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Tax Controversies

Practice and Procedure

Fourth Edition

2023 Supplement

Leandra Lederman

Stephen Mazza

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Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

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TAX CONTROVERSIES: PRACTICE AND PROCEDURE (4TH ED.)
2023 CUMULATIVE SUPPLEMENT
Stephen W. Mazza

This Cumulative Supplement to the Fourth Edition of the Tax Controversies: Practice and Procedure casebook by Leandra Lederman and Stephen W. Mazza replaces previous updates. It updates the casebook through July 1, 2023. 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.

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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 were 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 represented 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 increased 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.

Inflation Reduction Act of 2022 & Fiscal Responsibility Act of 2023

The Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818, was passed by Congress in mid-August 2022 and signed by President Biden. Among other provisions, the legislation expands Medicare benefits, attempts to lower health-care costs by allowing Medicare to negotiate certain drug prices, and creates investments in climate and energy projects. *See* Office of Management and Budget, *Statement of Administration Policy* (Aug. 6, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/08/SAP-H.R.-5376.pdf.

The legislation also provided $80 billion of additional funding for the IRS to help the agency increase enforcement, improve taxpayer service, update its technology, and create a free-file system. Pub. L. No. 117-169 § 10301; *see also* Kelly Anne Smith, *The Inflation Reduction*

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Act Is Now Law—Here's What It Means for You, FORBES ADVISOR (Aug. 23, 2022), https://www.forbes.com/advisor/personal-finance/inflation-reduction-act/. The planned funding increase was quickly put in jeopardy, however, when the House voted to rescind "[t]he unobligated balances of all amounts appropriated by the Inflation Reduction Act of 2022 for enhancement of Internal Revenue Service Resources . . . ." IRS Reduction Act, H.R. 8769, 117th Cong. § 2 (2022). That would amount to slashing $71 billion from the IRS budget over the next 10 years. Tony Romm, *House GOP votes to slash IRS funding, targeting pursuit of tax cheats*, WASH. POST (Jan. 9, 2023), https://www.washingtonpost.com/us-policy/2023/01/09/house-republicans-cut-irs/.

Subsequently, as part of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, which was enacted in June 2023 and extended the federal debt ceiling, Congress voted to reduce IRS funding by approximately $1.4 billion. *See id*. § 251; CONG. RSCH. SERV., *Changes to IRS Funding in the Debt Limit Deal* 2 (July 19, 2023), https://crsreports.congress.gov/product/pdf/IN/IN12172. In a separate deal in May 2023, lawmakers agreed to reallocate about $20 billion of the $80 billion that was provided to the IRS through the Inflation Reduction Act—$10 billion in 2024 and $10 billion in 2025. Kate Dore, *Proposed debt ceiling deal would cut part of $80 billion IRS funding*, CNBC (May 30, 2023), https://www.cnbc.com/2023/05/30/proposed-debt-ceiling-deal-would-cut-21point4-billion-in-irs-funding.html; THE WHITE HOUSE, *Background Press Call on the Bipartisan Budget Agreement* (May 28, 2023), https://www.whitehouse.gov/briefing-room/press-briefings/2023/05/28/background-press-call-on-the-bipartisan-budget-agreement.

By the time Congress passed the Fiscal Responsibility Act, the IRS had already released a 150-page plan explaining how the agency planned to use the $80 billion of additional funding provided by the Inflation Reduction Act. IRS*, Internal Revenue Service Inflation Reduction Act Strategic Operating Plan, FY2023 – 2031* (Apr. 5, 2023), https://www.irs.gov/pub/irs-pdf/p3744.pdf. The plan includes five strategic objectives:

> 1. Dramatically improve services to help taxpayers meet their obligations and receive the tax incentives for which they are eligible[;]
> 2. Quickly resolve taxpayer issues when they arise[;]
> 3. Focus expanded enforcement on taxpayers with complex tax filings and high-dollar noncompliance to address the tax gap[;]
> 4. Deliver cutting-edge technology, data, and analytics to operate more effectively[; and]
> 5. Attract, retain, and empower a highly skilled, diverse workforce and develop a culture that is better equipped to deliver results for taxpayers.

Id. at 2. Among the many projects and initiatives included in the plan, the IRS would enable taxpayers and representatives to access taxpayer data more easily, *id*. at 30, allow taxpayers to more easily track the status of returns, refunds, and payments made to the IRS, *id*. at 42, and expand enforcement for large corporations and partnerships as well as high-income and high-wealth individuals, *id*. at 68-72.

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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:

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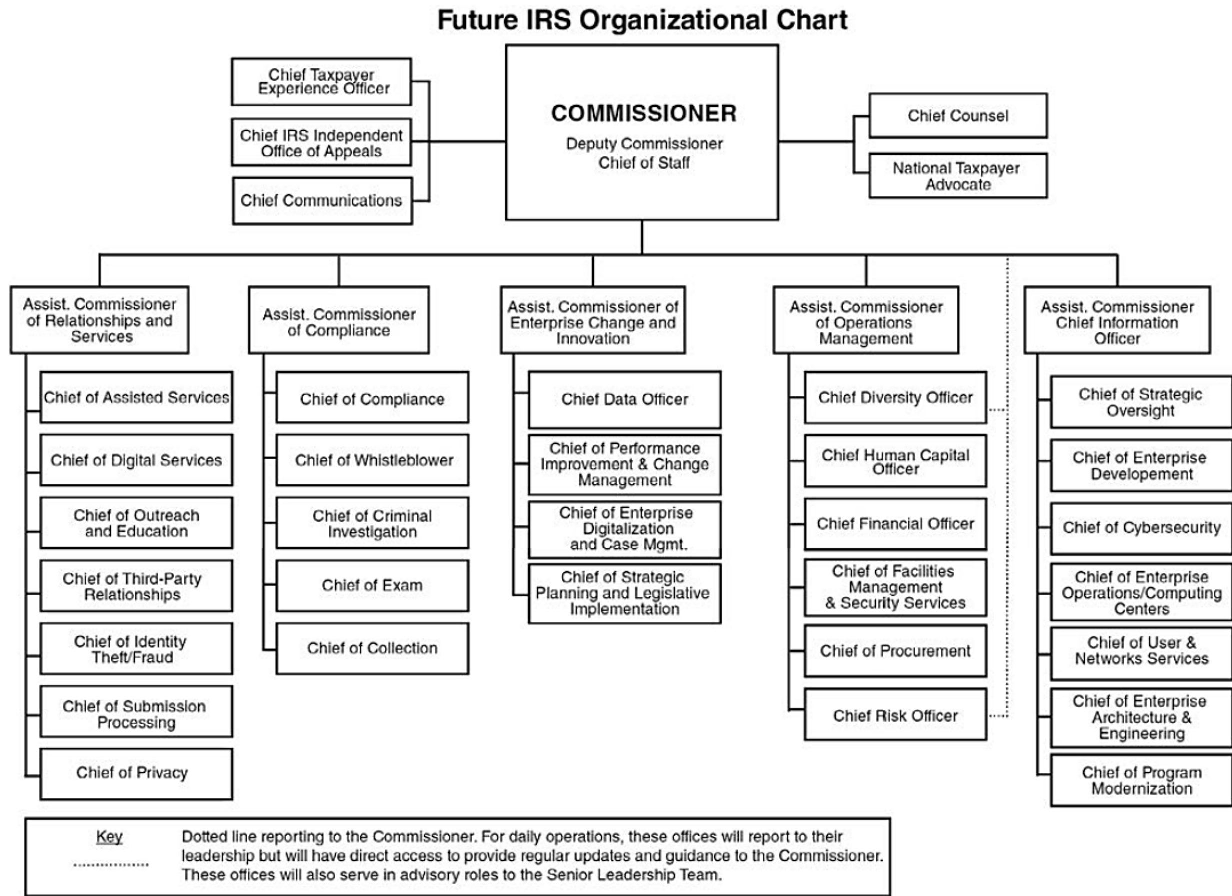

Id. at 23 fig. 1.

The proposed structure includes (on the upper left in the chart) a Chief Taxpayer Experience Officer who would "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 announced that it expected 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).

The IRS has made some strides towards implementing the new structure, but as of July 2023, it does not appear to have reorganized along employee-specialization lines. The IRS's current organizational structure as it appears on the agency's website (dated March 2023) is reproduced below. Note that it still includes (in the right column) Commissioners for the four operating divisions. *Department of the Treasury Internal Revenue Service Organization and Top Officials* (hereinafter IRS Org. Chart), https://www.irs.gov/pub/newsroom/marketing/internet/irs-organization-chart.pdf (last visited July 25, 2023).

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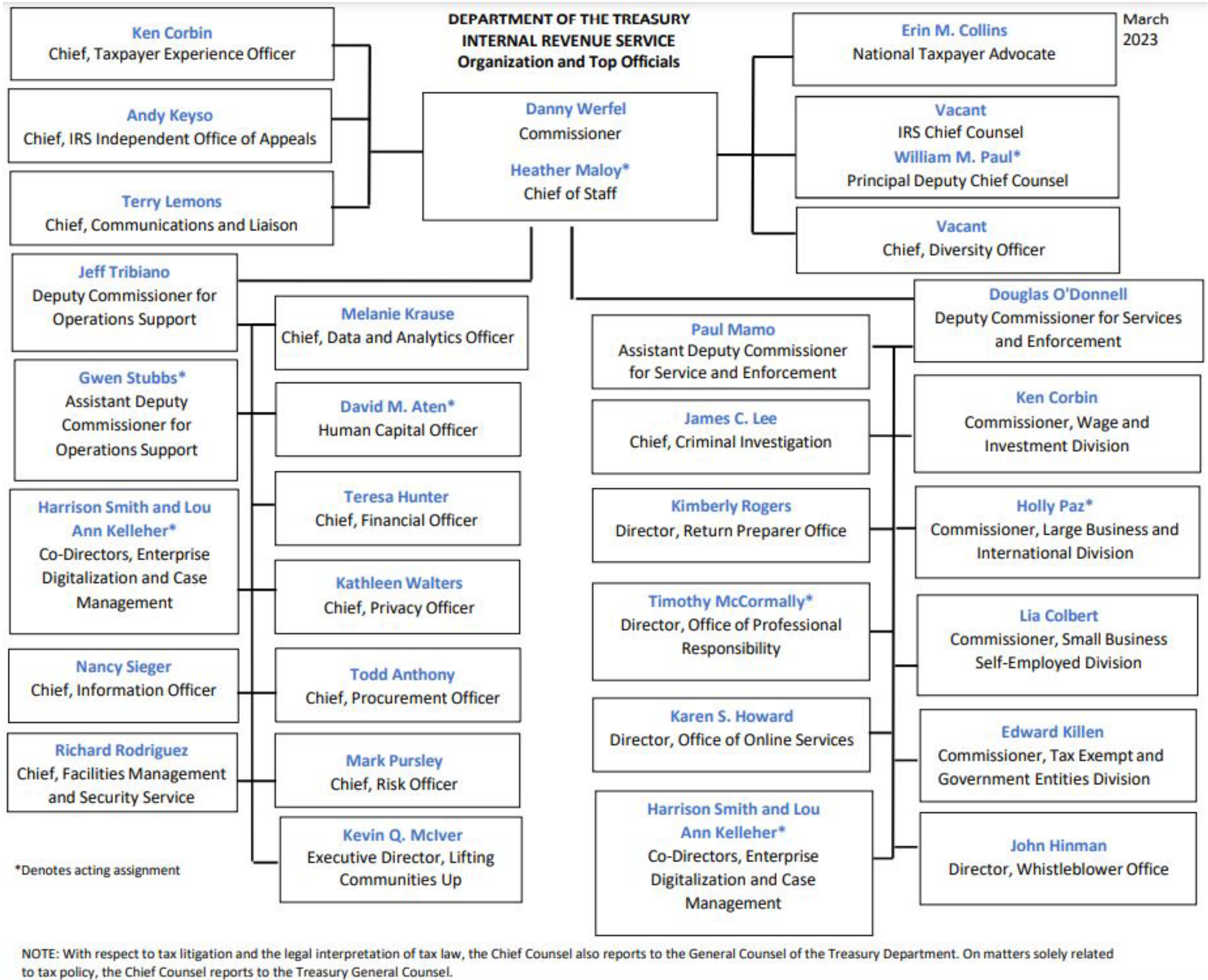

The current structure is somewhat different from the one on page 5 of the casebook. Note that the current structure includes a "Chief, Taxpayer Experience Officer," as the proposed structure does. The IRS officially launched the Taxpayer Experience Office in 2022. *Taxpayer Experience Office Formally Established to Improve Service Across the IRS,* IR-2022-50 (Mar. 4, 2022), https://www.irs.gov/newsroom/taxpayer-experience-office-formally-established-to-improve-service-across-the-irs. Commentators have expressed skepticism that the initiative will improve service or operations. Jonathan Curry, *It's Official: IRS Launches Taxpayer Experience Office*, 174 TAX NOTES FED. 1585 (Mar. 14, 2022). The current structure also includes a vacant position for "Chief, Diversity Officer." IRS Org. Chart, *supra*.

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

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> 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. A recent IRS Commissioner also blames the IRS's failure to keep up with technology modernization, in part, on a lack of funding. *See* Benjamin Guggenheim, *Rettig Blames Slow IT Modernization on 'Start-Stop' Funding*, 175 TAX NOTES FED. 648 (Apr. 25, 2022).

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The IRS has continued to take political fire. One of the targets of disagreement has been over the IRS's budget, which as shown in connection with the updates to page 21, has generally been declining over time, while the IRS has also received new responsibilities. The discussion on pages 2 to 3 of this Supplement, relating to the Inflation Reduction Act of 2022, reflects the political disagreement over IRS funding. The $80 billion of funding for the IRS over a 10-year period was targeted by the House for reduction soon after the bill was enacted, with some politicians portrayed the funding as providing 87,000 new IRS agents (auditors). *See* Katie Lobosco, *5 reasons why the Republican claim about 87,000 new IRS agents is an exaggeration*, CNN (Jan. 11, 2023), https://www.cnn.com/2023/01/11/politics/republican-irs-funding-87000-agents/index.html. However, as discussed above, the funds were provided for a variety of improvements, including to technology and service to taxpayers (which has declined significantly as IRS funding declined). *See id.*

The movement in favor of making the IRS budget more robust points in part to the importance of the IRS having enough employees to answer its phones. It may be shocking to learn that "[o]ut of the 282 million phone calls the IRS received in 2021, only 11% or 32 million were actually answered." Vanessa Williamson, *Cutting IRS funding is a gift to America's wealthiest tax evaders*, BROOKINGS (Jan. 26, 2023), https://www.brookings.edu/articles/cutting-irs-funding-is-a-gift-to-americas-wealthiest-tax-evaders/. Commentators also point to the benefits of giving IRS the resources needed to pursue wealthy tax evaders. *See, e.g.*, *id.* ("For the wealthiest and most sophisticated tax filers, a cash-strapped IRS has meant a tax evasion free-for-all."). What would the implications be of devoting most of the limited IRS enforcement resources to taxpayers less likely to have engaged in sophisticated tax evasion?

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Revenue Procedure 2023-2, 2023-1 I.R.B. 120, 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.

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The federal tax gap has continued 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/.

The IRS has released two new sets of tax gap estimates since the casebook was published, one in 2019 and one in 2022. In September 2019, the IRS released estimates based on the 2011 through 2013 tax years. *See* 2019 IRS Pub. 1415, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011–2013* (Sep. 2019), https://www.irs.gov/pub/irs-prior/p1415--2019.pdf. In that study, the IRS found an average rate of taxes timely and voluntarily paid of 83.6%. *Id.* at 2. Because the IRS had 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).

The IRS's estimate for the gross tax gap for the 2011 to 2013 years was $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.

In August 2022, the IRS released new tax gap estimates, based upon the 2014 through 2016 tax years. 2022 IRS Pub. 1415, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014–2016* (Aug. 2022), https://www.irs.gov/pub/irs-pdf/p1415.pdf. The IRS's estimate of the gross tax gap for years 2014 through 2016 is $496 billion annually. *Id.* at 1. The IRS also estimates that the annual gross tax gap will increase in the future, reaching $540 billion for years 2017 through 2019. *Id*. at 2. On a more positive note, the IRS's revised estimate of the voluntary compliance rate increased compared with earlier years, rising from 83.6% to 85%. *Id.* at 9 tbl. 1.

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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) 2021* (Jan. 2022), https://www.irs.gov/pub/irs-pdf/p5296.pdf; IRS, *Comprehensive Taxpayer Attitude Survey (CTAS) 2020* (Nov. 2020), https://www.irs.gov/pub/irs-prior/p5296--2021.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	2021	2022
"A little here and there"	9%	10%	9%	8%	7%	10%
"As much as possible"	3%	3%	3%	3%	3%	6%
"Not at all"	88%	85%	87%	87%	88%	84%
"No opinion"	<1%	2%	1%	1%	2%	0%

INTERNAL REVENUE SERV. DATA BOOK, 2022 viii (2023), https://www.irs.gov/pub/irs-pdf/p55b.pdf; INTERNAL REVENUE SERV. DATA BOOK, 2021 (2022) x, https://www.irs.gov/pub/irs-prior/p55b--2022.pdf; INTERNAL REVENUE SERV. DATA BOOK, 2020 x (2021), https://www.irs.gov/pub/irs-prior/p55b--2021.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:

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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-prior/p55b--2019.pdf; INTERNAL REVENUE SERV. DATA BOOK 23 tbl. 9a (2017), https://www.irs.gov/pub/irs-soi/17databk.pdf.

Unfortunately, the 2020 through 2022 IRS Data Books do not report similar figures. *See, e.g.*, INTERNAL REVENUE SERV. DATA BOOK, 2020 (2021), *supra*, at 46-47 tbl. 18. However, the IRS is reporting audit rates after the general 3-year statute of limitations has closed on a tax year. In April 2023, the IRS stated, "[t]he 2018 information is the most recent year we have final audit rate data because it is the most recent tax year for which the statutory period has closed, meaning in most cases no new audits will be started and the audit coverage rates should be final." IRS, *IRS Statement — Examination coverage rates in the 2022 Data Book*, https://www.irs.gov/newsroom/irs-statement-examination-coverage-rates-in-the-2022-data-book.

Another source, Transactional Records Access Clearinghouse (TRAC), 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*, TRAC IRS (last visited July 25, 2023), https://trac.syr.edu/tracirs/latest/641/. More recently, TRAC reported that the odds of a millionaire being audited during 2022 was just 1.1 percent, or 2.8 percent if you include those who received letters classified as a correspondence audit. *IRS Audits Few Millionaires But Targeted Many Low-Income Families in FY 2022*, TRAC IRS (Jan. 4, 2023), https://trac.syr.edu/reports/706/. By TRAC's estimates, this left around 700,000 millionaires with "no scrutiny whatsoever." *Id.* TRAC compares this rate to the 2021 audit rate for millionaires which, according to its calculations, was .41 percent. *Id.* TRAC also calculated audit rates of the lowest-income wage earners: for fiscal year 2022, the IRS audited low-income wage earners at a rate of 12.7 per 1000 returns (1.27%), compared with an audit rate of 2.3 per 1,000 returns (.23%) for everyone else. *Id.*, fig. 2.

A 2020 report by the Treasury Inspector General for Tax Administration found that the IRS was not focusing audit resources optimally, finding "that 47 percent [of the 10,755 returns it examined] were closed with no change to the tax return." 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. 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.* However, according to a March 2021 paper by the National Bureau of Economic Research, "[r]andom audits failed to catch substantial tax evasion

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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.”).

