TAX CONTROVERSIES

PRACTICE AND PROCEDURE (4TH EDITION)

2021 CUMULATIVE SUPPLEMENT

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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, 2021. After brief overviews of important 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.

Tax Cuts and Jobs Act of 2017

In December of 2017, Congress passed and then-President Trump signed 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).

Taxpayer First Act of 2019

On July 1, 2019, then-President Trump signed 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/.

Coronavirus Aid, Relief, and Economic Security (CARES) Act

On March 27, 2020, then-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 was primarily an economic relief package, but it does contain several tax provisions. For example, the legislation sought 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 granted recovery rebates for individual taxpayers (often termed "economic impact" or "stimulus" payments), 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.

Consolidated Appropriations Act, 2021 & American Rescue Plan Act of 2021

The Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, signed into law by then-President Trump in December of 2020, provided a second round of economic-impact payments and allowed taxpayers the opportunity to calculate earned income and child tax credits in such a way that could increase these amounts for some taxpayers. Several months later, on March 11, 2021, President Biden signed the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. Among other things, the Act increased funding for covid vaccination and testing programs, provided aid to state and local governments, and granted assistance to schools. It also provided a third round of economic impact payments and expanded the amount of and eligibility for various credits (earned income, child tax, child and dependent care) for the 2021 taxable year only. The Act also included an appropriation of approximately $1.5 billion to the IRS to administer the payments, provide service, and modernize its technology. *Id.* § 9601(d)(1). Beyond that, neither the Consolidated Appropriations Act nor the American Rescue Plan Act include provisions that directly affect the material discussed in the casebook.

CASEBOOK UPDATES

Chapter 1

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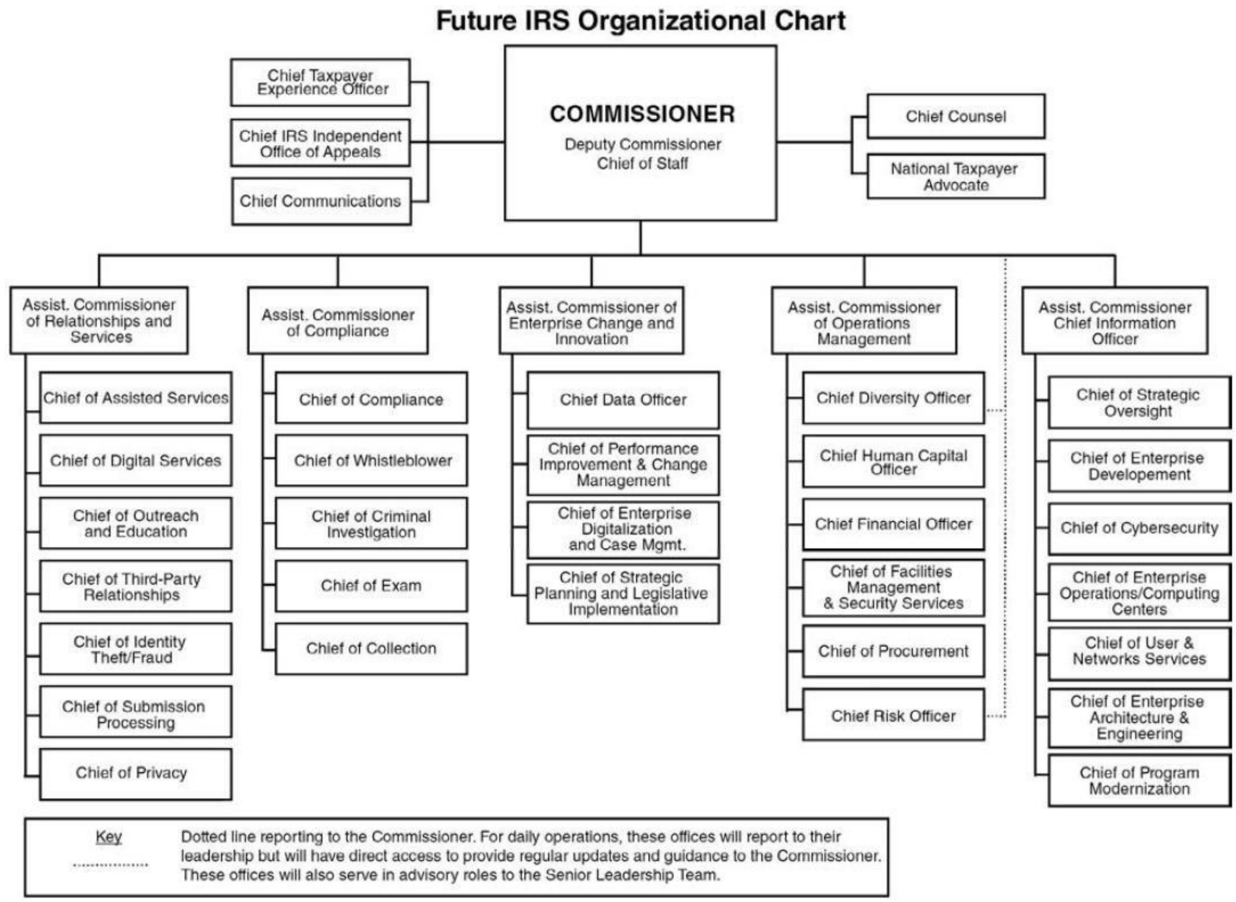
The Taxpayer First Act of 2019 (the "Taxpayer First Act") required the Secretary of the Treasury to submit a written IRS reorganization plan to Congress. Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1302. The legislation mandates that the plan "prioritize taxpayer services to ensure that all taxpayers 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.

After some delay, the IRS released a 253-page report in January 2021 entitled Taxpayer First Act Report to Congress ("First Act Report"). IRS Pub. 5426, *Taxpayer First Act Report to Congress* (Jan. 2021), https://www.irs.gov/pub/irs-pdf/p5426.pdf. The Report includes the following proposed IRS organizational structure:



Id. at 23 fig. 1.

The new proposed structure includes (on the upper left in the chart) a Chief Taxpayer Experience Officer who will "drive strategic direction for improving the taxpayer experience across the IRS and would help ensure a consistent voice and experience across all taxpayer segments by developing agency-wide taxpayer experience guidelines and expectations." *Id.* at 24. A key feature of the proposed plan involves a move away from an organizational structure based on *types of taxpayers* and towards a structure based on *employee specializations*. For example, the proposed plan consolidates all examination and collection functions into a single compliance division. *Id.* at 110. Currently, responsibility for examination and collection functions is spread across the various operating divisions. The IRS has announced that it expects to implement the redesign strategy over a five-year period, starting in 2021. Emily L. Foster, *IRS Picking 'Low-Hanging Fruit' for Initial Restructuring*, 170 Tax Notes Fed. 2093 (2021).

Before the reform plan was released, a former IRS Commissioner warned against a significant IRS reorganization, which he believed would negatively affect enforcement. Allyson Versprille, *Tax Veterans Caution Mnuchin Against Major IRS Reorganization*, Daily Tax Rep. (Bloomberg Law), July 23, 2019. A former Justice Department tax litigator and long-time practitioner views the report with some skepticism:

> The challenges facing taxpayers have rather little to do with the agency's organizational chart. Rather, they are a product of staffing shortages resulting from the reduction in the agency's workforce by more than 30% over the past decade. Those challenges are exacerbated by the fact that the remaining workforce is hamstrung by the agency's continuing reliance upon dozens of incompatible computer systems, something that training courses will not solve. The taxpayer experience can only improve if the agency can make it easier for taxpayers to obtain answers to their questions from IRS employees, who have better access to the information required to accurately respond to the taxpayers' inquiries. The report's focus upon management titles and new slogans does not put taxpayers first.

Stu Bassin, *Is It Really Time for Another IRS Reorganization?*, DAILY TAX REP. (BLOOMBERG LAW), Mar. 1, 2021. As this comment suggests, the IRS remains hampered by the severe budget cuts of the last decade and outdated technology.

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Revenue Procedure 2021-2, 2021-1 I.R.B. 116, 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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Several Congressional hearings have highlighted the challenges that IRS underfunding poses. For example, 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.* Mr. 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.

Written Testimony of The Honorable J. Russell George Treasury, Inspector General for Tax Administration Before the House Ways and Means Committee on Understanding the Tax Gap and Taxpayer Noncompliance 3 (May 9, 2019), https://www.treasury.gov/tigta/congress/congress_05092019.pdf.

An October 2020 hearing before the House Ways and Means Committee on "Taxpayer Fairness" included testimony by Professor Lederman on the importance of enforcement and adequate IRS funding. *See Taxpayer Fairness*, 116th Cong. (2020), https://waysandmeans.house.gov/legislation/hearings/taxpayer-fairness. The other speakers were Ambassador Norm Eisen (ret.), Senior Fellow, Brookings Institution; Kathleen Clark, Esq., Professor of Law, Washington University in St. Louis, School of Law; Steven M. Rosenthal, Senior Fellow, Urban-Brookings Tax Policy Center; and Andy S. Grewal, Professor & Joseph. F. Rosenfield Fellow in Law, The University of Iowa College of Law. The written testimony of all five speakers is linked at the URL provided above.

The federal tax gap continues to attract government attention. A June 2021 hearing on the tax gap before the House Ways and Means Committee had two panels. *See Minding the Tax Gap: Improving Tax Administration for the 21st Century: Hearing Before the H. Comm. On Ways and Means*, 117th Cong. (2021), https://waysandmeans.house.gov/legislation/hearings/chairman-thompson-and-chairman-pascrell-announce-joint-hearing-minding-tax-gap. The first panel included Mark Mazur, Deputy Assistant Secretary for Tax Policy, U.S. Department of Treasury and Doug O'Donnell, Deputy Commissioner for Services and Enforcement, Internal Revenue Service. The second panel included Dr. Janet Holtzblatt, Senior Fellow, Urban-Brookings Tax Policy Center; Steven Dean, Professor of Law, Brooklyn Law School; and Nina Olson, Executive Director, Center for Taxpayer Rights. Their written testimony is linked at the URL listed just above. *See also* Nina Olson, *The Current State of Taxpayer Service (or Lack Thereof) at the IRS*, PROCEDURALLY TAXING (July 14, 2021), https://procedurallytaxing.com/the-current-state-of-taxpayer-service-or-lack-thereof-at-the-irs/.

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. Cryptocurrency, such as Bitcoin, presents both challenges for tax enforcement. *See* Elise Hansen, *Treasury Eyes Crypto Reporting to Narrow The Tax Gap*, 2021 LAW360 (May 24, 2021), https://www.law360.com/articles/1387261/treasury-eyes-crypto-reporting-to-narrow-the-tax-gap.

> Tax enforcement is a key component of President Joe Biden's $1.8 trillion American Families Plan, which was unveiled last month. Thursday's report, which detailed the Treasury's plan to narrow the tax gap, homed in on increasing visibility into "opaque income streams," including cryptocurrency.

Id. For further reading about tax enforcement related to cryptocurrency, see Stevie D. Conlon, Anna Vayser & Robert Schwaba, Strashny, Zietzke, *and Virtual Currency: The More Technology Changes, the More Enforcement Stays the Same*, J. OF TAX PRAC. & PROC., Fall 2020, at 21 (discussing "recent tax-related court decisions . . . against taxpayers holding virtual currencies").

In testimony before the Senate Finance Committee in 2021, Commissioner Rettig suggested that the actual tax gap could be approaching $1 trillion annually. *See The Filing Season and Covid-19 Recovery: Hearing Before the S. Comm. on Finance* (Apr. 13, 2021), https://www.finance.senate.gov/hearings/the-2021-filing-season-and-21st-century-irs. *See also* Leslie Book, *Senate Finance Committee Tax Gap Hearing Today*, PROCEDURALLY TAXING (May 11, 2021), https://procedurallytaxing.com/senate-finance-committee-tax-gap-hearing-today-2/ (observing that that statement "got a lot of attention, especially as the IRS's own official tax gap estimates pegged the average gross tax gap at $441 billion per year, though it is based on data from 2011-2013."); *cf.* David van den Berg, *Tax Gap Has Likely Grown, But Is It $1 Trillion?*, LAW360: TAX AUTHORITY (May 7, 2021), https://www.law360.com/tax-authority/articles/1382561 ("Some are questioning IRS Commissioner Chuck Rettig's estimate that the true size of the annual tax gap could approach or exceed $1 trillion, though the figure is likely significantly higher than the agency's most recent estimate of $441 billion.").

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 the latest report on the tax gap by the Joint Committee on Taxation, see JOINT COMM. ON TAX'N, JCX-30-21, TAX GAP: OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF SELECTED ISSUES (2021), https://www.jct.gov/publications/2021/jcx-30-21/ (summarizing IRS tax-gap studies and discussing both the economics of tax compliance and measures designed to increase tax compliance).

Treasury highlighted the importance of addressing the tax gap in The American Families Plan Tax Compliance Agenda, released in May 2021. *See* U.S. DEPT. OF THE TREASURY, *The American Families Plan Tax Compliance Agenda* (May 2021), https://home.treasury.gov/system/files/136/The-American-Families-Plan-Tax-Compliance-Agenda.pdf.

> This report describes the President's tax compliance initiatives that seek to close the "tax gap"—the difference between taxes owed to the government and actually paid. According to Treasury analysis, the tax gap totaled nearly $600 billion in 2019 and will rise to about $7 trillion over the course of the next decade if left unaddressed—roughly equal to 15% of taxes owed.

Id. at 1.

There is a lot of recent discussion of the federal tax gap. For further reading, see, *e.g.*, Kaustuv Basu, *IRS Chief Says Tax Gap Could Shrink 20% With Funding Boost*, DAILY TAX REP. (BLOOMBERG LAW), May 19, 2021; Joyce Beebe, *INSIGHT: Tax Gap for Non-filers—Looking Through the Lens of Covid-19*, DAILY TAX REP. (BLOOMBERG LAW), July 15, 2020; Kim M. Bloomquist, *The Tax Gap: Holding Steady or Missing in Action?*, 165 TAX NOTES FED. 593 (2019); Laura Davison, *Tax Cheats Costing U.S. $1 Trillion a Year, IRS Estimates*, DAILY TAX REP. (BLOOMBERG LAW), Apr. 13, 2021; Alexis Gravely, *Congressional Action to Close Tax Gap Necessary to Address Debt*, 169 TAX NOTES FED. 345 (2020); William Hoffman, *Closing Tax Gap May Offer Unpalatable Choices, Observers Say*, 171 TAX NOTES FED. 487 (2021); Frederic Lee, *IRS Now Pursuing All High-Income Nonfiler Cases*, 170 TAX NOTES FED. 806 (2021); Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: Approaches and Revenue Potential*, 165 TAX NOTES FED. 1099 (2019); Ben Steverman, *Richest 1% in the U.S. Hide a Fifth of Their Income From the IRS*, DAILY TAX REP. (BLOOMBERG LAW), Mar. 22, 2021; *Treasury: Proposed Compliance Measures to Close Tax Gap (IRC §6201)* DAILY TAX REP. (BLOOMBERG LAW), May 20, 2021.

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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) 2020* (Nov. 2020), https://www.irs.gov/pub/irs-pdf/p5296.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2019* (Mar. 2020), https://www.irs.gov/pub/irs-prior/p5296--2020.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2018* (Nov. 2018), https://www.irs.gov/pub/irs-prior/p5296--2019.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. In 2017, the IRS stated, "[t]here 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.

	2017	2018	2019	2020
"A little here and there"	9%	10%	9%	8%
"As much as possible"	3%	3%	3%	3%
"Not at all"	88%	85%	87%	87%
"No opinion"	<1%	2%	1%	1%

INTERNAL REVENUE SERV. DATA BOOK, 2020 (2021), https://www.irs.gov/pub/irs-pdf/p55b.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2020*, *supra* at 15 ("Margin of error is +/- 2.1% for blended online/phone respondents and +/-3.1% for phone respondents only."); INTERNAL REVENUE SERV. DATA BOOK, 2019 viii (2020), https://www.irs.gov/pub/irs-prior/p55b--2020.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.").

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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.

Unfortunately, the 2020 IRS Data Book does not report similar figures; it only lists absolute numbers. *See* INTERNAL REVENUE SERV. DATA BOOK, 2020 (2021), *supra*, at 46-47 tbl. 18. It would be very helpful for the IRS to report those figures, and we hope that the IRS will return to doing that going forward. Another source, Transactional Records Access Clearinghouse (TRAC), reported a 0.29 percent audit rate for individuals for 2020. *Audits of Income Tax Returns Filed by Individuals*, TRAC IRS (last visited Aug. 2, 2021), https://trac.syr.edu/tracirs/highlights/current/individual.html (rate of 2.9 per 1,000 returns for individuals in 2020). TRAC also reported that of the "755 largest corporations in the country—those with over $20 billion in assets," 285, or 38 percent, were audited in 2020. *Millionaires and Corporate Giants Escape IRS Audits Again in FY 2020*, https://trac.syr.edu/tracirs/latest/641/ TRAC IRS (last visited Aug. 2, 2021).

For further reading on the decline in IRS audit rates, see Jad Chamseddine, *IRS Audit Rate Continues to Drop*, 163 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 compared with 0.88 percent in fiscal 2018."); Alexis Gravely, *Only 2 Percent of Millionaires Audited in 2020, Report Finds*, 170 TAX NOTES FED. 1929, 1929 (2021) (discussing a TRAC report, including TRAC's finding that "[l]arge corporations—those with more than $20 billion in assets—also aren't being audited as often: 38 percent were audited in 2020, compared with 93 percent in 2012.").

A 2020 report by the Treasury Inspector General for Tax Administration found that the IRS was not focusing audit resources optimally. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *The Large Case Examination Selection Method Consistently Results in High No-Change Rates*, 2020-30-031 (June 22, 2020), https://www.treasury.gov/tigta/auditreports/2020reports/202030031fr.pdf. The introductory material to the report explains:

> TIGTA analyzed the 10,755 returns closed in the DAS [Discriminant Analysis System] workstream during Fiscal Years 2015 through 2018 and found that 47 percent were closed with no change to the tax return. TIGTA analyzed the potential cost for excessive time charged to no-change returns, i.e., time in excess of 200 hours, and estimated that potentially $22.7 million was spent examining no-change returns in excess of 200 hours.

Id. (Highlights section); *see also* Laura Davison, *IRS Wasting Millions on Audits with No Results, Watchdog Says*, DAILY TAX REP. (BLOOMBERG LAW), June 25, 2020, https://www.bloomberg.com/news/articles/2020-06-25/irs-wasting-millions-on-audits-with-no-results-watchdog-says.

Since the period covered by the report, the IRS has "revamped its audit strategy to focus on high-risk areas where people are more likely to attempt to avoid taxes, such as offshore private banking, self-employment taxes, and cryptocurrencies." *Id.* According to a March 22 paper by the National Bureau of Economic Research, "[r]andom audits failed to catch substantial tax evasion by high-income taxpayers, even among those who had disclosed hidden wealth or foreign bank accounts ...." William Hoffman, *Big-Bucks Tax Evasion Eludes Random Audits, Research Shows*, 170 TAX NOTES FED. 2096 (2021) (also reporting that "IRS Commissioner Charles Rettig said at a House Ways and Means Oversight Subcommittee hearing March 18 that the paper would make the case for more—and more experienced and educated—tax audit staff. . . . 'With respect to the higher-income taxpayers, we need to have specialized agents' who are familiar with offshore and other tax plans that might skirt tax law, he said.").

Improving the effectiveness and reach of IRS audits is also a priority of the Biden administration, which has proposed increased funding for enforcement and a "plan to raise $700 billion over a decade from increased tax audits of the wealthy and corporations ...." Allyson Versprille, *Biden's Audit-the-Rich Target of $700 Billion Seen as Tall Order*, DAILY TAX REP. (BLOOMBERG LAW), May 6, 2021, https://news.bloomberglaw.com/daily-tax-report/bidens-audit-the-rich-target-of-700-billion-seen-as-tall-order.

