxpayers would not face penalties if they paid at least 80 percent of their estimated 2018 tax

liability. The penalty threshold is normally 90 percent. Notice 2019-25, 15 I.R.B. 942, https://www.irs.gov/pub/irs-drop/n-19-25.pdf. The IRS announced subsequently that it would calculate and waive penalties using the new percentage threshold. Taxpayers who already paid the penalty will receive a refund without the need to file a refund claim. IR-2019-44 (Aug. 14, 2019), https://www.irs.gov/newsroom/irs-automatically-waives-estimated-tax-penalty-for-eligible-2018-tax-filers.

Page 624:

As noted in the casebook, a taxpayer's position is not attributable to negligence if the position has a "reasonable basis." *See* Treas. Reg. § 1.6662-3(b)(1). A recent decision from the Eighth Circuit raises the issue of whether the reasonable basis standard requires that the taxpayer establish that he or she actually relied on the relevant legal authorities that support a return position (a subjective standard) or whether a position has a reasonable basis if, viewed objectively, the IRS or the courts would find that the position had a reasonable basis. In *Wells Fargo & Co. v. United States*, 957 F.3d 840 (8th Cir. 2020), the Eighth Circuit upheld, in a 2-1 decision, the application of a negligence penalty against the taxpayer when the taxpayer entered into a transaction with a nontax purpose. The Eighth Circuit phrased the penalty issue as follows:

> The parties dispute whether the reasonable-basis defense requires evidence that a taxpayer actually relied on relevant legal authority which supports its return position. Wells Fargo argues that its return position was objectively reasonable under the relevant legal authorities. Accordingly, it contends that it is irrelevant whether it actually relied upon those authorities in forming its return position. The government, however, asserts that a taxpayer cannot "base" its return position on the relevant authorities without showing that it actually relied on those authorities. Because Wells Fargo did not submit any evidence that it subjectively based its return position on legal authority, the government submits that the district court correctly applied the negligence penalty. Alternatively, the government argues that Wells Fargo lacked an objectively reasonable basis for its return position.
>
> We agree with the government that the reasonable-basis defense requires evidence of actual reliance on the relevant authority on the part of the taxpayer. We start with the plain language of the regulation, *see Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009), which provides a defense to the negligence penalty only when the taxpayer's "return position is reasonably *based* on one or more [relevant] authorities." 26 C.F.R. § 1.6662-3(b)(3) (emphasis added). The plain or common usage of the word "base" suggests that one is relying on particular information in order to form an opinion or a position about something. *See Base*, Black's Law Dictionary (10th ed. 2014) (defining "base," in part, as "[t]o use (something) as the thing from which something else is developed"). Thus, in order to "base" a return position on particular legal authority, a taxpayer must show that it actually relied upon those authorities in forming its position. As the district court noted, "[i]t is difficult to know how a taxpayer could 'base' a return position on a set of authorities without actually consulting those authorities, just as it is difficult to know how someone could

> 'base' an opinion about the best restaurant in town on Zagat ratings without actually consulting any Zagat ratings." *Wells Fargo II*, 260 F. Supp. 3d [1140,] at 1148. Indeed, the regulation does not require the taxpayer's position to be simply "consistent with" or "supported by" the relevant legal authority. If it did, then it might be sufficient that the relevant authorities supported the taxpayer's position, regardless of whether the taxpayer relied upon them. But in order for a taxpayer to "base" its position on relevant authority, it must have actually known about those authorities and actually relied upon them when forming its return position. . . . *But see TIFD III-E Inc. v. United States*, 8 F. Supp. 3d 142, 151 (D. Conn. 2014) (rejecting the government's position that evidence of taxpayer's subjective or actual reliance was necessary), *rev'd on other grounds*, 604 F. App'x. 69 (2d Cir. 2015).
>
> Moreover, we think that such a reading of the regulation is sensible in light of the broader context of the statute and accompanying regulatory definitions. Again, the government is seeking to impose a "negligence penalty," which suggests that the focus of the inquiry must be, at least in part, on the taxpayer's actual conduct—whether it met the requisite standard of care in preparing its tax return and considering its return position—rather than simply determining whether its legal position finds support in the relevant legal authority. *See* 26 U.S.C. § 6662(c) (defining "negligence" as "any failure to make a reasonable attempt to comply with the provisions of this title"). Indeed, in discussing the negligence penalty, we have explicitly held that "the burden is on the taxpayer to prove that he did not fail to exercise due care or do what a reasonable and prudent person would do under similar circumstances." *Chakales v. Comm'r*, 79 F.3d 726, 729 (8th Cir. 1996). Additionally, requiring evidence of actual reliance is supported by the fact that a taxpayer adopts a particular "return position" only when it actually "determines its tax liability with respect to a particular item of income, deduction or credit." 26 C.F.R. § 301.6114-1(a)(2)(i). Accordingly, reading the phrase "reasonably based" to require evidence of actual reliance is more consistent with the broader statutory and regulatory framework.