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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
2021	212,251	305,610	96
2022	157,323	273,286	89

INTERNAL REVENUE SERV. DATA BOOK, 2022 (2023), *supra*, at 59 tbl.25; INTERNAL REVENUE SERV. DATA BOOK, 2021 (2022), *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.

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Those comments seem even more relevant now, in light of the major decrease in enforcement actions from 2019 to 2020, and the additional declines in 2021 and 2022. However, the COVID-19 pandemic is an important factor in the 2021 and possibly 2022 drops. The IRS experienced a significant mail backlog due to closures of its processing facilities early in 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 July 23, 2023) (stating, in part, "We're processing tax returns, payments, refunds and correspondence. However, we continue to experience delays. We are working hard to get through the inventory."). Additional IRS funding included in the Inflation Reduction Act of 2022, H.R. 5376, discussed the Introduction to this Supplement, should help improve the situation, if that funding comes through.

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The IRS budget statistics for 2017 through 2023 and all figures—including the 2009 through 2016 figures in the casebook—updated to 2023 dollars are as follows:

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Fiscal Year	IRS Budget (absolute dollars, in thousands)	IRS Budget (2023 dollars, in thousands)
2009	$11,522,598	$16,387,142
2010	$12,146,123	$16,995,136
2011	$12,121,830	$16,442,144
2012	$11,816,696	$15,703,286
2013	$11,198,611	$14,667,072
2014	$11,290,612	$14,551,515
2015	$10,945,000	$14,089,361
2016	$11,235,000	$14,282,498
2017	$11,235,000	$13,984,577
2018	$11,158,703	$13,558,446
2019	$11,302,554	$13,488,819
2020	$11,510,054	$13,569,056
2021	$11,919,054	$13,420,713
2022	$11,919,054	$12,426,272
2023	$12,319,054	$12,319,054

2023 IRS Pub. 5530, *Program Summary by Budget Activity* 2 (2023), https://www.irs.gov/pub/irs-pdf/p5530.pdf (reporting absolute dollar figures for 2023; also reporting that the IRS's requested budget for 2024 is $14,136,585); 2022 IRS Pub. 5530, *Program Summary by Budget Activity* 2 (2022), https://www.irs.gov/pub/irs-prior/p5530--2022.pdf (reporting absolute dollar figures for 2022); 2021 IRS Pub. 5530, *Program Summary by Budget Activity* (2021), https://www.irs.gov/pub/irs-prior/p5530--2021.pdf (reporting absolute dollar figures for 2020 and 2021); 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://home.treasury.gov/system/files/266/16.-IRS-FY-2019-BIB-FY2019.pdf (reporting absolute dollar figures for 2017 and 2018). Inflation calculations were performed using *U.S. Inflation Calculator*, http://www.usinflationcalculator.com (last visited July 25, 2023).

The IRS budget did increase somewhat in absolute dollars most years after 2018, after staying steady or dropping since 2016. However, as recently as 2022, the IRS budget had not reached the 2010 level, even in absolute dollars. In 2023, it has just exceeded that level but remains much lower in inflation-adjusted dollars. As discussed in the Introduction to this Supplement, in August of 2022, Congress passed the Inflation Reduction Act, increasing IRS funding, but, in 2023, voted to reduce the additional funding. For further reading on the impact of IRS funding, see C. Eugene Steuerle, *Cutting IRS Resources and Punishing Honest Taxpayers*, TAX POL'Y CTR. (June 27, 2023), https://www.taxpolicycenter.org/taxvox/cutting-irs-resources-and-punishing-honest-taxpayers.

Congress has also given the agency significant additional responsibilities since 2010. 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

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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 rollout of the payments was not 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.

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> 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.*

An interim report on the 2022 filing season found that taxpayers continued to experience problems receiving live customer service from the IRS. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Interim Result of the 2022 Filing Season* No. 2022-40-035 (May 2, 2022), https://www.treasury.gov/tigta/auditreports/2022reports/202240035fr.pdf. The Interim Report also said that the IRS continued to have a backlog of unprocessed returns from the previous year: "More than 8.4 million individual tax returns and transactions remained to be processed at the end of Calendar Year 2021. . . . This represents a 33 percent increase in the number of unprocessed tax returns and a 61 percent increase in the number of amended tax returns that remained to be processed." *Id*. The IRS went so far as to reassign IRS examination agents to help break through the backlog. Jonathan Curry, *IRS Reshuffles Staff to Clear 'Unprecedented' Backlog*, 174 TAX NOTES FED. 872 (Feb. 7, 2022).

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A report from the National Taxpayer Advocate indicates that metrics for the 2023 filing season improved compared with 2022:

> [D]uring Filing Season (FS) 2023, most taxpayers did not experience any issues, as the IRS's overall operations significantly improved when compared to FS 2022. This was due in no small part to the IRS working through nearly all the backlogged individual original filed returns before starting FS 2023, meaning that for the first time since COVID-19 began, the IRS was not starting the filing season at a deficit with original individual filed returns. However, at the start of the year, it still had a sizable carryover of amended returns, business returns, correspondence, and returns identified with potential errors, all awaiting processing.
>
> As of April 21, 2023, the IRS received 137,144,000 individual income tax returns. Out of these, the IRS processed 134,649,000, or 98 percent, and issued 85,935,000 refunds totaling roughly $236.62 billion. However, as of April 22, 2023, there were still 2.6 million original individual and business paper income tax returns awaiting processing. In addition, there were 5.9 million individual and business electronic and paper-filed income tax returns that the IRS suspended for various reasons (error resolution cases, processing rejects, unpostable returns, and potential identity theft cases), including returns suspended from the previous filing season.

National Taxpayer Advocate, *Review of the 2023 Filing Season*, at 1, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/06/JRC24_SAO_ReviewFiling.pdf.

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As mentioned above, in August 2022, the IRS released new tax gap estimates based on the 2014 through 2016 tax years. *See* 2022 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 2014-2016 (2022)	Net Misreporting Percentage 2011-2013 (2019)	Net Misreporting Percentage 2008-2010 (2016)
"Income subject to substantial information reporting and withholding"	1%	1%	1%
"Income subject to substantial information reporting"	6%	5%	7%
"Income subject to some information reporting"	15%	17%	19%
"Income subject to little or no information reporting"	55%	55%	63%

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Id.; 2019 IRS Pub. 1415, *supra*, at 14 fig 3; IRS, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2008–2010*, at 12 chart 1 (2016), https://www.irs.gov/pub/irs-soi/p1415.pdf.

Note that the top figure in the chart above (1%) is the same as it was in the two prior reports. The net misreporting percentage of 55% for "Income subject to little or no information reporting" is the same as in the previous study. Although most of the numbers do vary over time, the main point remains the same: according to IRS estimates, increased information reporting correlates with greatly reduced noncompliance.

In 2020, former IRS Commissioner Charles Rossotti, a technology expert, 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 focused 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 argued 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 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

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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[.]

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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. The current IRS Commissioner recently noted that "since the IRS released its business modernization plan in 2019, it has received only 57 percent of the funding it requested to implement the plan." Jonathan Curry, *IRS Modernization Has Means but Not Funding, Rettig Says*, 174 TAX NOTES FED. 1903, 1904 (2022).

For a 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.

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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 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

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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.

Id. at 1159.

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 remains 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-

[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*.

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vote-in-an-important-tax-exceptionalism-case-altera-v-commissioner-of-internal-revenue/. On August 2, 2018, the Ninth Circuit substituted Judge Susan Graber for Judge Reinhardt. Ninth Circuit General Order 3.2h, Altera Corp. & 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

[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,

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

Altera filed a petition for certiorari. Altera Corp. v. Comm'r, 941 F.3d 1200 (9th Cir. 2019), *petition for cert. filed* (U.S. Feb. 10, 2020) (No.19-1009). 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."). A representative from the IRS Chief Counsel's Office has expressed surprise at the number of APA challenges filed by taxpayers in the aftermath of *Altera*. Andrew Velarde, *IRS Surprised by APA Challenges After* Altera, 173 TAX NOTES FED. 1182 (2021).

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

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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.

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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:

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> 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

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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

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> 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). Additional information relating to the *CIC Services* decision is included in Chapters 4 and 12 of this Cumulative Supplement.

CIC Services is just one (albeit very important) example of administrative law challenges to tax guidance. Another 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)).

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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).

On appeal, the Sixth Circuit affirmed the Tax Court's decision. Oakbrook Land Holdings, LLC v. Comm'r, 28 F.4th 700 (6th Cir. 2022). The court agreed with the Tax Court that the Treasury Department's statement of purpose for the regulation was adequate, *id*. at 713, and that the Treasury Department need not respond to *all* comments made in response to proposed regulations, only "significant" comments, *id*. at 714. Significant comments are those """that can be thought to challenge a fundamental premise" underlying the proposed agency decision,'" *id*. at 714 (quoting Carlson v. Postal Regul. Comm'n, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting

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MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 765 (D.C. Cir. 2000)). Accordingly, the Sixth Circuit turned to the question of whether the regulations survived *Chevron* deference; namely, whether the regulations reflected a permissible construction of the statute.

In support of its ruling that the regulations were worthy of deference, the court relied on what some commentators call the "legislative reenactment doctrine":

> Bolstering the reasonableness of the [] regulation is the fact that Congress has amended I.R.C. § 170 over thirty times during the past thirty-four years but has not voided Treas. Reg. § 1.170A-14(g)(6)(ii). *See Oakbrook Land Holdings*, 154 T.C. at 199-200, 199 n.5 (cataloguing amendments to § 170). "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561, . . . (1991) (quoting *United States v. Correll*, 389 U.S. 299, 305-06, . . . (1967)). Over three decades of congressional acquiescence to the [] regulation leaves us confident that the regulation is owed our deference under *Chevron*.

Id. at 719. The Supreme Court denied certiorari in 2023. 143 S. Ct. 626 (2023).

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, e.g.*, Green Valley Invs., LLC v. Comm'r, 2022 U.S. Tax Ct. LEXIS 643 (ruling that Notice 2017-10, relating to reportable transaction penalties under Code section 6662A, was issued in violation of the APA, relieving the taxpayers of penalty liability); Mann Construction Inc. v. United States, 27 F.4th 1138 (6th Cir. 2022) (ruling that Notice relating to listed transaction reporting penalties was invalid because the IRS failed to follow APA procedures when issuing the Notice); Hewitt v. Commissioner, 21 F.4th 1336 (4th Cir. 2021) (invalidating decades-old regulations concerning conservation easements because the IRS failed to comply with the APA when issuing the regulations); Liberty Glob., Inc. v. United States, 2022 U.S. Dist. LEXIS 62482 (D. Colo. 2022) (granting taxpayer's motion for summary judgment by finding temporary regulations relating to the effective date of section 245A invalid for failure to comply with the APA). For a discussion of recent APA challenges, see Leslie Book, *Tax Court Denies Reconsideration in Green Valley and More District Courts Invalidate Listing Notices*, PROCEDURALLY TAXING (Feb. 7, 2023), https://procedurallytaxing.com/tax-court-denies-reconsideration-in-green-valley-and-more-

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district-courts-invalidate-listing-notices/. *See also* 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*, 531 F. Supp. 3d 346 (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 taxpayer "lack[ed] standing to seek injunctive relief" and "fail[ed] to state a claim under the RFA." *Silver*, 531 F. Supp. 3d at 349. The D.C. Circuit Court of Appeals affirmed the District Court, Silver v. U.S., 2022 U.S. App. LEXIS 33613, and the Supreme Court denied certiorari, Monte Silver, Ltd. v. IRS, 2023 U.S. LEXIS 1849.

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*

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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 States*, 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).

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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

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> 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).

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

Stephanie Cumings, *Gorsuch Dissent Could Signal Beginning of the End for* Chevron, 162 TAX NOTES 1235, 1235 (2019). However, it is worth noting, as discussed briefly below, that in June 2019, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court declined to overrule *Auer* deference, partly for reasons of *stare decisis*. *Id.* at 2406.

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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

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> 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 2023. The current version is Revenue Procedure 2023-1, 2023-1 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 2023 version.

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Revenue Procedure 2017-2, 2017-1 I.R.B. 106, cited in the casebook, was superseded in 2018 through 2023, without significant revision. *See* Rev. Proc. 2023-2, 2023-1 I.R.B. 120.

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Revenue Procedure 2017-3, 2017-1 I.R.B. 130, cited in the casebook, similarly was superseded in 2018 through 2023, without material revisions. *See* Rev. Proc. 2023-3, 2023 IRB LEXIS 6.

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In January of 2022 the IRS announced a pilot "fast-track" letter ruling request procedure applicable to corporate taxpayers. *See* Rev. Proc. 2022-10, 2022-06 I.R.B. 473. The program's goal is to process ruling requests within 12 weeks. *See* Sec. 3.02. Taxpayers wishing to avail themselves of the process must agree to a pre-submission conference with the IRS. Before the conference, the taxpayer must provide a statement explaining the need for quick guidance and listing any facts that could impede the fast-track process. The taxpayer is also expected to submit a draft letter ruling. *See* Sec. 4. The fast-track process is intended to replace requests for expedited review for those letter ruling requests subject to the new procedures. *See* Sec. 5.

According to an IRS official, the new process is working well and, thus far, the IRS has not rejected any requests for fast-track treatment. Chandra Wallace, *IRS Fast-Track Program on Track to Issue Its First Letter Ruling*, 175 TAX NOTES FED. 941 (2022). The IRS is reportedly considering expanding the process beyond corporate taxpayers to cover ruling requests relating to employee benefits, exempt organizations, and employment taxes. Fred Stokeld, *Fast-Tracking of Letter Ruling Requests Is 'Hot Topic' at IRS*, 174 TAX NOTES FED. 896 (2022).

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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 in 2019 to a Form 1040 that is two 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 had only three schedules, which taxpayers used to report sources of income that were 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. Subsequent Forms 1040, including the 2022 version, are similar to the 2019 version, containing 2 pages. *See* IRS, FORM 1040 (2022), https://www.irs.gov/pub/irs-pdf/f1040.pdf (last visited July 30, 2023).

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-prior/i1040gi--2020.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. The deadlines in the 2021 filing season returned to their normal dates.

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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

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(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 Treasury Department finalized in 2023 regulations incorporating the amendments to section 6011(e). Treas. Reg. § 301.6011-2(c), T.D. 9972, 88 Fed. Reg. 11754.

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,

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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 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

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> 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 Federal Claims 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), aff'd 28 F.4th 233 (2022). *See also* Crispino v. United States, 2021 U.S. Dist. LEXIS 139086 (D.N.J.), *16-17 (finding regulation § 301.7502-1(e)(2)(i) valid under *Chevron*). For a discussion of the *Baldwin* line of cases, *see* Frank G. Colella, *'But I Mailed It'* – Crispino *Upholds IRS Mailbox Rule Regulation*, 173 TAX NOTES FED. 1479 (Dec. 13, 2021).

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In a more recent case, the Fourth Circuit in *Pond v. United States*, 69 F.4th 155 (4th Cir. 2023), 2023 U.S. App. LEXIS 13129, also addressed the interaction between the common law mailbox rule and section 7502. The taxpayer in *Pond* mailed refund claims for 2012 and 2013 in the same envelope using first-class mail. The IRS processed the 2012 claim but alleged that it never received the 2013 claim. When the taxpayer filed a refund suit, the IRS moved to dismiss the suit for failure to timely file a refund claim. In response, Pond claimed that he was entitled to a presumption of delivery under the common law mailbox rule and that he should be entitled to prove actual delivery using extrinsic evidence. *Id*. at 161.

On the first question, the court concluded that Code section 7502 replaced the common law mailbox rule when it comes to the question of whether a document was delivered. *Id*. at 164. According to the court, "For taxpayers, the common-law rule has been supplanted by a statutory one. And the statutory mailbox rule is narrower than the common-law rule: it only protects those who send their documents by registered or certified mail. Because Pond does not meet that statutory requirement, he cannot rely on a presumption of delivery to show timely filing." *Id*. at 161. Unlike *Baldwin*, however, the Fourth Circuit refused to give deference to the regulations promulgated under section 7502. In a footnote, the court stated: "The government asks that we defer to [the section 7502 regulations]. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, ... But we need not give the agency's interpretation of § 7502 any deference, because the statute is not "genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2d 841 (2019)." *Id*. at 163 n.8.

The Fourth Circuit went on to hold that even though the taxpayer "cannot rely on a *presumption* of delivery", "[h]e can still proceed if he has plausibly alleged that his claim was physically delivered to the IRS." *Id*. at 165-166. On the facts before it, the Fourth Circuit concluded that Pond did adequately allege physical delivery:

> First, Pond alleged that the envelope containing the 2013 claim "was postmarked with a date of July 18, 2017[.]" J.A. 7. The fact that the document was postmarked for delivery—which we accept as true—suggests that the document made it to its destination. This is the very idea underlying the presumptions of delivery: we can expect the U.S. Postal Service to do its job with some reliability. But if we allowed an allegation of a postmark alone to suffice for showing physical delivery, then that would effectively afford a "backdoor" presumption of delivery. So Pond must show more.
>
> Second, Pond alleged that his 2012 and 2013 claims were sent in a single envelope. The 2012 claim was paid. A reasonable inference from the fact that the IRS paid Pond's 2012 claim is that they timely received it . . . . If both the 2012 claim and the 2013 claim were in the same envelope, then another reasonable inference is that [the IRS] received Pond's 2013 claim at the same time.
>
> * * *
>
> Third, Pond alleged that the letter he received from the IRS denying his 2013 claim listed the "date of claims received" as July 17, 2017. J.A. 11. We cannot ignore—in deciding whether Pond plausibly alleged timely filing—that the IRS itself prepared a document listing a timely date as the "[d]ate of claims received." J.A. 84.

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Id. at 166-167. In light of these allegations, the Fourth Circuit remanded the case back to the District Court to consider, among other issues, whether the claim was timely filed. *Id*. at 168.

Would the Ninth Circuit in *Baldwin* also have been willing to consider extrinsic evidence of actual delivery? According to one commentator, the answer is unclear:

> The [section 7502 Eds.] regulations state that the presumption of delivery allowed by the designated methods are the exclusive means to establish prima facie evidence of delivery, *absent direct proof of actual delivery*. Does the *Pond* decision mean that direct proof of actual delivery can be established, even in those jurisdictions where the regulations have been held to be valid, by using evidence similar to that in *Pond* supporting an inference that delivery was made in accordance with standard postal delivery practices? Or does direct proof of actual delivery require more, such as evidence directly showing the document was mailed and received, rather than facts subject to more than one interpretation? In reaching its conclusion, the Fourth Circuit discusses only the application of the language in Section 7502, without reference to the regulations it has discarded, leaving the reach of its decision ambiguous. Whether the *Pond* opinion creates a crack in the wall of *Baldwin* that would allow taxpayers to present extrinsic evidence supported by a presumption that standard delivery practices occurred remains to be seen.

Marilyn Ames, *Fourth Circuit Adds Twist to Issue of Proving Mailing of Documents to the IRS*, PROCEDURALLY TAXING (June 14, 2023), https://procedurallytaxing.com/fourth-circuit-adds-twist-to-issue-of-proving-mailing-of-documents-to-the-irs/.

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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.*

In 2020, 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 the 2019 tax year and subsequent years. *See* IRS, INSTRUCTIONS FOR FORM 1040-X, AMENDED U.S. INDIVIDUAL INCOME TAX RETURN (Rev. Jan. 2023), https://www.irs.gov/pub/irs-pdf/i1040x.pdf. Taxpayers 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 were in a virtual format. *See*, *e.g.*, De Lon 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. An update dated Jan. 31, 2023 states "Although the PFI ended mid-July, the IRS continues to put people first. While beginning to resume its critical tax administration responsibilities, the IRS will also factor in the wide-ranging impacts of COVID-19 on taxpayers. Additionally, the health and safety of taxpayers and IRS employees remains an important consideration for the Service." *People First Initiative – Providing Relief to Taxpayers*, IRS.GOV (Jan. 31, 2023), https://www.irs.gov/newsroom/people-first-initiative-providing-relief-to-taxpayers (last visited July 30, 2023).