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The updated IRS enforcement statistics for 2016 on 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
2020	291,081	396,269	77

INTERNAL REVENUE SERV. DATA BOOK, 2020 (2021), *supra*, at 59 tbl. 25; INTERNAL REVENUE SERV. DATA BOOK (2019), *supra* at 60 tbl. 25; INTERNAL REVENUE SERV. DATA BOOK (2017), *supra*, at 41 tbl. 16; TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Trends In Compliance Activities Through Fiscal Year 2016* No. 2017-30-072 (Sep. 11, 2017), at 43-44, https://www.treasury.gov/tigta/auditreports/2017reports/201730072fr.pdf.

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, Matt Cooper & Chaim Gordon, *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.

Those comments seem even more relevant now, in light of the major decrease in enforcement actions from 2019 to 2020. However, the COVID-19 pandemic is an important factor in this latest drop. The IRS has experienced a significant mail backlog due to closures of its processing facilities during the pandemic, as IRS staff shifted to working remotely. William Hoffman, *Mail Backlog Dominates IRS Exam, Collection, and Correspondence*, 169 TAX NOTES FED. 339 (2020).

> Around 5 million pieces of mail remain stored at various IRS processing facilities around the country, about half of which involve tax returns, Laura Baek, executive director (intake and technical support) at the Taxpayer Advocate

> Service said October 2 during an American Bar Association Section of Taxation virtual meeting.
>
> Automated enforcement actions such as the federal payment levy program and automated collection system systemic levies will remain idle until mail backlogs are reduced, Baek said.

Id. at 339. *See also* Allyson Versprille, *IRS's Automated Enforcement Programs Still Paused, Official Says*, DAILY TAX REP. (BLOOMBERG LAW), May 13, 2021, https://news.bloombergtax.com/daily-tax-report/irss-automated-enforcement-programs-still-paused-official-says?context=search&index=3 (stating in May 2021 that "[t]he IRS's automated enforcement programs, such as automated levies, still haven't resumed since being placed on hold last spring, an agency official said Thursday."). For COVID-related IRS updates, see *IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue,* https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue (last visited August 4, 2021).

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The IRS budget statistics for 2017 through 2021 and all figures—including the 2009 through 2016 figures in the casebook—updated to 2021 dollars are as follows:

Fiscal Year	IRS Budget (absolute dollars, in thousands)	IRS Budget (2021 dollars, in thousands)
2009	$11,522,598	$14,592,559
2010	$12,146,123	$15,133,970
2011	$12,121,830	$14,641,537
2012	$11,816,696	$13,983,593
2013	$11,198,611	$13,060,856
2014	$11,290,612	$12,957,954
2015	$10,945,000	$12,546,411
2016	$11,235,000	$12,718,398
2017	$11,235,000	$12,453,103
2018	$11,158,703	$12,073,638
2019	$11,302,554	$12,011,636
2020	$11,510,054	$12,083,086
2021	$11,919,054	$11,919,054

IRS Pub. 5530, *Program Summary by Budget Activity* (2021), https://www.irs.gov/pub/irs-pdf/p5530.pdf (reporting absolute dollar figures for 2020 and 2021; also reporting that IRS requested budget for 2022 is $13,156,926); IRS, *Program Summary by Budget Activity* (2020), https://home.treasury.gov/system/files/266/19.-IRS-FY-2021-BIB.pdf (reporting absolute dollar figures for 2019 and 2020); 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 2017 and 2018). Inflation calculations were performed using *U.S. Inflation Calculator*, http://www.usinflationcalculator.com (last visited Aug. 5, 2021).

The IRS budget did increase somewhat in absolute dollars each year after 2019, after staying steady or dropping since 2016. Under President Biden, the requested IRS budget for 2022 reflects an even larger potential shift. *See* IRS, *Program Summary by Budget Activity* (2021), *supra*; William Hoffman, *Biden Calls for Big Boost to IRS Compliance Efforts*, 171 TAX NOTES FED. 491 (2021) ("The administration's $13.2 billion IRS request in its so-called skinny (that is, discretionary) budget includes $900 million more for tax enforcement, according to an April 9 statement from Treasury."). *See also* Kelly Phillips Erb, *As IRS Enforcement Makes News, Here's a Look at Liens and Levies*, DAILY TAX REP. (BLOOMBERG LAW), May 27, 2021, https://news.bloomberglaw.com/daily-tax-report/as-irs-enforcement-makes-news-heres-a-look-at-liens-and-levies ("President Joe Biden has proposed giving more money—an extra $80 billion over the next decade—to the IRS to collect taxes.").

Currently, 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/. The IRS sent out additional payments to eligible individuals in December 2020 and the spring of 2021. As of mid-May 2021, with the addition of payments under the American Rescue Plan Act enacted in March 2021,

> [t]hat brings the total disbursed payments from the third round of stimulus checks during the coronavirus pandemic to about 165 million, worth about $388 billion since these checks began rolling out to Americans in batches starting in mid-March.

Jessica Menton, *Stimulus Checks: IRS Sends Nearly 1M More COVID Relief Payments, Including 'Plus-Up' Payments*, USA TODAY (May 13, 2021), https://www.usatoday.com/story/money/2021/05/13/stimulus-check-2021-irs-covid-payment-update/5071379001/.

The American Rescue Plan Act also introduced monthly Advance Child Tax Credit payments to be paid out by the IRS. IRS, *Coronavirus Tax Relief*, https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments (last visited Aug. 2, 2021). The IRS is allowing individuals who did not previously qualify or did not file a tax return to apply for both the Economic Impact Payments and Advance Child Tax Credit payments on an ongoing basis through a tool provided on the IRS website. *Id.*

The rollout of the payments has not been without challenges and mistakes. *See* Sarah Skidmore Sell, *Second Stimulus Check Problems: Didn't Receive Your Relief Payment Yet? Get My Payment Errors? Here's What To Do.*, CHI. TRIB. (Jan. 7, 2021), https://www.chicagotribune.com/business/ct-biz-second-stimulus-check-missing-20210107-xndnhr3x2nfqxpe76npzagbkkq-story.html ("While the IRS and Treasury have distributed the bulk of the anticipated $164 million in second-round of relief payments for Americans faster than the first time, millions have not gotten payments yet or found hiccups in the distribution.").

> It also appears there was a major snafu this time for people who filed their taxes with an online tax preparation service such as TurboTax or H&R Block and paid for their tax preparation fees with their expected refund. In those cases, the IRS website may show that the money went to an account they do not recognize. That is because money may have been sent to a temporary bank account established by the tax preparer, which is no longer active.

Id.

Some individuals who should not have received payments received them in error, including foreign citizens who once worked in the United States. *See* Sacha Pfeiffer, *IRS Says Its Own Error Sent $1,200 Stimulus Checks to Non-Americans Overseas*, NPR (Nov. 30, 2020), https://www.npr.org/2020/11/30/938902523/irs-says-its-own-error-sent-1-200-stimulus-checks-to-non-americans-overseas.

> The total cost of payments that went to those not qualified is unknown. The Treasury Inspector General for Tax Administration did find that, as of late May, $34 million in stimulus money had gone to people who filed a tax return with a foreign address.
>
> But that includes eligible people, such as U.S. citizens living abroad, and does not include ineligible foreign citizens who received a check at a U.S. address . . . That $34 million also does not include people . . . who received a check but did not file a U.S. tax return.

Id.

After issuing payments to incarcerated individuals in the first round of Economic Impact Payments, the IRS stated that such payments would have to be paid back. Bob Segall, *VERIFY: Do Inmates in Jails and Prisons Get COVID-19 Stimulus Checks?*, WTHR (Feb. 26, 2021), https://www.wthr.com/article/news/verify/verify-inmates-receive-coronavirus-relief-stimulus-money/531-e2cdff6a-47ca-43d0-aeb8-8dac047316ee. However, following a class action lawsuit, a judge held that payments could not be denied to incarcerated individuals. *Id.*

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A November 2021 GAO report on the IRS's reorganization plan included discussion of shortcomings in the IRS's stated goal to improve service to taxpayers. *See* U.S. GOV'T

ACCOUNTABILITY OFFICE, GAO-21-18, IRS REORGANIZATION: PLANNING ADDRESSED KEY REFORM PRACTICES, BUT GOALS AND MEASURES FOR THE PLAN HAVE NOT BEEN FINALIZED 8-11 (2020), https://www.gao.gov/products/gao-21-18. One commentator observed:

> For example, one thing the IRS closely measures is its level of phone service and the accuracy of its assistance, [Ronald Jones, a senior analyst at the GAO,] said. The agency focuses on metrics such as how many people tried to get through, how many were put in touch with an IRS examiner, and how many received an answer that was technically correct. But those metrics don't address experience-related issues like how many times a taxpayer had to call, how many times they were redirected, and whether the answer had any bearing on the issue the taxpayer was calling about, he explained.

Jonathan Curry, *GAO Casts Doubt on IRS Efforts to Improve Taxpayer Experience*, 169 TAX NOTES FED. 1406, 1406-07 (2020); *cf.* Nina Olson, *The Current State of Taxpayer Service (or Lack Thereof) at the IRS, supra.*

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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); *see also* Charles O. Rossotti, Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: A Comprehensive Approach*, 169 TAX NOTES FED. 1467 (2020). The plan focuses on the single largest component of the tax gap: individuals' unreported business income. Rossotti, *supra*, at 1413. Rossotti's 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 observed. 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.

Former Commissioner Rossotti testified in May 2021 before the Senate Committee on Finance Subcommittee on Taxation and IRS Oversight on the latest components of his plan to reduce the tax gap. *Closing the Tax Gap: Lost Revenue from Noncompliance and the Role of Offshore Tax Evasion* (May 11, 2021), https://www.finance.senate.gov/hearings/closing-the-tax-gap-lost-revenue-from-noncompliance-and-the-role-of-offshore-tax-evasion. In his written testimony, Rossotti stated:

> We estimate that this plan would shrink the Tax Gap by 19% over 10 years, gaining about $1.4 trillion, almost as much as President Biden's proposal to increase individual income taxes. All this revenue gain would be from taxpayers in the top quartile of income and most of it would come from increased voluntary compliance. The revenue gain would be about 20 times the cost.
>
> Since most revenue comes from voluntary compliance, making it easier for taxpayers to comply is essential. Our plan would increase IRS increase [sic] service to levels to commercial levels. Treating taxpayers fairly, even when there is a dispute, is also essential and our plan proposes expanding taxpayer right.
>
> Our plan is a major long-term program that would require Congressional action to provide direction, authority and a source of assured funding of about 6% per year increase over what is needed to sustain IRS operations[.]
>
> All the details are available at shrinkthetaxgap.com.

Testimony of Charles O. Rossotti, Former IRS Commissioner (1997-2002) Before the Subcomm. on Taxation and IRS Oversight of the S. Comm on Finance 5 (May 11, 2021), https://www.finance.senate.gov/imo/media/doc/SFC%20written%20submission%20final05082021.pdf.

For a recent discussion of how new technology affects tax compliance, see James Alm et al., , *New Technologies and the Evolution of Tax Compliance*, 39 VA. TAX REV. 287, 287 (2020) ("offering a cohesive framework to address technological advancement and tax compliance"). 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. 145 (2020). 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 NOTES 149, 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. July 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 (July 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

[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*.

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

In June 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 was the odd claim 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 argument in favor of rehearing that was made before the denial of rehearing, see George M.

[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 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.

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). 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/.

In June 2020, the Supreme Court denied certiorari. Altera Corp. & Subsidiaries v. Comm'r 926 F.3d. 1061 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 131 (2020) (mem.). For discussion of the implications of the denial of certiorari, see Ryan Finley, *Altera's Failed Supreme Court Bid Leaves Questions Unanswered*, 167 TAX NOTES FED. 2344, 2344 (2020) ("Although the Supreme Court's denial of the petition means that reg. section 1.482-7A(d)(2) remains in force, allowing the Ninth Circuit's decision to stand without ruling on the question sets up the possibility that a new wave of challenges will emerge."); Ryan Finley, *Increasing Regulatory Scrutiny May Cause* Altera *Circuit Split*, 99 TAX NOTES INT'L 275, 275 (2020) ("Altera Corp. and amici have argued that an eventual circuit split is inevitable. Although the IRS resumed its enforcement of the regulation following the Ninth Circuit's ruling, the Tax Court is not bound by the holding in cases that can be appealed in other circuits under the *Golsen* rule.").

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 recent case is *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021). In *CIC Servs.*, the taxpayer challenged 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., LLC v. IRS*, 925 F.3d 247, 249-50 (6th Cir. 2019). The plaintiff challenged the Notice under the APA and moved for a preliminary injunction. *Id.* at 250. In District Court, 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.

In May 2021, the U.S. Supreme Court reversed, holding that the suit "does not trigger the Anti-Injunction Act." *CIC Servs., LLC*, 141 S. Ct. at 1594. The Court explained:

> A reporting requirement is not a tax; and a suit brought to set aside such a rule is not one to enjoin a tax's assessment or collection. . . .
>
> The complication here is that Notice 2016–66's reporting obligations . . . are backed up by a statutory tax penalty. ...... The question thus becomes whether that added tax penalty changes the analysis. . . .
>
> Three aspects of the regulatory scheme here, taken in combination, refute the idea that this is a tax action in disguise. . . .
>
> First, the Notice imposes affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty. ...... [O]beying that mandate is likely to involve significant time and expense....... Simply stated, this suit attempts to get out from under the (non-tax) burdens of a (non-tax) reporting obligation. . . .
>
> Second and relatedly, the Notice's reporting rule and the statutory tax penalty are several steps removed from each other .... To start, CIC has to withhold required information .... Next, the IRS must determine (often no small matter) that a violation of the Notice has in fact occurred. And finally, the IRS must make the—entirely discretionary—decision to impose a tax penalty. . . . That threefold contingency matters in assessing whether the Anti-Injunction Act applies. Even the Government concedes that when there is "too attenuated a chain of connection" between an upstream duty and a "downstream tax" . . . .
>
> Third, violation of the Notice is punishable not only by a tax, but by separate criminal penalties. ...... So the criminal penalties here practically necessitate a pre-enforcement, rather than a refund, suit. ...... [T]hose penalties necessitate a suit aimed at eliminating the Notice, rather than the statutory tax penalty. Only an injunction against the Notice gives the taxpayer or advisor what it wants: relief from the obligation to report transactions. An injunction against the tax penalty would not do so.

Id. at 1588-92 (citations omitted).

The concurring opinion by Judge Sotomayor "highlight[ed] that the answer might be different if CIC Services were a taxpayer instead of a tax advisor." *Id.* at 1594. It explained:

> For a given taxpayer … a tax on noncompliance may operate as a rough substitute for the tax liability she has evaded by withholding required information. Moreover, compared with their tax advisors, taxpayers may incur less expense in collecting and reporting their own financial information. Such information, after all, is about those taxpayers' own activities and is likely to be in their possession.

> Hence, while it will often be correct to conclude that a tax advisor challenging an IRS reporting requirement is not doing so "for the purpose of restraining" a tax on noncompliance, the analysis may be different when it comes to taxpayers.

Id. at 1594-95 (Sotomayor, J., concurring).

Judge Kavanaugh's concurrence argued that the majority's holding "in effect carves out a new exception to [*Alexander v.*] *Americans United*[, 416 U. S. 752 (1974)] and *Bob Jones* [*Bob Jones Univ. v. Simon*, 416 U. S. 725 (1974)] for pre-enforcement suits challenging regulations backed by tax penalties." He agreed with the majority that this was the correct approach:

> In *Americans United* and *Bob Jones*, this Court adopted a straightforward and broad rule for determining whether a pre-enforcement suit is barred by the Anti-Injunction Act. Under that rule, if a pre-enforcement suit would "necessarily preclude" the assessment or collection of a tax, that suit is barred by the Act and the taxpayer needs to bring a refund suit *after* paying the tax. *Bob Jones*, 416 U. S., at 732 …; see also *Americans United*, 416 U. S., at 760-761 …. In other words, *Americans United* and *Bob Jones* instruct courts to look to the *effects* of a suit. And if a pre-enforcement suit would have the effect of preventing the assessment or collection of a tax, then that suit is barred by the Anti-Injunction Act….
>
> I agree with the Court's decision to narrow *Americans United* and *Bob Jones* because the broad "effects" rule articulated in those decisions is hard to square with the text of the Anti-Injunction Act, which bars only a pre-enforcement "suit for the purpose of restraining the assessment or collection of any tax." §7421(a). Contrary to some sweeping language in *Americans United* and *Bob Jones*, the Anti-Injunction Act is best read as directing courts to look at the stated *object* of a suit rather than the suit's downstream effects. See *ante*, at 7-8. And for that reason, as the Court explains, the text of the Anti-Injunction Act is best read as distinguishing (i) pre-enforcement suits challenging the regulatory component of a regulatory tax, which remain prohibited because the requested relief necessarily runs against the assessment or collection of a tax, from (ii) pre-enforcement suits challenging a regulation backed by a tax penalty, which may proceed because the requested relief runs against an independent legal obligation.

Id. at 1595-96 (Kavanaugh, J., concurring).

What are the larger implications of *CIC Services*, in terms of what it will require of the IRS and the likelihood of taxpayers winning tax cases on procedural grounds? Professor Kristin Hickman has long advocated against "tax exceptionalism" with respect to administrative law. She argued that the *CIC Services* is important in that regard:

> In 2011, in *Mayo Foundation for Medical Education and Research v. United States*, [562 U.S. 44 (2011),] the Supreme Court unanimously (with Justice Kagan

> abstaining) told the tax community that it was "not inclined to carve out an approach to administrative review good for tax law only," thereby signaling to Treasury and the IRS that they ought to clean up their act respecting their compliance with general administrative law requirements, doctrines, and norms. Over the past ten years, the courts, the Government Accountability Office, and the Office of Information and Regulatory Affairs have slowly but surely prodded Treasury and the IRS in that direction. With its decision this week in *CIC Services, LLC v. IRS*, the Supreme Court has said to Treasury and the IRS—again unanimously—"yes, we really mean it."

Kristen E. Hickman, CIC Services, LLC v. IRS*: Another Blow to Tax Exceptionalism*, YALE J. ON REGUL. NOTICE & COMMENT (May 20, 2021), https://www.yalejreg.com/nc/cic-services-llc-v-irs-another-blow-to-tax-exceptionalism/. Professor Leslie Book supported that view, stating, "I . . . come at the issue not as someone who reflexively believes that IRS action is improper, or that IRS systemically runs roughshod over the APA. I do think, however, that tax administration would benefit from a defined and prompt path for litigants to challenge IRS rulemaking apart from traditional enforcement proceedings. Pre-enforcement challenges to agency rulemaking are the norm outside tax law." Leslie Book, *Further Initial Thoughts on CIC Services*, PROCEDURALLY TAXING (May 18, 2021), https://procedurallytaxing.com/further-initial-thoughts-on-cic-services-2/.