Id. at 851-53.

The dissenting judge in *Wells Fargo* concluded that the reasonable-basis standard does not require the taxpayer to show that the taxpayer actually relied on the relevant authorities that form its return position. *Id.* at 857. Picking up on the restaurant review analogy:

> [L]et us alter the district court's restaurant analogy. Suppose three friends try to decide where to go for dinner. Two of the friends, Friend A and Friend B, offer differing suggestions, each claiming his suggestion is the best restaurant in town. Tasked with resolving the dispute, Friend C consults Zagat to see which of the two recommended restaurants is indeed "the best," and, after doing so, sides with Friend A. Friend C's decision was indeed based on the Zagat ratings. But Friend A did not rely on the Zagat ratings when taking his position. In other words,

> Friend C's determination was based on Zagat, regardless of whether Friend A ever relied on the service.
>
> In my view, the court is more like Friend C, in that we are tasked with resolving the debate between the United States and Wells Fargo as to whether Wells Fargo's position had a reasonable basis. To decide, the court may find a reasonable basis if the position is supported by authorities designated in the regulation. This is true whether or not Wells Fargo actually relied on these authorities.

Id. Are you convinced by the dissenting judge's analogy? What if the law changes between the time the taxpayer reported the position and when the taxpayer is asked to establish that the position is supported by a reasonable basis. Does the Eighth's Circuit's analysis preclude the taxpayer from relying on authority that developed after the taxpayer reported the return position?

According to Professor Leslie Book, "*Wells Fargo* is the first appellate opinion to hold that reasonable basis for penalty defense purposes is based on a subjective rather than objective standard." He predicts that the Eighth Circuit's opinion will not be the last appellate word on the issue. Leslie Book, *In* Wells Fargo *8th Circuit Holds Reasonable Basis Defense to Negligence Penalty Requires Taxpayers Prove Actual Reliance on Authorities*, PROCEDURALLY TAXING (Apr. 27, 2020), https://procedurallytaxing.com/in-wells-fargo-8th-circuit-holds-reasonable-basis-defense-to-negligence-penalty-requires-taxpayers-prove-actual-reliance-on-authorities/.

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), 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 held "that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty." Chai v. Comm'r, 851 F.3d 190, 221 (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.

The holding in *Graev* has spawned significant litigation, and 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). In several subsequent cases, 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.*, McCarthy v. Comm'r, T.C. Memo. 2020-74, 2020 Tax Ct. Memo LEXIS *74 (substantial understatement penalty not imposed because of IRS's failure to comply with supervisory approval requirement); Kroner v. Comm'r, T.C. Memo. 2020-73, 2020 Tax Ct. Memo LEXIS *73 (same in the context of gift tax); J.C. Becker v. Comm'r, T.C. Memo. 2018-69, 2018 Tax Ct. Memo LEXIS *69 (civil fraud penalty not imposed); 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. Moreover, if the IRS attorney cannot obtain proof of proper supervisory approval, then the attorney should concede the penalty. *Id*. The IRS has also updated the Internal Revenue Manual to specify procedures for obtaining managerial approval of penalties. I.R.M. 4.19.13.6.2.

