NATIONAL TAXPAYER ADVOCATE

2020 Purple Book

Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration

December 31, 2019

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INTRODUCTION

Section 7803(c)(2)(B)(ii)(IX) of the Internal Revenue Code requires the National Taxpayer Advocate, as part of the annual report to Congress, to propose legislative recommendations to resolve problems encountered by taxpayers. This year, we present 58 legislative recommendations.

We have taken the following steps to make these recommendations as accessible and user-friendly as possible for Members of Congress and their staffs:

- We have consolidated our recommendations from various sections of this year's report, prior reports, and other sources into this single volume.
- We have grouped our recommendations into categories that generally reflect the various stages in the tax administration process. For example, return filing issues are presented separately from audit and collection issues.
- We have presented each legislative recommendation in a format like the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections.
- Where bills have been introduced in the past that are generally consistent with a recommendation, we have included a footnote at the end of the recommendation that identifies some of those bills.[1]
- We have included a table, which appears at the end of this volume as Appendix 1, that identifies additional materials relating to our recommendations, where such materials exist. In addition to identifying a larger number of prior bills than we cite in our footnotes, the table provides references to more detailed issue discussions that have been included in prior National Taxpayer Advocate reports.

By our count, Congress has enacted approximately 46 legislative recommendations that the National Taxpayer Advocate has proposed. See Appendix 2 for a complete listing. That total includes approximately 23 provisions that were enacted as part of the Taxpayer First Act.[2]

The National Taxpayer Advocate has titled this the "Purple Book" because the color purple, as a mix of red and blue, has come to symbolize bipartisanship. The Office of the Taxpayer Advocate is an independent, non-partisan organization within the IRS that advocates for the interests of taxpayers, and historically, tax

1 Because of the large number of bills introduced in each Congress, we almost surely have overlooked some. We apologize for any bills we have inadvertently omitted.

2 Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019). We say Congress enacted "approximately" a certain number of National Taxpayer Advocate recommendations, because in some cases, enacted provisions are substantially similar to what we recommended but are not identical. The statement that Congress enacted a National Taxpayer Advocate recommendation is not intended to imply that Congress acted solely because of our recommendation. Congress, of course, receives suggestions from a wide variety of stakeholders on an ongoing basis.

administration legislation has attracted bipartisan support. Most recently, the Taxpayer First Act was approved by both the House and the Senate on voice votes, with no recorded opposition.

We believe most of the recommendations presented in this volume are non-controversial, common sense reforms that will strengthen taxpayer rights and improve tax administration. We hope the tax-writing committees and other Members of Congress find it useful.

Strengthen Taxpayer Rights

#1 CODIFY THE TAXPAYER BILL OF RIGHTS, A TAXPAYER RIGHTS TRAINING REQUIREMENT, AND THE IRS MISSION STATEMENT AS SECTION 1 OF THE INTERNAL REVENUE CODE

Present Law

Internal Revenue Code (IRC) § 7803(a)(3) requires the Commissioner to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title [the Internal Revenue Code], including –

(A) *the right to be informed,*

(B) *the right to quality service,*

(C) *the right to pay no more than the correct amount of tax,*

(D) *the right to challenge the position of the Internal Revenue Service and be heard,*

(E) *the right to appeal a decision of the Internal Revenue Service in an independent forum,*

(F) *the right to finality,*

(G) *the right to privacy,*

(H) *the right to confidentiality,*

(I) *the right to retain representation, and*

(J) *the right to a fair and just tax system."*

The IRS Restructuring and Reform Act of 1998 directed the IRS to revise its mission statement "to place a greater emphasis on serving the public and meeting taxpayers' needs."[3] The IRS subsequently adopted the following mission statement: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and *by applying the tax law* with integrity and fairness to all" (emphasis added). In 2009, with no public discussion, the IRS quietly made a profound change to its mission statement, which now reads: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and *enforce the tax law* with integrity and fairness to all" (emphasis added).