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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") included 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 stated 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

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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 amended 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).

The amounts collected via the IRS's whistleblower program have been declining over time. IRS, FISCAL YEAR 2020 ANNUAL REPORT IRS WHISTLEBLOWER OFFICE, at 13, https://www.irs.gov/pub/irs-prior/p5241--2020.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 4. The decline may have been 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).

During fiscal year 2021, the IRS collected only $245 million in unpaid taxes, penalties, and interest—approximately $227 million less than in 2020. The IRS paid $36 million to 179 whistleblowers in fiscal year 2021. IRS, FISCAL YEAR 2021 ANNUAL REPORT IRS WHISTLEBLOWER OFFICE, at 4, https://www.irs.gov/pub/irs-prior/p5241--2021.pdf. For fiscal year 2022:

> [T]he IRS paid whistleblowers 132 awards totaling $37.8 million from proceeds collected of $172.7 million. The total dollar amount of awards paid increased from FY 2021 when $36.1 million in awards were paid. The total number of awards paid in FY 2022, however, decreased from 179 in FY 2021 to 132 in FY 2022. Awards paid as a percentage of proceeds collected increased from 14.7% in FY 2021 to 21.9% in FY 2022.

IRS, FISCAL YEAR 2022 ANNUAL REPORT IRS WHISTLEBLOWER OFFICE, at 4, https://www.irs.gov/pub/irs-pdf/p5241.pdf. The following graph provides a 10-year comparison of the number and dollar amounts of whistleblower awards the IRS paid.

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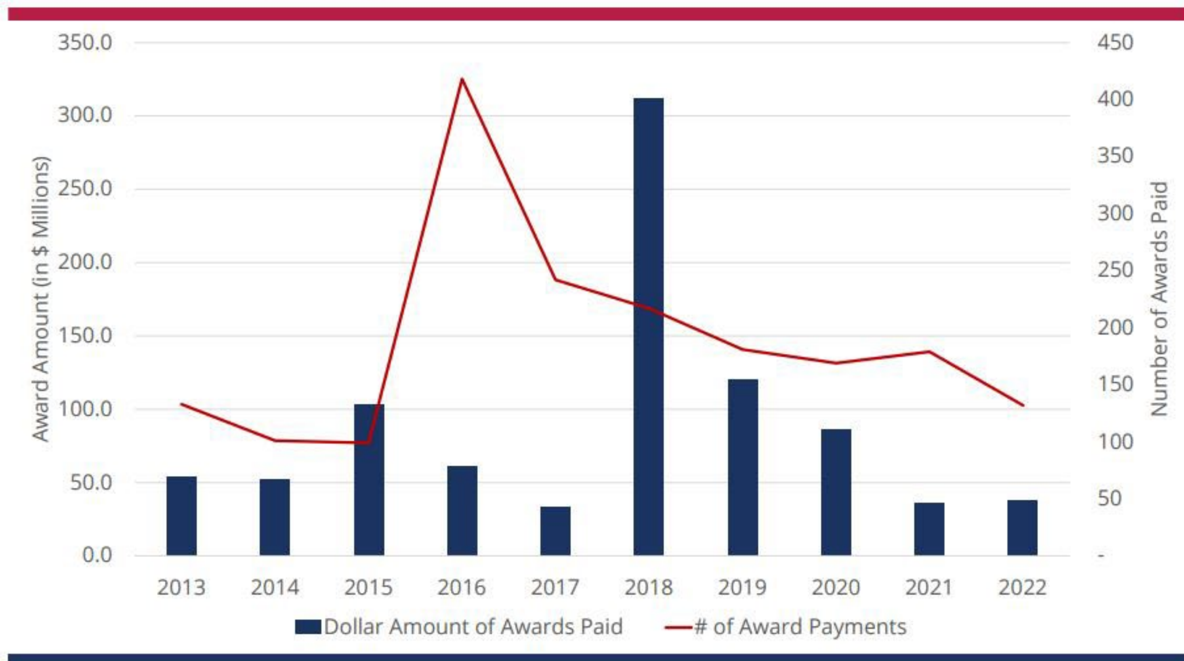

Id. at 21 fig. 3.

In *Lissack v. Commissioner*, 157 T.C. No. 5, 2021 U.S. Tax Ct. LEXIS 58 (2021), a whistleblower petitioned to the Tax Court following a denial by the IRS Whistleblower Office. In deciding the IRS's motion for summary judgment and Mr. Lissack's cross-motion for partial summary judgment, the Tax Court applied an abuse-of-discretion standard, observing that the usual "summary judgment standard 'is not generally apt' when reviewing whistleblower award determinations because we 'confine ourselves to the administrative record to decide whether there has been an abuse of discretion.'" *Id.* at *6 (quoting Van Bemmelen v. Commissioner, 155 T.C. 64, 78 (2020)).

The noncompliance Mr. Lissack disclosed to the IRS about a group of entities the court termed "the Target"—the failure to report income—did not lead to an adjustment. However, during the process of examining Mr. Lissack's claim, the IRS agent determined that the Target had reported a large, erroneous bad debt deduction. *Id.* at *2-5. The IRS denied Lissack's whistleblower claim "because the adjustment the IRS made was unrelated to the information he had supplied". Lissack argued that "'Congress did not intend to limit awards directly to the issues that the whistleblower provided information on'" and that the relevant portion of Treasury regulations are invalid. *Id.* at *12. Citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Tax Court disagreed, stating that "the regulatory provisions at issue, taken together, are not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at *20. Ultimately, the Tax Court ruled in favor of the IRS, upholding the Whistleblower Office's denial. *Id.* at *25.

On appeal, the D.C. Circuit Court of Appeals ruled that the Tax Court had jurisdiction to review the whistleblower's appeal of the denial of his claim. Lissack v. Comm'r, 68 F.4th 1312,

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1321 (D.C. Cir. 2023). In doing so, the court rejected the Government's argument that, because the IRS did not collect any tax based on information provided by Lissack, the denial was not reviewable. The court noted that the IRS had conducted an audit of the Target based on Lissack's claim. *Id*. at 1321. According to the court, "the statute does not require a whistleblower to establish a meritorious claim to an award before the Tax Court may exercise jurisdiction to review the IRS's determination on that claim." *Id*.

The D.C. Circuit ultimately ruled in favor of the Government, however, finding that Treasury regulations that mandate "awards only to whistleblowers who identify underpayments and provide information that advances to some substantial degree the IRS's recovery of those underpayments" were valid. *Id*. at 1324. According to the D.C. Circuit:

> Lissack defends his [] approach, arguing that he provided "valuable information" by informing the IRS that the [Target] taxpayers "are the type of taxpayers to misstate their tax liability generally, and debt in particular." Appellant's Br. 10. But there is "no statutory requirement that [the IRS] follow such an approach." *Clean Air Project*, 891 F.3d at 1051. Rather, there is ample reason to doubt that Congress meant to entitle whistleblowers to substantial awards just for raising plausible but meritless concerns about taxpayers who, on investigation by the IRS, turn out to be noncompliant in some other, unrelated way. Such a regime likely would encourage whistleblowers to flyspeck major taxpayers, identifying any plausible underpayment in the hope of triggering an examination yielding some other, major adjustment. The IRS approach, in contrast, calibrates mandatory awards to the fruits of the particular IRS actions that the whistleblower's information substantially assists.

Id.

It is worth noting that, in 2021, Congress introduced a bipartisan bill, the IRS Whistleblower Program Improvement Act of 2021, to change the standard of review to *de novo*. Geoff Schweller, *Advocates Argue for De Novo Review of Tax Whistleblower Cases*, WHISTLEBLOWER NETWORK NEWS (Apr. 26, 2022), https://whistleblowersblog.org/corporate-whistleblowers/tax-whistleblowers/advocates-argue-for-de-novo-review-of-tax-whistleblower-cases/.

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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 multiple sets of final and proposed regulations that seek to clarify the scope of the "BBA" (Bipartisan Budget Act) audit regime. *See*, *e.g.*, T.D. 9844, 84 Fed. Reg. 6468 (Feb. 27, 2019) (amending § 301.6222-1 relating to consistency requirements, and § 301.6241-1 relating to calculating the imputed underpayment).

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Reports indicate that BBA audits began in 2019. Kristen A. Parillo, *A Look Ahead: More BBA Audits, More Problems*, 174 TAX NOTES FED. 163 (Jan. 10, 2022). According to the Treasury Inspector General for Tax Administration, through the end of 2021, more than three-quarters of partnership audits carried out under the BBA rules have resulted in no changes or adjustments. TIGTA, *Centralized Partnership Audit Regime Rules Have Been Implemented; However, Initial No-Change Rates Are High and Measurable Goals Have Not Been Established*, Rep. No. 2022-30-020, at 5 (Mar. 17, 2022), https://www.treasury.gov/tigta/auditreports/2022reports/202230020fr.pdf (also reporting that, during the same time period, the no-change rate for partnership audits outside the BBA rules was only 50 percent compared with 78 percent for BBA audits).

To assist taxpayers to navigate the new regime, 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 July 23, 2023). It includes a link to a helpful flowchart illustrating how the procedures operate. IRS, BIPARTISAN BUDGET ACT (BBA) ROADMAP FOR TAXPAYERS, https://www.irs.gov/pub/irs-pdf/p5388.pdf.

For those interested in an in-depth analysis of the new regime, see, *e.g.*, Matthew Lay, *Reporting Consequences of Paying Taxes at the Partnership Level*, 175 TAX NOTES FED. 859 (May 9, 2022); Brad Kay & Robert Honigman, *Uncertainty in Partnership Tax Items After the BBA*, 172 TAX NOTES FED. 723 (Aug. 2, 2021); 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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In 2020, former IRS Commissioner Charles Rossotti 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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Chapter 4

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A recent U.S. Supreme Court opinion—an important victory for the IRS—examined the notice requirement in Code section 7609, which applies to third-party summonses. In *Polselli v. IRS*, 143 S. Ct. 1231 (2023), the IRS had not provided notice to certain third parties of summonses of their bank records. *Id.* at 1236. The issue was whether an exception to the notice requirement applied. (Note that the notice exception applies in summons issued in *collections* cases, not to investigations relating to the assessment of tax liability, the primary subject of Chapter 4.) In *Polselli*, the Court held for the IRS, "reject[ing] petitioners' argument that the exception to the notice requirement in §7609(c)(2)(D)(i) applies only if the *delinquent taxpayer* has a legal interest in the accounts or records summoned by the IRS." *Id.* at 1233 (emphasis added). (In this case, the records related to bank accounts owned not by the allegedly "delinquent taxpayer," Mr. Polselli, but by his wife and other entities.)

Polselli, which affirmed the Sixth Circuit's decision, resolved a circuit split. The Ninth Circuit had previously held that, in order for the exception to the notice requirement to apply, the "taxpayer [must] have 'some legal interest or title in the object of the summons.'" *Id*. at 1236 (citing *Ip v. United States*, 205 F. 3d 1168, 1175 (9th Cir. 2000). In this case, the "legal interest" test would have required that Polselli have an interest in the bank accounts the IRS sought to examine. A unanimous Supreme Court rejected the "legal interest" test, finding no support for it in the statutory language. *Id*. at 1237. That meant that the IRS had not been required to provide notice to Mrs. Polselli and the other third parties when it issued the third-party summonses.

For a helpful discussion of the Sixth Circuit and Supreme Court opinions, see Leslie Book, Polselli v US*: Circuit Split on Notice Rules for Summonses to Aid Collection*, PROCEDURALLY TAXING (Jan. 20, 2022), https://procedurallytaxing.com/polselli-v-us-circuit-split-on-notice-rules-for-summonses-to-aid-collection/; Leslie Book, *Supreme Court Finds for Government in* Polselli *Summons Litigation*, PROCEDURALLY TAXING (May 22, 2023), https://procedurallytaxing.com/supreme-court-finds-for-government-in-polselli-summons-litigation/.

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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

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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); *see also* United States v. Vaught, 2021 U.S. Dist. LEXIS 154863 (D. Idaho, Aug. 16, 2021). 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. For further reading about the *J.B.* and *Vaught* cases, see Leslie Book, *District Finds That IRS Failed to Adequately Notify Taxpayer Before It Contacted Third Party*, PROCEDURALLY TAXING (Aug. 30, 2021), https://procedurallytaxing.com/?s=failed+to+adequately+notify+taxpayer.

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.

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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)). More recently, the IRS issued interim guidance to Appeals employees notifying them that they should not make any third party contacts. IRS, *Interim Guidance – Appeals Policy on Third Party Contacts*, AP-08-0122-0001, https://www.irs.gov/pub/foia/ig/appeals/ap-08-0122-0001.pdf. According to the guidance, "[b]ecause third-party contacts are deemed investigative actions and because Appeals employees do not perform investigative actions, all third-party contact procedures, . . . will be obsoleted." *Id.*

A proposal included in President Biden's Fiscal Year 2022 budget request that would have expanded the obligation of financial institutions to report transactions made by owners drew significant controversy. As described in the General Explanation of the Administration's Fiscal Year 2022 Revenue Proposal:

> This proposal would create a comprehensive financial account information reporting regime. Financial institutions would report data on financial accounts in an information return. The annual return will report gross inflows and outflows with a breakdown for physical cash, transactions with a foreign account, and transfers to and from another account with the same owner. This requirement would apply to all business and personal accounts from financial institutions, including bank, loan, and investment accounts, with the exception of accounts below a low de minimis gross flow threshold of $600 or fair market value of $600.

Id. at 88, https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf#page=94. According to the General Explanation, the purpose of the new reporting requirement was to "increase the visibility of gross receipts and deductible expenses to the IRS." *Id*.

The proposal was met with skepticism from both financial institutions and the general public. *See* Joseph J. Thorndike, *The Bank Reporting Plan and Fear of an 'Inquisitorial' IRS*, 173 TAX NOTES FED. 445, 445 (Oct. 25, 2021) (reporting that 67 percent of Americans polled opposed the proposal). Shortly after the proposal was released, it was revised to increase the reporting threshold from $600 to $10,000. The revision would also exclude wages and government benefits when determining the $10,000 threshold. *See* Treasury Department, *Fact Sheet: Tax Compliance Proposals Will Improve Tax Fairness While Protecting Taxpayer Privacy*, https://home.treasury.gov/news/press-releases/jy0415. According to the Treasury Department, audit rates for those making less than $400,000 would not increase above current levels as a result of the proposal. It is estimated to generate $700 billion in additional tax collections over a decade. *Id*. The proposal was not included as part of the Inflation Reduction Act or the Build Back Better Act and has not been included in subsequent legislative packages.

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For further details on the reporting proposal see Marie Sapirie, *The Financial Status Audit Prohibition and Bank Info Reporting*, 173 TAX NOTES FED. 615 (Nov. 1, 2021); CONG. RSCH. SERV., *The Proposed IRS Bank Reporting Proposal: Frequently Asked Questions* (Oct. 20, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11772.

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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*

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> *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]

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> 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's petition to the U.S. Supreme Court to review the Fifth Circuit's earlier decision was denied. 142 S. Ct. 87 (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 began 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; *see also* In the Matter of the Tax Liabilities of John Does, No. 2:22-cv-05715 (C.D. Cal. 2022) (involving a John Doe summons to Ox Labs Inc. and SFOX). For further reading about the "Kraken" case, see Megan L. Brackney & Jas Singh, *John Does Summonses, Cryptocurrency, and the Taxpayer First Act*, 173 TAX NOTES FED. 327 (Oct. 18, 2021).

The IRS's efforts to obtain information through a John Doe summons from Coinbase have hit a roadblock. The IRS filed a John Doe summons against Coinbase in 2016 seeking information about clients who had engaged in transactions through the site in the amount of $20,000 or more. Several years later, one of Coinbase's clients, Harper, received a letter from the IRS informing him that it had received information about his accounts and that he might face

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criminal or civil consequences for not reporting his cryptocurrency transactions correctly. Harper filed a suit against the IRS claiming that it had obtained information about him in violation of his Fourth and Fifth Amendment rights and in violation of Code section 7609(f). Harper v. Rettig, 2021 U.S. Dist. LEXIS 53878 (Mar. 23, 2021). The District Court dismissed Harper's claims, ruling that the Anti-Injunction Act, which bars lawsuits that seek to challenge the assessment and collection of tax, prevented the court from obtaining jurisdiction.

On appeal, the First Circuit reversed the District Court. Harper v. Rettig, 46 F.4th 1 (1st Cir. 2022). Relying on the Supreme Court's recent holding in *CIC Services LLC v. IRS*, 141 S. Ct. 1582 (2021), which is discussed in the updates to Chapter 2 and 12 of this Supplement, the First Circuit concluded that the Anti-Injunction Act does not apply to challenges surrounding information gathering, only to cases involving collection and assessment of tax. According to the court:

> Despite the seemingly clear demarcation between information gathering, on the one hand, and assessment and collection, on the other, the IRS insists that the *purpose* of appellant's suit is restraining the assessment or collection of taxes, thereby bringing it within the scope of the Anti-Injunction Act. Invoking language from *CIC Services*, the IRS contends that "'the substance of the suit' is directed at the alleged harm of having the IRS *retain and use* information about [appellant]'s virtual currency transactions for use in determining [his] compliance with his income tax obligations," and "[t]he 'relief requested' is the expungement of information that would allow the IRS to do so." (Emphasis added.) *See CIC Servs.*, 141 S. Ct. at 1589 . . . .
>
> As the Court observed in *CIC Services*, however, "[t]he Anti-Injunction Act kicks in when the target of a requested injunction is a tax obligation—or stated in the Act's language, when that injunction runs against the 'collection or assessment of [a] tax.'" *Id.* at 1590. Here, the target of the requested injunction is the IRS's continued retention of appellant's personal financial information, which appellant alleges the IRS acquired in violation of the Constitution and 26 U.S.C. § 7609(f). Contrary to the IRS's suggestion that appellant's suit is "a 'preemptive' suit to foreclose tax liability" (which would be barred by the Anti-Injunction Act), this suit, like the suit at issue in *CIC Services,* "falls outside the Anti-Injunction Act because the injunction it requests does not run against a tax at all." *Id.* at 1593. Rather, "[t]he suit contests, and seeks relief from, a separate legal" wrong—the allegedly unlawful acquisition and retention of appellant's financial records. *Id.* Like the plaintiff in *CIC Services*, appellant "stands nowhere near the cusp of tax liability," *id.* at 1591, and "the dispute is [not] about a tax rule," where "the sole recourse" in light of the Anti-Injunction Act "is to pay the tax and seek a refund," *id.* at 1593. Consequently, the Anti-Injunction Act does not bar appellant's suit and the district court's judgment of dismissal . . . must be vacated.

Harper v. Rettig, 46 F.4th 1, 8-9. The court remanded the case to the District Court to consider multiple claims, including that the "IRS's acquisition of his Coinbase records through a John Doe summons was an unreasonable seizure and search of his private papers (in which he held

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both property and privacy interests) that violated the Fourth Amendment" and that "because he possesses both property and liberty interests in his Coinbase records, the Due Process Clause of the Fifth Amendment afforded him notice and an opportunity to be heard before the IRS attempted to deprive him of those interests." Harper v. Rettig, No. 1:20-cv-00771-JL, 2023 U.S. Dist. LEXIS 92295, *9 (D.N.H. May 26, 2023). After extensive analysis, the District Court concluded that the taxpayer "did not have a protectable Fourth Amendment interest in the account records and information produced by Coinbase in response to the IRS summons," *id*. at *18-19, and "Harper did not have a reasonable expectation of privacy in Coinbase's records of his account and accordingly does not have a protectable liberty interest for purposes of the Due Process Clause of the Fifth Amendment," *id*. at *24-25.