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, 1130 (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. I.R.C. § 6751(b)(1). As students who have studied Chapter 9 know, the IRS "determines" deficiencies, and a deficiency determination is a prerequisite for an assessment that is based on a deficiency. By contrast, "The Code does not require, or even contemplate, that 'assessments' will be 'determined.'" *Roth*, 922 F.3d, at 1132. 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. *See also* Koh v. Comm'r, T.C. Memo. 2020-77, 2020 Tax Ct. Memo LEXIS *75 (Chief Counsel attorney has the authority to make an initial penalty determination in an answer to the taxpayer's Tax Court petition).

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 the Tax Court, the answer is yes. *Clay v. Commissioner*, 152 T.C. 223 (2019), 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). *See also* Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 154 T.C. No. 4 (2020), 2020 Tax Ct. LEXIS *4, *21-22 (finding that 30-day letter proposing listed transaction penalty in section 6707A was the initial determination of the penalty and concluding that IRS Appeals Officer abused her discretion in a CDP Hearing when she upheld the penalty even though the Revenue Agent did not obtain supervisory approval before issuing 30-day letter.)

Often citing *Clay*, subsequent Tax Court cases also raise the question of what constitutes an initial determination of the penalty, which then allows the court to decide whether the IRS received timely supervisory approval. For example, in *Belair Woods, LLC v. Commissioner*, 154 T.C. No. 1 (2020), 2020 Tax Ct. LEXIS *1, a majority of the Tax Court ruled that a letter and summary report sent by a Revenue Agent to the tax matters partner of an LLC did not constitute an initial determination. The letter invited the tax matters partner to a conference to discuss the Revenue Agent's tentative proposed adjustments, which included penalty assertions. *Id*. at *4-5. According to Judge Lauber:

> The "initial determination" of a penalty may occur earlier in the administrative process, but it still must be a formal act with features resembling those that a "determination" itself displays. Like the 30-day letter involved in *Clay*, the "initial determination" of a penalty assessment will be embodied in a formal written communication to the taxpayer, notifying him that the Examination Division has completed its work and has made a definite decision to assert penalties.

Id. at *14-15. In *Belair Woods*, the court found that while the letter send by the Revenue Agent may have advised the taxpayers of the possibilities that penalties could be imposed, but it did not unequivocally communicate to the taxpayers that penalties would be imposed. *Id*. at *17.

The court also noted some broader implications that would result if the "initial determination" takes place too early in the tax controversy process:

> Considerations of fairness and efficient tax administration dictate that the taxpayer be given an opportunity to submit information bearing on the appropriateness of penalties before the Examination Division finalizes its adjustments. In some circumstances, facts that bear on the appropriateness of penalties may be exclusively in the taxpayer's possession. *See, e.g.*, sec. 6664(c)(3)(B) (requiring taxpayer to show that he "made a good faith investigation of the value of the contributed property" in order to establish defense to valuation misstatement penalty). Section 6751(b) does not require examining agents to get supervisory approval before taking exploratory steps to gather the pertinent facts.

Id. at *18-19. *See also* Tribune Media Co. v. Comm'r, T.C. Memo. 2020-2, 2020 Tax Ct. Memo LEXIS 2, *17-18 ("If developing a penalty issue, the IRS may need to request information related to whether imposing a particular penalty is justified. This would necessarily involve communicating the possibility that a penalty is being considered long before the Commissioner actually determines whether to impose a penalty, let alone communicates that determination to the taxpayer. The mere possibility that a penalty might be asserted is not a determination.").

An IRS Associate Chief Counsel also warns that "'if you push the supervisor's approval to the earliest point in the process, you're really not taking a close look at whether the penalty should be included in the statutory notice of deficiency.... It operates almost counter to the whole purpose [of section 6751(b)], which is the supervisor would act as a backstop—as someone who could really force the agent to appraise whether penalties are appropriate.'" Kristen A. Parillo, *Penalty Approval Decisions Raise IRS Policy Concerns*, 166 TAX NOTES FED. 1038, 1038 (2020) (quoting Kathryn Zuba, IRS Associate Chief Counsel (Procedure and Administration)).

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 2019 Tax Court decision examined the scope of that latter exception. *Walquist v. Commissioner*, 152 T.C. 61 (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).