Reasons for Change

Taxpayer rights serve as the foundation for effective tax administration. The U.S. tax system is frequently characterized as a system of "voluntary compliance." While taxpayers ultimately may face penalties for noncompliance, we rely in the first instance on the willingness of taxpayers to file returns on which they self-report their income (much of which is not reported to the IRS and is therefore difficult for the IRS to discover in the absence of self-reporting) and to pay the required tax.

More than 150 million individuals and more than ten million business entities file income tax returns and pay our nation's bills every year, and they are entitled to be treated with respect. Making clear that taxpayers possess rights is not only the right thing to do, but TAS research suggests that when taxpayers have confidence

3 Pub. L. No. 105-206, Title I, § 1002, 112 Stat. 685, 690 (1998).

the tax system is fair, they are more likely to comply voluntarily, which may translate into enhanced revenue collection as well.[4]

The National Taxpayer Advocate recommends that three foundational provisions that would promote respect for taxpayer rights and thereby strengthen tax administration be codified as Section 1 of the IRC.

First: The ten rights that make up the Taxpayer Bill of Rights (TBOR) are currently codified in IRC § 7803(a)(3). We believe that relocating these provisions to the front of the tax code would make a strong and important statement about the value Congress places on taxpayer rights.

Second: Effective employee training and evaluation is required to ensure that conceptual respect for taxpayer rights is translated into practice. Currently, IRS training materials incorporate taxpayer rights information inconsistently and insufficiently.[5] The Taxpayer First Act of 2019 directed the Commissioner to submit a report to Congress within one year of the date of enactment that outlines a comprehensive training strategy and that contains "a plan to develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate, for employees that interface with taxpayers and the direct managers of such employees."[6] While that provision is helpful, it requires only that the IRS submit a training plan on a one-time basis, and it is an "off-code" provision that is not codified within the IRC. Adding a statutory training and evaluation requirement to Section 1 of the IRC would ensure that agency management places appropriate emphasis on promoting employee awareness of and compliance with taxpayer rights and that employees have the knowledge and incentives to consider the impact of their actions on the taxpayers with whom they are working.

Third: The IRS mission statement sends a clear message about the IRS's priorities and articulates the guiding principles around which the IRS develops its strategic plans.

As noted above, the 2009 change in the IRS's mission statement from "applying" the tax law to "enforc[ing]" the tax law, while subtle, has significant consequences. If a tax agency views its primary mission as "enforcing" the tax law, it is likely to design its procedures and focus its resources around taking action against the relatively small number of taxpayers it views as noncompliant. By so doing, it may neglect to provide sufficient service and support to maintain and strengthen voluntary compliance among the overwhelming majority of taxpayers who are fully or substantially compliant, and thereby risk lower levels of compliance on their part. In our view, the phrase "applying the tax law" is broad enough to encompass enforcement while also encompassing non-coercive compliance strategies.

To make clear the value Congress places on taxpayer rights, the National Taxpayer Advocate recommends that Congress codify the TBOR, a taxpayer rights training and evaluation requirement, and the IRS mission statement as § 1 of the IRC.

4 *See* National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 34 (Research Study: *Small Business Compliance: Further Analysis of Influential Factors*); National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, at 1 (Research Study: *Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*).

5 The IRS currently requires all employees to take annual trainings, known as Mandatory Briefings, on topics such as ethics, unauthorized access of taxpayer accounts, and anti-discrimination laws. Although the Taxpayer Advocate Service has prepared materials to be used in a Mandatory Briefing on the TBOR that likely would take less than 30 minutes per employee to complete, the IRS to date has declined to require all employees who interact with taxpayers to take a briefing on taxpayer rights.

6 Taxpayer First Act, Pub. L. No. 116-25, § 2402, 133 Stat. 981 (2019).

Recommendation

Amend § 1 of the IRC to read as follows (and renumber existing Sections 1, 2, and 3 accordingly):

SECTION 1. TAXPAYER BILL OF RIGHTS AND INTERNAL REVENUE SERVICE MISSION STATEMENT.