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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*, 390 F. Supp. 3d 470 (S.D.N.Y 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 480. 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 475.

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"). For further reading on privileges in general, see Kip Dellinger, *Protecting a Taxpayer's Privileges*, THE TAX ADVISER, Aug. 2022, at 36; Joshua D. Smeltzer, David Gair & Larry Jones, *Guidelines for Protecting Privilege in Tax Cases*, J. TAX PRAC. & PROC., Summer 2021.

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As noted in the casebook, the attorney-client privilege applies only to legal advice, not advice relating to the preparation of a tax return or to business or investment advice. A document sought by the IRS may have been created to both (1) assist in preparing the client's return or to provide business advice (neither of which is protected by privilege) and (2) provide legal advice (which is protected by privilege). A recent case involving a grand jury subpoena sought to create a consistent standard for determining when the attorney-client privilege applies to dual-purpose communications that implicate both legal and tax/business concerns. In *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021), an unnamed company received a grand jury subpoena seeking a copy of advice given by a law firm relating to the company's ownership of cryptocurrency. As explained in the opinion, courts apply one of two tests to determine whether dual-purpose documents are subject to the attorney-client privilege:

> When dual-purpose communications are involved, there are two potential tests that courts have adopted: the "primary purpose" test and the "because of" test. Under the "primary purpose" test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. *See In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("We consider whether the predominant purpose of the communication is to render or solicit legal advice."). The natural implication of this inquiry is that a dual-purpose communication can only have a single "primary" purpose.
>
> On the other hand, the "because of" test—which typically applies in the work-product context—"does not consider whether litigation was a primary or secondary motive behind the creation of a document." *In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004). It instead "considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." *Id.* (cleaned up). It is a broader test than the "primary purpose" test because it looks only at causal connection, and not a "primary" reason. *See Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786JSW(EMC), . . . (N.D. Cal. Aug. 23, 2004). In the attorney-client privilege context, the "because of" test might thus ask whether a dual-purpose communication was made "because of" the need to give or receive legal advice.

Id. at 1091-92.

The Ninth Circuit refused to adopt the "because of" test in the context of the attorney-client privilege:

> [T]he attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United*

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> *States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). Unlike the work-product doctrine, the privilege is not necessarily tied to any adversarial process, and it is not so much concerned with the fairness of litigation as it is with providing a sanctuary for candid communication about any legal matter, not just impending litigation. Applying a broader "because of" test to attorney-client privilege might harm our adversarial system if parties try to withhold key documents as privileged by claiming that they were created "because of" litigation concerns. Indeed, it would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation. Because of these different aims, it makes sense to apply different tests for the attorney-client privilege and the work-product doctrine.

Id. at 1093-94.

Having clarified that the primary purpose test applied, the Ninth Circuit declined to flesh out *how* it applied; that is, whether providing legal advice was *a* primary purpose or *the* primary purpose. The Ninth Circuit cited *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 410 U.S. App. D.C. 382 (D.C. Cir. 2014), which had adopted the test of "a primary purpose," sometimes called the "significant purpose" test:

> In the eyes of the *Kellogg* court, "the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Id.* Even though it theoretically sounds easy to isolate "the primary or predominant" purpose of a communication, the exercise can quickly become messy in practice. That was the case in *Kellogg* in which the company conducted an internal investigation for both legal (*e.g.*, to obtain legal advice) *and* business reasons (*e.g.*, to comply with regulatory requirements and corporate policy). A test that focuses on *a* primary purpose instead of *the* primary purpose would save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes.
>
> We see the merits of the reasoning in *Kellogg*. But we see no need to adopt that reasoning in this case. None of our other sister circuits have openly embraced *Kellogg* yet. We also recognize that *Kellogg* dealt with the very specific context of corporate internal investigations, and its reasoning does not apply with equal force in the tax context. Nor are we persuaded that the facts here require us to reach the *Kellogg* question.

In re Grand Jury, at 1094-95 (footnotes omitted). The Ninth Circuit therefore saw no need to decide the "a" versus "the" issue.

The Supreme Court accepted certiorari in the case. 142 S. Ct. 2673 (2022). At oral argument, the Justices expressed skepticism about whether adopting a "primary purpose" or "significant purpose" test made any difference. According to Justice Kagan, "if it ain't broke, don't fix it." Mary Katherine Browne, *Supreme Court Tosses Case on Privilege of Tax Return*

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Talks, 178 TAX NOTES FED. 755 (Jan. 30, 2023); *see also* Kimberly Strawbridge Robinson, *Justices Have No Appetite for New Attorney Privilege Test*, DAILY TAX REP. (BLOOMBERG LAW), Jan. 12, 2023. After hearing arguments from the parties and reviewing amici briefs, the Court took the unusual step of dismissing the case as improvidently granted. It did not include an explanation for doing so. 143 S. Ct. 543 (2023). When such a determination takes place, the case is treated as if certiorari had never been granted in the first place.

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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:

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> 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).

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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 initial appointment in May of 2020. William Hoffman, *Keyso Named Chief of Independent Offices of Appeals*, 167 TAX NOTES FED. 1474 (2020); *see also* IRS Publication 6511, *Fiscal Year 2023 Independent Office of Appeals Focus Guide*, https://www.irs.gov/pub/irs-pdf/p6511.pdf (describing current organizational priorities for Appeals Office). 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. The current structure of the Appeals Office can be found at https://www.irs.gov/pub/irs-utl/appeals-org-structure.pdf.

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 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 IRS permits Appeals

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employees to transfer files to taxpayers via email. *See* Interim Guidance, AP-08-1221-0028 (Dec. 21, 2021), https://www.irs.gov/pub/foia/ig/appeals/ap-08-1221-0028.pdf.

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 was not 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. Legislation that would grant taxpayers the right to an Appeal conference without exam or Chief Counsel participation was introduced but not enacted. Small Business Taxpayer Bill of Rights Act of 2021, S. 1656, 117th Cong. § 7 (2021). A similar initiative limited to taxpayers in the Large Business and International Division that allows employees from the examination division and the Chief Counsel's office to participate in meetings involving Appeals employees and the taxpayer remains in existence. IRS, *Appeals Team Case Leader Conferencing Initiative: Summary of Findings and Next Steps* (Sept. 2021), https://www.irs.gov/pub/irs-utl/atcl_update.pdf.

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

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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 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,

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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. 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).

In September of 2022, the Treasury Department released proposed regulations under section 7803(e) that implement provisions within the Taxpayer First Act relating to Appeals

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access. Prop. Treas. Reg. § 301.7803, REG-125693-19. The regulations set out in detail the types of controversies Appeals handles, exceptions to the availability of Appeals consideration, and requirements the taxpayer must meet before Appeals will consider a case. The regulations identify 24 types of cases it will not consider, including cases involving frivolous positions, whistleblower cases, and cases designated for litigation. Prop. Reg. § 301.7803-2(c). The proposed regulations also exclude from Appeals consideration cases in which a taxpayer claims a Code provision is unconstitutional or claims that regulations or other guidance are invalid. Prop. Reg. § 301.7803-2(c)(18), (19), (20), (21).

The proposed regulations also implement the requirement that the IRS notify the taxpayer of the reasons for denying an Appeals request. Prop. Reg. § 301.7803-3. If the requirement applies, the Appeals Office will provide the taxpayer a detailed description of the facts, the basis for the denying the request, an explanation of how the basis for denial applies to the facts, and procedures for protesting the denial. *Id*. This relief applies only when the taxpayer received a Notice of Deficiency and only when the Appeals Office did not previously consider the matter. Prop. Reg. § 301.7803-3(a)(4). The relief also does not apply if the taxpayer's position is frivolous. Prop. Reg. § 301.7803-3(a)(2). For a detailed description of the proposed regulations, see Internal Revenue Bulletin 2022-39, https://www.irs.gov/irb/2022-39_IRB#REG-125693-19.

An early case interpreting new section 7803(e) is *Hancock County Land Acquisitions LLC v. Commissioner*, 553 F. Supp 3d 1284 (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. Citing *Facebook,* the District Court concluded that the statutory language did not create an absolute right to an Appeals conference. Moreover, the IRS's decision not to send the case to Appeals did not result in a waiver of sovereign immunity under the Anti-Injunction Act (AIA). *Id*. at 1295, *see also* Kristen E. Parillo, *Access to IRS Appeal Isn't Absolute Under 2019 Law, DOJ Says*, 173 TAX NOTES FED. 1302 (Nov. 29, 2021) (reporting that the Department of Justice's brief rejects the taxpayer's argument that Congress's enactment of section 7803(e)(5) was intended to overrule *Facebook*). *Id*. at 1303. On appeal, the Eleventh Circuit agreed with the District Court that the AIA barred its lawsuit:

> Hancock's single claim alleged that the IRS violated § 7803(e)(4) by failing to provide Hancock with administrative review of its tax case. To remedy that alleged violation, Hancock sought to compel the IRS to provide it with administrative review and, until it did, to prevent the IRS from issuing an FPAA [final partnership administrative adjustment, Eds.] (which the IRS had already issued). The FPAA that the IRS had issued finds that Hancock improperly claimed a $180 million deduction on its 2016 tax return, resulting in an underpayment of taxes. Because the relief Hancock's lawsuit seeks would restrain the IRS from assessing and collecting those taxes, it is barred by the AIA.

Hancock Cnty. Land Acquisitions, LLC v. United States, IRS, 2022 U.S. App. LEXIS 22850, *6, *cert. denied*, 143 S. Ct. 577 (2023).

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As part of its opinion, the Eleventh Circuit distinguished the taxpayer's case from the facts of *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021), discussed above in connection with Chapter 2, in which the Supreme Court ruled that the AIA does not bar pre-enforcement challenges to IRS reporting rules:

> Hancock first argues that its suit is not barred by the AIA because it does not seek to restrain the assessment or collection of a tax. Relying on *CIC Services*, Hancock argues that its suit challenges only unlawful IRS conduct, not the assessment of a tax. In the *CIC Services* case, the Supreme Court considered whether a suit challenging an information-reporting requirement was barred by the AIA. 141 S. Ct. at 1588. Failure to comply with the reporting requirement would lead to both tax and criminal penalties. *Id*. at 1587-88. The Court held that the suit fell "outside the [AIA] because the injunction" that it requested did not "run against a tax at all." *Id*. at 1593. Instead, the tax penalty functioned "only as a sanction for noncompliance with the reporting obligation," so the plaintiff's suit seeking to enjoin the reporting requirement was not barred by the AIA. *Id*. at 1594.
>
> Three considerations led to that conclusion in *CIC Services*. First, the reporting rule at issue "impose[d] affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty," *id*. at 1591; second, the taxpayer was "nowhere near the cusp of tax liability" because the "reporting rule and the statutory tax penalty [were] several steps removed from each other," *id*.; and third, the requirement was enforced through criminal penalties in addition to tax penalties, *id*. at 1591-92.
>
> Those same three considerations lead to the opposite conclusion here. First, Hancock will not be subject to any "costs separate and apart" from the tax penalty that may result from the FPAA. *Id*. at 1591. Second, Hancock was on "the cusp of tax liability" when it filed its suit, *id*., because the FPAA is the statutory prerequisite to assessing a tax on Hancock, *see* I.R.C. § 6232(b), and Hancock concedes that "if the FPAA is allowed [to] stand, the IRS will be able to immediately assess a tax." Third, Hancock will suffer no criminal punishment by following the AIA's "familiar pay-now-sue-later procedure." *Id*. at 1592.

Id. at *4-6. *See also* Rocky Branch Timberlands LLC v. United States, 2022 U.S. Dist. LEXIS 110052 (N.D. Ga. 2022) (denying taxpayer's request to force an Appeals hearing on facts similar to *Hancock*).

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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

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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. In November 2020, the IRS confirmed that the decision of how to conduct the conference is, generally, up to the taxpayer:

> 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.

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AP-08-1120-0021 (Nov. 6, 2020), 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.

A subsequent announcement by the IRS in October 2022 is even more clear:

> [T]axpayers and representatives can choose how they meet with Appeals through conferences that can be held by telephone, video or in-person. In addition, Appeals can work with taxpayers and representatives through the mail or secure electronic messaging. Appeals employees can successfully resolve disputes in every type of conference and the type of conference does not impact Appeals' decision.

IR-2022-170 (Oct. 4, 2022), https://www.irs.gov/newsroom/irs-appeals-revises-initial-contact-letters-as-part-of-effort-to-enhance-the-taxpayer-experience. The same October 2022 announcement confirms that the initial contact letter from the Appeals Office will include both the Appeals Officer's contact information and the name and phone number of the Officer's manager.

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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.* An article on the topic 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:

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> 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).

In recent years, a high-profile set of events brought section 6103 to the attention of the general public. The backdrop is that, unlike other U.S. Presidents, former President Trump had not disclosed his tax returns. In the spring of 2019, the House Ways and Means Committee, which, at the time, was 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 then-IRS Commissioner Charles Rettig on April 3, 2019 seeking those returns. Letter from the Hon. Richard E. Neal, to the Hon. Charles Rettig, Before the H. Comm. On Ways & Means, 116th Cong. (Apr. 3, 2019) [hereinafter Rep. Neal Letter], https://cdn.cnn.com/cnn/2019/images/04/03/neal.letter.to.rettig.signed.2019.04.03.pdf.. 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." Rep. Neal Letter, *supra*. One of the issues, therefore, was how frequently the IRS audits Presidential tax returns.

After letters back and forth, 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 (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://rollcall.com/2019/05/17/mnuchin-refuses-to-comply-with-subpoenas-for-trump-

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tax-returns/. 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 requesting "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 were numerous court decisions in this case. *See, e.g.*, *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); *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); *Comm. on Ways & Means v. U.S. Dep't of the Treas.*, 575 F. Supp. 3d 53, 68 (D.D.C. 2021). The fourth opinion affirmed the District Court's ruling in favor of the Ways and Means Committee. *Comm. on Ways & Means v. U.S. Dep't of the Treas.*, 45 F.4th. 324, 328 (D.C. Cir. Aug. 9, 2022). The D.C. Circuit denied the former President's petition for rehearing en banc. *Comm. on Ways v. U.S. Dep't of the Treas.*, 2022 U.S. App. LEXIS 30024. The Supreme Court also denied former President Trump's application for stay of the mandate. *Trump v. Comm. on Ways & Means*, 143 S. Ct. 476 (2022).

Finally, in December 2022, House Committee on Ways and Means voted and released the former President Trump's 2015 to 2020 tax returns, ending the "lengthy legal battle." Jacob Pramuk & Brian Schwartz, *Trump's Tax Returns Released by House Ways and Means Committee*, CNBC (Dec. 30, 2022), https://www.cnbc.com/2022/12/30/trumps-tax-returns-released-by-house-ways-and-means-committee.html. The returns are available on Politico.com at https://www.politico.com/news/2022/12/30/read-trump-tax-returns-pdf-00074830. "The summary prepared by the Joint Committee on Taxation showed Trump declared negative income in 2015, 2016, 2017 and 2020. He paid a total of $1,500 in income taxes for the years 2016 and 2017." Pramuk & Schwartz, *supra*. The House also issued a report on the returns, which is available at https://int.nyt.com/data/documenttools/jc-treport-full/f668ccce9e46c975/full.pdf.

On the issue of auditing Presidential returns, Professor Daniel Hemel explains:

> Notwithstanding the IRS's stated policy of annually examining the president's returns, the agency didn't initiate an audit of Trump's tax filings until more than two years into his term. Indeed, according to the committee report, the IRS didn't start to examine Trump's returns until House Ways and Means Chair Richard Neal (D-Mass.) requested that the agency provide his panel with copies of the president's tax filings and a status report on the IRS's audits of Trump….
>
> The New York Times … —citing information from spokespeople for former President Barack Obama and President Joe Biden—…reported that the IRS

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> annually audited Trump's predecessor and successor. The Times's report suggests that the breakdown of the IRS's presidential audit program started—and ended—with Trump.

Daniel J. Hemel, *House Democrats' Report on Trump Taxes Highlights IRS's Failures—and Their Own*, LAWFARE (Dec. 22, 2022), https://www.lawfaremedia.org/article/house-democrats-report-trump-taxes-highlights-irss-failures-and-their-own.

In December 2022, the House also passed the Presidential Tax Filings and Audit Transparency Act of 2022, which would make public the President's tax returns and require an IRS audit of those returns as soon as practicable. *See* H.R. 9640, 117th Cong. (2022). This appears to be a political statement; the "bill that stands no chance of becoming law in this Congress . . . ." Laura Weiss, *House Passes Bill to Make Presidential Tax Returns Public*, ROLL CALL (Dec. 22, 2022), https://rollcall.com/2022/12/22/house-passes-bill-to-make-presidential-tax-returns-public/.

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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:

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> 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 . . .

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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.

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Chapter 7

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The IRS Chief Counsel has 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), cert. denied, 142 S. Ct. 758 (2022), 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:

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> [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 affirmed the Tax Court in a brief memorandum opinion. Beverly Clark Collection, LLC v. Comm'r, 851 F. App'x 1, 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).

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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 28, 2023) ("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, with a $3.00 per-document cap. *See* https://www.ustaxcourt.gov/transcripts_and_copies.html. 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 photocopies 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. The Tax Court website currently states that "Requests for copies of Court records from non-parties (copy requests) may be made in person or by telephone and will be fulfilled electronically by email," https://www.ustaxcourt.gov/transcripts_and_copies.html.

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:

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> 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/. The DAWSON system now has the capacity to search for cases, orders, and opinions. *See* https://dawson.ustaxcourt.gov/ (last visited July 28, 2023).

Users have reported several issues with DAWSON. Some practitioners are concerned with the overall accessibility of DAWSON. *See* Nathan J. Richman & Frederic Lee, *Six Months In, Lawyers Still Grappling with New Tax Court System*, 172 TAX NOTES FED. 312, 313 (2021). 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. The Tax Court has made enhancements to the system and posted a User Guide and detailed instructions on how to use the system. *See* https://ustaxcourt.gov/dawson_user_guides.html (last visited July 28, 2023). For an explanation of more recent updates to the DAWSON system, see Keith Fogg, *Tax Court Expands Online Availability of Documents*, PROCEDURALLY TAXING (May 10, 2023).

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For those interested in what sorts of tax issues the Tax Court handles most commonly, see the charts included in Keith Fogg, *What Are the Most Litigated Issues and What's Happening in Collection?*, PROCEDURALLY TAXING (Jan. 25, 2022), https://procedurallytaxing.com/?s=what+are+the+most+litigated+issues. The charts, derived

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from the National Taxpayer Advocate's Annual Report, show the number of Tax Court opinions relating to particular issues and the number of Tax Court petitions by issue. *See also* Keith Fogg, *Where Have Tax Court Deficiency Cases Come From in the Past Decade?*, PROCEDURALLY TAXING, (Jan. 28, 2022), https://procedurallytaxing.com/?s=where+have+tax+court (reporting that the bulk of cases derive from correspondence examinations "which means that the bulk of Tax Court cases are from low or lower middle-income taxpayers, which means that the bulk of Tax Court petitioners are pro se.").

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 amendments on November 30, 2018; July 15, 2019; January 15, 2020; October 6, 2020; and March 20, 2023 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

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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/.