On the other hand, "the government and some tax experts expressed concern that a decision in favor of CIC would shift tax litigation from refund lawsuits to pre-enforcement[] lawsuits, hinder the IRS's ability to assess taxes, and lead to a decline in the amount of taxes collected." MILAN N. BALL, CONG. RSCH. SERV., LSB10619, SUPREME COURT'S DECISION IN *CIC SERVICES, LLC V. INTERNAL REVENUE SERVICE* IMPACTS PRE-ENFORCEMENT CHALLENGES TO IRS REPORTING MANDATES 3 (JULY 12, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10619. The IRS had "argued that a decision in CIC's favor would open the floodgates to pre-enforcement tax litigation" but the Supreme Court found these arguments unpersuasive. *Id.* The Congressional Research Service report concludes:

> The impact of the Court's decision in CIC Services is unclear. For example, it is unclear whether the Court would have ruled the same way if CIC was (sic) a taxpayer participating in a reportable transaction as opposed to a material advisor. Presumably the costs of complying with the Notice would be less for a taxpayer than a material advisor, and it is arguable that there would be fewer steps between the upstream Notice and a downstream tax. In addition, despite CIC's success in CIC Services, CIC could still lose the merits. In *Mann Construction, Inc. v. United States*, a district court held that another reportable transaction notice, concerning a transaction that the IRS designated a listed transaction, was not subject to the Administrative Procedure Act's notice-and-comment requirements because Congress had "authorized" the IRS to issue the notice without notice and comment.

> If Congress imposes a tax on a prescribed reportable transaction, then there might be a different outcome in cases like *CIC Services*—the AIA may bar judicial review of pre-enforcement challenges. The Court's opinion suggests that the AIA would have barred pre-enforcement judicial review of CIC's challenge if Congress imposed a tax on the micro-captive transactions themselves or Congress had delegated that authority to Treasury, instead of simply providing Treasury with the authority to issue guidance requiring reportable transaction disclosures and backing that guidance with statutory penalties.…

Id. at 3-4.

For an argument that "*CIC Services* makes it easier to get into court with an APA challenge," see Lee A. Sheppard, *Successful Challenges to IRS Guidance After CIC Services?*, 171 TAX NOTES FED. 1349, 1355 (2021). However, "[a]ccording to Monte A. Jackel, of counsel to Leo Berwick, the Court's *CIC Services* opinion 'is very narrowly targeted, and it does not look like taxpayers or their advisers will have any materially greater pre-enforcement rights than what they had before this case today.'" Kristen A. Parillo, *Supreme Court's CIC Services Opinion Clarifies Scope of AIA*, 171 TAX NOTES FED. 1286, 1288-89 (2021). *CIC Services* is also discussed in Chapter 12 of this Cumulative Supplement.

CIC Services is just one (albeit very important) example of administrative law challenges to tax guidance. Another recent example is *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. 180 (2020), in which the Tax Court upheld a Treasury Regulation as being properly promulgated under the APA. The case involves a claimed charitable deduction for donation of a conservation easement. *See id.* at 180-81. Setting the stage in the first paragraph of the opinion, the court observed that "[o]n its Federal income tax return for 2008, Oakbrook claimed for this donation a charitable contribution deduction of $9,545,000. Oakbrook thus took the position that the land covered by the easement had appreciated in value by about 700% in a single year during the worst real estate crisis to hit the United States since the Great Depression." *Id.* at 181.

The challenge to a Treasury regulation came into play because of a statutory requirement: "A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." I.R.C. § 170(h)(5)(A). On the facts, "[t]he parties understood that changed circumstances might make it impossible, at some point in the future, to continue protecting the conservation area. Should that happen … [portions] … of the Deed governed how Oakbrook and SRLC [Southeast Regional Land Conservancy, the donee] would divide the proceeds of sale following a judicial extinguishment of the easement." *Id.* at 181-82. Treasury regulation section 1.170A-14(g)(6) governs judicial extinguishment of easements. As the Tax Court noted, "[t]his regulation requires that the easement deed guarantee the donee 'a proportionate share of extinguishment proceeds.'" *Id.* at 185 (quoting Carroll v. Commissioner, 146 T.C. 196, 2019 (2016)).

The taxpayer made an APA-based challenge to the regulation, arguing that the IRS failed to comply with the APA requirement that "[a]fter consideration of the relevant matter presented, incorporate in the rules adopted a concise general statement of their basis and purpose," 5 U.S.C. § 553(c). *Oakbrook Land Holdings*, 154 T.C. at 190. The taxpayer argued that the Treasury had failed to give adequate reason and explanation for two parts of the "judicial extinguishment" rule, namely the "requirement that the donee receive a proportional share of the proceeds and the fact that the 'proportionate share' formula does not account for the possibility of donor improvements." *Id.* at 192. The Tax Court pointed to the regulation's preamble as satisfactory explanation:

> The preamble to the final regulations explains that they were being promulgated to "provide necessary guidance to the public for compliance with the law," as recently amended by Congress, "relating to contributions of partial interests in property for conservation purposes." The preamble to the proposed regulations supplied extensive background about the legislative history, explaining that "[t]he regulations reflect the major policy decisions made by the Congress and expressed in the[] committee reports." Treasury noted that "[t]he most difficult problem posed in this regulation was how to provide a workable framework for donors, donees, and the [IRS] to judge the deductibility of open space easements," inviting public comments on this and other points.
>
> In response to this request Treasury received comments from 90 organizations and individuals who supplied voluminous commentary on many aspects of the proposed regulations. Treasury considered these comments and made numerous changes throughout, highlighting the most important revisions in a two-page "Summary of Comments." The preamble to the final regulations states that, "[a]fter consideration of all comments regarding the proposed amendments, those amendments are adopted as revised by this Treasury decision."
>
> The broad statements of purpose contained in the preambles to the final and proposed regulations, coupled with obvious inferences drawn from the regulations themselves, are more than adequate to enable us to perform judicial review. We find that Treasury's rationale for the judicial extinguishment rule "can reasonably be discerned and coincides with the agency's authority and obligations under the relevant statute."

Id. at 194-95 (citations omitted).

For further discussion of this case and its implications for future cases, see Leslie Book, Oakbrook Land Holdings v Comm'r*: A Follow-Up Post Exploring the Impact of Administrative Law on Validity of Tax Regulations*, PROCEDURALLY TAXING (June 9, 2020), https://procedurallytaxing.com/oakbrook-land-holdings-v-commr-a-follow-up-post-exploring-the-impact-of-administrative-law-on-validity-of-tax-regulations/ ("*Oakbrook* suggests that the bar may be lower for longstanding tax regulations, and highlights the way that these challenges arise in deficiency cases rather than at a time closer to the rule's promulgation.") For additional reading about the importance of tax regulation preambles, see Monte Jackel, *What is a Preamble Worth?*, PROCEDURALLY TAXING (Jan. 18, 2021), https://procedurallytaxing.com/what-is-a-preamble-worth/.

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 further explained several years ago 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*, 2021 U.S. Dist. LEXIS 58711 (D.D.C. 2021), under these provisions. *Id.* In his *Tax Notes* article, he argued 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 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). In May 2021, the District Court granted the IRS's Motion for Summary Judgment because the taxpayers "lack[ed] standing to seek injunctive relief" and "fail[ed] to state a claim under the RFA." *Silver*, 2021 U.S. Dist. LEXIS, at *37-38. The taxpayers filed an appeal in the case on May 27, 2021. *See id.* at *0 (subsequent history).

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 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).

A recent case, *Mayo Clinic v. United St*ates, 997 F.3d 789 (8th Cir. 2021), partially upheld a regulation in the face of a validity challenge. The case involved the question of whether the Mayo Clinic, a 501(c)(3) organization, owed unrelated business income tax (UBIT). *Id.* at 791-92. The court stated the issue in the case as:

> whether Mayo is a “qualified organization” exempted from paying UBIT on “unrelated debt-financed income” under IRC § 514(c)(9)(C)(i)........Section 170(b)(1)(A)(ii) describes “an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.” The IRS denied Mayo the exemption because it is not an “educational organization” as defined in 26 C.F.R. § 1.170A-9(c)(1), that is, an organization whose “*primary function* is the presentation of formal instruction” and whose noneducational activities “are *merely incidental* to the educational activities.”

Id. at 792 (emphasis added). The District Court found the regulation invalid because “it adds requirements—the primary-function and merely incidental tests—Congress intended not to include in the statute.” *Id.*

> In concluding that Treasury Regulation § 1.170A-9(c)(1) invalidly adds conditions Congress did not intend, the district court primarily relied on the established principle that, “[w]hen Congress includes particular language in one section of a statute but omits it in another— let alone in the very next provision— this Court presumes that Congress intended a different meaning.” Loughrin v. United States, 573 U.S. 351, 358 … (2014) …, quoting Russello v. United States, 464 U.S. 16, 23 … (1983). Comparing … subsections (ii) and (iii), the district court determined that under the *Russello* principle, Congress unambiguously intended to exclude from subsection (ii) the primary purpose or function test it included in subsection (iii).

Id. at 794. On appeal, the Court of Appeals reversed in part because “the district court failed to give sufficient consideration to the origins of the statutory charitable exemption and the Treasury Regulation at issue ......” *Id.* The court stated:

> Although relevant, the *Russello* principle is not controlling, and we conclude the district court failed to give sufficient consideration to the origins of the statutory charitable exemption and the Treasury Regulation at issue, and the manner in which the current statutory provisions have been added to the IRC and modified over more than a century. . . .

Id. The court further explained:

> (1) We agree with the district court that Treasury Regulation § 1.170A-9(c)(i) adds unreasonable conditions to the statutory requirement. ...... The requirement that the organization's "primary function [must be] the presentation of formal instruction" has no long history of congressional acceptance. First promulgated in 1958, it was a dramatic departure from the description of an educational organization's primary purpose in the regulation relating to § 101(6) of the 1939 Code. . . .
>
> (2) Though the regulation unreasonably limits "educational organizations" to those principally providing "formal instruction," the terms "primary function" and "merely incidental" activities have a valid role in interpreting the statute. . . .
>
> The settled *judicial* interpretation of "organized and operated exclusively," established and consistently followed for nearly a century, includes organizations whose "primary purpose"......., and whose non-charitable activities were "merely incidental" to those purposes. Congress has retained this "organized and operated exclusively" requirement for more than a century, obviously aware of the judicial non-literal construction of the word "exclusively" And because Congress limited the charitable tax advantage in § 170(b)(1)(A)(ii) to only one of the charitable uses enumerated in § 501(c)(3), it is valid to interpret the statute as requiring that a qualifying organization's primary purpose be "educational" and that its *noneducational* activities be merely incidental to that primary purpose. . . .

Id. at 799-800 (citations omitted). The Court of Appeals therefore "reverse[d] the district court's invalidation of Treasury Regulation § 1.170A-9 to the extent it is not inconsistent with IRC § 170(b)(1)(A)(ii) …." *Id.* at 802. The court remanded the case because "the district court did not reach the[] questions" of "whether Mayo's overall purpose and operations establish that it is 'organized and operated exclusively' for educational rather than other purposes." *Id.*

An article by Kristen A. Parillo discusses the *Mayo* case and includes a comment from Patrick J. Smith of Ivins, Phillips & Barker Chtd.:

> Smith said he had found the district court's application of the Russello principle in invalidating the regulation to be compelling. "But I have to say, I thought the Eighth Circuit's opinion was very persuasive," he told Tax Notes. "They did an excellent job of tracing the history of the tax exemption for educational organizations and the use of either exclusive purpose or primary function in that long history. It was more than enough to overcome the *Russello* principle."

Kristen A. Parillo, *Appeals Court Reverses Mayo's Reg Challenge Win*, 171 TAX NOTES FED. 1107, 1109 (2021).

The Eighth Circuit's *Mayo* decision has already been cited in an appeal of another case, *Whirlpool Fin. Corp. & Consol. Subsidiaries v. Commissioner*, 154 T.C. 142 (2020). *See* Kristen A. Parillo, *Whirlpool Says Mayo Opinion On Reg Validity Backs Its Case*, 171 TAX NOTES FED. 1660, 1660 (2021) ("Whirlpool Financial Corp. has alerted the Sixth Circuit to a recent appellate decision that partially invalidated a Treasury regulation, saying it's instructive to its own appeal regarding the validity of the manufacturing branch rule. Attorneys for Whirlpool on June 1 sent a letter of supplemental authority to the Sixth Circuit, which is hearing the company's appeal of a May 2020 Tax Court decision in *Whirlpool Financial Corp. v. Commissioner*.").

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In recent years, 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 *Chevron* doctrine and his questioning whether it retains any force are significant.
>
> "These comments are certainly a clear invitation to future litigants in the Supreme Court to mount a vigorous challenge to this doctrine, which, as [Gorsuch] notes, has been subject to mounting criticism by members of the Court," Smith said.

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.").

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As noted above, in a March 2019 Policy Statement, the Treasury Department said, "[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 sub-regulatory guidance." DEPT. OF 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, David B. Blair & Robert L. Willmore, *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.

As noted above, in June 2019, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court declined to overrule *Auer* deference. The Court stated, 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).

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For additional reading on section 7805(b), see Monte Jackel, *A Brief Look at Section 7805(b)*, PROCEDURALLY TAXING (Jan. 11, 2021), https://procedurallytaxing.com/a-brief-look-at-section-7805b/ (discussing retroactive regulations and the meaning of "issued" within the regulation).

Pages 67-84:

Revenue Procedure 2017-1, cited and excerpted on pages 67 through 84, was superseded with annual updates in 2018 through 2021. The current version is Revenue Procedure 2021-1, 2021-1 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 2021 version.

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Revenue Procedure 2017-2, 2017-1 I.R.B. 106, cited in the casebook, was superseded in 2018 through 2021, without significant revision. *See* Rev. Proc. 2021-2, 2021-1 I.R.B. 116.

Revenue Procedure 2017-3, 2017-1 I.R.B. 130, cited in the casebook, similarly was superseded in 2018 through 2021, without material revisions. *See* Rev. Proc. 2021-3, 2021-1 I.R.B. 140.

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 that 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. 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* IRS, FORM 1040 (2019), https://www.irs.gov/pub/irs-prior/f1040--2019.pdf. The 2020 Form 1040 is similar to the 2019 version. *See* IRS, FORM 1040 (2020), https://www.irs.gov/pub/irs-pdf/f1040.pdf.

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, 2020. Taxpayers were 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 and any interest, penalty, or addition to tax for failing to file or pay tax (discussed in Chapter 12) accruing between April 15 and July 15 did not apply. *Id*. For a discussion of how the extended due date affects the running of the statutes of limitations on assessment and refunds, as well as the refund "lookback" rules in section 6511(b), see Evan M. Stone, *Taxpayers Need to Know Their Limitations,* THE TAX ADVISER, Jan. 2021, at 62.

The IRS also extended the deadline for filing 2020 income tax returns and paying associated liability. The deadline was moved from April 15, 2021 to May 17, 2021 without the need to file an extension request. *See* IRS, 1040 AND 1040-SR INSTRUCTIONS (2020), https://www.irs.gov/pub/irs-pdf/i1040gi.pdf. As in 2020, taxpayers who filed by the extended date were not subject to interest or delinquency penalties for taking advantage of the extended deadline. *See Tax Day for Individuals Extended to May 17: Treasury, IRS Extend Filing and Payment Deadline*, IRS (Mar. 17, 2021), https://www.irs.gov/newsroom/tax-day-for-individuals-extended-to-may-17-treasury-irs-extend-filing-and-payment-deadline.

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The Taxpayer First Act mandated an expansion of electronic tax return filing. Section 2301 of the Act amended 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 (reduced from 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(e)(3)(D).

The question of when an electronically submitted return is "filed" has led to some controversy. A report from the Treasury Inspector General for Tax Administration (TIGTA) highlights the issue and suggests improvements that could avoid processing delays. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Expansion of Self-Correction for Electronic Filers and Other Improvements Could Reduce Taxpayer Burden and Costs Associated with Tax Return Error Resolution* No. 2021-40-008 (Dec. 15, 2020), https://www.oversight.gov/sites/default/files/oig-reports/202140008fr.pdf.

According to the report, the IRS's e-file processes "consider an e-filed tax return to be 'filed' when the IRS accepts the return for processing, ... Current e-file processes do not consider a rejected e-file tax return to be 'received' until the taxpayer resubmits the rejected return and the IRS accepts it for processing." *Id*. at 4. The report goes on to explain:

> E-filed returns are sent through a series of validation checks before they are accepted by the IRS for processing. If a return fails one or more of these validation checks, the IRS rejects the tax return and provides the taxpayer with an explanation of the specific errors identified on his or her return. Once corrected by the taxpayer, the return can then be resubmitted electronically. This unique feature of e-filing enables tax return preparers and taxpayers to fix mistakes before returns are processed, which decreases overall processing time and shortens the time it takes to receive a refund. If the error is not corrected, the taxpayer can still file his or her tax return but the IRS requires the return to be filed on paper.

Id. at 5. The IRS has adopted a grace period that allows a taxpayer whose e-filed return is rejected and who does not correct the return electronically the ability to file a paper return. The paper return is deemed timely filed if the taxpayer files the return by the later of the regular due date or ten calendar days after the IRS notifies the taxpayer that the return is rejected. *See* IRS Pub. 1345, HANDBOOK FOR AUTHORIZED E-FILE PROVIDERS OF INDIVIDUAL INCOME TAX RETURNS, at 27.

The issue raised in the TIGTA report relates to the fact that, while the IRS allows taxpayers to correct e-filed returns that the IRS's system identifies as incorrect, the IRS often accepts e-filed returns that contain errors. On the bright side, the accepted return triggers the statute of limitations on assessment and may avoid delinquency penalties. However, these accepted returns are subject to manual review. This additional review often leads to delays in resolving problems and issuing refunds. The report suggests that taxpayers whose returns are accepted even though they have errors such as missing attachments be notified of the errors and given the opportunity to self-correct the return in order to speed processing, avoid refund delays, and avoid potential audits. *Id*. at 3. TIGTA also suggested that the IRS use available internal data to self-correct some returns, thereby improving return processing. *Id*. at 6-7.

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 2020. Baldwin v. United States, 140 S. Ct. 690 (2020). The Court of Appeals for the Federal Circuit recently followed *Baldwin*, refusing to apply the common law mailbox rule when the document was not submitted by registered or certified mail. Taha v. United States, 148 Fed. Cl. 37 (2020).

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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). Electronic filing is permitted for both the 2019 and 2020 tax years. *See* IRS, FORM 1040-X, AMENDED U.S. INDIVIDUAL INCOME TAX RETURN (Jan. 2020), https://www.irs.gov/pub/irs-pdf/f1040x.pdf. Taxpayers will still have the option to file a paper version of Form 1040-X.

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As part of its People First Initiative, the IRS announced in early 2020 that it would suspend in-person meetings relating to ongoing audits. It also announced that it would suspend new audits through July 15, 2020. *See People First Initiative FAQs: Audits*, IRS (July 9, 2020), https://www.irs.gov/newsroom/people-first-initiative-faqs-audits. It appears that some units within the IRS began compliance activities once the People First Initiative lapsed in July 2020, although some of those activities remain in a virtual format. *See, e.g.*, Le Don Harris, *SB/SE Compliance Priorities Post People First Initiative* (July 6, 2020), https://www.irs.gov/pub/irs-utl/sbse_compliance_priorities_post_people_first_initiative.pdf.

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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 ("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).

A recent report shows that the amount collected by the IRS through the whistleblower program has declined during the last several years. IRS, FISCAL YEAR 2020 ANNUAL REPORT IRS WHISTLEBLOWER OFFICE, at 13, https://www.irs.gov/pub/irs-pdf/p5241.pdf. During fiscal year 2020, the IRS collected $472 million in unpaid taxes, penalties, and interest, which is around $145 million less than the prior year. The IRS paid $86 million to 169 whistleblowers in fiscal year 2020. *Id*. at 2. The decline may be due to disruptions created by the COVID-19 pandemic and staffing shortages, which cause backlogs. *See* Alexis Gravely, *IRS Whistleblower Proceeds Decline from Previous Year*, 170 TAX NOTES FED. 165 (2021).

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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 Begin This Summer, IRS Official Says*, DAILY TAX REP. (BLOOMBERG LAW), June 6, 2019. *See also* Eric Yauch, *IRS Roadmap Provides Overview of BBA Audit Process*, 168 TAX NOTES FED. 301 (2020) (noting that audits are already underway).