(a) **Taxpayer Rights.**

(1) In discharging their duties, every officer and employee of the Internal Revenue Service shall act in accord with taxpayer rights as afforded by other provisions of this title, including —

(a) the right to be informed,

(b) the right to quality service,

(c) the right to pay no more than the correct amount of tax,

(d) the right to challenge the position of the Internal Revenue Service and be heard,

(e) the right to appeal a decision of the Internal Revenue Service in an independent forum,

(f) the right to finality,

(g) the right to privacy,

(h) the right to confidentiality,

(i) the right to retain representation, and

(j) the right to a fair and just tax system.[7]

(2) The National Taxpayer Advocate shall develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate, and the Commissioner shall establish procedures to ensure that all officers and employees of the Internal Revenue Service receive such annual training.[8]

(3) The Commissioner shall establish procedures to ensure that annual performance evaluations of all officers and employees of the Internal Revenue Service address compliance with taxpayer rights.

(b) **Mission of The Internal Revenue Service.** The Internal Revenue Service shall aim to provide taxpayers with top-quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all and with due regard for taxpayer rights as described in subsection (a)(1) and other provisions of this title.

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7 The provisions of the TBOR were codified at IRC § 7803(a)(3). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, § 401(a), 129 Stat. 2242, 3117 (2015). During the drafting of the TBOR language, we understand staff of the Joint Committee on Taxation (JCT) raised concerns that if the TBOR were codified without limitation, some taxpayers might assert purported violations and seek remedies in administrative and litigated disputes, potentially requiring the IRS and the courts to adjudicate vague claims with no clear standard for resolution. After considering the JCT's concerns, the tax-writing committees ultimately settled on the language enacted as IRC § 7803(a)(3). To avoid reopening this issue, we are proposing to relocate the existing language in IRC § 7803(c)(3) virtually without change. We are recommending a minor refinement to the lead-in language that we think makes it read more clearly and does not substantially change the meaning. However, if the JCT believes our refinement does substantially change the meaning, the text of IRC § 7803(a)(3) could be relocated with no change in language at all.

8 For legislative language generally consistent with this aspect of the recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 102(2) (2018).

#2 PROVIDE THE IRS WITH SUFFICIENT FUNDING TO MEET TAXPAYER NEEDS AND IMPROVE FEDERAL TAX COMPLIANCE

Present Law

Congress controls the IRS's priorities by dividing its annual appropriation into four accounts: Taxpayer Services, Enforcement, Operations Support, and Business Systems Modernization. With limited exception, the IRS may not reallocate its appropriated funding among its accounts.

Under the Congressional Budget and Impoundment Control Act of 1984, as amended, the federal appropriations process is generally a zero-sum game: Once Congress establishes spending caps for the upcoming fiscal year, a dollar allocated to one agency or program leaves one less dollar available for allocation to another agency or program.

As an exception to the spending caps, Congress in some years has authorized "program integrity cap adjustments," which allow it to appropriate funding for IRS enforcement initiatives in excess of the caps on the basis that the initiatives are projected to generate a positive return on investment (ROI).[9]

Reasons for Change

The IRS mission statement says the agency's mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."[10] Since fiscal year (FY) 2010, the IRS budget has been reduced by more than 20 percent after adjusting for inflation.[11] Largely as a result of these budget reductions, the IRS is neither providing top quality service nor enforcing the law with fairness to all.[12] In addition, its information technology (IT) systems are in desperate need of upgrades.

The IRS Is Not Providing Top Quality Service

The IRS received nearly 100 million telephone calls in FY 2019. Its employees answered only 29 percent of these calls, with hold times averaging 16 minutes. The President's Management Agenda emphasizes the importance of high-quality customer service as measured by the American Customer Satisfaction Index (ACSI) and the Forrester U.S. Federal Customer Experience Index™.[13] By these measures, the IRS performs poorly. The ACSI report for 2018 ranked the Treasury Department tied for 10th out of 12 federal departments and says that "most [IRS] programs score … well below both the economy-wide national ACSI average and the federal government average."[14] The 2019 Forrester report ranked the IRS 13th out of 15 federal agencies and characterized the IRS's score as "very poor."[15]

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9 *See, e.g.*, Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3165 (2009) (IRS Administrative Provision § 105 provided a cap adjustment of $890 million for "enhanced tax law enforcement"); H.R. Con. Res. 218, 103rd Cong. § 25 (1994). For a detailed discussion of the mechanics of cap adjustments, see H.R. Rep. No. 103-490, at 58 (1994).