Amendments effective March 20, 2023, include stylistic and minor organizational revisions to many Tax Court Rules. *Notice*, U.S. TAX COURT 1 (Mar. 20, 2023), https://www.ustaxcourt.gov/resources/rules/Notice_03202023.pdf. More significant revisions were made to rules relating to Tax Court filings (Rule 20), subpoenas (Rule 147), and discovery (Rule 70). These amendments are designed to conform the Tax Court Rules more closely with the Federal Rules of Civil Procedure. *Id*. at 8, 97, 47. As part of the same 2023 overhaul, the Tax Court adopted new rules relating to invention by third parties (Rule 64); rules for filing amici briefs with the Tax Court (Rule 151.1); and rules relating to identifying and certifying an administrative record in cases in which judicial review is limited to the administrative record (Rule 93). The explanation to Rule 93 reads as follows:

> Rule 93 provides a uniform process governing the submission of the administrative record to the Court in certain actions where judicial review is normally limited to the administrative record or where judicial review requires an examination of the administrative record and other relevant evidence, as appropriate. Examples of the types of cases that are covered by new Rule 93 include whistleblower actions, collection review actions, and spousal relief disputes. The new Rule normally is not applicable in other actions, such as deficiency cases and interest abatement cases arising under Code section 6404, although in appropriate circumstances the Court may invoke the procedure in its discretion.
>
> Under paragraph (a), the parties must file the administrative record, stipulated as to its genuineness, no later than 45 days after service of the notice setting the case for trial. If the parties are unable to stipulate, the Commissioner is expected to file the administrative record, certified as to its genuineness, within the same 45-day period.
>
> Paragraph (b) of Rule 93 provides that an opposing party may move to complete or supplement the administrative record no later than 60 days after service of the notice setting the case for trial, unless the Court orders otherwise. Paragraph (b) of Rule 93 also describes the contents of such a motion.

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> The composition of the administrative record will vary depending on the type of action subject to review. The Court therefore adopts a general definition of the term "administrative record" to include "all documents and materials received, developed, considered, and exchanged in connection with the administrative determination."

Id. at 79.

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 July 28, 2023).

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, *Press Release*, U.S. TAX COURT (Nov. 12, 2020), https://www.ustaxcourt.gov/resources/press/11122020.pdf. However, in June of 2022, the order was reversed. On June 6, 2022, the Tax Court opened to the public. *Press Release*, U.S. Tax Court (June 6, 2022), https://www.ustaxcourt.gov/resources/press/06032022.pdf. A few months later, the Tax Court issued an order relating to covid protocols for in-person court proceedings. Administrative Order No. 2022-01, U.S. TAX COURT (Aug. 23, 2022), https://ustaxcourt.gov/resources/administrative_orders/Administrative_Order_2022-01.pdf.

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

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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 2022 figures. *See SOI Tax Stats—Chief Counsel Workload: Tax Litigation Cases, by Type of Case—IRS Data Book Table 29* (May 26, 2022), https://www.irs.gov/statistics/soi-tax-stats-chief-counsel-workload-tax-litigation-cases-by-type-of-case-irs-data-book-table-29 (last visited Aug. 15, 2022).

Fiscal Year	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
Number of cases pending (dockets in thousands)	27.6	24.9	24.0	25.4	22.1	32.6	39.4
Dollars in Dispute in Cases Pending (in billions)	$22.5	$21.2	$18.4	$21.8	$20.6	$26.6	$41.1

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 released several press announcements relating to the high volume of petitions filed in 2021. *See*, *e.g.*, *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 typically falls between 23,000 and 26,000, but by November of 2021, the Tax Court had already received roughly 33,000 petitions. *Press Release*, U.S. TAX COURT (Dec. 9, 2021), https://ustaxcourt.gov/resources/press/12092021.pdf. The press release noted:

> Of the total petitions filed, approximately 20% were filed electronically. The Court continues to process petitions expeditiously, and the number of paper-filed petitions that have yet to be processed continues to drop as the number of electronic petitions increases. Electronic petitions were up to 30% in October and increased to 36% in November. There is no backlog with respect to electronically filed petitions.

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/.

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Chapter 9

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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 Chapter 5, above.) In the notice of deficiency context, *Moya v. Commissioner*, 152 T.C. 182 (2019), provides an example. In that case, the taxpayer argued that "[t]here are no deficiencies in tax for any of the examination years because the notice was unlawfully issued. The notice was unlawfully issued because, in conducting his examination for the examination years, respondent deprived her of rights guaranteed to all taxpayers by the TBOR." *Id.* at 188. The Tax Court found that that did not invalidate the notice of deficiency or warrant looking behind it:

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

Id. at 192.

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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.

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

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

Id. at *5-6.

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

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

In *Banister*, the Tax Court stated that "the notice of deficiency indicates that the third-party payers paid petitioner the amounts in question and reported those payments to respondent. Although direct evidence of the payments is not in the record, the notice of deficiency alone suggests, as in *Rapp* and *Curtis*, that respondent possessed such evidence." *Banister*, 2008 Tax Ct. Memo LEXIS 197, at *5 (*citing* Rapp v. Comm'r, 774 F.2d 932, 935 (9th Cir. 1985)); Curtis v. Comm'r, T.C. Memo. 2001-308, *aff'd in part and rev'd on another issue*, 73 Fed. Appx. 200 (9th Cir. 2003)). This line of cases would therefore be applicable if, for example, the IRS in *Nelson* no longer had the W-2 but had a document, such as the notice of deficiency, that it had prepared based on the W-2. That is not the case, and *Banister* does not

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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. For additional reading, see Bryan Camp, *Lesson From the Tax Court*, *supra*.

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For fairly 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).

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The issue of whether the Tax Court petition-filing deadline is considered jurisdictional has drawn significant recent attention. As Carlton Smith explained in 2020:

> 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), cert. denied, 141 S. Ct. 2596 (2021). 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

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

The Tax Court revisited the issue of whether the 90-day deadline in section 6213(a) is jurisdictional in *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6, 2022 U.S. Tax Ct. LEXIS 817. In a unanimous opinion, the Tax Court ruled that the filing deadline is jurisdictional. *Id.* at *1. In a lengthy opinion analyzing legislative history and statutory construction, the Tax Court concluded:

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> This history of reenactments of and amendments to section 6213(a) demonstrates that Congress's intention is to provide an adequate but strict timeframe within which a taxpayer may file a deficiency petition in the Tax Court. Congress has given taxpayers certain liberalizing adjustments to the last day of the deadline but has also made clear the deadline's finality. Furthermore, section 6213(c), providing that "[i]f the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency . . . shall be assessed, and shall be paid upon notice and demand", has remained constant. This historical treatment of section 6213 reflects an intention of Congress, remarkably persistent over the past century, that, in balancing the rights of the taxpayer and the interests of the Government, the deficiency assessment regime give the taxpayer an adequate time within which to file a deficiency petition, but that (1) a taxpayer's failure to do so within the prescribed time will foreclose the opportunity to litigate his deficiency before the Tax Court, (2) the deficiency not timely petitioned will be assessed so that the IRS may begin collection, and (3) the taxpayer's remaining remedy is to pay the assessment and sue for a refund.

Id. at *51-52.

The Tax Court also rejected the assertion that the jurisdictional grant is in Code section 6214(a), not section 6213(a). *Id*. at *55. Code section 6214(a) provides: "Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing." Carlton Smith has written a series of posts criticizing the Tax Court's opinion in *Hallmark* and predicting subsequent litigation on the same issue. The series begins with Carlton Smith, *What's Wrong with the Tax Court's* Hallmark *Opinion: Part 1*, PROCEDURALLY TAXING (Dec. 6, 2022), https://procedurallytaxing.com/whats-wrong-with-the-tax-courts-hallmark-opinion-part-1/.

As a result of a recent Third Circuit ruling in *Culp v. Commissioner*, 2023 U.S. App. LEXIS 18287, a circuit split now exists on the jurisdictional question. In *Culp*, the taxpayers filed their Tax Court petition after the 90-day deadline in Code section 6213(a). *Id*. *4. The Third Circuit framed the issue as follows: "The central question in this appeal is whether the Culps' late filing deprives the Tax Court of jurisdiction to consider their petition. Put another way, is § 6213(a)'s 90-day requirement jurisdictional or is it a claims-processing rule?". *Id*. at *6. In reaching its conclusion, the court found no "clear tie between the [filing] deadline and the jurisdictional grant." *Id*. at *9 (citing Boechler, PC v. Comm'r, 142 S. Ct. 1493 (2022)). According to the court:

> The most pertinent part of § 6213(a) provides that "[w]ithin 90 days . . . after the notice of deficiency . . . is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." Nothing in that language links the deadline to the Court's jurisdiction. Yet, elsewhere in § 6213(a), Congress specified that "[t]he Tax Court shall have no jurisdiction to enjoin any action or

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> proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition." 26 U.S.C. § 6213(a). So Congress knew how to limit the scope of the Tax Court's jurisdiction. It expressly constrained the Tax Court from issuing injunctions or ordering refunds when a petition is untimely. But it did not similarly limit the Tax Court's power to review untimely redetermination petitions.

Id. at *9-10. The Third Circuit went on to rule that the filing deadline was subject to equitable tolling and remanded the case to the Tax Court to determine whether the taxpayers were entitled to equitable relief. *Id*. at *16-17. The conflicting Court of Appeals decisions increase the likelihood that the U.S. Supreme Court will rule on the issue.

As discussed in connection with the updates to Chapter 16, the Supreme Court recently held that the 30-day filing deadline in section 6330(d) to appeal a Collection Due Process determination to the Tax Court was not jurisdictional. In doing so, the Court allowed the taxpayer to raise an equitable tolling argument to explain why the appeal was filed late. Boechler, PC v. Comm'r, 142 S. Ct. 1493 (2022). The litigation in *Hallmark* and *Culp* was prompted by the Supreme Court's ruling in *Boechler*.

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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.

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Id. at 925-26.

The Third Circuit 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.

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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/.

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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.

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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 denied the taxpayer's appeal, Nelson v. Comm'r, 2019 U.S. App. LEXIS 33126 (2d Cir.), and the Supreme Court rejected the taxpayer's writ of certiorari, Nelson v. Comm'r, 140 S. Ct. 526 (2019).) 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).

For a case in which the Tax Court found that the taxpayer did raise a reasonable dispute as to the accuracy of an information return under section 6201(d), see *Trice v. Commissioner*, T.C. Memo 2023-15, 2023 Tax Ct. Memo LEXIS 15. In *Trice*, the taxpayer disputed the accuracy of her SSA-1099, reporting disability benefits, by presenting bank records that indicated that not all the benefits reported should be included in income. *Id*. at **5-6. Finding the evidence credible, the Tax Court ruled that the IRS must produce "'reasonable and probative information concerning such deficiency in addition to such information return.'" *Id*. at **9 (quoting I.R.C. § 6201(d)). When the IRS did not do so, the court denied the IRS's motion for summary judgment. *Id*. at **14-15.

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.

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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*.

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The "determination" issue continues to spur controversy. In a fairly 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*

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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

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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.

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Chapter 10

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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 has been 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.

Filing and processing delays continued in 2022. According to the National Taxpayer Advocate's 2022 Filing Season report: "As of April 22, 2022, the IRS had 2.3 million paper tax returns filed in 2021 that it still needed to process. Because the IRS processes returns on a first-in, first-out basis, it will not begin processing the paper returns filed in 2022 until it processes the 2021 paper returns. In other words, any taxpayer who chose to file or who was required to file a paper return will not see his or her refund until the IRS catches up on its prior paper backlog. As of this writing, it is anticipated that the IRS will be caught up with the 2021 paper tax filings by the end of June 2022, at which point it will begin processing the paper returns filed beginning January 24, 2022." NAT'L TAXPAYER ADVOC., *Review of the 2022 Filing Season* 1 (2022), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/06/JRC23_SAO_ReviewFiling.pdf.

As explained in the updates to Chapter 2, processing delays improved in many respects during the 2023 filing season. However, the number of refunds processed and the amount of refunds given were both down compared with 2019 (pre-pandemic) levels, as well as compared with 2022 figures. NAT'L TAXPAYER ADVOC., *Review of the 2023 Filing Season*, at 2 (fig. 2.1), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/06/JRC24_SAO_ReviewFiling.pdf. The decline may be due to the elimination of economic stimulus payments in 2022 and the relatively lower amount of child and dependent care credits. *Id*. at 3.

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Code section 6405(a) requires the IRS to submit to the Joint Committee on Taxation for review refunds in excess of $2 million ($5 million for C corporations). A recent Joint Committee report describes in detail the approval process and provides statistics on the total amount of refunds it reviews each year and the amounts approved. JOINT COMM. ON TAX'N, *Summary of Joint Committee on Taxation Refund Review Under Section 6405 for Fiscal Years 2021 and 2022 and Certain Prior Years*, JCX-3-23 (Mar. 2, 2023), https://www.jct.gov/publications/2023/jcx-3-23/. The following table shows the amount of refunds reviewed and adjustments made in 2013 through 2020:

Year	Total Refunds Subject to Review	Subsequent Reductions in Refunds	Staff Review Memorandums Written
2013	$30,478,633,801	$189,312,440	29
2014	$28,242,674,729	$54,821,718	15
2015	$19,950,387,326	$44,271,353	16
2016	$20,375,608,125	$27,710,900	14
2017	$15,313,348,096	$71,859,669	20
2018	$13,935,342,317	$299,483,078	11
2019	$20,925,702,698	$209,409,350	10
2020	$13,445,229,206	$22,325,296	22

Note: December 19, 2014, and thereafter the refund review threshold for C corporations increased from $2 million to $5 million.

Id. at 8.

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A recent Tax Court case illustrates some technical issues surrounding whether a remittance to the IRS is a payment or a deposit. In *Ahmed v. Commissioner*, T.C. Memo. 2021-142, 2021 Tax Ct. Memo LEXIS 186, the taxpayer submitted a check to the IRS for $625,000 accompanied by a letter stating that the submission was intended to be a deposit. The accompanying letter also included a request that the IRS not apply the remittance to the taxpayer's outstanding liability for trust fund recovery penalties, which apply when the taxpayer fails to withhold and remit employment taxes to the government. *See* I.R.C. §6672(a). The letter cited Code section 6603. The IRS ignored the request and applied the funds against the taxpayer's outstanding penalty liability. *Ahmed*, at *3-4. With the liability paid in full, the IRS released the outstanding lien against the taxpayer's property and moved to dismiss the case the taxpayer had filed in Tax Court to dispute the liability. *Id*. at *5.

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The Tax Court rejected the taxpayer's argument that the remittance was a deposit rather than a payment on a number of grounds. First, the court pointed out that Code section 6603 and Revenue Procedure 2005-18 (both discussed in the casebook on pages 479-81) apply only to deposits of income, gift, estate, generation-skipping, and certain excise taxes. *See* I.R.C. § 6603(a). The trust fund recovery penalty did not fall within any of those categories. *Id*. at *8 n.4. Second, the court pointed out that taxpayers can only make deposits for taxes that have "not been assessed at the time of the deposit." *See* I.R.C. § 6603(a). The trust fund recovery penalty is an assessable penalty, which allows the IRS to make an assessment without following typical deficiency procedures. Because the penalty had been previously assessed, the taxpayer could not qualify for a deposit. With the remittance treated as a payment, which discharged the taxpayer's full liability, no deficiency remained and the Tax Court dismissed the case for lack of jurisdiction. *Ahmed*, at *12. For further reading about the *Ahmed* case, see Hale E. Sheppard, *Case Shows Tricky Issues With Making "Deposits" With the IRS to Stop Interest Accrual During Lengthy Tax Disputes*, TAXES: THE TAX MAGAZINE (Apr. 2022), at 43.

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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

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> 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. (The controversy surrounding the application of section 6751(b) is discussed at length in the updates to Chapter 12.)

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).

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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? An 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). …

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> 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). Other cases have also called into question whether filing a proper and timely refund claim is a jurisdictional requirement. For a discussion of these cases, see the multi-part blog post by Keith Fogg, starting with *Two Recent Circuit Level Decisions Appear to Dispute View That the Refund Claim Filing Requirement is Jurisdictional (Part 1)*, PROCEDURALLY TAXING (Feb. 9, 2022), https://procedurallytaxing.com/two-recent-circuit-level-decisions-appear-to-dispute-view-that-the-refund-claim-filing-requirement-is-jurisdictional-part-1/.

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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).

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Filing extensions early in the COVID-19 pandemic created issues for taxpayers seeking refunds for amounts paid in 2019 and 2020. A post by Bob Probasco explains the problem:

> Because of the COVID emergency declaration and IRS responses, most taxpayers had until July 15, 2020, to file their 2019 tax returns and until May 17, 2021, to file their 2020 tax returns. And most taxpayers have been conditioned to assume, from multiple reminders over the years, a general rule that they must file refund claims (including filing an original return claiming a refund) within three years of the original filing due date to receive that refund. Thus, some were likely to assume that they had until July 15, 2023, to file refund claims for the 2019 tax year. Before Notice 2023-21 was issued, that was not a safe assumption, and still isn't for some taxpayers.

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Bob Probasco, *Refund Claims and Section 7805A – Progress!*, PROCEDURALLY TAXING (Apr. 10, 2023), https://procedurallytaxing.com/refund-claims-and-section-7508a-progress-2/.

The issues raised in the blog post are largely resolved by IRS Notice 2023-21, *Lookback Periods for Claims for Credit or Refund for Returns with Due Dates Postponed by Notice 2020-23 or Notice 2021-21*, https://www.irs.gov/irb/2023-11_IRB#NOT-2023-21. Notice 2023-21 provides the following relief:

> For an Affected Taxpayer with a due date postponed by Notice 2020-23, the period beginning on April 15, 2020, and ending on July 15, 2020, will be disregarded in determining the beginning of the lookback period for the purpose of determining the amount of a credit or refund under § 6511(b)(2)(A) relating to the tax for which the return filing or payment due date was postponed. In addition, for an Affected Taxpayer with a due date postponed by Notice 2021-21, the period beginning on April 15, 2021, and ending on May 17, 2021, will be disregarded in determining the beginning of the lookback period for the purpose of determining the amount of a credit or refund under § 6511(b)(2)(A) relating to the tax for which the return filing or payment due date was postponed.

Id. An example included in the Notice helps explain the problem taxpayers faced:

> Taxpayer is a calendar-year filer with a 2019 Federal income tax return due date of April 15, 2020. Taxpayer's employer withheld income taxes from Taxpayer's wages throughout 2019 and remitted the withheld income taxes to the IRS. Per § 6513(b), these withheld income taxes are deemed paid on April 15, 2020. The due date for Taxpayer's 2019 Federal income tax return was postponed by Notice 2020-23 to July 15, 2020. Pursuant to the postponed due date, Taxpayer timely filed their return on June 22, 2020. Under § 6511(a), Taxpayer may timely file a claim for credit or refund until three years from the return filing date, or June 22, 2023. But if Taxpayer files a claim for credit or refund on June 22, 2023, absent the relief granted in this notice, the amount of Taxpayer's credit or refund would be limited to tax paid during the period beginning three years before the filing of the claim, or June 22, 2020. As a result, a credit or refund of Taxpayer's withheld income taxes would be barred because they were deemed paid on April 15, 2020, outside of the lookback period in § 6511(b)(2)(A). This notice provides relief by disregarding the period beginning on April 15, 2020, and ending on July 15, 2020, in determining the beginning of the lookback period. Accordingly, under the relief provided by this notice, if Taxpayer files a claim for credit or refund on or before June 22, 2023, the lookback period extends three years back from the date of the claim, disregarding the period beginning on April 15, 2020, and ending on July 15, 2020. As a result, the limit to the amount of the credit or refund would include Taxpayer's withheld income taxes deemed paid on April 15, 2020.

Id.

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The 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:

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> 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. …

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

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

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In *Borenstein v. 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

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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).