Later in 2020, the IRS released further proposed regulations. *See* Rochelle Hodes, *Treasury and IRS Release New Round of BBA Partnership Audit Proposed Regulations*, PROCEDURALLY TAXING (Dec. 14, 2020), https://procedurallytaxing.com/treasury-and-irs-release-new-round-of-bba-partnership-audit-proposed-regulations/. More recently, the IRS posted an internet resource for taxpayers and practitioners that explains the post-TEFRA procedures. *See BBA Partnership Audit Process*, IRS, https://www.irs.gov/businesses/partnerships/bba-partnership-audit-process (last visited Aug. 9 2021). It includes a link to a helpful flow-chart illustrating how the procedures operate. IRS, BIPARTISAN BUDGET ACT (BBA) ROADMAP FOR TAXPAYERS, https://www.irs.gov/pub/irs-pdf/p5388.pdf.

The issues addressed in the Consolidated Appropriations Act and the updated regulations are beyond the casebook's scope. For those interested in an in-depth analysis of the new regime, see, *e.g.*, *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 Rules*, 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.

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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.

Before the Taxpayer First Act became law, 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.thetaxadviser.com/content/dam/tta/news/sbse-04-0719-0034.pdf.

The IRS has incorporated updates included in the Memorandum for Commissioners into the Third-Party Contact Program portion of the Internal Revenue Manual. *See, e.g.,* IRM 25.27.1.3.1 (setting forth third-party contact-notification procedures that incorporate revisions to Code section 7602(c)).

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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 Court of Appeals for the Fifth Circuit rejected the firm's privilege argument. 957 F.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.

In a 9-8 decision, the Fifth Circuit denied a rehearing request. Taylor Lohmeyer Law Firm P.L.L.C. v. United States, 982 F.3d 409 (5th Cir. 2020). The dissenting judges wrote that a rehearing would give the court the opportunity to clarify the boundaries of the attorney-client privilege as it relates to clients' identities. *Id.* at 410. The law firm has filed a petition with the U.S. Supreme Court to review the Fifth Circuit's earlier decision. Jeffery Leon, *Law Firm Seeks Supreme Court Review of 'John Doe' Summons Ruling*, DAILY TAX REP. (BLOOMBERG LAW), May 19, 2021. Note also that 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.

In an effort to root out taxpayers who may be failing to report income by using virtual currency transactions, the IRS has begun to issue John Doe summonses to some cryptocurrency platforms. In a recent example, *In re Tax Liability of John Does*, No. 21-cv 02201-JSC, 2021 U.S. Dist. LEXIS 62794 (N.D. Cal. Mar. 31, 2021), a California district court initially expressed concerns that the IRS summons did not comply with revised section 7609(f)—which, as noted above, now requires that the request be "narrowly tailored" to information that pertains to an "identified" provision of the Code. *Id.* at *1-2. Subsequently, however, the court allowed the IRS to issue a modified John Doe summons to the company Kraken.com seeking information about its users. *In re Tax Liability of John Does*, No. 3:21-cv-02201-JSC, 2021 U.S. Dist. LEXIS 108487, at *1 (N.D. Cal. May 5, 2021). With the John Doe summons now issued, the IRS can seek to enforce the summons if the company and its users do not voluntarily comply. In that case, the company and its users can file a motion to quash. *Id.* at *1-2.

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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 June 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 *12. 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 [found] 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.

On August 7, 2020, the Court of Appeals for the Ninth Circuit concluded that Sanmina had implicitly waived the work-product privilege with respect to "factual or non-opinion work product in the Attorney Memos that serve as foundational material for the DLA Piper Report." *Id.* at 1125. The court explained:

> Here, Sanmina obtained a valuation report from DLA Piper in anticipation of scrutiny from the IRS over a claimed tax deduction. When asked for proof from the IRS, Sanmina responded with the DLA Piper Report—a document that expressly referred to the Attorney Memos. Presumably, Sanmina could have chosen to substantiate the deduction with other documents that did not make reference to the Attorney Memos but did not. Such conduct seems inconsistent with Sanmina's purported goal of keeping the memoranda secret from the IRS. Assuming that Sanmina reasonably expected confidentiality over the Attorney Memos when sharing them with DLA Piper, this expectation became far less reasonable once Sanmina decided to disclose to the IRS a valuation report that explicitly cited the memoranda as a basis for its conclusions. In doing so, Sanmina increased the possibility that the IRS, its adversary in this matter, might obtain its protected work product, and thereby engaged in conduct inconsistent with the purposes of the privilege.

Id. at 1124. However, the court "conclude[d] that fairness does not require the categorical disclosure of Sanmina's protected work product to the IRS at this stage of prelitigation. Rather, fairness requires, at most, the disclosure of the factual, or non-opinion, work product contained in the Attorney Memos upon which the DLA Piper Report relies." *Id.* at 1125.

Accordingly, the Ninth Circuit "grant[ed] in part and den[ied] in part the IRS's petition to enforce its summons." *Id.* at 1126 (emphasis removed). The court also "remand[ed] to the district court for the limited purpose of determining the specific portions of the Attorney Memos that should be disclosed to the IRS and ordering disclosure consistent with [the] opinion." *Id.* Les Book commented on the Procedurally Taxing blog:

> As Jack Townsend has discussed in a recent blog post, the opinion highlights the difference between factual and opinion work product, and it remains difficult to force disclosure of true legal analysis. The devil, however, is in the details, and the district court will have to carefully distinguish between fact and legal analysis. Perhaps that too will lead to more litigation—all of course as predicate to a possible challenge to the merits of the deduction.

Leslie Book, US v Sanmina*: Attorney Client Privilege and Work Product Protections,* PROCEDURALLY TAXING (Aug. 26, 2020), https://procedurallytaxing.com/us-v-sanmina-attorney-client-privilege-and-work-product-protections/.

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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).

The court stated that "[t]he crux of this case is the applicability of the federally authorized tax practitioner ('FATP') privilege, which Microsoft claims for 164 of 174 documents." *Microsoft Corp.*, 2020 U.S. Dist. LEXIS 8781, at *17. The court found that "Following the Court's review, the Court finds itself unable to escape the conclusion that a significant purpose, if not the sole purpose, of Microsoft's transactions was to avoid or evade federal income tax." *Id.* at 22. One scholar explains that "the court in Microsoft found that the FATP privilege was not applicable to discussions regarding international income shifting (i.e., tax sheltering) suggested (i.e., promoted) by the taxpayer's current accounting firm. The court reached this conclusion by employing broad definitions of tax sheltering and promotion developed in previous FATP privilege cases." James M. Plecnik, *Tax Sheltering and the Federally Authorized Tax Practitioner Privilege*, J. TAX'N, 6, 6 (2021). For an article critiquing the *Microsoft* decision, see Tyler M. Johnson, John Hildy & John W. Horne, *Cost Sharing Is a Tax Shelter Now. Wait, What?* 168 TAX NOTES FED. 2193, 2199 (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(e)). According to the 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 legislation also provided for the appointment of a "Chief of Appeals" who reports directly to the IRS Commissioner. I.R.C. § 7803(e)(2). The 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 location of the Chief of the Independent Office of Appeals within the larger IRS proposed reorganization is reflected in the chart included above in connection with the Chapter 1 updates.

Several years after the Taxpayer First Act was signed, the practical effect of the new legislation on the Appeals process remains unclear. 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. A recent post by the current Chief of Appeals describes the Appeals process in a manner similar to the process that existed before Congress enacted the Taxpayer First Act. *See* Andy Keyso, *A Closer Look at the IRS Independent Office of Appeals*, IRS (April 8, 2021), https://www.irs.gov/about-irs/a-closer-look-at-the-irs-independent-office-of-appeals. *See also* Emily L. Foster, *IRS Appeals Taking More Steps to Further Independence Mission*, 171 TAX NOTES FED. 1651 (2021) (reporting statements made by the Chief of Appeals to the effect that the Appeals Office will more carefully review installment agreement requests and revise its hiring procedures to seek employees who did not previously work for the IRS).

The Taxpayer First Act did 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 on Page 282 (in Chapter 6) of the casebook.

The Taxpayer First Act 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.

A pilot program that required IRS exam personnel and representatives from the IRS Chief Counsel's Office to participate in certain Appeals conferences drew criticism and will not be extended. Foster, *supra*, at 1651. The IRS maintained that the goal of the program was "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, maintained that allowing exam personnel to participate in Appeals conferences 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 National Taxpayer Advocate's 2020 Report proposed 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://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook.pdf. Recently introduced legislation would grant taxpayers the right to an Appeal conference without exam or Chief Counsel participation. Small Business Taxpayer Bill of Rights Act of 2021, S. 1656, 117th Cong. § 7 (2021).

The Taxpayer First Act also included 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).

It does not appear that the IRS has issued a stand-alone report detailing the number of Appeals requests that have been denied. However, the *Taxpayer First Act Report to Congress* cites in an Appendix an IRS Information Release from August 2020. *See Taxpayer First Act Report to Congress* 164 (Jan. 2021) (linked at https://www.irs.gov/taxpayer-first-act). The

Information Release states that no issues had been designated for litigation. *See IRS Updates Procedures for Designating Taxpayer Disputes for Litigation, Implementing Provisions of Taxpayer First Act* IR-2020-188, IRS (Aug. 24, 2020), https://www.irs.gov/newsroom/irs-updates-procedures-for-designating-taxpayer-disputes-for-litigation-implementing-provisions-of-taxpayer-first-act. Such a designation allows examination personnel to request that the Office of Chief Counsel litigate an issue, thereby denying the taxpayer an opportunity to have that issue considered by Appeals. *See id.*

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, but plans for releasing those procedures were included in the IRS's 2020-2021 Priority Guidance Plan. *2020-2021 Priority Guidance Plan*, IRS (Nov. 17, 2020), at 10, https://www.irs.gov/pub/irs-utl/2020-2021_pgp_initial.pdf. 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).

Another early case interpreting section 7803(e) is *Hancock County Land Acquisitions LLC v. Commissioner*, 2021 U.S. Dist. LEXIS 143312 (N.D. Ga. 2021). The taxpayer in *Hancock*, a partnership, claimed that the IRS violated the mandate in section 7803(e)(4) when it refused to send a dispute surrounding conservation easements to Appeals. The Justice Department's motion to dismiss asserts that the statutory language does not create an absolute right to Appeals. The use of the phrase "shall be generally available," according to the Justice

Department, "plainly is not a mandate that *all* taxpayers' disputes with the IRS *must* be referred to Appeals." Mem. in Supp. of Defs.' Mot. to Dismiss at 22.

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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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Prior to the outbreak of the COVID-19 pandemic, an IRS official announced that the decision over whether an Appeals conference will take place in person or by telephone will be at the discretion of the taxpayer. AP-08-1118-0013 (Nov. 28, 2018). This position reversed guidance issued in Internal Revenue Manual section 8.6.1.5.1., cited in the casebook, which places the discretion to grant an in-person conference with the Appeals Office. A more recent IRS announcement, issued in November of 2020, confirms the IRS's new position:

> 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-08-1120-0021 (Nov. 6, 2020), at https://www.irs.gov/pub/foia/ig/appeals/ap-08-1120-0021.pdf. The IRS has updated Internal Revenue Manual section 8.6.1.5.1 to reflect these changes. However, during the pandemic, the Appeals Office announced that it would host no in-person conferences until further notice. IRS Independent Office of Appeals, *Feedback/Listening Session: Independent Office of Appeals*, PROCEDURALLY TAXING (Jan. 26, 2021), http://procedurallytaxing.com/wp-content/uploads/2021/01/Appeal-Listening-Session-1_26_2021.pdf. The Appeals Office also announced that, due to the pandemic, it would accept digital signatures and accept documents via email as well as secure drop-box systems. *Memorandum For All Appeals Employees*, AP-08-0512-0015, DEPT. OF THE TREAS. (May 26, 2021), https://www.irs.gov/pub/foia/ig/appeals/ap-08-0521-0015.pdf.

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. (July 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 fairly 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 then-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, then-President Trump's attorney 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." Compl. 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 July 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.*

In January 2021, "Trump's lawyer, William Consovoy, asked the court to assess the status of the suit following the transfer of power and change of leadership at Treasury." Jad Chamseddine, *Date Scheduled to Determine Fate of Trump's Tax Returns*, 170 TAX NOTES FED. 654, 654 (2021). The judge in the case, Judge Trevor McFadden, accordingly "scheduled a conference call . . . to determine whether the Ways and Means Committee plans to renew its request for Trump's tax returns in the 117th Congress and whether Trump would be given notice if Treasury complies with the request." *Id.* Then, on January 22, 2021, the scheduled day of the call, *id.*, Judge McFadden "said in an order that until February 5, Treasury must give 72 hours' notice to Trump's tax counsel before releasing his tax returns to House Democrats." Brett Ferguson, *Treasury Must Give Notice Before Releasing Trump's Tax Returns*, 170 TAX NOTES FED. 804, 804 (2021). Then, on May 3, 2021, Judge McFadden "further delayed the battle over former President Trump's tax returns, giving the interested parties more time to negotiate a resolution" — he "gave Congress, Treasury, and Trump's lawyers until May 28 to file a joint status report explaining how they want to proceed with the case." Jad Chamseddine, *Judge Grants Extension in Trump Tax Return Case*, 171 TAX NOTES FED. 969, 969 (2021). 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 7-2 decisions authored by Chief Justice Roberts. In *Trump v. Vance*, 140 S. Ct. 2412 (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 former President can make further arguments. *Id.* at *39.

Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (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 2022. 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 2029-32, 2036. 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 a 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 1141 (2019); James W. Wetzler, *Trump's Taxes and the Erosion of Norms*, 164 TAX NOTES FED. 1069 (2019).

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A recent FOIA case provides an example of attorney's-fee litigation. The FOIA requester, "Margaret Kwoka, a law professor at the University of Denver, studies federal agency administration of FOIA." *Kwoka v. IRS*, 989 F.3d 1058, 1061 (D.C. Cir. 2021). The background to the case is the following:

> Kwoka [had] submitted a FOIA request for nine categories of information about each FOIA request received by the IRS in Fiscal Year 2015. ......[S]he sought (1) the names of all "third-party" requesters, i.e., those who requested information about another person, and (2) the organizational affiliations of all requesters who provided one. Kwoka needed this information "to examine whether the IRS is administering its FOIA obligations in a manner that is efficient and effective given the nature of frequent requesters."

Id. She planned to include this information in presentations, articles, and a book. *Id.* at 1061-62.

The IRS provided Prof. Kwoka with most of the information she sought but, relying on FOIA Exemptions 3 and 6, "[t]he IRS...... denied [her request] with respect to the two categories of information described above." *Id.* at 1062. The IRS's reliance on Exemption 3 was grounded in an argument that Code section 6103 protected the material from disclosure. *Id.* Prof. Kwoka filed suit and "[t]he district court......reject[ed] the IRS's blanket withholding of the two categories of information, but allow[ed] for the possibility of limited redactions on a case-by-case basis." *Id.* Prof. Kwoka then made a motion for attorney's fees, which the court denied, and she appealed. *Id.* at 1063.

On appeal, the Court of Appeals for the D.C. Circuit explained the standard it applies:

> Drawing from legislative history, our court has devised a four-factor test to guide district courts in determining whether a plaintiff is "entitled" to fees. That test "looks to (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *Morley v. CIA* (*Morley II*), 810 F.3d 841, 842,.......(D.C. Cir. 2016) (internal quotation marks omitted).

Id. at 1063-64. With respect to the first factor, the Court of Appeals observed that:

> [T]he district court weighed the first factor in Kwoka's favor. Although the parties spar over the proper magnitude the district court gave or should have given to that factor, the IRS does not argue that the court abused its discretion by finding "some benefit to the public" from the lawsuit.

Id. at 1064.

The Court of Appeals found that the second and third factors supported a fee award. It explained:

> [T]he second and third factors "generally" should weigh in favor of scholars and journalists unless their interest "was of a frivolous or purely commercial nature." . . .
>
> Kwoka undoubtedly has a serious, scholarly interest in how federal agencies administer FOIA. She has published articles about FOIA in the *Yale* and *Duke Law Journals* . . . . Additionally, she has either testified about FOIA or presented her research to the Senate Judiciary Committee, the Securities and Exchange Commission's FOIA Office, and the National Archives and Records Administration's FOIA Advisory Committee, while also previously serving on the latter committee as Co-Chair of the Proactive Disclosures Subcommittee. . . . Moreover, the IRS does not contend that Kwoka's interest was "frivolous" or "purely commercial."

Id. at 1064-65 (citations omitted).

For the fourth factor, the court found that "the IRS's argument that section 6103 exempted all of the requested information was plainly unreasonable." *Id.* at 1066. The Court of Appeals explained that "many of the hypotheticals posed by the IRS made no sense on their own terms" and that "one of the IRS's own summary judgment declarations admitted that 'some' of Kwoka's 'requests for non-tax records likely do not implicate significant privacy interests' and are therefore 'non-exempt.'" *Id.* However, the Court of Appeals observed that "the district court never addressed the IRS's other argument—that at the time of Kwoka's initial request, it reasonably believed that segregating the exempt and non-exempt materials would impose an unreasonable burden." *Id.* Accordingly, the Court of Appeals remanded the case so that the District Court could consider the IRS's "unreasonable burden" argument "and then . . . re-balance the four factors in view of [the Court of Appeals'] conclusion that factors two and three weigh in Kwoka's favor." *Id.* at 1067.

Chapter 7

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The IRS Chief Counsel recently advised that when a taxpayer files a second, superseding return before the filing deadline, the date that the "return" was filed for purposes of the statute of limitations on assessment is the date that the *original*—not superseding—return was filed. *Office of Chief Counsel Internal Revenue Service Memorandum*, Number: 202026002, IRS WRITTEN DETERMINATIONS (Feb. 26, 2020), https://www.irs.gov/pub/irs-wd/202026002.pdf. The CCA cites *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). *Id.* at 2. The IRS further explained that the distinction only matters if the timely filings occur under a filing extension:

> If both returns are filed before the original due date, this ambiguity has no effect on when the statute of limitations begins because a return filed before the last day prescribed for filing is deemed filed on the last day. See I.R.C. §§ 6501(b)(1) and 6513(a). Thus, in that situation, regardless of which return is "the return," the statute will begin on the original due date for the return. But a return filed on extension is treated as filed on the day it is received.

Id. at 3.

In *Coffey v. Commissioner*, 987 F.3d 808, 813 (8th Cir. 2021), the Court of Appeals for the Eighth Circuit held that because the taxpayers did not file returns with the IRS, the statute of limitations on assessment had not begun to run. The Coffeys had filed returns with the U.S. Virgin Islands' Bureau of Internal Revenue (VIBIR), and that agency in turn had sent to the IRS the first two pages and copies of the Coffeys' W-2s. *Id.* at 811. Reversing the Tax Court, the Court of Appeals held that "Although the VIBIR uses the same forms, returns filed with the VIBIR—for a USVI nonresident, as in this case—are not returns filed with the IRS." *Id.* at 815.

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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, 2019 Tax Ct. Memo LEXIS 156, 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.

The Court of Appeals for the Ninth Circuit recently affirmed the Tax Court in a brief memorandum opinion. Beverly Clark Collection, LLC v. CIR, No. 20-70472, 2021 U.S. App. LEXIS 18697 (9th Cir. 2021). The court stated in part that "[a] six-year limitations period does not apply because Nelson and Beverly Clarks' partial reporting of gain from the transaction at issue was not an 'omi[ssion]' under 26 U.S.C. § 6501(e)(1)(A) (2000)........We find unpersuasive the Commissioner's attempt to distinguish *Colony, Inc.* and *Home Concrete & Supply, LLC* and also his invitation to rely on out-of-circuit authority predating *Home Concrete & Supply, LLC*." *Id.* at *2.