10 *See* IRS, The Agency, its Mission and Statutory Authority (Aug. 9, 2019), https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last visited Dec. 12, 2019).

11 IRS response to TAS information request (Oct. 2, 2019).

12 *See* National Taxpayer Advocate 2019 Annual Report to Congress (Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*).

13 Office of Management and Budget, *President's Management Agenda* 7, 28 (2018), https://www.performance.gov/PMA/Presidents_Management_Agenda.pdf.

14 American Customer Satisfaction Index, *ACSI Federal Government Report 2018*, at 3-4 (2019).

15 Forrester Research, Inc., *The US Federal Customer Experience Index, 2019*, at 15-16 (June 11, 2019).

The IRS Is Not Enforcing the Law With Fairness to All

The IRS recently estimated it was unable to collect an annual average of about $381 billion in unpaid tax attributable to legal-source income for tax years 2011-2013.[16] With approximately 122 million U.S. households in 2013, that suggests each U.S. household is effectively paying an average annual "surtax" of more than $3,000 to subsidize noncompliance by others.[17] To be "fair to all," the IRS should be funded to reduce noncompliance. But equally important, it must be staffed to answer calls from taxpayers against whom it takes collection actions, such as wage garnishments, bank levies, or the filing of notices of federal tax lien. Levies, in particular, often create economic hardships for taxpayers, and the law requires the IRS to release levies in those cases.[18] But taxpayers often cannot reach the IRS to make it aware of their hardships. In FY 2019, the IRS received 15 million calls on its consolidated automated collection system telephone lines. IRS employees were able to answer only about 31 percent, and taxpayers who got through waited on hold an average of about 38 minutes.

Upgraded Information Technology Systems Would Improve Service and Enforcement

The two IRS systems containing the official records of individual and business taxpayer accounts are the oldest major technology systems in the federal government. The IRS also has about 60 case management systems that generally are not interconnected; each function's employees must transcribe or import information from other electronic systems and mail or fax it to other functions. Obsolete IT systems limit the functionality of online taxpayer accounts, prevent taxpayers from obtaining full details about the status of their cases, and prevent the IRS from selecting the best cases for compliance actions. To modernize its IT systems, the IRS requires gradual, consistent funding increases for its Business Systems Modernization account without significant fluctuations from year to year, which could disrupt IT contracts and increase the long-term cost of the upgrades.

The IRS Is an Extraordinary Investment

In FY 2018, the IRS collected nearly $3.5 trillion on a budget of about $11.43 billion, producing a remarkable ROI of more than 300:1.[19] It is economically irrational to underfund the IRS. If a company's accounts receivable department could generate an ROI of 300:1 and the chief executive officer (CEO) failed to provide enough funding for it to do so, the CEO would be fired. Yet in general, the federal budget rules exclusively take into account outlays and ignore the revenue those outlays generate. The program integrity cap adjustment mechanism gives Congress the ability to provide some funding above the spending caps, but because it historically has been used solely to fund enforcement initiatives, it can lead to imbalances in the IRS's operations.

Balanced Funding Is Needed

Most initiatives require resources from more than one of the IRS's budget accounts. When the IRS hires more collection personnel through the Enforcement account, for example, it requires funding for additional office space, equipment, and the like from the Operations Support account. When the IRS takes additional enforcement actions against taxpayers and the taxpayers call or visit the IRS, there needs to be sufficient

16 IRS Pub. 1415, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011–2013, at 8 (Sept. 2019).

17 United States Census Bureau, *Historical Households Tables: Table HH-1: Households by Type: 1940 to Present*, https://www.census.gov/data/tables/time-series/demo/families/households.html (last visited Dec. 17, 2019). For purposes of computing this "surtax," we make the simplifying assumption that the government is seeking to collect a fixed amount of revenue, such that compliant taxpayers pay more to subsidize noncompliance by others.