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

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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), cert. denied 141 S. Ct. 2596 (2021). 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:

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> 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.

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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.

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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).

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Chapter 11

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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; Policing the Case*, PROCEDURALLY TAXING (May 11, 2021), https://procedurallytaxing.com/policing-the-settlement-policing-the-case/.

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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*

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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 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.

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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.

On appeal, the Ninth Circuit vacated the Tax Court's decision in *Jacobs* and remanded the case to the Tax Court. Jacobs v. Commissioner, 2022 U.S. App. LEXIS 30690. The Ninth Circuit found that the IRS's position included in its answer to the Tax Court petition, which it subsequently abandoned, should have taken into account the prior administrative proceedings. Noting that Jacobs' entitlement to litigation costs under section 7340 depended upon whether the IRS's position in its answer was reasonable, the court went on to rule:

> Our review of the record suggests that the Tax Court failed to appreciate that evaluating the reasonableness of the [Commissioner']s litigation position, as reflected in the answer, requires some review of the administrative proceedings. The questionable nature of the government's actions during the administrative proceedings is not directly relevant to litigation costs because § 7430 "does not provide a bridge," between the administrative proceedings and the judicial proceedings. *Pac. Fisheries*, 484 F.3d at 1108. However, the "reasonableness" of the [Commissioner]'s answer here depends on what the [Commissioner] learned, or should have learned, from the preceding administrative proceedings. Thus, whether the [Commissioner] should have issued an initial notice of deficiency or should have held an in-person meeting during the administrative proceedings does not control the inquiry as to the reasonableness of the answer the [Commissioner]

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> filed in the Tax Court. However, Jacobs contends that the information provided to the [Commissioner] during the administrative proceedings made it unreasonable for the [Commissioner] to file an answer denying the allegations in his petition.
>
> Here, it is not clear whether the Tax Court interpreted case law separately analyzing administrative and judicial proceedings as precluding it from considering the merits of Jacobs' assertion that the [Commissioner]'s answer to his petition was unreasonable. But we read our precedent as allowing the Tax Court, in ruling on a request for litigation costs under § 7430, to consider the administrative proceedings, not to determine the propriety of the proceedings, but as informing the reasonableness of the [Commissioner]'s answer in the Tax Court. Accordingly, we vacate and remand for the Tax Court to consider the merits of Jacobs' claim that, in light of the information the [Commissioner] had received in the administrative proceedings, the [Commissioner]'s litigation position was unreasonable.

Id. at *3-5. How do you predict the Tax Court will rule in the case on remand?

Jacobs contrasts with another case decided in 2021 by the U.S. Tax Court, *Morreale v. Commissioner*, T.C. Memo. 2021-90, 2021 Tax Ct. Memo LEXIS 120. That case, in which the taxpayer was awarded a recovery under section 7430, is discussed in Hale E. Sheppard, *New Cases Clarify Standards for Reimbursement to Taxpayers Under Section 7430*, J. TAX'N, Nov. 2021, at 10. *Morreale* involved the audit of a taxpayer who failed to file income tax returns for two years. 2021 Tax Ct. Memo LEXIS 120, at *2. During the audit, the taxpayer provided the IRS agent with spreadsheets and financial data to establish basis and justify the taxpayer's method of accounting. *Id*. at *3-4. The agent apparently ignored the information and issued an examination report and eventually a Notice of Deficiency that did not take the taxpayer's information into account. *Id*. at *5. After filing a Tax Court petition, the taxpayer had a docketed Appeals conference. The Appeals officer suggested that the IRS concede both issues, which the Chief Counsel attorney handling the Tax Court case did. *Id*. at *7-8.

In considering the taxpayer's claim for a recovery of fees under section 7430, the Tax Court rejected the IRS's argument that its position was substantially justified. The court approached the issue by looking at the overall reasonableness of the IRS's argument, rather than just an examination of each separate issue involved.

> To determine whether the United States' position was substantially justified, we must also identify the nature of the position. Ordinarily, this Court applies an item-by-item analysis, whereby "[t]he justification for each of respondent's positions must be independently determined." Foothill Ranch Co. P'ship v. Commissioner, 110 T.C. 94, 97 (1998). After petitioner filed his motion but before respondent filed his response, however, the U.S. Court of Appeals for the Tenth Circuit issued its opinion in Johnson, 920 F.3d at 649, reversing a District Court which applied a similar item-by-item analysis under section 7430 on the basis that this was an "erroneous methodology". While that case arose under different facts, we conclude that its holding with regard to the proper

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> analysis of a section 7430 claim is "squarely in point". Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). Accordingly, we will apply its analysis.

Id. at 12.

Noting that the IRS did not change its position during the examination or Appeals phase of the controversy, even though it had been presented with relevant information by the taxpayer, and that it eventually conceded both issues in dispute, the Tax Court concluded that the IRS's position was not substantially justified.

> In bringing about and continuing this litigation, these two determinations [basis and method of accounting] were critical elements of the Government's overall claim. By way of illustration, after filing his answer, respondent conceded these determinations and stipulated that petitioner's tax liability was a mere 16% of the original determined deficiency for tax year 2012 and conceded the penalty and the additions to tax. Of course, it is true that conceding a case—even in full—does not, on its own, mean that the position of the United States was not substantially justified. Maggie Mgmt. Co. v. Commissioner, 108 T.C. at 443. But this case does not involve a mere concession in respondent's answer; respondent's concessions here came after filing his answer and were made because the Appeals Office concluded that the determination reflected in his answer lacked a basis in fact and law—a conclusion with which we agree. In the light of all the facts of this examination and litigation, we cannot say that the position of the United States was "justified * * * in the main". . . . Rather, these determinations were contrary to applicable guidance and were lacking in a factual basis, and they tainted the Government's position in the entire case.

Id. at 21. How do you reconcile the Tax Court's approach in *Jacobs* (which was recently vacated by the Ninth Circuit), with the Tax Court's approach in *Morreale*?

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/. They reported similar data for 2015 through 2017, as well. *Id.* They stated, "the *extremely* low number of cases that resulted in an award of fees suggests that practitioners may be overlooking the ability to pursue an award of attorney's fees and, we suspect, are greatly underutilizing [Qualified Offers]." *Id.* (Qualified Offers, addressed in Code section 7430(c)(4)(E), don't require as a prerequisite for an award of attorney's fees "proof that the government's position was not substantially justified." Donner & Galler, *supra*.

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The inflation-adjusted recovery amount for attorney's fees under section 7430 is $230 per hour for 2023. Rev. Proc. 2022-35, 2022-45 I.R.B. 445 § 3.60. That amount represents an increase compared with 2020, 2021, and 2022. Rev. Proc. 2021-45, 2021 I.R.B. LEXIS 492 § 3.60; Rev. Proc. 2020-45, 2020-46 I.R.B. 1016 § 3.60; Rev. Proc. 2019-44, 2019-47 I.R.B. 1093 § 3.60.

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)

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> 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 fairly 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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Chapter 12

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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 Yauch, *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 is adjusted for inflation for years after 2020. I.R.C. § 6651(j)(1). The penalty amount for returns filed in 2024 is $485. Rev. Proc. 2022-38, 2022-45 I.R.B. 445, § 3.52.

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In a Notice issued in 2022, the IRS provided relief from the late filing penalty in section 6651(a) (as well as other selected penalties) for taxpayers who filed 2019 and 2020 tax returns late. Notice 2022-36, 2022-36 I.R.B. 188, https://www.irs.gov/irb/2022-36_IRB#NOT-2022-36. According to the Notice, individuals and corporations that filed income tax returns in 2019 and 2020 will not be subject to the late filing penalty if those returns were filed before September 30, 2022. The penalties "will be automatically abated, refunded, or credited, as appropriate without any need for taxpayers to request this relief." *Id*. Sec. 3. According to the Notice, the "penalty relief . . . will allow the IRS to focus its resources more effectively, as well as provide relief to taxpayers affected by the COVID-19 pandemic." *Id*. Sec. 2.

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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.* In a more recent opinion, another district court followed *Intress* and rejected the taxpayer's argument that reliance on an accountant to electronically file an extension request constituted reasonable cause. Oosterwijk v. United States, 2022 U.S. Dist. LEXIS 14984, *16-17 (D. Maryland) (noting that the taxpayers "were free to file their own extension request on paper . . . . [T]he same means available to the *Boyle* taxpayer in 1979 were available to the Oosterwijks in 2017, even if the IRS encourages e-filing.").

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).

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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

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> *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.

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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/. Thus far, however, it does not appear that other circuit courts have joined in the debate.

As noted in the casebook on pages 623 and 624, a taxpayer seeking penalty relief based on the advice of a professional must receive "substantive advice" from the professional. Moreover, the taxpayer must provide the advisor with all relevant facts into order to claim reasonably reliance. A recent Tax Court opinion distinguishes between tax advice and mere tax preparation. In *Patacsil v. Commissioner*, T.C. Memo 2023-8, 2023 Tax Ct. Memo LEXIS 9, the Tax Court denied the taxpayers' claims for net operating loss carryforwards, Schedule C deductions, and the exclusion of cancellation of indebtedness income based on the insolvency exception. *Id*. at *9-*16. To avoid the Government's imposition of the accuracy-related penalty, the taxpayers claimed to have reasonably relied on the advice of their preparer. *Id*. at *16. Judge Holmes started his analysis by distinguishing between tax preparation and tax advice. Applying that distinction to the facts, he concluded:

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> Young, the Patacsils' preparer for those years, is a licensed CPA and worked as an IRS revenue agent in the past. We find that this qualifies him as a competent tax professional. But the Patacsils did not give him necessary and complete information on some of the items that created their deficiencies, and didn't get advice from him on others.
>
> We do believe Young's testimony that he advised them not to recognize COI income because they were insolvent, but Mrs. Patacsil herself testified that she didn't include in the list of assets that she prepared for him the values of either the business or the real properties that she and her husband held for investment. This information was necessary to any advice regarding their entitlement to the insolvency exception to recognition of COI income for both years.
>
> Then there was the question of the Patacsils' entitlement to additional business expenses. Here the problem was that they did not seek Young's advice, but only his help in filling out their returns. Throughout his testimony, Young consistently referred to his employees who would've done the calculations for the tax returns based on the documents they received from the Patacsils, and he would review their work afterwards. Put differently, Young gave no advice about the deductibility or amounts of their claimed expenses. And we also find it more likely than not that Mrs. Patacsil's recordkeeping system would not have given him necessary and accurate information about those expenses.
>
> * * *
>
> We do find reasonable reliance, however, as to the portion of the Patacsils' 2017 understatement attributable to the NOL. The computations of NOLs are complex; the rules on carrying them backwards and forwards are not intuitive and are often changed by Congress. And in reporting an NOL carryforward, we find that the Patacsils did not withhold any information that Young would have needed to compute whether and how much of an NOL carryforward they could claim for their 2017 tax year. We also find that, although the problem in Young's computations and failure to include the required proof of election to waive a carryback of any NOL were plain to us, they would not have been evident to people like the Patacsils with their limited knowledge of tax-law arcana. They're not entitled to an NOL carryforward, but we do find them to have reasonably and in good faith relied on Young in claiming one.

Id. at *17-19.

In October of 2021, the IRS announced a new process for releasing Frequently Asked Questions (FAQs) relating to newly enacted tax laws. FAQs will now be announced in a separate news release and posted to the IRS's website. The announcements will also be dated. *IRS Updates Process for Frequently Asked Questions on New Tax Legislation and Addresses Reliance Concerns*, IR-2021-202 (Oct. 15, 2021), https://www.irs.gov/newsroom/irs-updates-

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process-for-frequently-asked-questions-on-new-tax-legislation-and-addresses-reliance-concerns. More importantly, the IRS indicated that taxpayers may rely on the FAQs to establish a reasonable case defense to accuracy-related penalties. *Id*. The IRS plans to include the following legend in each release:

> These FAQs are being issued to provide general information to taxpayers and tax professionals as expeditiously as possible. Accordingly, these FAQs may not address any particular taxpayer's specific facts and circumstances, and they may be updated or modified upon further review. Because these FAQs have not been published in the Internal Revenue Bulletin, they will not be relied on or used by the IRS to resolve a case. similarly, if an FAQ turns out to be an inaccurate statement of the law as applied to a particular taxpayer's case, the law will control the taxpayer's tax liability. Nonetheless, a taxpayer who reasonably and in good faith relies on these FAQs will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax. Any later updates or modifications to these FAQs will be dated to enable taxpayers to confirm the date on which any changes to the FAQs were made. Additionally, prior versions of these FAQs will be maintained on IRS.gov to ensure that taxpayers, who may have relied on a prior version, can locate that version if they later need to do so.

Id.

Page 629:

Revenue Procedure 2021-52, 2021-51 I.R.B. 883, updates Revenue Procedure 2016-13, 2016-4 I.R.B. 290, cited in the casebook, without significant revisions to the material discussed in the casebook.

Page 649:

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

The taxpayers in *Graev* received a notice of deficiency asserting a 40-percent gross valuation misstatement penalty relating to noncash charitable contribution deductions. After the IRS filed an answer to the taxpayers' Tax Court petition, the IRS amended its answer to concede the 40-percent penalty and instead impose a 20-percent accuracy-related penalty arising from different contributions made by the taxpayers. In an earlier opinion involving the same set of

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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). Carolina Vargas & Courtney Rozen, *Jump in '*Graev*' References Pressures IRS on*

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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.

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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. 132, 142-43 (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), 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 232-33.

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 238. According to the court:

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> 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 249. 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. 80, 89 (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). *But see* Castro v. Comm'r, T.C. Memo 2022-120, 2022 Tax Ct. Memo LEXIS 125 (ruling that when IRS agent obtained supervisory approval before issuing the 30-day letter, later approval of changes to those same penalties did not negate timely approval).

Even the Tax Court, however, recognizes that some communications early in the controversy process may not rise to the level of an "initial" determination. 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

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> 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, 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. 87, 93 (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)).

More recently, appellate courts have begun to challenge the Tax Court's position that communications with taxpayers before the IRS issues a notice of deficiency trigger the supervisory approval requirement. *See*, *e.g*., Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 29 Fed. 4th 1066, 1074 (9th Cir. 2022) (reversing the Tax Court, the Ninth Circuit concluded that

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in the case of assessable penalties such as the listed transaction penalty in section 6707A, the supervisor can approve the penalty at any time before assessment and the Revenue Agent's earlier letter to the taxpayer threatening to impose a penalty did not prevent a later approval by the supervisor); Minemyer v. Comm'r, 2023 U.S. App. LEXIS 1253 (10th Cir. 2023), at *13 (holding that, in the context of the civil fraud penalty, "the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency").

In a recent case, *Kroner v. Commissioner*, 48 F.3d 1272 (11th Cir. 2022), the Eleventh Circuit overturned the Tax Court's ruling that communications between the taxpayer and the IRS about proposed penalties constituted the initial determination. According to the court:

> Kroner argues, citing a series of Tax Court decisions, that the statute restricts *communications* between the IRS and a taxpayer. The Tax Court has held that an initial determination of an assessment is any "communication that advises the taxpayer that penalties will be proposed . . . ." *Clay v. Comm'r*, 152 T.C. 223, 249 (2019), *aff'd on other grounds*, 990 F.3d 1296 (11th Cir. 2021). And the Tax Court has also held that a supervisor must approve the communication before it is delivered. *See id.* Essentially, the Tax Court reads the statute as follows: "No penalty shall be communicated to a taxpayer until such communication has been approved by the communicator's immediate supervisor."

Id. at 1276.

The Eleventh Circuit disagreed with the Tax Court's interpretation for several reasons. The court pointed out that the Tax Court's position fails to consider section 6751(b)'s use of the work "assessment". According to the court, "'The statute does not make any reference to the communication of a proposed penalty to the taxpayer . . . ." *Id*. at 1072. An initial determination of an assessment "and a communication to a taxpayer . . . are two different things, and the statute addresses only the former.'" *Id*. at 1278 (citing Laidlaw's, 29 Fed. 4th 1066, 1072). Moreover:

> We likewise see nothing in the text that requires a supervisor to approve penalties at any particular time before assessment. The word "unless" is the only connection between the restricted activity—assessing—and the required procedure—approval. But "unless" establishes a condition precedent. It means "except" or "on the condition that." *See Unless*, MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986); *Unless*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999); *Unless*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2012). "Unless" requires something, but it does not require that thing by a particular time.
>
> Kroner points to the use of the word "initial" in "initial determination of such assessment" as support for his timing argument. But reading the word "initial" to establish a timing deadline for approval, and thus a timing restriction on assessment, smuggles the word from one statutory clause to another. The statute provides that "[n]o penalty . . . shall be assessed unless the initial

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> determination of such assessment is personally approved." Stripped to bare bones, the statute directs that the IRS shall not take action X "unless" condition Y is met. X is the assessment of a covered penalty, and Y is the act of obtaining supervisory approval of the initial determination of assessment. The word "initial" modifies the phrase "determination of such assessment," all on the right side of the "unless" and all concerned with what must be approved to satisfy the statute's condition. "Initial" does not modify the phrase "no penalty under this title shall be assessed" on the opposite side of the "unless," which is the clause concerned with when in the process of a tax investigation the statute restricts the IRS's actions. In other words, "initial" describes *what* must be approved, not *when*.

Id. at 1278-1279. If you are confused by the supervisory approval requirement in section 6751(b), it may be because courts' interpretations are not consistent. As one commentator recently noted, "[Different results for taxpayers can occur depending on which circuit has venue over any ensuing appeal." Monica Gianni, *Graev's Long Shadow: Section 6751(b) and Supervisory Approval of Penalties*, PROCEDURALLY TAXING (Sept. 29, 2022), https://procedurallytaxing.com/graevs-long-shadow-section-6751b-and-supervisory-approval-of-penalties/.

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." . . .

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> 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.

The Build Back Better Act, H.R. 5376, 117th Cong. § 138404 (2021), which was not enacted, contained a related proposal that would not entirely eliminate the section 6751(b) approval requirement but would instead require that the IRS certify on a quarterly basis that penalty approval took place. Commentators remain concerned that eliminating or revising the

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penalty approval standards would undermine the statute's original purpose of imposing accountability among IRS agents. *See* Mary Katherine Browne, *IRS Accountability May Take a Hit if Penalty Approval Changes*, 173 TAX NOTES FED. 848 (2021) (recounting statements of former IRS attorney who believes the quarterly review proposal "destroys government accountability and will make taxpayers believe the 'game is rigged.'"); Kristen A. Parillo, *Proposed Fix to IRS Penalty Approval Rules Gets Mixed Reviews*, 171 TAX NOTES FED. 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). For further reading on proposals to amend section 6751(b), *see* Nina Olson, *Throwing the Baby Out with the Bathwater – the Proposed Repeal of IRC § 6751(b) Supervisor Approval of Penalties*, PROCEDURALLY TAXING (Dec. 1, 2021), https://procedurallytaxing.com/throwing-the-baby-out-with-the-bathwater-the-proposed-repeal-of-irc-%c2%a7-6751b-supervisor-approval-of-penalties/.

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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-

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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.

On remand, the District Court in *CIC Services*, ultimately ruled that Notice 2016-66 was invalid because the IRS failed to follow notice and comment procedures as required by the Administrative Procedure Act. CIC Services LLC v. IRS, 2022 U.S. Dist. LEXIS 63545, *11 (E.D. Tenn.). The court further ruled that the Notice was arbitrary and capricious because the administrative record revealed, according to the court, no facts to support the IRS's determination that micro-captive insurance arrangements had the potential for tax avoidance or evasion. *Id*. at *19-20. The court later entered an amended judgment stating "For the reasons

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stated in the memorandum opinion dated March 21, 2022, and the memorandum opinion filed contemporaneously herewith, Internal Revenue Service Notice 2016-16 is hereby VACATED." CIC Servs., LLC v. IRS, 2022 U.S. Dist. LEXIS 105376 (E.D. Tenn.).