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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 way in which 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 has its own system, which generally focused on opinions and orders. 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 has not only impeded access, it has increased private costs. PACER is low cost or even free. PACER, *Pricing Frequently Asked Questions*, https://pacer.uscourts.gov/help/faqs/pricing (last visited July 31, 2021) ("Access to case information costs $0.10 per page .... The cost to access a single document is capped at $3.00 [for most types of documents] ......If you accrue $30 or less of charges in a quarter, fees are waived for that period. 75 percent of PACER users do not pay a fee in a given quarter."). By contrast, 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://www.ustaxcourt.gov/resources/press/01152020.pdf. This can be cost-prohibitive even for those in the Washington, DC area. However, the court did institute a $3.00 per-document cap (like PACER) in a May 2020 press release. *See Press Release*, U.S. TAX COURT 1 (May 29, 2020), https://www.ustaxcourt.gov/resources/press/05292020_copywork.pdf ("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."). Also, the Tax 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/resources/press/03132020.pdf. At the end of May 2020, 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/resources/press/05292020_copywork.pdf. That Press Release further announced that "[u]ntil further notice, all copy requests must be made by telephone and will be fulfilled electronically by email." *Id.*

The Tax Court's use of email should 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 (June 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, but changes along those lines do not seem likely anytime soon. Instead, the Tax Court replaced its old system with a new online case-management system, the Docket Access Within a Secure Online Network ("DAWSON"), on December 26, 2020. Steve Milgrom, *DAWSON is Awesome*, PROCEDURALLY TAXING (Jan. 6, 2021), https://procedurallytaxing.com/dawson-is-awesome/. Upon its release, some tax practitioners celebrated the new tool, as it permits Tax Court petitions to be e-filed. *Id.* However, the implementation was not without issues. The Tax Court noted that the December 2020 DAWSON implementation was only the initial rollout, with functionality being added over time. *See* Nathan J. Richman, *Tax Court Filing System Rollout Includes Some Difficulties*, 170 TAX NOTES FED. 349, 349 (2021). In January 2021, the court added to DAWSON access to "today's orders." *See Press Release* (Jan. 11, 2021), https://www.ustaxcourt.gov/resources/press/01112021.pdf. As Keith Fogg notes, orders are not precedential, but can still be very important. Keith Fogg, *DAWSON Updates*, PROCEDURALLY TAXING (Jan. 11, 2021), https://procedurallytaxing.com/dawson-updates/. However, the January 2021 update did not include search capability; the court stated in the press release, "[t]he Court will, over time, continue to deploy enhancements and new features to DAWSON, including the ability to sort 'Today's Orders', search orders, and search opinions." *Id.*

As of July 2021, DAWSON is still creating several issues for users. First, the system is "wholesale sealing" documents, meaning that if a case contains any sealed documents, the entire docket will be hidden from the public. *See* Nathan J. Richman & Frederic Lee, *Six Months In, Lawyers Still Grappling with New Tax Court System*, 172 TAX NOTES FED. 312, 313 (2021). This is restricting access to many documents for both practitioners and taxpayers. *Id.* Additionally, DAWSON currently only permits case searching using the petitioner's name or docket number. *Id.* Searching for orders and opinions is still labeled as "Coming Soon" on the DAWSON website. *Welcome to DAWSON*, U.S. TAX COURT, https://dawson.ustaxcourt.gov/ (last visited July 31, 2021).

More broadly, some practitioners are concerned with the overall accessibility of DAWSON. Richman & Lee, *supra* at 313. One practitioner reportedly said that "it could be difficult for pro se petitioners to initially figure out how to gain access to dockets through DAWSON, and that finding the system's docket search page itself on the Tax Court website might be hard for someone inexperienced." *Id.* at 314.

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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; January 15, 2020; and October 6, 2020 amendments. *See id.*

The November 30, 2018 amendments include changes to Rules 3, 11, 13, 20, 22, 23, 25, 34, 143, 280, and 281. U.S. Tax Ct. Notice (Nov. 30, 2018), https://ustaxcourt.gov/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://www.ustaxcourt.gov/resources/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 (July 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 (July 15, 2019), https://www.ustaxcourt.gov/resources/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/resources/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://www.ustaxcourt.gov/resources/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 October 6, 2020 amendments include changes to Rules 21 (Service of Papers), 24 (Appearance and Representation), 260 (Proceeding to Enforce Overpayment Determination), 261 (Proceeding to Redetermine Interest), and 262 (Proceeding To Modify Decision in Estate Tax Case Involving Section 6166 Election). *Press Release*, U.S. TAX COURT 1 (Oct. 6, 2020), https://www.ustaxcourt.gov/resources/press/10062020.pdf. For additional explanation of these changes, see Keith Fogg, *Tax Court Finalizes Adoption of New Rules*, PROCEDURALLY TAXING (Oct. 16, 2020), https://procedurallytaxing.com/tax-court-finalizes-adoption-of-new-rules/.

In the past few 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) (last visited Aug. 4, 2021).

The Tax Court has 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_releases.html. The first one was on March 11, 2020. *See id.* 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/resources/press/05292020_proceedings.pdf. The transition to remote proceedings included a number of technical changes, including the use of Zoomgov (a government video conferencing tool), changes to filing deadlines, and remote calendar calls. *See* Caitlin Hird, Note, *The Transition to a Remote Tax Court*, 23 J. TAX PRAC. & PROC. 37, 38-40 (2021). The Tax Court announced on November 12, 2020 that its buildings would remain closed to the public, but would begin accepting mail to the main courthouse on November 16, 2020. *Press Release*, U.S. TAX COURT (Nov. 12, 2020), https://www.ustaxcourt.gov/resources/press/11122020.pdf. As of July 2021, the Tax Court remains operating under these procedures, but circumstances can change rapidly among the COVID-19 pandemic.

Recently, the Tax Court issued two press releases discussing their diversity and inclusion efforts. On February 12, 2021, the Court announced the beginning of the Diversity and Inclusion Series, the first webinar of which was intended to celebrate Black History Month. *Press Release*, U.S. TAX COURT (Feb. 12, 2021), https://www.ustaxcourt.gov/resources/press/02122021.pdf. Additionally, the press release noted that this would become a monthly series intended to "spotlight different trailblazers and their paths to, and success in, the field of tax law." *Id.* The Tax Court announced on April 5, 2021, that it was accepting applications for its Diversity in Government Internship Program, intended to "provide significant exposure to the inner workings of the U.S. Tax Court, including the opportunity to observe judges and lawyers; attend virtual trials, meetings, and presentations; and assist on projects with departments throughout the Court, including Case Services, Facilities, Finance, Human Resources, Information Technology, Library, and Public Affairs." *Press Release*, U.S. TAX COURT (Apr. 5, 2021), https://www.ustaxcourt.gov/resources/press/04052021.pdf. This program is designed specifically for "talented and underserved undergraduate or graduate students interested in careers with the federal government," and the Tax Court hopes that it "will enhance its workforce while developing and nurturing interest in public service through recruitment, education, and training." *Id.*

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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 2020 figures. *See SOI Tax Stats—Chief Counsel Workload: Tax Litigation Cases, by Type of Case—IRS Data Book Table*, IRS 27 (June 24, 2020), 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 31, 2021).

Fiscal Year	**2016**	**2017**	**2018**	**2019**	**2020**
Number of cases pending (dockets in thousands)	27.6	24.9	24.0	25.4	22.1
Dollars in Dispute in Cases Pending (in billions)	$22.5	$21.2	$18.4	$21.8	$20.6

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.

The Tax Court recently announced that it has received a particularly high volume of petitions in 2021, which has caused delays. *Press Release*, U.S. TAX COURT (July 23, 2021), https://www.ustaxcourt.gov/resources/press/07232021.pdf. As shown in the chart above, the average number of petitions in any given year falls between 23,000 and 26,000, but by July 2021, the Tax Court had already received roughly 24,000 petitions. *Id.* The press release noted, "[t]he Court is processing petitions expeditiously, but the increased volume has caused a delay between when a petition is received by the Court and when it is served on the Internal Revenue Service (IRS)." *Id.*

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For an interesting discussion of how the decision in *Golsen v. Commissioner*, 54 T.C. 742 (1970), applies to Tax Court rules, see Keith Fogg, *Does the Golsen Rule Apply to Tax Court Rules?*, PROCEDURALLY TAXING (Apr. 9, 2021), https://procedurallytaxing.com/does-the-golsen-rule-apply-to-tax-court-rules/.

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.

Page 427:

The "arbitrary and erroneous" standard was recently discussed in *Eldridge v. Commissioner*, 835 F. App'x 271 (9th Cir. 2021) (unpublished). In that case, the Court of Appeals for the Ninth Circuit summarily affirmed the Tax Court's decision to uphold an IRS deficiency determination. *Id.* at 271. The Ninth Circuit stated:

> The Tax Court properly upheld the Commissioner's deficiency determination for 2015 because the Commissioner presented "some substantive evidence" that Eldridge failed to report income, and Eldridge failed "to show by a preponderance of the evidence that the deficiency was arbitrary or erroneous." *Id.*

Id.

Page 428:

Nelson v. Commissioner, T.C. Memo. 2018-95, 2018 Tax Ct. Memo LEXIS 95, raises the question of what constitutes a "naked assessment." In *Nelson*, the Tax Court found that the taxpayer had been 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 442:

Is the Tax Court petition-filing deadline still considered jurisdictional? Carlton Smith explains:

> The Tax Court and every Circuit court has long held the deadline to file a Tax Court deficiency petition at section 6213(a) to be a jurisdictional condition of the suit. Of course, jurisdictional deadlines are never subject to equitable tolling, waiver, estoppel, or forfeiture. But, nearly every court opinion so holding had been issued before the Supreme Court changed the rules in 2004 making filing deadlines now almost never jurisdictional.

Carlton Smith, *Ninth Circuit Holds the Deficiency Petition Filing Deadline Still Jurisdictional*, PROCEDURALLY TAXING (June 19, 2020), https://procedurallytaxing.com/ninth-circuit-holds-the-deficiency-petition-filing-deadline-still-jurisdictional/.

The Court of Appeals for the Ninth Circuit recently answered "yes" to the jurisdiction question. *See* Organic Cannabis Found., LLC v. Comm'r, 962 F.3d 1082 (9th Cir. 2020). The court explained:

> In a series of recent cases, the Supreme Court has tried "'to bring some discipline to the use' of the term 'jurisdiction.'" Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 . . . (2013) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 . . . (2011)). Given that labeling a statutory requirement as jurisdictional

> produces "harsh consequences" . . . the Court has clarified that "procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much." United States v. Kwai Fun Wong, 575 U.S. 402, 409 . . . (2015). . . . "Congress must do something special, beyond setting an exception-free deadline," in order to create a jurisdictional requirement, and that remains true "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Id*. Considering the "'text, context, and relevant historical treatment' of the provision at issue," Musacchio v. United States, 136 S. Ct. 709, 717...... (2016) (quoting Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)), we conclude that Congress has indeed done "something special" to "plainly show" that § 6213's time limit is "imbued . . . with jurisdictional consequences." Kwai Fun Wong, 575 U.S. at 410. Specifically, [certain] … features of the statute confirm that its time limit for filing a petition in the Tax Court is jurisdictional.

Id. at 1093.

The jurisdictional nature of the filing deadline could be important. The court explained:

> [I]f the taxpayer does file a petition in the Tax Court, then a decision "dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the [IRS]," *id.* § 7459(d), and *such decision as to "amount" is entitled to preclusive effect in subsequent proceedings between the taxpayer and the IRS, see Malat v. Comm'r*, 302 F.2d 700, 706 (9th Cir. 1962). However, there is no such "decision" as to "amount," and no preclusive effect, if the Tax Court's "dismissal *is for lack of jurisdiction*." 26 U.S.C. § 7459(d) (emphasis added). Under Appellants' non-jurisdictional reading of § 6213(a), the Tax Court's dismissal of a petition as untimely could potentially have the perverse effect of barring the taxpayer from later challenging the amount in a refund suit‒ironically yielding precisely the sort of "harsh consequence[]" that the Supreme Court's recent "jurisdictional" jurisprudence has sought to avoid. *Kwai Fun Wong*, 575 U.S. at 409. That peculiar outcome is avoided if § 6213(a) is read as being jurisdictional, because then dismissals for failure to meet its timing requirement would fall within § 7459(d)'s safe-harbor denying preclusive effect to Tax Court dismissals "for lack of jurisdiction."

Id. at 1095 (emphasis altered). For an opposing viewpoint on this, see Keith Fogg, *IRC 7459(d) and the Impact of Dismissal*, PROCEDURALLY TAXING (June 4, 2021), https://procedurallytaxing.com/irc-7459d-and-the-impact-of-dismissal/ (raising the issue and stating that "In our cert. amicus brief in *Northern California* [*Small Business Assistants v. Commissioner*, No. 17-72877, 2020 U.S. App. LEXIS 27581 (9th Cir. Aug. 28, 2020)], we acknowledged that that was a theoretical possibility. We noted in our brief that neither Carl Smith nor I could recall any case where a person who was dismissed from the Tax Court for late filing later full-paid the deficiency and sued for refund. We acknowledged that it is possible such rare cases existed, but said they must be a very few since it could arise in the traditional refund context or when there is no balance due but a disallowed refundable credit and a late filed petition.”).

Organic Cannabis is also discussed below, in connection with the Chapter 10 updates.

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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.

The Third Circuit recently addressed a similar issue in *Gregory v. Commissioner*, 839 F. App’x 745 (3d Cir. 2020). In that case, Damian and Shayla Gregory moved in June 2015, but did not update their address with the IRS or the U.S. Postal Service before they faced an IRS audit. *Id.* at 745. When their CPA, Michael Chaffee, filed their 2014 returns in October 2015, he failed to use their new address. *Id.* at 746. As the court explained:

> Chaffee sent Form 2848 to the IRS agent conducting the audit, designating himself as Power of Attorney for the Gregorys. The Form 2848 listed the Gregorys’ new address. Form 2848 states that its only purpose is for “representation before the IRS.” The instructions for Form 2848 state that the address listed on the form will not change the taxpayer's last known address and directs the taxpayer to file Form 8822 to change their address with the IRS.

> In April 2016, Chaffee filed IRS Form 4868 to extend the Gregorys' time to file their 2015 tax return. Form 4868 also listed the Gregorys' new address, but, like Form 2848, its instructions told the taxpayer to use Form 8822 to change their address with the IRS ....Sometime in the summer of 2016, Chaffee told the IRS agent Buzzelli during a telephone call that the Gregorys had moved.
>
> In October 2016, the IRS mailed to the Gregorys, at their old address, a statutory notice of deficiency (SNOD) for their 2013 and 2014 taxes. The notice gave the Gregorys ninety days to petition for review in the Tax Court. After the ninety-day period had ended, Chaffee called the IRS to learn whether the IRS had issued the Gregorys a SNOD, and the IRS confirmed that it had. Chaffee and the Gregorys then mailed a petition to the Tax Court.
>
> In the Tax Court, the IRS moved to dismiss the petition for lack of jurisdiction as untimely. The Gregorys cross-moved to dismiss the SNOD for lack of jurisdiction because it was not sent to their last known address. The Tax Court granted the IRS's motion because the Gregorys' petition to the Tax Court was late and the Gregorys' last known address was their old address. The Gregorys appealed.

Id.

On appeal, the Gregorys argued that these forms, coupled with direct contact with an IRS agent, constituted "clear and concise notice of a new address." *Id.* at 747. The Court of Appeals for the Third Circuit agreed. The court declined to adopt a "bright-line rule" regarding what is considered clear and concise notice of an address change, but found that the forms the taxpayers utilized, coupled with the actual notice provided to an IRS employee, constituted "sufficient notice that the IRS knew or should have known that the Gregorys had changed addresses." *Id.* at 747-48.

For further discussion and analysis of the *Gregory* opinion, see Audrey Patten, *Third Circuit Weighs Individual Facts and Circumstances in Ruling that Taxpayers Had Given the IRS Clear and Concise Notice of a Change of Address*, PROCEDURALLY TAXING (Feb. 2, 2021), https://procedurallytaxing.com/third-circuit-weighs-individual-facts-and-circumstances-in-ruling-that-taxpayers-had-given-the-irs-clear-and-concise-notice-of-a-change-of-address/; Keith Fogg, *Last Known Address Taxpayer Victory*, PROCEDURALLY TAXING (Dec. 31, 2020), https://procedurallytaxing.com/last-known-address-taxpayer-victory/.

For a discussion of how delayed IRS processing of returns caused by the COVID-19 pandemic has resulted in additional problems for address updates, see Keith Fogg, *A Twist on the Last Known Address Issue and an Update on DAWSON*, PROCEDURALLY TAXING (May 6, 2021), https://procedurallytaxing.com/a-twist-on-the-last-known-address-issue-and-an-update-on-dawson/.

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).

The Fifth Circuit recently decided a naked assessment case in which the taxpayers relied on *Portillo*: *Hernandez v. Commissioner*, 813 F. App'x 964 (5th Cir. 2020). In *Hernandez*, the taxpayers claimed various business deductions on their 2014 tax return. *Id.* at 964. In addition, the IRS "received a Form 1099-C, Cancellation of Debt (COD), from Department Stores National Bank indicating that [the taxpayers] had received COD income of $1,136.85 in 2014." Hernandez v. Commissioner, T.C. Memo. 2018-163, 2018 Tax Ct. Memo LEXIS 163, at *2 (Sep. 25, 2018). The IRS issued a notice of deficiency. *Id.* at *3. Relying on *Portillo*, the taxpayers argued in Tax Court that the IRS's "determination that petitioners received unreported COD income was arbitrary because respondent relied on a third-party information return." *Id.* at *5. The Tax Court distinguished *Portillo* because the IRS did present additional evidence of the COD income. *Id.* at *5-6.

On appeal, the taxpayers argued that "the Tax Court erred in failing to shift the burden of proof to the Commissioner at trial." *Hernandez*, 813 F. App'x at 964. The Fifth Circuit rejected the taxpayers' argument and affirmed the Tax Court. *Id.* at 966. With respect to the COD income, it explained:

> Appellants argue that the Commissioner relies solely on the 1099-C filed by Department Stores National Bank and that a deficiency notice that relies solely on a 1099-C is always a "naked" assessment.
>
> This argument is factually mistaken. The Commissioner did not rely solely on the 1099-C . . . The Commissioner in this case procured a follow-up affidavit from Department Stores National Bank attesting to the veracity of the 1099-C, matched the debt to a Macy's credit card loan in Hernandez's name, and produced an account statement verifying that the balance on the loan at the time the debt was allegedly cancelled was equal to or greater than the amount cancelled.

Id. at 965.

With respect to the disallowed deductions, citing *Portillo*, the Court of Appeals explained that the taxpayers were not entitled to a shift in the burden of proof. *Id.* at 965-66. The taxpayers had not presented any substantiation or other evidence and had refused to testify. *Id.* at 965. The Court of Appeals therefore affirmed the Tax Court on this issue, as well. *Id.* at 966.

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

Page 473:

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.*

It is hard to know if this trend continued through the 2020 and 2021 filing seasons, as the IRS is still dealing with a tax return backlog stemming from the administration of three rounds of economic impact payments, legislation enacted during filing season, and personnel challenges connected with the COVID-19 pandemic. *See* National Taxpayer Advocate, *Review of the 2021 Filing Season* 1 (2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/06/JRC22_SAO_ReviewFiling.pdf. In a review of the 2021 return filing season, the National Taxpayer Advocate found that the IRS had "35.3 million unprocessed returns at the end of the 2021 filing season[, which] represented a four-fold increase from the 7.4 million unprocessed returns at the end of the 2019 filing season." *Id.* at 6; *see also* Richard Rubin, *Millions Await Tax Refunds as IRS Struggles to Clear Backlog*, WALL ST. J. (June 30, 2021), https://www.wsj.com/articles/irs-struggles-to-catch-up-on-piles-of-unprocessed-tax-returns-11625070252.