18 IRC § 6343(a)(1)(D).

19 IRS, 2018 Data Book, Table 1: Collections and Refunds, by Type of Tax (May 2019); Department of the Treasury, *FY 2020 Budget-in-Brief* 69 (2019), https://home.treasury.gov/system/files/266/FY2020BIB.pdf.

funding in the Taxpayer Services account to answer the calls and handle the visits. If Congress provides a boost to the Enforcement account without corresponding increases to the Operations Support and Taxpayer Services accounts, the IRS cannot use the funding in a way that is reasonable and fair to taxpayers. Therefore, we believe Congress should not rely on program integrity cap adjustments to fund the IRS unless it takes a holistic view of compliance initiatives and funds the downstream costs as well.

Recommendations

- Provide sufficient funding for the IRS to increase the “Level of Service” on both its accounts management and compliance telephone lines to 80 percent, with average hold times not to exceed five minutes, and provide sufficient funding for the Business Systems Modernization account to enable the IRS to replace its 1960’s technology systems and create a robust integrated case management system.
- Ensure the IRS receives balanced funding by taking into account the interactive effects of changing the funding level for one IRS account on other IRS accounts, including the downstream increase in telephone calls and TAS cases that are likely to result from increased enforcement funding.
- Revise existing budget rules to fund the IRS in a manner that more closely follows the principles private sector businesses apply in setting funding levels for their accounts receivable departments — while keeping in mind the public sector goal is slightly different and should focus on maximizing tax compliance, especially voluntary compliance, while protecting taxpayer rights and minimizing taxpayer burden.

#3 REQUIRE THE IRS TO PROVIDE TAXPAYERS WITH A "RECEIPT" SHOWING HOW THEIR TAX DOLLARS ARE BEING SPENT

Present Law

Internal Revenue Code (IRC) § 7523 requires the IRS to provide taxpayers with very basic information regarding federal taxes and federal spending. Specifically, the IRS is required to include pie-shaped graphs in its instructions for Form 1040 that show the relative sizes of major budget outlay categories and major income categories. In the 2018 Form 1040 instructions booklet, the IRS published two graphs on page 112 depicting *Major Categories of Federal Income and Outlays for Fiscal Year 2017*.

Reasons for Change

IRC § 7523 was enacted for tax years beginning after 1990. The purpose was to help taxpayers understand the connection between the taxes they pay and the benefits they receive. Taxpayers who perceive that connection may be more compliant with their tax obligations.

However, the National Taxpayer Advocate believes the information required by IRC § 7523 is too cursory to achieve its objective. It would be more helpful to provide each taxpayer with personalized information regarding the taxpayer's own contributions, such as the taxpayer's marginal tax rate, effective tax rate, and tax benefits claimed.

In addition, the value of even this cursory requirement has diminished over time. In 1990, almost all taxpayers filed their tax returns on paper, so the instructions booklet was widely available and widely used. Today, about 90 percent of individual income tax returns are filed electronically,[20] and the instructions booklet is much less visible. For those reasons, far fewer taxpayers see the Form 1040 instructions booklet today.

If the statute is modified, e-filing has the potential to enhance the value of the requirement. Specifically, tax software is capable of computing and displaying personalized tax information, including the taxpayer's marginal tax rate, effective tax rate, and tax benefits claimed, and can show how much of each taxpayer's tax payments go toward major categories of federal spending. If required by Congress and programmed by software companies, this information can be presented in far greater detail than was possible when the statute was enacted in 1990.

To further promote public engagement, once taxpayers are given information regarding their tax payments and their contribution to federal spending, taxpayers could be given an opportunity to voice their opinions about how their tax dollars should be spent in the future. This could be achieved by inviting taxpayers to "vote" on their tax returns regarding how much and on what programs the government should spend its money and by requiring the IRS to report the results of that "voting." The "voting," of course, would be non-binding. But this exercise in public engagement could help Americans gain a better understanding of the connection between the federal taxes they pay and the federal benefits they receive. And, as noted, when taxpayers have a clear understanding of the benefits they receive in relation to the taxes they pay, tax morale and tax compliance are likely to increase.