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As noted in Section 12.06 of the casebook, Code Section 7491(c) places the burden of production on the IRS to establish an individual's liability for most penalties. The Tax Court's decision in *Graev v. Commissioner*, discussed above, concluded that part of the IRS's burden of production under section 7491(c) includes coming forward with evidence that it complied with the supervisory approval requirements in Code section 6751(b). Graev v. Commissioner, 149 T.C. 485, 492-94 (2017). In *Frost v. Commissioner*, 154 T.C. No. 2 (2020), 2020 U.S. Tax Ct. LEXIS 2, the Tax Court reiterated the need for the IRS to satisfy its burden of production in penalty cases and that this burden incorporates establishing timely supervisory approval. *Id*. at *12-13. What happens, procedurally, when the IRS introduces evidence that it complied with section 6751(b)(1)? According to the court, "[O]nce the Commissioner makes that showing, the

taxpayer must come forward with contrary evidence." *Id*. at *15. What might that contrary evidence entail?

> The burden now shifts to petitioner [the taxpayer] to offer evidence suggesting that the approval of the substantial understatement penalty was untimely—e.g., that there was a formal communication of the penalty before the proffered approval. If a taxpayer makes that showing, we will weigh the evidence before us to decide whether the Commissioner satisfied the requirements of section 6751(b)(1). This rule is faithful to the requirement that the Commissioner come forward initially with evidence of written penalty approval. By shifting the burden to the taxpayer after the Commissioner makes the initial showing, we avoid imposing the burden of proving a negative (i.e., that there were no prior formal communications). If the taxpayer introduces sufficient evidence to contradict the Commissioner's initial showing, then the Commissioner can respond with additional evidence and argument, and the Court can weigh all of the evidence (that is after all the business of judging). And evidence of prior formal communication (if it exists) would be available to the taxpayer since he would have received such a communication and therefore could introduce it to challenge a claim that the supervisory approval was timely. In other words, the rule we articulate today will not require the Commissioner to show that there was no prior formal communication as part of his initial burden.

Id. at *17-18. On the facts of *Frost*, the taxpayer did not introduce any evidence showing that the IRS communicated to him a penalty determination before the Revenue Agent received supervisory approval. And because the taxpayer also did not present evidence of any applicable defenses to the penalty, the penalty was sustained. *Id*. at *18-19. Note that the court did not address the question of which party bore the ultimate burden of proof regarding section 6751(b). Because the taxpayer did not introduce any contrary evidence, placing the ultimate burden of proof on the IRS would not have changed the outcome. *Id*. at *10 n.6. For an extensive discussion of burden of proof issues in penalty cases, see Jenny L. Johnson Ware, *Litigating Supervisory Approval of Penalties: Who Bears the Burden of Proof?,* J. TAX PRAC. & PROC., Apr.-May 2019, at 19.

Chapter 13

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As noted in the casebook, a taxpayer may file a stand-alone suit in either federal district court or the U.S. Court of Federal Claims to recover overpayment interest. If the taxpayer files the suit in district court relying on 28 U.S.C. section 1346(a)(2) (the "Little Tucker Act"), the amount of the recovery is limited to $10,000. Whether the district court also has jurisdiction to hear stand-alone claims for overpayment interest under 28 U.S.C. section 1346(a)(1), which does not have a recovery cap, remains unclear. Recently, the Second Circuit Court of Appeals ruled in *Pfizer Inc. v. United States*, 939 F.3d 173 (2nd Cir. 2019), that section 1346(a)(1) does not grant district courts jurisdiction to hear overpayment interest suits. This conflicts with existing precedent from the Sixth Circuit, which holds that the district courts do have jurisdiction under section 1346(a)(1) to hear stand-alone refund suits for overpayment interest. E.W. Scripps Co. v. United States, 420 F.3d 589 (6th Cir. 2005). A series of recent district court opinions have come to differing conclusions. *See, e.g.*, Estate of Culver v. United States, 2019 U.S. Dist. LEXIS 173235 (D. Colo. 2019) (following *Pfizer*); Paresky v. United States, 2019 U.S. Dist. LEXIS 149629 (S.D. Fla. 2019) (same); Bank of America Corp. v. United States, 2019 U.S. Dist. LEXIS 109238 (W.D.N.C. 2019) (following *Scripps*).