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In a recent case, the Court of Appeals for the Ninth Circuit applied the waiver doctrine to the specificity requirement of Treasury regulation 301.6402-2(b)(1). In *Harper v. United States*, 847 F. App'x 408 (9th Cir. 2021), the taxpayers had filed amended returns for the husband's construction company ("HCC"), claiming additional research and development credits under Code section 41. *Harper v. United States*, No. 18cv2110 DMS (LL), 2019 U.S. Dist. LEXIS 71154, *1-2 (S.D. Cal. Apr. 25, 2019). The IRS denied these credits. *Id.* at *2. In the District Court, "Defendant [IRS] assert[ed] the claims submitted by HCC to the IRS fail to adequately set forth the grounds and facts entitling Plaintiffs to any credit, and that failure deprives the Court of subject matter jurisdiction over Plaintiffs' suit for refund." *Id.* at *2-3. The district court agreed, finding that the taxpayers had not met the specificity requirement of Treasury regulation 301.6402-2(b)(1). That regulation states in part that "The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." *Id.*

On appeal, the Court of Appeals for the Ninth Circuit reversed. It explained that the specificity requirement of Treasury regulation 301.6402-2(b)(1) "is an administrative exhaustion provision, intended to 'ensure that the IRS is given adequate notice of each claim and its underlying facts, so that the IRS may conduct an administrative investigation and determination.'" *Id.* at 409 (quoting *Quarty v. United States*, 170 F.3d 961, 972 (9th Cir. 1999)). It observed that the requirement is waivable. *Id.* at 410. And it found that the IRS's actions constituted a waiver:

> The IRS's substantive examination and final denial on the merits constitutes a textbook case of waiver here. Over the course of the four-year audit, the IRS targeted its questioning and document requests specifically on determining Taxpayer's eligibility for the increased research credit, including, *inter alia*, Taxpayer's project accounting practices, the means used to translate that accounting to capture Qualified Research Expenses, the breakdown of its business components, the satisfaction of the "substantially all" rule of 26 U.S.C. § 41(d)(1)(C) and the breakdown of eligible employee salaries. Upon receiving Taxpayer's multiple answers and over a hundred thousand pages of documentary support, the IRS substantively determined that "You have not shown you are entitled to the claimed refund" and informing Taxpayer of the availability of recourse by filing suit in the district court to challenge the IRS's determination. *The direction to bring suit in case of disagreement is a strong indication of the IRS's understanding that it was making a substantive determination*. At no point, up to and including its final determination, did the IRS tell Taxpayer that it had not submitted enough information or evidence to satisfy the specificity requirement or for it to determine Taxpayer's eligibility for the tax credit.

Id. at 410 (emphasis added).

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The U.S. District Court for the Middle District of Florida 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/.

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For an example of a case in which the court did not find the informal claim doctrine to be met, see *Gaynor v. United States*, 150 Fed. Cl. 519 (2020). In *Gaynor*, the court found that the matter lacked subject matter jurisdiction for several reasons. *Id.* at 530. Although the court found the taxpayer had waived the informal claim argument, *id.* at 535, the court analyzed the taxpayer's argument that his informal correspondence with the IRS constituted an informal refund claim. *Id.* at 534-36. The court found that "Mr. Gaynor simply informed the IRS of his desire to avoid payment of the . . . tax assessment at issue by explaining why he did not know about his filing obligations," rather than putting the IRS on notice that he was making a claim. *Id.* at 536. The court found that this did not rise to the level of an informal claim under *United States v. Kales*, 314 U.S. 186 (1941).

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://procedurallytaxing.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).

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For additional reading regarding the requirements of sections 6511(a) and 6511(b), see Marilyn Ames, *Refund Claim Time Limits Create an Unwelcome Barrier*, PROCEDURALLY TAXING (Nov. 12, 2020), https://procedurallytaxing.com/refund-claim-time-limits-create-an-unwelcome-barrier/ (focusing on the case of *Koopman v. United States*, 151 Fed. Cl. 313 (2020) and the value of filing a protective refund claim).

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 regarding 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 Treasury regulation 301.7502-1(f) 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.

Page 513:

In *Borenstein v. Comm'r*, 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." Keith Fogg, *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).

Page 516:

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 517:

In a case also discussed above, in connection with the Chapter 9 updates, the Court of Appeals for the Ninth Circuit addressed the application of the Section 7502 mailbox rule to Federal Express. *See* Organic Cannabis Found., LLC v. Commissioner, 962 F.3d 1082 (9th Cir. 2020). In *Organic Cannabis*, the IRS had issued two notices of deficiency in 2015, both of which stated that the deadline to petition the Tax Court was April 22, 2015. *Id.* at 1086. The taxpayers had their attorney prepare the appropriate petitions on April 21, 2015. *Id.* The attorney asked an assistant to prepare the petitions for FedEx overnight shipping. *Id.* "She selected the 'FedEx "First Overnight"' delivery option because, "given the attorneys' obvious concerns about meeting the filing deadlines, [she] felt [she] should select the delivery method that would guarantee the earliest possible delivery." *Id.* The package containing the petitions was dropped off at a nearby FedEx office at 8:04 P.M. on April 21, 2015. *Id.* Unfortunately, however, the petitions were not delivered to the Tax Court until April 23, 2015, a day after the petition deadline.

The Ninth Circuit court explained what's known about what happened to delay delivery:

> The original FedEx label prepared by the secretary stated that the shipping date was "21APR15" and that the package was to be delivered "WED — 22 APR 8:30A" by "FIRST OVERNIGHT." At some point in processing the package, however, FedEx apparently prepared a new label that bears a notation indicating it was created on "04/22" and that redesignates the package for delivery on "THU — 23 APR 8:30A" by "FIRST OVERNIGHT." This new label was affixed directly over the prior label, and the package arrived in that form at the Tax Court on the morning of April 23. The limited FedEx tracking information that was later available concerning the package no longer listed any of the details of the package's transit while being handled by FedEx; instead, it merely stated that the "Ship date" was "Wed 4/22/2015" and that the package was delivered at "7:35 am" on "4/23/2015 — Thursday."

Id.

The IRS argued that Organic Cannabis's petitions should be dismissed for lack of jurisdiction for failure to timely petition the Tax Court. *Id.* at 1087. The IRS further argued that the mailbox rule of section 7502 did not apply because "'FedEx First Overnight' was not designated as an approved private delivery service under § 7502(f)(2) until May 6, 2015." *Id.* The Tax Court agreed with the IRS and deemed the petition untimely. *Id.* at 1090.

On appeal, the Ninth Circuit affirmed. *Id.* The court explained that the regulations under section 7502 carry the day:

> Unlike Federal Rule of Appellate Procedure 25(a)(2)(A)(ii), which applies a mailbox rule to the timely delivery of a brief to "a third-party commercial carrier," § 7502 does not allow taxpayers to use the services of *any* bona fide commercial courier. Instead, the statute specifies that a particular "delivery service provided by a trade or business" will count as a "designated delivery service" only "if such service is designated by the Secretary for purposes of this section." I.R.C. § 7502(f)(2).

Id.

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

Page 550:

The Tax Court can reject a settlement proposed by the parties (i.e., a proposed stipulated decision). For discussion of a recent Tax Court order doing just that, see Keith Fogg, *Policing the Settlement* (May 11, 2021), https://procedurallytaxing.com/policing-the-settlement-policing-the-case/.

Pages 555-56:

A fairly 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/.

Despite the fact that the IRS had fully conceded all issues in a case, the Tax Court found that the taxpayer in *Jacobs v. Commissioner*, T.C. Memo. 2021-51, 2021 Tax Ct. Memo. LEXIS 78, did not qualify for an award of litigation costs under section 7430. Jacobs, a former Justice Department attorney, claimed business deductions associated with his work as a full-time college professor. A protracted examination occurred during which Jacobs submitted written evidence to support his position. Nonetheless, the IRS agent denied the expenses. *Id.* at *9-11. The case went to Appeals and then to Tax Court. *Id.* at *18-19. Shortly after Jacobs filed his Tax Court petition, the Chief Counsel attorney conceded the case. *Id.* at *21. Subsequently, Jacobs filed a petition to recover litigation costs. *Id*.

The Tax Court denied Jacobs' request, concluding that the IRS's position was substantially justified, thereby preventing Jacobs from establishing that he was a prevailing party.

> There is no dispute that Mr. Jacobs substantially prevailed with respect to the amount in controversy. The issue, therefore, is whether the position reflected in the Commissioner's answer—i.e., that Mr. Jacobs' deductions should be disallowed—was substantially justified when the answer was filed. A position is "substantially justified" if it is "justified to a degree that could satisfy a reasonable person" or has a "reasonable basis both in law and fact." Swanson v. Commissioner, 106 T.C. 76, 86 (1996) (quoting Pierce v. Underwood, 487 U.S. 552, 565 … (1988)); ....The determination of reasonableness is based on all the facts of the case and the available legal precedents. *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. at 443. A position has a reasonable basis in fact if there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Underwood*, 487 U.S. at 565. A position has a reasonable basis in law if legal precedent substantially supports the Commissioner's position given the facts available to him. *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. at 443.
>
> "As the Supreme Court has observed, substantially justified means 'more than merely undeserving of sanctions for frivolousness.'" United States v. Yochum (In re Yochum), 89 F.3d 661, 671 (9th Cir. 1996) (quoting *Underwood*, 487 U.S. at 566). The Commissioner's position may be substantially justified even if incorrect "if a reasonable person could think it correct." *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. at 443 (quoting *Underwood*, 487 U.S. at 566 n.2). Courts have found that the Commissioner's position was substantially justified in cases that involve primarily factual questions. *See, e.g.*, Bale Chevrolet Co. v. United States, 620 F.3d 868 (8th Cir. 2010). The fact that the IRS loses a case or makes a concession "does not by itself establish that the position taken is unreasonable," but is "a factor that may be considered." *Maggie Mgmt. Co. v. Commissioner*, 108 T.C. at 443.

Id. at *25-26.

The Tax Court also rejected Jacobs' argument that delay and mismanagement by the IRS during the examination and Appeals phases of the controversy should be taken into account when determining whether the IRS's position was substantially justified. *Id*. at *31.

> Both our Court and the U.S. Court of Appeals for the Ninth Circuit, to which an appeal in this case would lie unless the parties agree otherwise, see sec. 7482(b), have repeatedly held that the Commissioner's actions at the administrative level do not determine whether his position in litigation was substantially justified. Rather, our Court evaluates the reasonableness of the Commissioner's position separately for administrative and judicial proceedings. *See Maggie Mgmt. Co. v. Commissioner*, 108 T.C. at 442;........ As the Ninth Circuit has said: "The plain language of * * * [section 7430] distinguishes administrative from judicial proceedings and does not provide a bridge for conduct or events that span those proceedings." Pac. Fisheries Inc. [v. United States], 484 F.3d [1103] at 1108 [(9th Cir. 2007)]. For purposes of awarding litigation costs, therefore, we consider the Commissioner's actions after the petition is filed and do not base our decision on the activity at the administrative level, even if that activity gave rise to the litigation. *See id.* at 1110-1111 (holding that the Government's litigating position was reasonable despite arguably unreasonable prelitigation conduct that "forced the taxpayers into litigation");........ To do otherwise would contravene the statutory framework that Congress established.

Id. at *32-33.

Data gathered by two tax experts support the notion that few cases that make their way to the Tax Court result in an award of attorney's fees. Based on information obtained under FOIA, the authors report that, in fiscal year 2018, out of roughly 25,000 Tax Court cases, only 10 resulted in an award for attorney's fees. Maria Donner & Linda Galler, *Why More Taxpayers Should Pursue Attorney's Fees Through Qualified Offers*, PROCEDURALLY TAXING (Mar. 4, 2021), https://procedurallytaxing.com/why-more-taxpayers-should-pursue-attorneys-fees-through-qualified-offers/.

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The inflation-adjusted recovery amount for attorney's fees under section 7430 is $210 per hour for 2021. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016 § 3.60. That amount remains the same as it was in 2020, but is an increase from 2019. Rev. Proc. 2019-44, 2019-47 I.R.B. 1093 § 3.60; Rev. Proc. 2018-57, 2018-49 I.R.B. 827 § 3.60 ($200 for 2019).

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]he 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?

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For a more recent example of a case involving res judicata, see *Yates v. United States*, 150 Fed. Cl. 128 (2020). In that case, the taxpayer disputed his $123,648 tax liability from 2006. *Id.* at 131. The Tax Court found in part for the taxpayer and reduced his liability to $70,912. *Id.* After an unsuccessful appeal of the Tax Court's decision to the Fourth Circuit, the taxpayer filed five additional suits regarding the matter, all of which the courts dismissed. *Id.* The taxpayer then filed suit in the Court of Federal Claims. *Id.* at 132. That court found that it lacked subject-matter jurisdiction to review the Tax Court. *Id.* at 137. In addition, among other things, the Court of Federal Claims determined that the IRS had a valid res judicata defense based on the prior Tax Court litigation. *Id.* The elements of res judicata were satisfied because the parties to the two cases were identical, as were the underlying facts presented in the two cases, and the Tax Court had issued a final decision in the matter. *Id.*

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A 2019 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. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Few Accuracy-Related Penalties Are Proposed in Large Business Examinations and They Are Generally Not Sustained on Appeal*, No. 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).

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The Taxpayer First Act increased the minimum penalty for failure to file an income tax return within 60 days of the due date to the lesser of $330 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)). However, the $330 dollar amount was increased to $435 by the Further Consolidated Appropriation Act of 2020, Pub. L. No. 116-94, 133 Stat. 2534 (2019); *see also* I.R.C. § 6651(a). The increased penalty applies to returns filed after December 31, 2019, and it is adjusted for inflation for years after 2020. I.R.C. § 6651(j)(1).

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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 were quick to criticize the decision in *Intress*. For example, one commentator stated 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. Kristen A. Parillo, *Reasonable Cause Standard Unchanged by E-Filing*, 164 TAX NOTES FED. 1147, 1148 (2019).

Another practitioner 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.

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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/.

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Revenue Procedure 2020-54, 2020-53 I.R.B. 1806, 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.

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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* spawned significant litigation, leading tax practitioners to take a closer look at penalty assessments to ensure that the IRS followed 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 include procedures for obtaining managerial approval of penalties. *See* I.R.M. 20.1.1.2.3 (advising that approval must be "dated, and retained in the case file . . . on a penalty approval form, in the form of an email, memo to file, or electronically.").

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); Palmolive Bldg. Investors, LLC v. Comm'r, 152 T.C. 75, 85 (2019) (IRS may make multiple penalty assertions at different stages of an examination and initial determinations may take place at different times). *But see* Oropeza v. Comm'r, 155 T.C. No. 9, 2020 U.S. Tax Ct. LEXIS 26, at *16-18 (Oct. 13, 2020) (failure to obtain prior approval of an accuracy-related penalty included in a revenue agent's report prevented the IRS from asserting a penalty for the same transaction under section 6662(i)—transactions lacking economic substance—even when the economic substance penalty assertion was property approved).

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). Since *Clay*, the Tax Court has issued subsequent opinions relieving taxpayers of penalty liability when the IRS did not receive supervisory approval before issuing a 30-day letter that was accompanied by a revenue agent's report that contained a penalty assertion. *See*, *e.g.*, Battat v. Comm'r, T.C. Memo. 2021-57, 2021 T.C Memo LEXIS 86 (finding that revenue agent's report accompanied by an Agreed Examination Transmittal Report asserting penalty was an initial determination); Beland v. Commissioner, 156 T.C. 96 (2020) (ruling that agent's presentation of a revenue agent's report asserting a fraud penalty to a taxpayer during an in-person conference was an initial determination); *see also* Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 154 T.C. 68 (2020) (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. 1 (2020), 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 3. 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 10. 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 11.

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 12. *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."); Thompson v. Comm'r, 155 T.C. No. 5, 2020 U.S. Tax Ct. LEXIS 22, at *8 (Aug. 31, 2020) (settlement offer letter containing penalty assertion sent to taxpayers before the exam was completed "does not require supervisory approval because it is not a 'determination' at all, but a preliminary proposal of the revenue agent within an ongoing examination.").

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). *See also* Caleb Smith, *Substantial Understatement Penalties and Supervisory Approval: Big Changes Coming?*, PROCEDURALLY TAXING (May 26, 2021), https://procedurallytaxing.com/substantial-understatement-penalties-and-supervisory-approval-big-changes-coming/ (discussing the possible distinction between a substantial understatement penalty generated automatically as a result of an automated exam (as in *Walquist*) and the same penalty generated by a human revenue agent).

Given the uncertainty associated with the supervisory approval requirement in section 6751(b) and the Government's concern that taxpayers who allegedly committed fraud or engaged in avoidance transactions have been relieved of penalty liability, the Treasury Department has proposed amendments to section 6751 to create bright-line rules. The Greenbook, which explains the government's revenue proposals, includes proposals that would allow the IRS to propose a penalty at any time before it issues a notice that is reviewable by the Tax Court. The proposed changes would also allow the IRS to raise a penalty issue during a Tax Court proceeding if supervisory approval is obtained. In addition, the proposal would eliminate the written approval requirement for accuracy-related penalties for underpayments under section 6662, penalties for reportable transactions under section 6662A, and the civil fraud penalty in section 6663. *General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals* 99-100, U.S. DEPT. OF THE TREAS., https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf; *see also* Kristen A. Parillo, *Proposed Fix to IRS Penalty Approval Rules Gets Mixed Reviews*, 171 TAX NOTES 1835 (2021) (weighing concerns for more certainty surrounding penalty approval against concerns that eliminating the supervisory requirements would lead to unchecked behavior on the part of the IRS, particularly against low-income taxpayers who are disadvantaged when contesting penalties).

Page 642:

As referenced on pages 642-43 of the casebook, those who organize or promote tax shelter transactions ("material advisors") are subject to reporting requirements and may suffer a tax penalty if they do not disclose transactions the IRS has identified as abusive. I.R.C. §§ 6111, 6707. Those same individuals may also be subject to criminal liability for willfully failing to comply with the reporting requirements. I.R.C. § 7203. In *CIC Services, LLC v. IRS*, 141 S. Ct. 1582, material advisors challenged a reporting requirement contained in Notice 2016-66, 2016-47 I.R.B. 745, which mandated that the advisors submit information to the IRS about micro-captive insurance transactions that the IRS believed were being used to avoid tax liability. *Id.* at 1587. The challenge was premised on the argument that the IRS failed to comply with the Administrative Procedure Act when issuing the Notice. *Id.* at 1588. The challenge was filed before the reporting deadline date and before the IRS had asserted any penalties for failing to comply with the requirement. *Id*.

The question before the Supreme Court was whether the Anti-Injunction Act, I.R.C. § 7421, prevented the advisors from challenging the Notice's reporting mandate before the IRS sought to enforce it or proposed a penalty. *Id.* As explained in Section 14.04[B] of the casebook, the Anti-Injunction Act prohibits most suits against the government challenging the assessment or collection of tax liability (including most penalties) and instead generally requires that the taxpayer pay the contested liability before filing a legal challenge. Both the District Court and the Sixth Circuit in *CIC Services* had ruled that the Anti-Injunction Act prevented the taxpayers from maintaining a pre-enforcement challenge to the Notice's requirement. In their view, the advisors must actually pay the penalty and file for a refund in order to contest the reporting requirement. CIC Services LLC v. IRS, No. 3:17-cv-110, 2017 U.S. Dist. LEXIS 186594 (E.D. Tenn. Apr. 21, 2017); *aff'd*, 925 F.3d 247 (6th Cir. 2019).