20 IRS, 2019 Filing Season Statistics (week ending May 10, 2019), https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-may-10-2019 (showing that of 141,567,000 returns received by the IRS during filing season 2019 as of May 10th, 127,939,000 had been e-filed).

Recommendations

- Amend IRC § 7523 to require the IRS to provide each taxpayer with a "taxpayer receipt" that shows, on a single page, how federal dollars are spent and the taxpayer's own contributions in the form of taxes paid and tax benefits claimed. The IRS should develop these receipts in consultation with TAS. For taxpayers who use tax software to self-prepare their returns, this requirement may be satisfied if the IRS, as part of its Authorized IRS e-file Providers rules,[21] requires e-file providers to include a page displaying the one-page breakdown at the end of the return preparation process. For taxpayers who use paid preparers, the requirement may be satisfied by requiring the preparer to include the one-page breakdown when furnishing the taxpayer with a completed copy of his or her tax return, as required by IRC § 6107(a).
- Consider amending IRC § 7523 to require that (i) the taxpayer receipt contain an online link or a paper "ballot" where the taxpayer can "vote" on which programs he or she believes federal funds should be spent on and in what amounts and (ii) the IRS publish the aggregate results of taxpayer "voting" no later than 30 days after the end of the calendar year.

21 *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488; IRS Pub. 3112, IRS e-file Application and Participation (Apr. 2017).

Improve the Filing Process

#4 REVISE E-FILING PROCEDURES SO THAT TAXPAYERS ARE INFORMED OF E-FILING ERRORS AND ARE NOT SUBJECT TO FAILURE-TO-FILE PENALTIES WHEN THOSE ERRORS ARE TIMELY CORRECTED

Present Law

Internal Revenue Code (IRC) § 6651 imposes an addition to tax when a taxpayer fails to file a return by the return due date, unless the taxpayer can show the failure was due to reasonable cause and not to willful neglect (hereinafter, the "failure-to-file penalty").

In the IRS Restructuring and Reform Act of 1998, Congress adopted a policy that "paperless filing should be the preferred and most convenient means of filing Federal tax and information returns" and directed the IRS to set a goal of having at least 80 percent of all tax and information returns e-filed by 2007.[22]

IRC § 6011(f) provides the IRS with broad authority to issue regulations to promote e-filing. However, it does not establish standards for processing e-filed returns.

In the paper filing context, courts have held that a taxpayer's submission to the IRS is presumptively valid as a tax return to be accepted for processing if it, among other things, contains sufficient information to calculate a tax liability.[23]

Under current IRS policy, authorized e-file providers of business returns are given ten days to resubmit a return after an e-filed return is rejected.[24]

Reasons for Change

Unlike with paper-filed returns, IRS procedures provide that e-filed returns may be rejected, and thus considered "not filed," for a variety of reasons not essential to calculating tax liability.[25] If a taxpayer fails to timely refile a return after it is rejected, he or she will be subject to the failure-to-file penalty. Thus, a taxpayer who e-files a return may be subject to penalties in circumstances where the identical return submitted on paper would be accepted and deemed timely filed.

The IRS's procedures that govern rejected e-filed returns raise the following concerns:

- *Taxpayers are not directly notified by the IRS if it rejects a return.* The majority of taxpayers file returns electronically and generally assume they have fulfilled their tax obligations unless they receive an IRS notice in the mail or a notification from the software provider or preparer they used. However,

22 Pub. L. No. 105-206, § 2001(a), 112 Stat. 685, 723 (1998).

23 *See, e.g.*, *Beard v. Comm'r*, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). Under the test, a return will be valid if (i) the information on the return is sufficient for the IRS to calculate the tax liability; (ii) the filed document purports to be a tax return; (iii) the return makes an honest and reasonable attempt to comply with the tax laws; and (iv) the taxpayer executes the return under penalties of perjury.

24 *See* IRS Pub. 4163, Modernized e-File (MeF) Information for Authorized IRS e-File Providers for Business Returns 53-54 (Dec. 2018).