For a discussion of these cases and the effect that the appropriate sources of jurisdiction have on the statute of limitations on filing suit, see the series of blog posts on this by Bob Probasco, the latest of which at press time is *Another Aftershock From* Pfizer, PROCEDURALLY TAXING (Nov. 14, 2019), https://procedurallytaxing.com/another-aftershock-from-pfizer/. Some of his previous posts on this topic are linked there.

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 gone unpaid. William Hoffman, *Private Tax Collections Seeing Uptick So Far in Fiscal 2019*, 162 TAX NOTES1397 (2019). The IRS reports that for fiscal year 2019, the private debt collection program generated a $147.7 million balance (after IRS costs), which helped the IRS hire more compliance personnel. William Hoffman, *2019 Private Debt Collections Almost Triple 2018's*, 165 TAX NOTES FED. 1890 (2019).

The Taxpayer First Act included several provisions relating to the private debt collection program. The Act 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 Act 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, "[t]he 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).

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As noted in the casebook, Code section 6334(a) lists 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).

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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, the greater of either payment of an amount equal to the value of the property or the sale proceeds. I.R.C. §§ 7426, 6343(b). The 2017 Tax Act extended the time period by which the wrongly levied action may be filed from 9 months after the date of levy to two years. I.R.C. § 6532(c). 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.

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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)).

Final regulations raise the user fee for offers in compromise from $186 to $205. T.D. 9894 (amending 26 C.F.R. § 300.3). The increased fees apply to offers submitted after April 26, 2020. The regulations except from the user fee offers made based on doubt as to liability and also incorporate the fee waiver for low-income taxpayers. 26 C.F.R. § 300.3(b)(1), (d).

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In 2018, the IRS announced that it will send back 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).

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In April of 2020, the IRS released an updated Form 656-B, the "Form 656 Booklet: Offer in Compromise" that contains Form 656 (an older version of which is reproduced starting on page 767 of the casebook) and Form 433-A (OIC) (an older version of which starts 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

Pages 808-09:

A recent report from the Treasury Inspector General for Tax Administration (TIGTA) concludes that the IRS generally complies with applicable Collection Due Process (CDP) procedures. However, the IRS sometimes misclassifies CDP requests, which can affect the taxpayer's ability to obtain a CDP hearing and, by extension, Tax Court review of the IRS's determination to proceed with collection. TIGTA, *Review of the Office of Appeals Collection Due Process Program* (Sept. 6, 2019), https://www.treasury.gov/tigta/auditreports/2019reports/201910058fr.pdf. According to the report:

> Appeals properly informed taxpayers that Collection Due Process and Equivalent Hearings were conducted by an impartial hearing officer with no prior involvement with the tax or tax periods covered by the hearing. However, TIGTA identified some errors that were similar to errors identified in prior reports. Specifically, the Office of Appeals did not always classify taxpayer requests properly, and as a result, some taxpayers received the wrong type of hearing. TIGTA reviewed a statistically valid stratified sample of 140 cases and identified nine taxpayer cases that were misclassified. This is approximately the same number of misclassified cases that were identified in the prior year's review.
>
> Based on the same stratified sample, TIGTA determined that the Collection function did not timely process the hearing requests for an additional five taxpayers. When taxpayers mail or fax their hearing request to the wrong Collection function location, Collection function procedures require employees to fax the taxpayer's request to the appropriate Collection Due Process Coordinator at the correct location on the same day. While the Office of Appeals provided taxpayers with the correct hearing type in these cases, the Collection function did not follow procedures. As a result, the IRS may not have adequately protected the taxpayers' rights due to the untimely processing of the misdirected hearing requests.

Id.

The report also finds that the IRS sometimes miscalculates the applicable statute of limitations on collection for cases that are sent through the CDP process.

> In addition, TIGTA continued to identify errors related to the determination of the Collection Statute Expiration Date (CSED) on taxpayer accounts. TIGTA identified eight taxpayer cases that had an incorrect CSED. For five taxpayer cases, the IRS incorrectly extended the time period, allowing the IRS additional time to collect delinquent taxes. In the remaining three taxpayer cases, the IRS incorrectly decreased the time to collect the delinquent taxes. Overall, this is approximately the same number of CSED errors that were identified in the prior year's review.