In a unanimous opinion, the U.S. Supreme Court reversed the lower courts. *CIC Services*, 141 S. Ct. at 1588. Justice Kagan, who wrote the opinion, and her colleagues viewed the nature of the case as a challenge to the reporting requirement rather than a challenge to the tax penalty that would result from violating the reporting requirement. *Id.* at 1594. As a result, the Anti-Injunction Act's prohibition did not apply. In reaching this conclusion, the Court rejected the IRS's argument that a lawsuit to challenge the reporting requirement and one to preclude the tax penalty are "'just two sides of the same coin.'" *Id*. at 1589 (quoting Respondents' Brief at 37). First, the Court noted that the reporting requirement imposed compliance costs on the advisor beyond just the tax penalty; namely, the hours of work necessary to collect and submit detailed information about the transactions at issue and their participants. *Id*. at 1591. Second, the Court ruled that the "downstream" penalty and the "upstream" reporting requirement were several steps removed from one another. *Id.* at 1591. The penalty would only apply if CIC decided to withhold the information, the IRS determined that a reporting violation occurred, and the IRS made the discretionary decision to impose a penalty. Because of the disconnect between the reporting requirement and penalty liability, the Court found that "it is … hard to characterize this suit's purpose as enjoining a *tax*." *Id*. (emphasis added). The Court was also swayed by the fact that the reporting requirement was enforceable not just by the threat of a monetary tax penalty but also by criminal liability. *Id*. at 1591-92. Because of the prospect of criminal fines, the Court noted, the advisors are put in the position of committing a crime in order to raise an Administrative Procedure Act challenge to the Notice. According to the Court, "criminal penalties here practically necessitate a suit aimed at eliminating the Notice, rather than the statutory tax penalty." *Id*. at 1592. The Court therefore remanded the case for determination of whether the IRS's issuance of Notice 2016-66 complied with the Administrative Procedure Act. *Id.* at 1594.

A major concern raised by the IRS in the case was whether the Court's holding would permit a wave of pre-enforcement lawsuits by taxpayers claiming non-tax reasons for contesting penalties, taxes, and other reporting obligations. *Id.* at 1592-93. The Court responded by noting that the dispute in *CIC Services* related to a legal mandate (a reporting requirement), rather than a tax. *Id.* at 1593. According to the Court, if the dispute at issue had related to whether income must be reported or whether a deduction was allowable, the legal rule at issue would be a tax provision and the Anti-Injunction Act would apply. *Id*. By way of illustration, the Court noted:

> Had Congress, or the IRS acting through a delegation, imposed a tax on micro-captive transactions themselves—and had CIC then brough a pre-enforcement suit to prevent the IRS from applying that tax—the Anti-Injunction Act would have kicked in. Then, CIC would have had to pay the tax and seek a refund. But Congress and the IRS chose a different path. They imposed a non-tax, reporting obligation to address their concerns about micro-captive agreements. And by that choice, they took suits to enjoin their regulatory response outside the Anti-Injunction Act's domain.

Id. at 1594.

Some commentators believe that the case could open a door for challenges to information reporting rules that are backed by civil and criminal penalties. *See, e.g.*, Andrew Velarde, *IRS Sees* CIC Services' *Applicability as 'Rather Narrow'*, 171 TAX NOTES FED. 1652 (2021); Lee A. Sheppard, *Successful Challenges to IRS Guidance After* CIC Services*?*, 171 TAX NOTES FED. 1349 (2021); Leslie Book, *Further Initial Thoughts on* CIC Services, PROCEDURALLY TAXING (May 18, 2021), https://procedurallytaxing.com/further-initial-thoughts-on-cic-services-2/.

Interestingly, before the Supreme Court issued its opinion in *CIC Services*, a federal district court had already ruled that the Administrative Procedure Act did not require that the IRS follow notice-and-comment procedures before issuing a similar IRS notice that identified another transaction subject to the same "listed transaction" reporting requirements. *See* Mann Construction Inc. v. United States, No. 1:20-cv-11307, 2021 U.S. Dist. LEXIS 91344, at *16-18, *41-42 (E.D. Mich. May 13, 2020). Further implications of the *CIC Services* decision for tax administration are discussed in connection with the Chapter 2 updates. For further reading, see Monte A. Jackel, *The Way to Challenge Tax Rules Remains Unresolved*, 171 TAX NOTES FED. 1268 (2021).

Page 649:

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. 23 (2020), 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 31. What happens, procedurally, when the IRS introduces evidence that it complied with section 6751(b)(1)? According to the court, "Once the Commissioner makes that showing, the taxpayer must come forward with contrary evidence." *Id*. at 34. 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 35-36.

In *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 36. 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 34 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

Page 679:

As noted in connection with Chapter 3 of this supplement, the IRS extended the due date for filing 2019 individual income tax returns to July 15, 2020. The IRS has announced that overpayment interest on refunds arising from 2019 tax returns filed by July 15, 2020 will be calculated from April 15, 2020 until the date of the refund. *IRS Statement on Interest Payments*, IRS (June 24, 2020), https://www.irs.gov/newsroom/irs-statement-on-interest-payments.

Page 688:

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. A couple of years ago, the Court of Appeals for the Second Circuit 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. More recently, the Federal Circuit and the Eleventh Circuit joined in the Second Circuit's position in *Pfizer*. Bank of America Corp. v. United States, 964 F.3d 1099 (Fed. Cir. 2020); Paresky v. United States, 995 F.3d 1281 (11th Cir. 2021). These decisions conflict 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).

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 topic by Bob Probasco, the latest of which at press time is *The End of the Line for the Pareskys?*, PROCEDURALLY TAXING (May 3, 2021), https://procedurallytaxing.com/the-end-of-the-line-for-the-pareskys/. Some of his previous posts on this topic are linked there.

Chapter 14

Page 692:

In response to the global COVID-19 pandemic, the IRS rolled out during 2020 the People First Initiative, which suspended certain collection activities from April 1, 2020 through July 15, 2020. IRS, *People First Initiative – Providing Relief to Taxpayers* (May 25, 2021), https://www.irs.gov/newsroom/people-first-initiative-providing-relief-to-taxpayers. During this period, the IRS suspended the issuance of most Notices of Federal Tax Lien and delayed some levy activities. As part of the program, the IRS also encouraged taxpayers who were experiencing financial hardship to request that the taxpayer's case be placed in "currently not collectible" status. Then, in November of 2020, the IRS announced a related initiative, the Taxpayer Relief Initiative, that extended collection relief and made it easier in many cases to obtain an installment agreement or offer in compromise. IRS, *COVID Tax Tip 2020-158: Taxpayer Relief Initiative Aims to Help Those Financially Affected by COVID-19* (Nov. 19, 2020), https://www.irs.gov/newsroom/taxpayer-relief-initiative-aims-to-help-those-financially-affected-by-covid-19.

In June of 2021, the IRS announced that it will return to normal collection casework: Beginning in August 2021, the IRS plans to begin sending out payment due notices, filing Notices of Federal Tax Lien, and issuing levy notices. IRS, *IRS Operations During COVID-19: Mission-Critical Functions Continue*, https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue.

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. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *The IRS and Private Debt Collectors Took Some Action for 16 Potential Violations of Fair Tax Collection Practices During Fiscal Year 2017*, No. 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://www.taxpayeradvocate.irs.gov/reports/2018-annual-report-to-congress/.

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 NOTES 1397 (2019). A recent TIGTA Report included the following statistics relating to the program:

> Since the IRS began delivering cases to PCAs [Private Collection Agencies, eds.] in April 2017, more than 3.28 million taxpayer accounts have been assigned, with the value of those accounts totaling more than $30.1 billion. As of May 14, 2020,

> the IRS reported that PCAs had collected $498.4 million in commissionable payments, or 1.79 percent of the total value of accounts assigned. However, of the total commissionable payments collected by PCAs since inception of the program, $222.7 million, or 45 percent, was collected in the first two-thirds of Fiscal Year (FY) 2020 (October 1, 2019, through May 14, 2020). This increase in collections in FY 2020 may be because all four of the PCAs hired new assistors, effectively increasing the number of assistors who worked the IRS case inventory in FY 2019 by 150 percent. The new assistors were hired because of the number of cases being sent to PCAs, which increased by 150 percent in FY 2019, from 4,000 cases per week to 10,000 cases per week. . . .
>
> According to the IRS, it has incurred approximately $193.7 million in costs since inception of the program, which includes just under $98.6 million (51 percent) resulting from commissions paid to the PCAs. Thus, the [Private Debt Collection] program has had net revenues of approximately $345.6 million since inception of the program.

TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Fiscal Year 2021 Biannual Independent Assessment of Private Collection Agency Performance*, No. 2021-30-010 (Dec. 28, 2020), at 2-3, https://www.oversight.gov/report/tigta/fiscal-year-2021-biannual-independent-assessment-private-collection-agency-performance.

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). The December 2020 TIGTA Report quoted above found that the IRS may not be properly carrying out the mandates in section 6306(d) to exclude some low-income taxpayers from being assigned to private debt collection agents. TIGTA, Rep. No. 2021 30-010, *supra*, at 16-18.

Page 720:

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).

Page 722:

Among the few revisions included in the 2017 Tax Act that relate to tax procedure are changes to the levy and sale procedures. As noted in the casebook, a person other than the delinquent taxpayer whose property was seized by the IRS may bring a civil action in district court for wrongful levy and in the suit seek return of the property or, if the property has already been sold, 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 nine months to two years. I.R.C. § 6343(b).

Chapter 15

Page 755:

As noted in Chapter 14 of this Supplement, the IRS issued guidance during the COVID-19 pandemic designed to assist taxpayers experiencing financial hardship. The Taxpayer Relief Initiative, released by the IRS in November of 2020, announced several changes relating to installment agreements and offers in compromise. Some "highlights of the Taxpayer Relief Initiative" include:

- The IRS is offering flexibility for some taxpayers who are temporarily unable to meet the payment terms of an accepted Offer in Compromise.
- The IRS will automatically add certain new tax balances to existing Installment Agreements, for individual and business taxpayers who have gone out of business.
- Certain qualified individual taxpayers who owe less than $250,000 may set up Installment Agreements without providing a financial statement if their monthly payment proposal is sufficient.
- Some individual taxpayers who only owe for the 2019 tax year and owe less than $250,000 may qualify to set up an Installment Agreement without a notice of federal tax lien filed by the IRS.

IRS, *Taxpayer Relief Initiative Aims to Help Those Financially Affected by COVID-19*, https://www.irs.gov/newsroom/taxpayer-relief-initiative-aims-to-help-those-financially-affected-by-covid-19. For more information about the Taxpayer Relief Initiative, see Carol M. Luttati, *What's New in IRS Collections Since the Onset of the Pandemic*, J. TAX PRAC. & PROC., Spring 2021, at 5.

Page 760:

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

Page 765:

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

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).

Page 766:

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 (last revised Sept. 22, 2020). 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 (last revised Sept. 22, 2020). 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. 5.8.2.4.1.4 (last revised Sept. 22, 2020).

Page 767:

In April 2021, 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.

Page 799:

A 2020 Fifth Circuit opinion examines what can happen if a taxpayer who has entered into an offer in compromise fails to remain current on filing and payment obligations. The taxpayers in *Sadjadi v. Commissioner*, 816 Fed. App'x. 997 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 853 (2020), entered into an offer in compromise in 2013. *Id.* at 999. Similar to the language on page 771 of the casebook, the compromise agreement required the taxpayers to comply with filing and payment obligations during the next five years. *Id.* at 998. While the taxpayers paid the entire amount of settled tax liability required by the compromise agreement, they failed to pay their 2015 tax liability. *Id*. at 999.

The IRS sent the taxpayers a Notice of Intent to Levy, claiming that their failure to remain current on their payment obligation for five years as required by the compromise agreement meant that they were now liable for the entire tax liability that was compromised earlier. *Id.* The taxpayers requested a collection due process hearing and at the hearing proposed an installment agreement to pay their liability over time, which the Appeals officer rejected. *Id.* The taxpayers appealed the Agent's determination to the Tax Court "arguing that the settlement officer failed to consider that they had already paid more than the agreed amount in the offer-in-compromise and that the agreement did not state that compliance is required after the balance is completely paid." *Id*. at 1000. The Tax Court sustained the Appeals officer's determination. *See*

Sadjadi v. Commissioner, T.C. Memo. 2019-58, 2019 Tax Ct. Memo LEXIS 62. The Court of Appeals for the Fifth Circuit upheld the Tax Court's decision:

> The IRS does not dispute that the petitioners paid the amount agreed upon in the offer-in-compromise. Rather, the IRS argues that the form the petitioners used was clear and unambiguous. The IRS asserts that the obligation to comply with filing and payment obligations for five years from the acceptance date is not contingent on the petitioners' payment of the amount in the compromise agreement. According to the IRS, the petitioners must comply with tax filing and payment obligations for five years regardless of when the agreed amount is paid, and if the petitioners do not do so, the offer-in-compromise is violated. Thus, the IRS argues that the settlement officer did not abuse her discretion.
>
> Here, we conclude that the settlement officer did not abuse her discretion when she declared the offer-in-compromise had been violated and imposed the levy. An offer-in-compromise is a contract, and the rules applicable to contracts generally govern. *United States v. Lane*, 303 F.2d 1, 4 (5th Cir. 1962). . . .
>
> [T]he offer-in-compromise in this case contains clear and unambiguous language that explains the consequences of default. The form states that the petitioners would "file tax returns and pay required taxes for the five-year period beginning with the date of acceptance of this offer." The form further explains that the petitioners would "comply with [their] future tax obligations and . . . remain liable for the full amount of [their] tax debt until all terms and conditions of this offer have been met." Indeed, the petitioners conceded that they understood "the necessity of complying with future tax obligations" and "what would happen if they default[ed]." Specifically, if they defaulted, they understood that "the IRS may levy or sue [them] to collect any amount ranging from the unpaid balance of the offer to the original amount of the tax debt without further notice of any kind." Hence, the offer-in-compromise is "so precise, and the intention which it manifests is so evident, as to leave no doubt that the [government's] course of action . . . was fully authorized by the ...... agreement." *See Lane*, 303 F.2d at 4.

Id. at 1000-01. Does the representative have any obligation to ensure that clients who have successfully compromised tax liability remain current on their filing and payment obligations? *See* Keith Fogg, *Failing to Keep Current After Obtaining an Offer in Compromise*, PROCEDURALLY TAXING (Aug. 7, 2020), https://procedurallytaxing.com/failing-to-keep-current-after-obtaining-an-offer-in-compromise/.

Chapter 16

Pages 808-09:

A 2020 annual report from the Treasury Inspector General for Tax Administration (TIGTA) identified several issues surrounding the IRS's compliance with applicable Collection Due Process (CDP) procedures. According to the report, 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. *Review of the Independent Office of Appeals Collection Due Process Program*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. No. 2020-10-054 (Aug. 21, 2020), https://www.treasury.gov/tigta/auditreports/2020reports/202010054fr.pdf. According to the report:

> 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 14 taxpayer cases that were misclassified. Based on the same stratified sample, TIGTA determined that the Collection function did not timely process the hearing requests for an additional four 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 function personnel at the correct location on the same day. While 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 (CSED) for cases that are sent through the CDP process.

> In addition, TIGTA continued to identify errors related to the determination of the CSED on taxpayer accounts. TIGTA identified 12 taxpayer cases that had an incorrect CSED. For six taxpayer cases, the IRS incorrectly extended the time period, allowing the IRS additional time to collect delinquent taxes. For the remaining six taxpayer cases, the IRS incorrectly decreased the time to collect the delinquent taxes.

Id.

One commentator suggested, based on similar findings in an earlier TIGTA report, that 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/. *See also* Keith Fogg, *Calculating the Collection Statute of Limitations*, PROCEDURALLY TAXING (Jan. 29, 2021), https://procedurallytaxing.com/calculating-the-collection-statute-of-limitations/ (lamenting how difficult it can be to receive assistance from the IRS to calculate the statute of limitations on collection accurately).

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 IRS office:

> 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 809:

As noted in the casebook, the taxpayer has 30 days from the date of the notice granting a pre-levy CDP Hearing under section 6330 to request the hearing. I.R.C. 6330(a)(3). In *Ramey v. Commissioner*, 156 T.C. No. 1, 2021 U.S. Tax Ct. LEXIS 1, the IRS sent the notice to the taxpayer's last known address, which was shared office space. Someone other than Ramey's employee signed for the notice but it did not get into Ramey's possession until shortly before the 30-day filing deadline. *Id*. at *5. Ramey's CDP hearing request was mailed after the filing deadline, which led the Appeals officer to deny him a CDP hearing. *Id*. at *6.

Ramey contested the denial in Tax Court. Judge Toro phrased the issue as follows:

> In this collection due process ("CDP") case, we are asked to consider what appears to be a question of first impression for our Court: whether a notice of

> intent to levy that is sent to a taxpayer's actual (and last known) address by United States Postal Service ("USPS") certified mail, return receipt requested, starts the running of the 30-day period for requesting a hearing under section 6330, even though the taxpayer does not personally receive the notice because the taxpayer's address is shared by multiple businesses and the USPS letter carrier leaves the notice at that address with someone who neither works for the taxpayer nor is authorized to receive mail on the taxpayer's behalf.

Id. at *1-2.

As those who have studied Chapter 9 know, a notice of deficiency sent to the taxpayer's last known address triggers the taxpayer's right to file a petition in Tax Court. I.R.C. §§ 6212(b), 6213(a). In that context, as long as the notice is sent to the taxpayer's last known address, the notice remains valid even if the taxpayer never receives it. *See* Gyorgy v. Comm'r, 779 F.3d 466, 473 (7th Cir. 2015). Judge Toro relied on authority in the deficiency context to conclude that the notice sent to Ramey's last known address was valid even though he did not actually receive it:

> Section 6330(a)(2) provides three separate ways in which the IRS may provide a taxpayer with notice of its intent to levy and the taxpayer's right to a hearing: (1) the notice may be given in person; (2) it may be left at the taxpayer's dwelling or usual place of business; or (3) it may be "sent by certified or registered mail, return receipt requested," to the taxpayer's last known address. The third method of providing notice focuses on the sending of the notice, not the taxpayer's receipt of it. It describes the type of USPS service the IRS must select--certified or registered mail, return receipt requested. ...... The primary responsibility of the IRS under this method of service is to place the notice in the hands of the USPS. So long as the IRS properly addresses the notice to the taxpayer's last known address and selects the correct type of service from the USPS--either certified or registered mail, with return receipt requested--the IRS complies with the terms of the statute.

Ramey, 2021 U.S. Tax Ct. LEXIS 1, at *17-18 (footnotes omitted). Because Ramey's request for a CDP hearing was untimely, the Appeals Officer instead afforded him an equivalent hearing. As explained in the text, determinations resulting from equivalent hearings are not subject to Tax Court review. As a result, Judge Toro denied Ramey's request for review, finding that the Tax Court had no jurisdiction over the case. *Id*. at *6, 20.

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. 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).

In another case involving a taxpayer who raised the possibility of an offer in compromise during a CDP hearing, the Tax Court recently ruled that an Appeals officer abused her discretion when she refused as part of the CDP hearing to independently review the merits of an offer made by the taxpayers that had been returned earlier by the IRS's Offer in Compromise unit without consideration. Mason v. Comm'r, T.C. Memo 2021-64, 2021 T.C. Memo LEXIS 93. The Tax

Court in *Mason* distinguished another recent case, *Galloway v. Commissioner*, which held that it was not an abuse of discretion for the Appeals officer not to consider an earlier offer in compromise that had been reviewed and *rejected* by the Offer in Compromise unit when the taxpayer refused the Appeals officer's invitation to update the financial records underlying the offer request. *Mason*, 2021 T.C. Memo LEXIS 93 *28-29 (*citing* Galloway v. Commissioner, T.C. Memo 2021-24, 2021 Tax Ct. Memo LEXIS 29).