25 *See* IRS Pub. 1345, Handbook for Authorized IRS e-File Providers of Individual Income Tax Returns (Feb. 2019). Reasons for rejections include missing forms, misspelled names, and duplicated or mismatched Social Security numbers. *See* IRS Pub. 4164, Modernized e-File (MeF) Guide for Software Developers and Transmitters (Nov. 2019).

the IRS does not directly notify taxpayers of rejected e-filed returns. Instead, it provides notification to the electronic return originator (generally, the software company). Moreover, when a taxpayer relies on a return preparer to prepare and e-file a return, as most taxpayers do, the electronic return originator provides notification of a rejection to the preparer — not the taxpayer. The IRS does not mail taxpayers a notification stating whether it received and accepted an e-filed return, so a taxpayer will not necessarily find out quickly if his or her return is rejected.

- *Taxpayers are limited in their ability to proactively determine whether their returns or other filings have been received by the IRS.* The IRS's "Where's My Refund" feature is not available for all forms or for taxpayers who are not claiming a refund. When taxpayers are unaware their returns have been rejected, they are unable to timely address the reason for the rejection and are at risk of incurring a failure-to-file penalty.[26]
- *The IRS does not provide sufficient time for taxpayers to resubmit rejected returns.* If an e-filed return is rejected, the taxpayer must fix the underlying problem and resubmit a paper return by the latter of the return due date or ten days from the date the error notification was received. While ministerial errors, like misspelled names, can be corrected easily, other issues may require more time (*e.g.*, where a taxpayer must locate additional documentation or where a taxpayer needs to consult with a tax professional). Taxpayers in vulnerable populations that use free tax return preparation services, such as the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs, may face delays in scheduling a time to return for assistance. Taxpayers who are sick or traveling face similar challenges, as they may not have immediate access to documents required to correct mistakes.
- *Treating rejected returns as "not filed" and subject to a penalty discourages taxpayers from e-filing.* Although Congress has directed the IRS to facilitate and encourage e-filing, taxpayers who choose to do so are held to a higher standard than taxpayers who file paper returns. Unlike in the case of e-filed returns, if a taxpayer's paper return contains an error, such as a mismatched Social Security number, the IRS will still accept the return for processing instead of rejecting it. The IRS has procedures for resolving errors of this nature through internal editing and correspondence with the taxpayer, thus precluding the risk of a failure-to-file penalty.[27] The fact that taxpayers who e-file their returns are at greater risk than paper filers of having their returns rejected and being subject to the failure-to-file penalty serves as a deterrent to e-filing, which undermines Congress's and the IRS's policy objective.

Recommendations

- Amend IRC § 6011(f) as follows:
  - Require the IRS to send taxpayers an "e-filing receipt" via the taxpayer's chosen method of correspondence to indicate the IRS's acceptance or rejection of a return and, in the case of a rejected return, to provide information about the steps necessary to resolve the problem.
  - Provide a ten-day window after an e-filed return is rejected for taxpayers to resubmit the return.
  - Convert rejected e-filed returns into paper-processible returns if they remain unresolved after the ten-day window closes.

26 For a related recommendation, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Extend Reasonable Cause Abatement of the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to e-File Their Returns)*, *infra*.

27 *See*, *e.g.*, IRM 3.11.3.13.4, Dependent's Name Control and TIN (Jan. 1, 2016).

- Amend IRC § 6651 as follows:
    - Provide that a return timely resubmitted and accepted by the IRS within the ten-day window (as proposed in the second recommendation to amend IRC § 6011(f) above) will be treated as timely filed and therefore not subject to the failure-to-file penalty.
    - Provide that the failure-to-file penalty will not be imposed when the IRS converts an e-filed return into a paper-processible return (as proposed in the third recommendation to amend IRC § 6011(f) above).

#5 TREAT ELECTRONICALLY SUBMITTED TAX PAYMENTS AND DOCUMENTS AS TIMELY IF SUBMITTED BEFORE THE APPLICABLE DEADLINE

Present Law

Internal Revenue Code (IRC) § 7502(a)(1) provides that if certain requirements are satisfied, a mailed document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope. Therefore, if the postmark shows a document or payment was mailed on or before the due date, it will be considered timely, even if it is received after the due date.