Id. One commentator suggests that, based on these findings, practitioners should be wary about relying on the IRS to calculate the statute of limitations and should review the date established by the IRS for accuracy. Keith Fogg, *TIGTA Report Reminds That IRS Regularly Misclassifies CDP Request Impacting Taxpayer's Ability to Obtain a CDP Hearing and the Statute of Limitations*, PROCEDURALLY TAXING (Dec. 5, 2019), https://procedurallytaxing.com/tigta-report-reminds-that-irs-regularly-misclassifies-cdp-requests-impacting-taxpayers-ability-to-obtain-a-cdp-hearing-and-the-statute-of-limitations/.

As noted in the casebook, the taxpayer must timely request a CDP hearing in order to trigger Appeals review and, ultimately, Tax Court review. Recognizing that CDP notices issued by the IRS come in a variety of forms and can include confusing mailing instructions, the IRS announced that a CDP hearing request may be considered timely even if it was sent to the wrong address:

> When a taxpayer mails the CDP hearing request to the wrong office, it sometimes takes several days or weeks to reach the correct office. Under current procedures, this results in taxpayers receiving equivalent hearings and, ultimately, depriving the taxpayer of the opportunity for judicial review. In June 2013, our office issued Program Manager Technical Advice (PMTA) to the IRS explaining our position that timeliness of an improperly-addressed hearing request is determined by when it is received in the correct office. Consistent with this advice, the Service has procedures to forward improperly-addressed CDP hearing requests to the correct office and determine timeliness based on receipt in the correct office. . . . Because of the confusion caused by including multiple addresses on current versions of the CDP notices, we recommend that the Service determine timeliness based on the date the request was mailed to the wrong office, so long as the address of the wrong office was shown on the CDP notice (such as the payment voucher address on the LT11 or the originating office on the Letter 3172). . . . The June 2013 PMTA should no longer be followed.

Chief Counsel Memo, *Treatment of Incorrectly-Addressed CDP Hearing Requests* (Dec. 12, 2019) at 2-3, https://www.irs.gov/pub/lanoa/pmta-2020-02.pdf.

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 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 fairly 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. 89 (2018), 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 90.

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 92. However, the court held that abuse of discretion review applied because the taxpayer was not challenging the underlying tax liability for 2009 but instead the case involved "a question of whether the liability remains *unpaid*." *Id.* at 92. This case also had a second opinion issued the same day, *Melasky v. Commissioner*, 151 T.C. 93 (2018). 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. 330 (2019), the Tax Court held that it lacked jurisdiction over the case because the taxpayer had not received a determination letter. *Id.* at 331. The taxpayer's CDP request was untimely made and it never received a CDP hearing. *Id.* at 333, 337. 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.* at 336. 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. 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 864:

For a recent Court of Appeals decision discussing the "knowledge" element, and highlighting the difficulty of obtaining a reversal of a Tax Court decision in an innocent spouse case, see Jacobsen v. Commissioner, 950 F.3d 414 (7th Cir. 2020). In that case, the court affirmed the Tax Court's decision to grant innocent spouse relief to the taxpayer-husband for 2010 but not for 2011, which was the year the taxpayer's wife was arrested for embezzlement. *Id.* at 415, 417. The court observed, "by the time the 2011 returns were filed in April 2012, she had been convicted of embezzlement and was incarcerated. The Tax Court thus denied relief under § 6015(b), and (c) on account of Jacobsen's knowledge of the omitted income." *Id.* at 417.

For 2011, the Tax Court had found against the taxpayer-husband under all three subsections of section 6015: (b), (c), and (f). With respect to section 6015(f), the Tax Court stated, "Although the other factors for equitable relief either favor petitioner or are neutral, petitioner's knowledge of the embezzlement income and his involvement in preparing the 2011 return weigh too heavily against him to allow relief." Jacobsen v. Commissioner, T.C. Memo 2018-115, 2018 Tax Ct. Memo LEXIS 116, at *31. On this part of the Tax Court's holding, the Court of Appeals stated:

> Jacobsen's argument that the Tax Court improperly assigned too much weight to that knowledge is more persuasive. Jacobsen claims that because, with the exception of knowledge, the factors relevant to relief under § 6015(f) all favored him or were neutral, by denying Jacobsen's request for equitable relief the Tax Court essentially elevated lack of knowledge to a but-for criteria for relief. Jacobsen suggests the Tax Court's conclusion was especially problematic in light of Congressional intention to liberalize innocent spouse relief. Specifically, prior to the 2013 changes …, the relevant Revenue Procedures directed that actual knowledge of the understatement would be treated "as a strong factor weighing against relief." …. The Revenue Procedures accompanying the 2013 changes to § 6015 expressly abandon that approach ….
>
> Although the 2013 regulations make clear that knowledge is no longer *necessarily* a strong factor weighing against relief, as Jacobsen himself acknowledges in his brief, they do not prohibit the Tax Court from assigning more weight to petitioner's knowledge if such a conclusion is supported by the totality of the circumstances…. And although knowledge no longer weighs heavily *against* relief, nothing in the statute or revenue procedures forecloses the decisionmaker from concluding that in light of "all the facts and circumstances," § 6015(f), knowledge of the understatement weighs heavily against granting equitable relief. There is thus no reason to believe the Tax Court's decision was *necessarily* erroneous because only one of the nonexhaustive factors for consideration weighed against relief.

> We are sympathetic to Jacobsen's situation, and recognize that the Tax Court could have easily decided on this record that Jacobsen was entitled to equitable relief under § 6015(f). Indeed, were we deciding the case in the first instance as opposed to on deferential review, we may have decided the case differently….
>
> Jacobsen's case is a close one, and we are ultimately persuaded by our deferential standard of review. Because nothing in the record leads us to believe the Tax Court clearly erred or abused its discretion, we AFFIRM its denial of equitable relief.

Jacobsen, 950 F.3d at 421-23 (citations omitted).

For further discussion of this case, see Carlton Smith, *Seventh Circuit Affirms Tax Court's Discretion to Weigh Actual Knowledge More Heavily than Four Positive Factors for Innocent Spouse Relief*, PROCEDURALLY TAXING (Feb. 17, 2020), https://procedurallytaxing.com/seventh-circuit-affirms-tax-courts-discretion-to-weigh-actual-knowledge-more-heavily-than-four-positive-factors-for-innocent-spouse-relief/ (also discussing, *Sleeth v. Commissioner*, T.C. Memo. 2019-138, which is cited below in connection with section 6015(e)(7)).

Smith and Keith Fogg litigated the *Jacobsen* case for Harvard's tax clinic. *Id.* Smith commented, "Given *Jacobsen*, I am not sure that any court of appeals will ever reverse the Tax Court on a section 6015 ruling against a taxpayer." *Id.* However, Harvard's tax clinic is also representing Sleeth on appeal from the decision cited above. Smith's blog post explains:

> Sleeth had paid counsel in the Tax Court, but she could not afford to pay counsel for an appeal. The Harvard tax clinic, pro bono, is now representing her in an appeal to the Eleventh Circuit (Docket No. 20-10221). If the Eleventh Circuit is as deferential as to the weighing of factors as the Seventh Circuit was in *Jacobsen*, Sleeth will have a hard time in obtaining victory. However, there are arguments that the Tax Court erred in its holdings with respect to the knowledge and financial hardship factors. So, it is still possible that *Sleeth* will break the unbroken string of taxpayer losses in appeals of innocent spouse cases from the Tax Court.

Id.

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). Christine Speidel has argued, "[a]s others have commented, limiting the Court's scope of review while setting a de novo standard of review makes very little sense, particularly in equitable relief cases and cases in which abuse is a factor. Unfortunately, taxpayers seeking relief will be caught up in delays and litigation over these provisions." Christine Speidel, *Taxpayer First Act Update: Innocent Spouse Tangles Begin*, PROCEDURALLY TAXING (Oct. 10, 2019), https://procedurallytaxing.com/taxpayer-first-act-update-innocent-spouse-tangles-begin/. That blog post also contains further discussion about the Taxpayer First Act changes.

In *Jacobsen v. Commissioner*, 950 F.3d 414 (7th Cir. 2020), which is discussed in more detail above, the Court of Appeals for the Seventh Circuit held that new section 6015(e)(7) only affected the Tax Court's standard and scope of review, it did not affect the standard of review on appeal. *Id.* at 419.