Some commentators believe that *CIC Services* 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/. Further implications of the *CIC Services* decision for tax administration are discussed in connection with the Chapter 2 updates. For further reading, see Jenny L. Johnson Ware, CIC Services *and Its Impact on Tax Practice*, J. TAX PRAC. & PROC., Summer 2021, at 9; Monte A. Jackel, *The Way to Challenge Tax Rules Remains Unresolved*, 171 TAX NOTES FED. 1268 (2021).

Interestingly, before the Supreme Court issued its opinion in *CIC Services*, a federal district court had already ruled that the Administrative Procedure Act (APA) 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 Constr. 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). After the Supreme Court's opinion in *CIC Services* was released, the Sixth Circuit reversed the District Court in *Mann* and ruled that the Notice at issue was invalid because the IRS failed to follow APA procedures when issuing the notice. Mann Constr. Inc. v. United States, 27 F.4th 1138, 1143-45 (6th Cir. 2022). Because the taxpayers in *Mann* had already paid the reporting penalties, the Sixth Circuit's reversal resulted in a refund of the amounts paid. *Id*. at 1147. For an explanation of the distinctions between *CIC Services* and *Mann*, *see* Leslie Book, *Oh Mann: The Sixth Circuit Holds IRS Notice Issued in Violation of the APA; District Court in* CIC Services *Finds Case is Binding Precedent,* PROCEDURALLY TAXING (Mar. 22, 2022), https://procedurallytaxing.com/oh-mann-the-sixth-circuit-holds-irs-notice-issued-in-violation-of-the-apa-district-court-in-cic-services-finds-case-is-binding-precedent/. For a discussion of subsequent proceedings in *Mann* after it was remanded by the Sixth Circuit, see Leslie Book, *Latest Round of Litigation in* Mann *Construction Another Defeat For The Government*, PROCEDURALLY TAXING (May 16, 2023), https://procedurallytaxing.com/latest-round-of-litigation-in-mann-construction-another-defeat-for-the-government/.

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As noted in Section 12.06 of the casebook, Code Section 7491(c) places the burden of production on the IRS to establish an individual's liability for most penalties. The Tax Court's decision in *Graev v. Commissioner*, discussed above, concluded that part of the IRS's burden of production under section 7491(c) includes coming forward with evidence that it complied with the supervisory approval requirements in Code section 6751(b). Graev v. Commissioner, 149 T.C. 485, 492-94 (2017). In *Frost v. Commissioner*, 154 T.C. 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,

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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.

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Chapter 13

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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.

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As noted in the casebook, a taxpayer may file a stand-alone suit in either federal district court or the U.S. Court of Federal Claims to recover overpayment interest. If the taxpayer files the suit in district court relying on 28 U.S.C. section 1346(a)(2) (the "Little Tucker Act"), the amount of the recovery is limited to $10,000. Whether the district court also has jurisdiction to hear stand-alone claims for overpayment interest under 28 U.S.C. section 1346(a)(1), which does not have a recovery cap, remains unclear. A few 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 Bob Probasco, *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 the same topic are linked there.

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Chapter 14

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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). 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 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.

The status of these initiatives is somewhat unclear. In June of 2021, the IRS announced that it would return to normal collection casework, 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 (last visited June 5, 2021). However, in early 2022, the IRS issued an Information Release announcing that, in light of the backlog of unprocessed tax returns still existing at the end of 2021, it would stop sending over a dozen different types of automated collection notices in cases in which the IRS has no record of the taxpayer filing a return. IR-2022-31, *IRS Continues Work to Help Taxpayers; Suspends Mailing of Additional Letters* (Feb. 9, 2022), https://www.irs.gov/newsroom/irs-continues-work-to-help-taxpayers-suspends-mailing-of-additional-letters. Information on the IRS's website, updated May 1, 2023, merely states, "While the IRS is resuming critical tax administration responsibilities, it will also factor in the wide-ranging impact of COVID-19 on taxpayers," https://www.irs.gov/newsroom/information-on-notices-of-federal-tax-lien-installment-agreements-offers-in-compromise-and-temporarily-delaying-the-collection-process.

In an effort to help taxpayers resolve tax debts more easily, the IRS Collection Division has redesigned some of its collection notices. The notices are written in simplified language and many include Quick Response (QR) scannable codes that allow taxpayers to easily access online resources to help resolve their tax issues. Carol M. Luttati, *The Impetus Behind the IRS' Redesigned Collection Notices*, J. TAX PRAC. & PROC. (Spr. 2022), at 9. The revised notices include Notice CP14, the first notice the IRS typically sends the taxpayer to inform that unpaid tax is due; Notice CP504, the Notice of Intent to Levy; and Notice LT11, the notice that informs the taxpayer of the right to request a Collection Due Process hearing. *Id*.

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The private debt collection program remains controversial. A Treasury Inspector General for Tax Administration Report released in September of 2018 faulted private debt collection

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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 TIGTA Report released in 2022 included the following statistics relating to the program:

> Since the IRS began delivering cases to four PCAs [Private Collection Agencies, Eds.] in April 2017 as part of the first private debt collection contract, more than 4 million taxpayer accounts were assigned totaling more than $36.8 billion. As of the end of the first contract in September 2021, the IRS reported that the PCAs had collected over $1 billion in commissionable payments and had established more than 188,000 payment arrangements, but taxpayers later defaulted on more than half of them. The PCAs continue to perform well on telephone calls in terms of quality metrics. . . .
>
> According to the IRS, it has incurred approximately $370.2 million in costs since inception of the program, which includes just over $202 million (55 percent) resulting from commissions paid to the PCAs. Thus, the PDC program had net revenues of approximately $720.8 million for the duration of Contract 1.

TREAS. INSPECTOR GEN. FOR TAX ADMIN., *Fiscal Year 2023 Biannual Independent Assessment of Private Collection Agency Performance*, No. 2023-30-005 (Dec. 27, 2022), at 3, https://www.tigta.gov/sites/default/files/reports/2023-01/202330005fr.pdf.

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.

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As noted in the casebook, the ten-year statute of limitations on collection in Code section 6502 may be tolled for various reasons, including during the period the IRS is prohibited from collecting any amount after issuing a notice of deficiency and during bankruptcy proceedings. I.R.C. § 6503(a), (h). The statute of limitations on collection is also suspended once the taxpayer makes a Collection Due Process (CDP) hearing request "for the period during which such hearing, and appeals therein, are pending." I.R.C. § 6330(e).

A recent decision from the Third Circuit illustrates the potential pitfalls taxpayers face when contesting collection actions. The tax liabilities in *United States v. Weiss*, 52 F.4th 546 (3rd Cir. 2022), stemmed back to 1994. The statute of limitations was tolled during the pendency of several bankruptcy filings. *Id*. at 547. In 2009, as the statute of limitations was expiring, the IRS filed a notice of intent to levy. In response, the taxpayer filed a request for a CDP hearing. He appealed the result of CDP hearing to the Tax Court, which took five years to affirm the Appeals officer's determination. He then appealed to the D.C. Circuit Court of Appeals, which affirmed the Tax Court and denied the taxpayer's subsequent requests for rehearings. He then appealed to the Supreme Court, which denied his petition for certiorari in 2018. At that point, the government abandoned its attempt to levy on the taxpayer's property and instead filed a collection suit in district court. *Id*. at 548.

The question before the Third Circuit was whether a petition for certiorari to the Supreme Court is considered an "appeal" within the meaning of Code section 6330(e), which would suspend the running of the statute of limitations on collection. After carefully analyzing the wording in section 6330(e), the court concluded that "in interpreting the statute, petitions for writs of certiorari are 'appeals therein,' and also an appeal remains 'pending' until the time to file such a petition expires." *Id*. at 547. As a result, the statute of limitations was tolled and the Government's lawsuit was timely filed.

Writing about the *Weiss* decision, Keith Fogg notes that the case "might also give future taxpayers pause in bringing appeals if they seek to ride out the [collection statute of limitations] as their path to defeating payment of the tax." Keith Fogg, *Suspending the CSED by Pursuing Litigation or Is This the Final Stop for the* Weiss *Case?*, PROCEDURALLY TAXING (Nov. 23, 2022), https://procedurallytaxing.com/suspending-the-csed-by-pursuing-litigation-or-is-this-the-final-stop-for-the-weiss-case/. For a case in which the taxpayer extended the statute of limitations on collection by filing proceedings intended to delay the process, see United States v. Ward, 2022 U.S. Dist. LEXIS 119673 (D. Alaska 2022) (ruling that offer in compromise requests, including those that were meritless, extended the statute of limitations on collection).

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As noted in the casebook, Code section 6334(a) lists classes of property exempt from levy. One of those levy exemptions includes a minimum amount of wage income, the amount of which is based upon the taxpayer's standard deduction and the taxpayer's personal and dependency exemptions. *See* I.R.C. § 6334(b) (before repeal). During those years in which the

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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).

In 2022 the IRS announced that it would not seize property located on private premises unless the person in possession of the property voluntarily consents to the seizure or the IRS obtains a court order authorizing its agents to enter the property for purposes of seizure. IRS Policy Statement 5-38 (Rev. 1), *Seizure of Assets Located on Private Premise* (June 10, 2022). The policy is now incorporated into the Internal Revenue Manual at Part 1.2.1.6.10. More recently, the IRS issued a news release stating that "As part of a larger transformation effort, the Internal Revenue Service today announced a major policy change that will end most unannounced visits to taxpayers by agency revenue officers to reduce public confusion and enhance overall safety measures for taxpayers and employees." *IRS Ends Unannounced Revenue Officer Visits to Taxpayers; Major Change to End Confusion, Enhance Safety as Part of Larger Agency Transformation Efforts,* IR-2023-133 (July 24, 2023), https://www.irs.gov/newsroom/irs-ends-unannounced-revenue-officer-visits-to-taxpayers-major-change-to-end-confusion-enhance-safety-as-part-of-larger-agency-transformation-efforts. The announcement goes to say:

> The change reverses a decades-long practice by IRS revenue officers, the unarmed agency employees whose duties include visiting households and businesses to help taxpayers resolve their account balances by collecting unpaid taxes and unfiled tax returns. Effective immediately, unannounced visits will end except in a few unique circumstances and will be replaced with mailed letters to schedule meetings.
>
> IRS Commissioner Danny Werfel announced the change as part of a larger effort to transform IRS operations following passage of the Inflation Reduction Act last year and the creation of the new IRS Strategic Operating Plan in April.
>
>> "We are taking a fresh look at how the IRS operates to better serve taxpayers and the nation, and making this change is a common-sense step," Werfel said. "Changing this long-standing procedure will increase confidence in our tax administration work and improve overall safety for taxpayers and IRS employees."
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> * * *
>
> Werfel also noted that there have been increased security concerns in recent years on multiple fronts. The growth in scam artists bombarding taxpayers has increased confusion about home visits by IRS revenue officers. Sometimes scam artists appear at the door posing as IRS agents, creating confusion for not just the taxpayers living there but local law-enforcement.
>
> For IRS revenue officers, these unannounced visits to homes and businesses presented risks. Revenue officers routinely faced hazards and

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> uncertainty making unannounced visits to attempt to resolve delinquent tax matters.
>
> * * *
>
> In place of the unannounced visits, revenue officers will instead make contact with taxpayers through an appointment letter, known as a 725-B, and schedule a follow-up meeting. This will help taxpayers feel more prepared when it is time to meet.
>
> Taxpayers whose cases are assigned to a revenue officer will now be able to schedule face-to-face meetings at a set place and time, with the necessary information and documents in hand to reach resolution of their cases more quickly and eliminate the burden of multiple future meetings.
>
> The IRS noted there will still be extremely limited situations where unannounced visits will occur. These rare instances include service of summonses and subpoenas; and also sensitive enforcement activities involving seizure of assets, especially those at risk of being placed beyond the reach of the government.

Id.

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).

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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. According to more recent IRS guidance, "Although the [relief initiative ended] mid-July [2020], the IRS continues to put people first. While beginning to resume its critical tax administration responsibilities, the IRS will also factor in the wide-ranging impacts of COVID-19 on taxpayers." IRS, *People First Initiative: Providing Relief to Taxpayers* (Jan. 31, 2023), https://www.irs.gov/newsroom/people-first-initiative-providing-relief-to-taxpayers.

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)).

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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).

In 2021 the IRS released a video series to help taxpayers applying for an offer in compromise. IR-2021-229, *IRS Offers How-To Videos to Help Taxpayer Apply for Offers in Compromise and Avoid Scams*, https://www.irs.gov/newsroom/irs-offers-how-to-videos-to-help-taxpayers-apply-for-offers-in-compromise-and-avoid-scams. The videos encourage taxpayers to complete the process themselves and avoid excessive fees charged by unscrupulous preparers.

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. 2, 2022). 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 (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(2) (last revised Sept. 2, 2022).

The IRS recently issued guidance altering the overpayment recoupment process relating to offers in compromise. IRS, SBSE-05-1021-0063, *Interim Guidance on Refund Recoupments* (Oct. 28, 2021), https://www.irs.gov/pub/foia/ig/sbse/sbse-05-1021-0063redacted.pdf. Under the prior policy, a taxpayer whose offer was accepted in one calendar year could see the IRS recoup an overpayment for any tax period extending through that calendar year. For example, if a taxpayer's offer was accepted in 2020 and she filed a 2020 return in 2021 showing a refund, the IRS would apply that refund against the taxpayer's outstanding liability. Under the new policy, if the taxpayer's offer was accepted by the IRS in 2020, the refund shown on the 2020 return filed in 2021 would not be offset against the taxpayer's liability. The new relief does not apply while the offer in compromise is still under consideration. *Id*. The updated guidance is reflected in Internal Revenue Manual section 5.19.7.10(2) (last revised Oct. 6, 2022).

Page 767:

In April 2023, the IRS released another 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.

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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

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> 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/.

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Chapter 16

Pages 808-09:

A 2023 annual report from the Treasury Inspector General for Tax Administration (TIGTA) concluded that the Appeals Office was in compliance with most Collection Due Process (CDP) procedures. *Review of the Independent Office of Appeals Collection Due Process Program*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. No. 2023-10-038 (July 21, 2023), https://www.oversight.gov/sites/default/files/oig-reports/TIGTA/202310038fr.pdf. According to the report:

> The IRS Independent Office of Appeals (Appeals) properly informed taxpayers that Collection Due Process and Equivalent Hearings were conducted by an impartial hearing officer. Appeals hearing officers verified applicable law or administrative procedures were met; allowed taxpayers to raise issues at the hearing related to the unpaid tax; and made a determination on the proposed levy, the filing of the Notice of Federal Tax Lien, or both after considering the collection action balances efficient tax collection with the taxpayer's concern that the collection action be no more intrusive than necessary.

Id.

The report, however, found that "Appeals did not always classify taxpayer requests properly or provide only one hearing with respect to the taxable period related to the unpaid tax." *Id*. Moreover, according to the report, the IRS sometimes miscalculates the applicable statute of limitations on collection for cases that are sent through the CDP process. "[S]imilar to prior audits, TIGTA identified incorrect Collection Statute Expiration Date (CSED) posting errors in . . . which the IRS either incorrectly extended the CSED, allowing the IRS additional time to collect the delinquent taxes; or incorrectly shortened the CSED, resulting in the IRS having less 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

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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:

For a discussion of how CDP appeals affect the running of the statute of limitations on collection, see the updates in Chapter 14 associated with Page 694.

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. 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.

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Id. at 3.

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 13 (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 15.

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).

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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 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 Tax Ct. 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*, T.C. Memo 2021-64 *30-31, 2021 Tax Ct. Memo LEXIS 93 (*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*

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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.

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Id. at 655. *See also* Knight v. Commissioner, T.C. Memo 2022-76, 2022 T.C. Memo LEXIS 73 (finding that taxpayer could not challenge his underlying tax liability in a second CDP hearing when he failed to raise the issue in the first CDP hearing).

The U.S. Supreme Court recently overturned an Eight Circuit decision that had ruled that the section 6330(d)(1) deadline to appeal with the Tax Court a Notice of Determination issued in a CDP case was jurisdictional. Boechler, PC v. Comm'r, 967 F3d 760 (8th Cir. 2020). In *Boechler*, the taxpayer, a North Dakota law firm, missed by one day the 30-day filing deadline with the Tax Court to appeal an adverse Notice of Determination. *Id*. at 763. Following the Ninth Circuit's earlier decision in *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018), the Eight Circuit found the filing deadline was jurisdictional and upheld the Tax Court's decision that it did not have jurisdiction in the case because the taxpayer missed the filing deadline. *Id*. at 764. According to the Eight Circuit:

> As a general principle, a statutory time limit is jurisdictional when Congress clearly states that it is. Musacchio v. United States, 136 S. Ct. 709, 717, 193 L. Ed. 2d 639 (2016). Mere proximity to a jurisdictional provision is insufficient. . . . "Congress must do something special, beyond setting an exception-free deadline, to tag a [time limit] as jurisdictional and so prohibit a court from tolling it." United States v. Kwai Fun Wong, 575 U.S. 402, 410, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015). Even so, Congress does not have to "incant magic words" to make a deadline jurisdictional if the "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." Id.
>
> * * *
>
> The statutory text of § 6330(d)(1) is a rare instance where Congress clearly expressed its intent to make the filing deadline jurisdictional. The provision states: The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter). 26 U.S.C. § 6330(d)(1). The parenthetical "(and the Tax Court shall have jurisdiction with respect to such matter)" is clearly jurisdictional and renders the remainder of the sentence jurisdictional. See Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849, 204 L. Ed. 2d 116 (2019).

Id. at 764-65. By finding the section 6330(d)(1) filing deadline jurisdictional, the Eighth Circuit rejected the taxpayer's argument that the deadline could be extended based on an argument of equitable tolling.

The Supreme Court, in a unanimous opinion, reversed the Eighth Circuit, finding that the deadline was not jurisdictional. Boechler, PC v. Comm'r, 142 S. Ct. 1493 (2022). Justice Barrett phrased the issue as follows:

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> Section 6330(d)(1) provides: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."
>
> The only jurisdictional language appears in the parenthetical at the end of the sentence. All agree that the parenthetical grants the Tax Court jurisdiction over petitions for review of collection due process determinations. And all agree that the provision imposes a 30-day deadline to file those petitions. The question is whether the provision limits the Tax Court's jurisdiction to petitions filed within that timeframe.
>
> The answer depends on the meaning of "such matter," the phrase marking the bounds of the Tax Court's jurisdiction. Boechler contends that it refers only to the immediately preceding phrase: a "petition [to] the Tax Court for review of such determination." If so, the filing deadline is independent of the jurisdictional grant. The Commissioner, by contrast, argues that "such matter" refers to the entire first clause of the sentence, sweeping in the deadline and granting jurisdiction only over petitions filed within that time. On this reading, the deadline is jurisdictional.

Id. at 1497-98.

Applying rules of grammar, the Court gave the taxpayer's interpretation a "small edge." According to the Court:

> It is also worth noting that the parties' back-and-forth does not exhaust the universe of plausible ways to read "such matter." For example, "such matter" might refer to "such determination" (which in turn refers to a "determination under this section"). Or "such matter" might refer to the preceding subsection's list of "[m]atters" that may be considered during the collection due process hearing. . . . Neither possibility ties the Tax Court's jurisdiction to the filing deadline, and that is another point in Boechler's favor. Where multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear. See *Sossamon* v. *Texas*, 563 U. S. 277, 287, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).