A series of posts by Caleb Smith provides helpful discussion of what issues may or may not be raised during a CDP hearing, including reminders to ensure that the administrative record surrounding the case is complete so that, if the taxpayer appeals the determination, the Tax Court can adequately review the case. The series starts with Caleb Smith, *Making All Your Arguments in Collection Due Process Cases. Designated Orders, August 10-14, 2020 (Part One),* PROCEDURALLY TAXING (Jan. 8, 2021), https://procedurallytaxing.com/making-all-your-arguments-in-collection-due-process-cases-designated-orders-august-10-14-2020-part-one/.

Page 817:

Section 6330(c)(2)(B) allows a taxpayer to challenge the existence or amount of the underlying tax liability as part of a CDP hearing when the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute the tax liability. Although the record was not entirely clear, the Seventh Circuit in *Jeffers v. Commissioner*, 992 F.3d 649 (7th Cir. 2021) assumed that the taxpayer did not receive a notice of deficiency for either the taxpayer's 2008 or 2009 taxable years. The taxpayer did receive a notice granting him a post-lien CDP hearing under section 6320, which he ignored. *Id.* at 652. Sometime after the taxpayer filed amended returns for 2008 and 2009, the IRS pursued a tax levy and sent the taxpayer another notice granting him a pre-levy CDP hearing under section 6330 for the same taxable years. *Id.* At that hearing, the taxpayer raised the issue of the amended returns he had filed and maintained that he did not owe the underlying tax liability. The Appeals officer rejected the taxpayer's argument, finding that the taxpayer had an opportunity to contest the underlying liability during the earlier CDP hearing. *Id*. at 652-53. The taxpayer appealed the determination to the Tax Court, which ruled in favor of the IRS's motion for summary judgment. *Id*. at 653. The taxpayer then appealed to the Seventh Circuit, which affirmed the Tax Court's decision. *Id*. at 656.

Having not received a notice of deficiency, the taxpayer could have contested his underlying liability during the post-lien CDP hearing under section 6320. Because he ignored that opportunity, he could not raise that issue during a section 6330 CDP hearing triggered by a later levy notice. *Id*. at 654. The Seventh Circuit came to this conclusion by relying on Treasury Regulation section 301.6330-1(e)(3) (T&A-E7), which provides, "If the taxpayer previously received a CDP Notice under section 6320 [the provision for notice of a federal lien] with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice, the taxpayer had a prior opportunity to dispute the existence or amount of underlying tax liability." Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), discussed in Chapter 2 of the casebook, the Seventh Circuit found the regulation was a reasonable interpretation of Code section 6330(c)(2)(B):

> This interpretation is sensible considering the purposes of CDP hearings. In essence, Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998 as a procedural protection for taxpayers to oppose IRS *collection* actions, with mere incidental review of underlying liability in specifically enumerated instances. [Our Country Home Enterprises v. Commissioner, 855 F.3d] at 779; *see also Kindred*, 454 F.3d at 695. The regulation reasonably interprets an "opportunity" in light of this purpose by precluding challenges to underlying liability when a taxpayer received a CDP notice for the same tax and tax period even if the taxpayer did not request a CDP hearing because the operative point is that the taxpayer could have done so. . . . For these reasons, the regulation reasonably interprets the statute and was properly applied.

Id. at 655.

Page 819:

For a nice overview of fairly recent issues in CDP litigation, see Keith Fogg, *Recent Collection Due Process Decisions*, PROCEDURALLY TAXING (Mar. 29, 2021), https://procedurallytaxing.com/recent-collection-due-process-decisions/; Keith Fogg, *Year In Review—Court Cases*, PROCEDURALLY TAXING (Jan. 5, 2021), https://procedurallytaxing.com/year-in-review-court-cases/ (including 2020 CDP cases).

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 (emphasis added). 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).

In *Lee v. Commissioner*, No. 20675-19, 2020 U.S. Tax Ct. LEXIS 29 (2021) (bench op.), the taxpayers made several arguments as to why the Settlement Officer (SO) had abused her discretion when denying their request for an installment agreement, all of which the Tax Court rejected. *Id.* at *11-13. Tax Court outlined the abuse of discretion standard as follows:

> When evaluating whether an SO abused her discretion, the Court reviews the record to determine whether the SO: (1) verified that the requirements of applicable law and administrative procedure have been met; (2) considered any relevant issues that petitioners raised; and (3) considered "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." Sec. 6330(c)(3).

Id. at *10. The court further stated that "If an SO follows all statutory and administrative guidelines and provides a reasoned and balanced decision, the Court will not reweigh the equities." *Id.*

For further discussion of the abuse of discretion standard, see, *e.g.*, Sadjadi v. Commissioner, 816 F. App'x 997, 998 (5th Cir. 2020) (unpublished op.) (settlement officer did not abuse her discretion when she declared an offer-in-compromise violated and imposed a levy because the taxpayers "did not remain current on their tax payment obligations" as required by the offer-in-compromise); Brown v. Commissioner, 826 F. App'x 673, 673-74 (9th Cir. 2020) (unpublished op.) (finding the IRS did not abuse its discretion in denying the taxpayer's offer-in-compromise because the Code only requires the IRS to "consider" a proposed offer, which an agent did, "reasonably concluding that other pending matters that could affect Brown's tax liability precluded further consideration of the offer."); Boettcher v. Commissioner, T.C. Memo. 2021-4, 2021 Tax Ct. Memo LEXIS 5, *12 (Jan. 12, 2021) (remanding for a supplemental CDP hearing because "[m]ultiple unanswered questions cast doubt on the settlement officer's analysis," including regarding calculation of the taxpayers' income and expenses).

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 (July 8, 2019), https://procedurallytaxing.com/taxpayer-bill-of-rights-does-not-confer-tax-court-with-jurisdiction-in-collection-due-process/.

For some recent examples of sanctions imposed on frivolous arguments made in the CDP context, see Calpino v. Commissioner, 819 F. App'x 860, 863 (11th Cir. 2020) (unpublished op.) (affirming the Tax Court's assessment of a $25,000 fine for a frivolous CDP petition when the Tax Court had repeatedly warned the taxpayers that frivolous arguments could be sanctioned); Jaxtheimer v. Commissioner, Fed. App'x , 2021 U.S. App. LEXIS 11352, *5-6, *9 (10th Cir. 2021) (holding that the taxpayers frivolous tax-protestor arguments provide no basis for appeal and affirming the imposition of a $2,000 penalty).

Page 845

In 2018, the Tax Court held that it does not have jurisdiction to order refunds in collection due process cases, relying on the *Greene-Thapedi* precedent. McLane v. Commissioner, T.C. Memo. 2018-149, 2018 Tax Ct. Memo LEXIS 151, *14-15 (Sept. 11, 2018) This decision reportedly has been appealed to the Fourth Circuit by the taxpayer. Frederic Lee, *Tax Court's Denial of Collection Refund Jurisdiction Challenged*, 168 TAX NOTES FED. 175, 175 (2020). The American College of Tax Counsel has filed an amicus brief written by Frank Agostino of Agostino & Associates. *Id.* The brief argues that the procedural context of the case—the taxpayer never received the notice of deficiency the IRS sent—inadvertently eliminated the taxpayer's ability to pursue a refund in a U.S. District Court or the U.S. Court of Federal Claims of his overpayment.

Page 848:

In *Lunnon v. United States*, No. 16-1152 MV/JFR, 2020 U.S. Dist. LEXIS 227955 (D.N.M. 2020), the New Mexico District Court upheld a magistrate judge's findings that section 7422, which requires that the taxpayer file a refund claim as a prerequisite to filing suit, applies to a refund claimed in a CDP hearing. *Id.* at *6-7. *See* Lunnon v. United States, 2020 U.S. Dist. LEXIS 228946 *15-16 (Oct. 26, 2020) (Magistrate Judge's Proposed Findings and Recommended Disposition).

Chapter 17

Page 853:

A recent Tax Court case found that a spouse had "signed" the join return although she did not physically sign it or explicitly give her consent to file jointly. In *Jones v. Commissioner*, T.C. Memo. 2019-139, 2019 Tax Ct. Memo LEXIS 145, the Tax Court determined that because the taxpayer-wife did not file her own return and relied on her husband to handle their finances every year, she had tacitly consented to the filing of the 2010 joint return. *Id.* at *12. Citing prior case law, the court stated that "The determinative factor in deciding whether a filed return qualifies as a joint return is whether the spouses intended to file a joint return. The absence of one spouse's signature on a joint return does not necessarily preclude a finding of a valid joint return where the facts indicate otherwise." *Id.* (citations omitted).

The Ninth Circuit has heard oral argument for the *Jones* case but has not yet rendered a decision. *Calif. Woman Ineligible for Spouse Tax Relief, 9th Circ. Told*, 2021 LAW360 140-43 (May 20, 2021). For further discussion of both *Jones* and the *Sleeth* case—which is discussed at length below—see Keith Fogg, *Innocent Spouse Updates*, PROCEDURALLY TAXING (Apr. 5, 2021), https://procedurallytaxing.com/innocent-spouse-updates/.

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 *Jacobsen*, the Seventh Circuit 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 also 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.*

In the *Sleeth* case cited just above, the Tax Court held that taxpayers are generally presumed to have constructive knowledge of the information reported on tax returns they have signed, ultimately denying Lori Sleeth's innocent spouse claim. *Sleeth*, T.C. Memo. 2019-138, at *12, *14. Although taxpayer-husband did not inform taxpayer-wife that he did not have the funds to pay their joint tax liability, the Tax Court determined that she had a duty to do more than assume her husband would pay the tax owed. *Id.* at *13. The Tax Court noted that innocent spouse relief is not available to taxpayers who ignore available information. *Id.* at *12.

Sleeth appealed to the Court of Appeals for the Eleventh Circuit. On appeal, the Harvard Tax Clinic represented her. In *Sleeth*, the Eleventh Circuit concluded that the Tax Court had not erred in denying innocent spouse relief under section 6015(f) because there was no abuse of discretion by the Tax Court. *Sleeth v. Commissioner*, 991 F.3d 1201, 1208 (11th Cir. 2021). In part, the Court of Appeals found on the knowledge factor that "Lori signed the Sleeths' returns, was aware of their shared financial troubles, and knew of their prior problems with the IRS." *Id.* at 1207-08. The Eleventh Circuit disagreed with Sleeth's argument that the Tax Court had placed too much weight on the knowledge factor, relying on the Seventh Circuit's decision in *Jacobsen*:

> To begin, "nothing in the statute or revenue procedures" prevents the tax court from "concluding that in light of 'all the facts and circumstances,'" the knowledge or reason-to-know factor "weighs heavily against granting equitable relief." *Jacobsen v. Comm'r*, 950 F.3d 414, 422 (7th Cir. 2020) (quoting § 6015(f)). …
>
> Indeed, although "no one factor or a majority of factors necessarily determines the outcome," the tax court may deny equitable relief even if just one factor weighs against it. Rev. Proc. 2013-34 § 4.03(2), 2013-43 I.R.B. 397, 400, 2013-2 C.B. 397, 2013 IRB LEXIS 478 (emphasis added); *Jacobsen*, 950 F.3d at 421-22. Given that, we do not see how the tax court abused its discretion.

Sleeth, 991 F.3d at 1208.

Page 877:

For recent analyses of the seven threshold conditions of Revenue Procedure 2013-34 where the requesting spouse is not entitled to equitable relief, see the bench opinion in *Spitulnik v. Commissioner*, No. 21686-18L, 2021 U.S. Tax Ct. LEXIS 12 (T.C. 2021) and *Jones v. Commissioner*, T.C. Memo. 2019-139, 2019 Tax Ct. Memo LEXIS 145. For a successful claim under Rev. Proc. 2013-34, see *Leith v. Commissioner*, T.C. Memo. 2020-149, 2020 Tax Ct. Memo LEXIS 142 *30 (Nov. 4, 2020) (awarding streamlined relief and finding in part that "Intervenor's controlling and abusive behavior hindered petitioner's ability to question the understatements and underpayment and to participate meaningfully in the preparation of their joint returns.").

Page 887:

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 of 2019 made an important change in the scope of review in innocent spouse cases, adding new paragraph (7) to section 6015(e).
Taxpayer First Act of 2019, Pub. L. No. 116-25 § 1203(a)(1) (adding new paragraph 6015(e)(7)) (emphasis added). The new provision reads:

> 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.

I.R.C. § 6015(e)(7).

The new provision provides a *de novo* standard of review, consistent with *Demeter*. However, the scope of review in section 6015(e)(7) differs. The new 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/.

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.

It is too soon for there to be many court opinions analyzing section 6015(e)(7). The effective date of the new provision was July 1, 2019, but there was a question regarding how to apply that to cases that were already underway on that date. In *Sutherland v. Commissioner*, 155 T.C. No. 6, 2020 U.S. Tax Ct. LEXIS 23 (2020) (reviewed by the court), a unanimous Tax Court held:

> By amending the statute to provide that this Court's review would be limited to the administrative record (apart from previously unavailable or newly discovered evidence), Congress incentivized taxpayers to cooperate with the IRS by building a complete record during the administrative process. By making Act sec. 1203(a) of the Act effective "on or after" July 1, 2019, Congress gave the amendments prospective effect only. But if the revised scope of review in subsection (e)(7) were applicable to cases like this, that amendment would have a kind of retroactive effect, punishing taxpayers whom it is too late to incentivize.

> In sum, using the linguistic tools at our disposal, considering the amendment's overall context, and applying the anti-surplusage canon, we conclude that the effective date provision is best interpreted to make subsection (e)(7) applicable only to *petitions filed in this Court on or after July 1, 2019*. Petitioner filed her petition on February 20, 2018, more than 16 months before the amendment took effect. We accordingly hold that section 6015(e)(7) has no application here.

Id. at *13 (emphasis added).

In *Sutherland*, the taxpayer sought a remand to the IRS Appeals Office so she could introduce new evidence into the administrative record. *Id.* at *15-16. The Tax Court observed that it had previously declined to remand stand-alone innocent spouse cases under section 6015(f). In addition, because it had found that section 6015(e)(7) did not apply to the case (as discussed above), the traditional *de novo* standard applied. The court held that the taxpayer was free to introduce new evidence at trial, making remand unnecessary. *Id.* at *16.

In a recent small tax case, taxpayer-husband sought innocent spouse relief under section 6015 for a 2015 tax debt resulting from his wife's early-retirement withdrawal. *Fatty v. Commissioner*, No. 3787-20S, 2021 U.S. Tax Ct. LEXIS 36, *2 (T.C. 2021). In a bench opinion, Tax Court Judge Mark Holmes explained the new 6015(e)(7) scope of review, stating:

> Until recently, the scope of review in a Tax Court case involving a request for innocent spouse relief [was] … de novo. People would come, they'd introduce evidence, and I as a judge would look at it with fresh eyes.
>
> Congress has more recently changed that scope of review. Now I am supposed to look at what is called the administrative record. The administrative record consists of all the documents and the evidence that the IRS looked at when Mr. Fatty first applied for relief.
>
> I am supposed to look only at the administrative record, with two exceptions. And those two exceptions are evidence that is newly discovered or evidence that was previously unavailable. This is a change in the law, and the Fattys are one of the first cases to come after this change in the law.
>
> However, in this particular case, I just assumed that testimony given under oath and subject to cross-examination, like the testimony given by both Mr. and Mrs. Fatty, is this newly available evidence, because when Mr. Fatty applied for innocent spouse relief, he wasn't able to give sworn testimony and neither he nor his wife were subject to cross-examination.
>
> As I said, I'm not deciding this for all cases in the future. This is an S case. But I am assuming that I can look at the evidence that they give me in the form of their testimony. So I will look both at the administrative record in this case and at the testimony of both Mr. and Mrs. Fatty.

Id. at *4-5. For further reading about *Fatty*, see Leslie Book, *The Fatty Rule for Post TFA Innocent Spouse Cases? An Early Look at the Otherwise Unavailable Evidence Exception*, PROCEDURALLY TAXING (May 4, 2021), https://procedurallytaxing.com/the-fatty-rule-for-post-tfa-innocent-spouse-cases-an-early-look-at-the-otherwise-unavailable-evidence-exception/.

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 fairly 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).

Page 899:

A recent development related to injured spouse relief is in connection with the government's recent Economic Impact Payments. Because these payments were withheld for past-due child support, many taxpayers lost out on their own Economic Impact Payments due to their spouse's past-due child support. Press Release, IRS, *IRS: 50,000 Spouses to Get Catch-Up Economic Impact Payments* (Aug. 25, 2020), https://www.irs.gov/newsroom/irs-50000-spouses-to-get-catch-up-economic-impact-payments.

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).

Not yet enacted into law, 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 2021, the White House included such a provision in its American Families Plan, which encompasses proposed legislation that would, among other provisions, increase tax rates on the wealthy and provide free pre-school and community college education for all taxpayers. *The American Families Plan Tax Compliance Agenda* 21, DEPT. OF TREAS. (May 2021), https://home.treasury.gov/system/files/136/The-American-Families-Plan-Tax-Compliance-Agenda.pdf.

In response to the decision in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), discussed in the casebook on page 909, 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 (AICPA) 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 (at the time, $33) was reasonable. *Id*. at 1068.

In April 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, 85 Fed. Reg. 21126 (Apr. 16, 2020). A few months later, the Treasury Department issued final regulations adopting the $21 fee. Treas. Reg. § 300.12.

The IRS has announced that it plans to update Circular 230, which has not been revised since 2014. *2020-2021 Priority Guidance Plan*, DEPT. OF TREAS. (Nov. 17, 2020) 23, https://www.irs.gov/pub/irs-utl/2020-2021_pgp_initial.pdf. The AICPA submitted comments recommending, among other changes, that Circular 230 properly reflect the jurisdictional scope of the regulations in light of *Loving* and that the rules relating to written advice be revised. Joseph DiSciullo, *AICPA Asks IRS to Revisit Circular 230 Practice Standards*, 170 TAX NOTES FED. 1895 (2021).

Page 924:

For an excellent, and extensive, discussion surrounding conflict of interest issues that arise in tax practice, see the three-part series of articles by William Elliott, beginning with William D. Elliott, *Conflict of Interest and the Practice of Tax Law: The Triad of Ethical Authorities*, J. TAX PRAC. & PROC., Winter 2020, at 27.

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 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, one 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 fairly 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.

Page 974:

For reading regarding collections relief the IRS has offered during the COVID-19 pandemic, see Darren Guillot, *IRS Offers New Relief Options to Help Taxpayers Affected by COVID-19*, IRS.GOV (Nov. 2, 2020), https://www.irs.gov/about-irs/irs-offers-new-relief-options-to-help-taxpayers-affected-by-covid-19. The IRS Deputy Commissioner wrote:

> When appropriate, we want to help taxpayers by taking steps like abating penalties, extending payment plans, expanding access to installment agreements, and providing relief for taxpayers having difficulty meeting the terms of previously accepted offers to settle tax debts.

COVID-19 relief from tax collection is also discussed in the Chapter 14 updates of this Supplement.

Chapter 20

Some of the sources and online research databases referenced in Chapter 20 have been revised. For example, Lexis Advance, which is mentioned throughout Chapter 20, is now known as Lexis+. Among other changes:

- Govinfo.gov now includes Congressional Committee reports and replaces FDsys,gov, mentioned on page 985 of the casebook.
- CCH *IntelliConnect*, mentioned on page 991 of the casebook, remains available but is transitioning to Wolters Kluwer *Cheetah*.
- The *Daily Tax Report*, mentioned on page 1002 of the casebook, is now published under the designation Bloomberg LAW rather than Bloomberg BNA.
- The *Tax Management Portfolios*, mentioned on page 1000, are now published by Bloomberg rather than the Bureau of National Affairs.