A few recent Tax Court cases cite new Code section 6015(e)(7), but they do not provide analysis of it. *See* Rogers v. Commissioner, T.C. Memo 2020-91; Lassek v. Commissioner, T.C. Memo 2019-145, 2019 Tax Ct. Memo LEXIS 151; Jones v. Commissioner, T.C. Memo 2019-139; Sleeth v. Commissioner, T.C. Memo 2019-138; Kruja v. Commissioner, T.C. Memo 2019-136, 2019 Tax Ct. Memo LEXIS 142. In three of these cases, the court had held the trial before section 6015(e)(7) was enacted but stated that the new provision did not affect the outcome of the case. *See Lassek*, 2019 Tax Ct. Memo LEXIS at *2 n.2; *Jones*, 2019 Tax Ct. Memo LEXIS 145 at *2 n.2; *Kruja*, 2019 Tax Ct. Memo LEXIS at *8 n.4. Some of the cases cited above are on appeal. *See* Carlton Smith, *Seventh Circuit Affirms Tax Court's Discretion to Weigh Actual Knowledge More Heavily than Four Positive Factors for Innocent Spouse Relief*, PROCEDURALLY TAXING (Feb. 17, 2020), https://procedurallytaxing.com/seventh-circuit-affirms-tax-courts-discretion-to-weigh-actual-knowledge-more-heavily-than-four-positive-factors-for-innocent-spouse-relief/ and the comments following it. For further discussion of the *Sleeth* and *Kruja* cases, see Keith Fogg, *First Tax Court Opinions Mentioning Section 6015(e)(7)*,

PROCEDURALLY TAXING (Oct 16, 2019), https://procedurallytaxing.com/first-tax-court-opinions-mentioning-section-6015e7.

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 a recent case finding a lack of refund-court jurisdiction over an innocent spouse claim, see *Chandler v. United States*, 338 F. Supp. 3d 592 (N.D. Tex. 2018) (Horan, Mag. J., *adopted by* Scholer, J.); *cf.* 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 (magistrate judge's recommendation in *Hockin*; rejected as described below).

In *Hockin*, the district court judge rejected the magistrate judge's findings in part, finding jurisdiction over an innocent spouse case involving a refund claim. *See* Hockin v. United States,

400 F. Supp. 3d 1085 (D. Ore. 2019). For further discussion of this case, see Sarah Lora & Kevin Fann, *Innocent Spouse Survives Motion to Dismiss in Jurisdictional Fight with the IRS*, PROCEDURALLY TAXING (Sep. 18, 2019), https://procedurallytaxing.com/innocent-spouse-survives-motion-to-dismiss-in-jurisdictional-fight-with-the-irs/ (noting "The question still arises, however, as to whether this ruling extends to stand-alone innocent spouse claims.").

Page 891:

Several appellate cases have held that the 90-day filing period of Code section 6015(e) 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. Rubel, 856 F.3d 301, 306 (3d Cir. 2017).

Chapter 18

Pages 908-09:

In the last paragraph on page 908, the reference to 31 C.F.R. section 10.02(a)(8) should be 10.2(a)(8). The reference to section 10.03(f)(2)-(3) should be to 10.3(f)(2)-(3).

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. *See, e.g.*, Taxpayer Protection and Preparer Proficiency Act of 2019, S. 1192, 116th Cong. § 2 (2019). 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 2018 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.), *cert. denied*, 140 S. Ct. 39 (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.

In April of 2020, the IRS announced that the annual fee to apply for or renew a PTIN would be $21, plus a $14.95 third-party processing charge. REG-117138-17. The announcement was made before the district court in *Montrois*, on remand, determined what would be a reasonable fee. Joseph DiSciullo, *Commentators Remark on Proposed PTIN Regs*, 167 TAX NOTES FED. 1613 (2020). Some commentators have suggested that it would be more appropriate to set the fee after the district court has been given an opportunity to address the fee amount. Frederic Lee, *Lingering Concerns Spur Call to Revoke Proposed PTIN Regs*, 167 TAX NOTES FED. 1651, 1652 (2020).

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 –