Id. The Court went on to determine that the filing deadline was subject to equitable tolling and remanded the case to the Tax Court to determine whether tolling was appropriate. *Id*. at 1500, 1501.

The *Boechler* case is discussed in a series of posts starting with Keith Fogg, *What Happens After* Boechler *– Part 1: The IRS Argues IRC 6330 Is Unique*, PROCEDURALLY TAXING (Apr. 25, 2022), https://procedurallytaxing.com/what-happens-after-boechler-part-1-the-irs-argues-irc-6330-is-unique/. Lee Sheppard has written two interesting and entertaining takes on the issues surrounding *Boechler*. *See* Lee A. Sheppard, *What Deadlines? Deficiency Filing*

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Deadline Challenged, 175 TAX NOTES FED. 829 (2022); Lee A. Sheppard, *What Deadlines? Tax Court Jurisdiction Remodeling*, 175 TAX NOTES FED. 685 (2022).

As of June 2023, the *Boechler* case is still on remand. In a posting on the Procedurally Taxing blog, Carlton Smith reports on a case in which Tax Court Judge Greaves issued an order finding that the taxpayer presented sufficient evidence to justify a finding that the filing deadline for contesting a CDP hearing was equitably tolled. Carlton Smith, *The Tax Court's First Grant of Equitable Tolling*, PROCEDURALLY TAXING (June 21, 2023), https://procedurallytaxing.com/?s=first+grant+of+equitable. The case, *Hauser v. Commissioner*, involved a taxpayer who was incorrectly advised by a Tax Court employee that he had 90 days to file a petition contesting his Notice of Determination, rather than the correct filing deadline of 30 days. In denying the IRS's motion for summary judgment, the judge found that the incorrect advice was sufficient to equitably toll the filing deadline. Docket No. 9088-22L, Order dated June 16, 2023, *available at* http://procedurallytaxing.com/wp-content/uploads/2023/06/Hauser-T.C.-order-of-6-16-23.pdf. The judge returned the case "to the general docket for trial or other disposition." *Id*. The Tax Court judge's order in *Hauser* did not specify what standards or precedent the judge used in finding that the filing deadline was tolled. According to Carlton Smith, "Equitable tolling rulings are often based on prior precedents presenting similar fact patterns. A T.C. division opinion should have been issued to accompany the order, so that any later taxpayers who have tangible proof that they were misled by Tax Court employees could cite the opinion as grounds for equitable tolling." Smith, *Equitable Tolling*.

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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).

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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

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> 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). A compilation of other cases finding abuse of discretion in CDP cases is included in

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William D. Elliott, *Consideration of Cases Finding Abuse of Discretion in CDP Proceedings*, TAXES, July 2021, at 17.

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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).

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Several cases after *Greene-Thapedi v. Commissioner*, excerpted in the casebook, have addressed the question of whether the Tax Court has authority to determine an overpayment and order a refund as part of a CDP appeal? The Fourth Circuit recently held that it did not. McLane v. Commissioner, 24 F. 4th 316 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 408 (2022). The taxpayer in *McLane* was mailed a Notice of Deficiency but the parties agreed that he never received it. In response to a later notice reflecting a tax lien, the taxpayer requested a CDP hearing under section 6330. Because the taxpayer did not receive a Notice of Deficiency, he was permitted to challenge the amount of the underlying liability during the CDP hearing. *See* I.R.C. §6330(c)(2)(B). He did so, presenting information showing that he had losses greater than income for the year at issue and that he owed no tax. *McLane*, 24 F. 4th, at 317-18. In his CDP appeal, he raised for the first time the argument that he was due a refund. Affirming the Tax

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Court's decision that it did not have jurisdiction in his CDP appeal to order a refund, the Fourth Circuit stated:

> Sections 6330 and 6320 provide a taxpayer with the right to a CDP hearing only when the IRS seeks to enforce collection of tax liability via lien or levy. If the taxpayer requests a CDP hearing, the Appeals Office determines in the first instance whether the IRS's collection action may go forward. When as here, the Commissioner has already conceded that a taxpayer has no tax liability and that the lien should be removed, any appeal to the Tax Court of the Appeals Office's determination as to the collection action is moot. No collection action remains, for which there is underlying tax liability, to appeal. . . .
>
> We cannot read the phrase "underlying tax liability" in isolation, but instead must read it in "the specific context in which that language is used." *Yates v. United States*, 574 U.S. 528, 537, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)). Here, the "specific context" is the IRS's attempt to collect via lien or levy. *See Montgomery v. Comm'r*, 122 T.C. 1, 12 (2004) (Laro, J., concurring) ("The relevant term, 'underlying tax liability', is clear and unambiguous and is read easily to mean the tax liability underlying the proposed levy."). The phrase "underlying tax liability" does not provide the Tax Court jurisdiction over independent overpayment claims when the collection action no longer exists. The Commissioner is correct that the "taxpayer was permitted to challenge the amount of his underlying liability in the [collection due process] hearing . . . *only* in the context of determining whether the collection action could proceed." Appellee's Br. at 15-16 (emphasis added); *see Iames*, 850 F.3d at 162 ("Section 6330 provides a set of procedural safeguards for taxpayers *facing* a potential levy action by the IRS . . ." (emphasis added)). McLane no longer faces such an action.

Id. at 318-19. In a series of posts, Caleb Smith has explored the question of when a taxpayer can seek a return of funds (albeit not pursuant to a typical overpayment claim) as part of a CDP hearing. *See*, *e.g.*, Caleb Smith, *"Refunds" and CDP Review*, PROCEDURALLY TAXING (Jan. 25, 2023), https://procedurallytaxing.com/refunds-and-cdp-review/.

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Chapter 17

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A 2019 Tax Court case found that a spouse had "signed" the joint 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 "[t]he 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.* at *11 (citations omitted).

On appeal, the Ninth Circuit affirmed the decision and agreed that the "[taxpayer-wife's] history of noncompliance with income tax laws and knowledge of her ex-husband's financial difficulties outweighed those factors favoring relief, namely, marital status and a lack of benefit from the underpayments." Jones v. Commissioner, No. 20-70013, 2022 U.S. App. LEXIS 3095 at *3 (9th Cir. Feb. 3, 2022). 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/.

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For a fairly 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

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> 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, 2019 Tax Ct. Memo LEXIS 143, 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 "[t]axpayers are generally presumed to have constructive knowledge of [the] information reported on [tax] returns [that]

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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, 1206 (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. For a recent case in which the taxpayer/spouse was found not to have knowledge or reason to know of the understatement, see *Blappert v. Commissioner*, 2022 U.S. Tax LEXIS 19 (Jan. 7, 2022), at *9-11.

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For recent analyses of the seven threshold conditions of Revenue Procedure 2013-34 where the requesting spouse is not entitled to equitable relief, see *Sutherland v. Commissioner*, T.C. Memo. 2021-110, 2021 Tax Ct. Memo LEXIS 143; *Goode v. Commissioner*, No. 14832-18S, 2021 Tax Ct. Summary LEXIS 34 (T.C. Sept. 23, 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 at *30 (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.").

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As noted in the casebook, a taxpayer can seek innocent spouse relief using IRS Form 8857, *Request for Innocent Spouse Relief*. The IRS updated Form 8857 in June of 2021. The updates are explained in Audrey Patten, *Significant Changes in New Draft Form 8857*, PROCEDURALLY TAXING (June 24, 2021), https://procedurallytaxing.com/significant-changes-in-new-draft-form-8857/.

In *Demeter v. Commissioner*, T.C. Memo. 2014-238, 2014 Tax Ct. Memo LEXIS 236, 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.

The effective date of section 6015(e)(7) was July 1, 2019. The issue of whether the new statute applied to cases already underway on that effective date was litigated in Tax Court. In *Sutherland v. Commissioner*, 155 T.C. 95, 2020 U.S. Tax Ct. LEXIS 23 (reviewed by the court), a unanimous Tax Court held:

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> 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 105 (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 106. 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.*

Cases interpreting section 6015(e)(7) are starting to be reported. In a recent small tax case, for example, 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*, 2021 U.S. Tax LEXIS 19 (Apr. 30, 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.

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> 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; *see also* Bacigalupi v. Comm'r, 2022 U.S. Tax Ct. LEXIS 600 (concluding that testimony given by taxpayer during the Tax Court proceeding in support of her claim for relief is newly discovered evidence). 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/. For further reading about the *Bacigalupi* case, see John R. Leavins & Vinita Ramaswamy, *The Impact of Changes to the Innocent Spouse Rules*, 178 TAX NOTES FED. 39, 41 (2023) (pointing out that the "introduction of [Bacigalupi's] testimony became critical to the final decision in the case. The statements made in the testimony contradicted the IRS position. Under the abuse of discretion review, the disagreement would not have mattered, but it substantially affected the result under the *de novo* review.").

A more recent case, *Thomas v. Commissioner*, 160 T.C. No. 4, 2023 U.S. Tax Ct. LEXIS 733, required the Tax Court to interpret the language in section 6015(e)(7)(B), which requires the court to consider "any additional newly discovered . . . evidence" as part of its review of an innocent spouse claim. Thomas, a lifestyle blogger, sought innocent spouse relief after her husband died. As part of her Tax Court trial, the IRS sought to introduce into evidence posts that "reflect information about Ms. Thomas's assets, lifestyle, and business, as well as her relationship with" her husband. *Id*. at *2-4. Those posts were not included in the administrative record: The IRS discovered them after she filed her Tax Court petition. *Id*. at *6. In support of her motion to strike that evidence, the taxpayer claimed that the blog posts were publicly available to the IRS while it was reviewing her case and, therefore, should not be considered newly discovered evidence. *Id*. at *7-8.

In denying the taxpayer's motion to strike, the Tax Court relied upon the ordinary meaning of the terms "newly" and "discovered":

> Applied to this case, the phrase "newly discovered evidence" encompasses the blog posts that Ms. Thomas seeks to strike. The Commissioner discovered the posts by searching the internet after Ms. Thomas filed the Petition upon which this case is based. . . . . There is no evidence that the Commissioner obtained the blog posts any sooner, and Ms. Thomas makes no argument to that effect. Therefore, we conclude that [the posts] are admissible as "newly discovered . . .

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> evidence" for purposes of this Court's review of Ms. Thomas's innocent spouse claim.

Id. at *15.

The Tax Court also found support for its conclusion by focusing on how the scope of review and the extent of the record under review relate to one another:

> Our reading finds additional support in the structure of section 6015(e)(7), which grants this Court *de novo* review of innocent spouse determinations. A *de novo* standard of review suggests that we should construe our authority to consider information outside the administrative record broadly rather than narrowly, because limiting the evidence we can consider inhibits our ability to evaluate a case's merits. *See*, *e.g*., Wilson v. Commissioner, 705 F.3d at 993 ("The Tax Court must be able to compile a *de novo* record if it is to consider 'all the facts and circumstances' when deciding whether a taxpayer is entitled to relief from joint liability under § 6015(f) . . . ."). For this reason, in our cases a *de novo* standard of review typically goes hand-in-hand with a fresh record, *see* Ax v. Comm'r, 146 T.C. 153, 161 (2016) ("The Internal Revenue Code . . . reflects Congress's intention that the Tax Court will decide deficiency cases not by reviewing the agency's determinations for abuses of discretion but by deciding issues according to the evidence."), while cases where we are limited to the administrative record more commonly are reviewed for abuse of discretion, Kasper v. Commissioner, 150 T.C. 8, 20, 22 (2018) (articulating the standard and scope of review for whistleblower cases). Accordingly, that Congress chose a *de novo* standard of review in section 6015(e) supports our conclusion that evidence unknown to a participant in the innocent spouse administrative proceeding should be admissible if that participant (now a party in our Court) offers it in the proceedings before us.

Id. at *18-19. For further reading on the *Thomas* case, see Nina Olsen, Thomas v. Commissioner*, Some Clarity on "Newly Discovered Evidence" Under IRC 6015(e)(7) That Comes With a Reality Check*, PROCEDURALLY TAXING (Apr. 17, 2023), https://procedurallytaxing.com/thomas-v-commissioner-some-clarity-on-newly-discovered-evidence-under-irc-6015e7-that-comes-with-a-reality-check/ (pointing out that "going forward [the case] may very well be more helpful to taxpayers than for the IRS").

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):

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(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.)

A recent case examining the operation of section 6015(e)'s grant of jurisdiction in innocent spouse cases is *Coggin v. Commissioner*, 157 T.C. No. 12, 2021 U.S. Tax Ct. LEXIS 75. The facts are somewhat convoluted. The taxpayer discovered after her husband's death that he had not properly filed the couple's returns for 2001 through 2009 and had not fully paid the couple's tax liability. The IRS assessed the liability against both spouses. Claiming that the returns filed by her deceased husband were invalid because they did not contain her signature, the taxpayer filed amended returns for 2001 through 2009, completing the returns by electing married filing separate status. According to the taxpayer, she was entitled to refunds for years 2001 through 2007. She did not seek innocent spouse relief in her refund requests. *Id*. at *1-2.

The IRS rejected her refund claims and the taxpayer filed suit in District Court to recover the amounts. The Justice Department filed a counterclaim asking the court to reduce the amounts owed through 2009 to judgment. *Id*. at *3-4. The District Court granted the Government's motion to dismiss the refund claims for 2001 through 2007 but retained jurisdiction over the counterclaims. *Id.* at *4-5. In defense of the counterclaim, the taxpayer sought innocent spouse relief. *Id*. at *5. The District Court suspended the case so that the taxpayer could request innocent spouse relief from the IRS. *Id.* at *5-6. The IRS denied her relief and the taxpayer filed a petition in Tax Court appealing the denial. *Id*. at *7-8. The IRS filed a motion to dismiss in the Tax Court

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case claiming that the District Court already had jurisdiction over the tax years at issue and that it would be inappropriate to allow two courts to have jurisdiction over the same tax year. *Id*. at *8, *14.

The jurisdiction question turned on an interpretation of section 6015(e)(3). According to the Tax Court:

> As outlined above, when a suit for refund is filed in a District Court or in the Court of Federal Claims by either individual filing the joint return pursuant to section 6532, this Court loses jurisdiction over a taxpayer's action under section 6015 to whatever extent the District Court or the Court of Federal Claims acquires jurisdiction over the taxable years that are subject of the suit for refund. Sec. 6015(e)(3)(A). Ms. Coggin initiated a jurisdictionally valid refund suit in the District Court for years 2001-07. Ms. Coggin now seeks innocent spouse relief for years 2001-09 in the Tax Court, while her court action involving some of the same years remains pending in the District Court.
>
> Section 6015(e)(3) provides that "[i]f a suit for refund is begun" the "Tax Court shall lose jurisdiction". This text is not explicit about the timing or sequence requirement (if any) as to a refund suit and filing of an innocent spouse relief claim in the Tax Court. Section 6015(e)(3) could be read to mean that this Court's jurisdictional limitation applies only where a petition is filed before a refund claim. However, we do not interpret the statute as having such a requirement or as compelling us to give any weight to the sequence of Ms. Coggin's actions with respect to her claims.
>
> Where, as here, a District Court acquires jurisdiction in a suit for refund, it acquires jurisdiction over the entire liability for that tax year including the taxpayer's claim for recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. . . .
>
> As evidenced by its July 2018 order the District Court did not find any jurisdictional defects and retained jurisdiction over Ms. Coggin's claim for innocent spouse relief under section 6015. Although the District Court dismissed Ms. Coggin's refund claims for years 2001-07 after ruling on their merits, the District Court has not entered judgment, it has not ruled on Ms. Coggin's claim for innocent spouse relief, and it has stayed the case pending administrative review of her request for innocent spouse relief.
>
> When Ms. Coggin filed Form 8857 with the IRS requesting relief from joint liability for years 2001-09, waited six months, and filed with the Tax Court a petition seeking that relief, she met the prerequisites for invoking the Tax Court's jurisdiction for years 2001-09. However, because Ms. Coggin's refund action pending in the District Court overlaps with some of the tax years before

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> this Court--namely years 2001-07--we conclude that the Tax Court loses jurisdiction and the District Court acquires jurisdiction over her petition under section 6015(e)(3) for those same tax years. A plain reading of section 6015(e)(3)(A) supports this conclusion.

Id. at *16-18.

As for the remaining two years at issue—2008 and 2009—the Tax Court ruled that it could retain jurisdiction over those years. Apparently the taxpayer had not paid the liability at issue for those years thus the District Court could not take refund jurisdiction even though it had jurisdiction over the Government's counterclaim. *Id*. at *18-19. In a footnote, the Court concluded:

> [I]t appears to us that the District Court has jurisdiction over the Government's counterclaim for years 2008 and 2009--and potentially has jurisdiction over Ms. Coggin's innocent spouse claims, including those for years 2008 and 2009, insofar as they are defenses to the counterclaim--while we have jurisdiction over the innocent spouse claims for years 2008 and 2009.

Id. at *19 n. 22. The *Coggins* case is discussed further in Keith Fogg, *Tax Court Lacks Jurisdiction in Innocent Spouse Case Pending Before District Court*, PROCEDURALLY TAXING (Dec. 23, 2021), https://procedurallytaxing.com/tax-court-lacks-jurisdiction-in-innocent-spouse-case-pending-before-district-court/.

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. *See, e.g.*, *Nauflett v. Commissioner*, 892 F.3d 649, 653, 655 (4th Cir. 2018); *Matuszak v. Commissioner*, 862 F.3d 192, 197-98 (2d Cir. 2017); *Rubel v. Rubel*, 856 F.3d 301, 306 (3d Cir. 2017). However, after the Supreme Court's 2022 opinion in *Boechler*, which held that the 30-day filing deadline in section 6330(d) to appeal a Collection Due Process determination to the Tax Court was not jurisdictional, the Tax Court has raised the issue of whether the section 6015(e) filing deadline remains jurisdictional. Those proceedings, involving the case of *Frutiger v. Commissioner*, Tax Court Docket No. 31153-21, are discussed in Carlton Smith, *Second Appellate Case on Whether IRC 6213(a)'s Deadline Is Still Jurisdictional and First Tax Court Case Involving IRC 6015(e)(1)(A)*, PROCEDURALLY TAXING (Oct. 26, 2022), https://procedurallytaxing.com/second-appellate-case-on-whether-irc-6213as-deadline-is-still-jurisdictional-and-first-tax-court-case-involving-irc-6015e1a/.

Boechler is discussed above in connection with the updates to Chapters 9 and 16.

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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 announced several years ago 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

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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). In November 2021, *Tax Notes* reported that the Treasury Department was still reviewing draft revisions to Circular 230. Mary Katherine Browne, *Updates Near for Fixing Obsolete Professional Conduct Rules*, 173 TAX NOTES FED. 1165 (2021). As of late 2022, revisions to Circular 230 remained on the list of projects the Treasury Department hoped to complete by June 30, 2023. Treasury Department, *2022-2023 Priority Guidance Plan* (Nov. 4, 2022), https://www.irs.gov/pub/irs-utl/2022-2023-pgp-initial.pdf. As of May 5, 2023, the project remained on the list of incomplete projects. Treasury Department, *Third Quarter Update to 2022-2023 Priority Guidance Plan* (May 5, 2023), https://www.irs.gov/pub/irs-utl/2022-2023-pgp-3rd-quarter-update.pdf.

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.

For an interesting take on the role of taxpayers, practitioners, IRS agents, Chief Counsel attorneys, and judges in forming opinions about tax law, see *Jasper L. Cummings Jr., Who Has Discretion in Tax Opinions?*, 172 TAX NOTES FED. 431 (2021) (concluding that “Taxpayers have the most discretion in tax opinions, practitioners the least.”).

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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:

An 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

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> 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:

An 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.

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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*. *Cheetah* has now been rebranded as *VitalLaw*.
- 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.