IRC § 7502(b) and (c) provide that this timely mailed/timely filed rule (commonly known as the "mailbox rule") applies to documents sent by U.S. postal mail, private delivery services, and electronic filing through an electronic return transmitter. However, the statutory mailbox rule does not apply to all filings and payments. With respect to certified mail and electronic filing, the Secretary is authorized to promulgate regulations describing the extent to which the mailbox rule shall apply.[28] To date, the only regulations the Secretary has promulgated relating to electronic filing cover documents filed through an electronic return transmitter.[29]

Reasons for Change

The statutory mailbox rule in IRC § 7502 does not apply to the electronic transmission of payments to the IRS. In addition, the mailbox rule does not apply to the electronic filing of time-sensitive documents (except documents filed electronically with an electronic return transmitter).[30] If the IRS does not receive an electronically submitted document (including a facsimile transmission) or payment until after the due date, the document or payment is considered late, even if the taxpayer can produce a confirmation that he or she transmitted the payment or document before the due date. The comparatively unfavorable treatment of electronically submitted documents and payments undermines the IRS's efforts to encourage greater use of digital services and imposes additional cost and burden on taxpayers and the IRS alike.

Along similar lines, the IRS encourages U.S. taxpayers to make payments electronically using the Treasury Department's Electronic Federal Tax Payment System (EFTPS). However, the EFTPS website displays the following warning: "Payments using this Web site or our voice response system must be scheduled by **8 p.m. ET the day before the due date** to be received timely by the IRS. The funds will move out of your banking account on the date you select for settlement" (emphasis in original).[31] This limitation applies to all payments.

Example: If a taxpayer owes a balance due on April 15 and mails the payment to the IRS before midnight on April 15, the payment will be considered timely, even though it will probably take about a week until the IRS receives, opens, and processes the check. If the same taxpayer submits the payment on EFTPS, the payment will be considered late if submitted after 8 p.m. on April 14 (28 hours earlier), even though the payment generally would be debited from the taxpayer's account on April 16 — about one week sooner than if submitted by mail.

This disparity in the treatment of mailed and electronically submitted payments makes little sense. As compared with a mailed check, an electronic payment is received more quickly, is cheaper to process, and

28 IRC § 7502(c)(2).

29 Treas. Reg. § 301.7502-1(d).

30 *See* Treas. Reg. § 301.7502-1(d)(3)(i) (containing a definition of an electronic return transmitter). *See also* Rev. Proc. 2007–40, 2007–1 C.B. 1488 (providing a list of documents that can be filed electronically with an electronic return transmitter).

31 *See* www.eftps.gov (last visited Aug. 29, 2019).

eliminates the risk that a mailed check will be lost or misplaced. Yet rather than encouraging taxpayers to use EFTPS, the earlier deadline serves as a deterrent.

Recommendation

- Amend IRC § 7502 to direct the Secretary to issue regulations that apply the mailbox rule comparably to all documents and payments submitted by a taxpayer regardless of whether they are submitted electronically or by mail.

#6 AUTHORIZE THE IRS TO ESTABLISH MINIMUM COMPETENCY STANDARDS FOR FEDERAL TAX RETURN PREPARERS

Present Law

Current law imposes no competency or licensing requirements on tax return preparers. Attorneys, certified public accountants, and enrolled agents are required to take courses and pass competency tests. Volunteers are required to pass competency tests as part of the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs. But most preparers are non-credentialed and are not required to pass any competency tests or take any courses in tax return preparation.

Reasons for Change

The IRS receives more than 150 million federal income tax returns every year, and the majority are prepared by paid tax return preparers. For that reason, both taxpayers and the tax system depend heavily on the ability of preparers to prepare accurate tax returns. Yet numerous studies have found that non-credentialed tax return preparers routinely prepare inaccurate returns, which has the effect of harming taxpayers, the public fisc, or both.

To protect the public, federal and state laws generally require lawyers, doctors, financial planners, actuaries, appraisers, contractors, motor vehicle operators, and even barbers and beauticians to obtain licenses or certifications, and in most of these cases, they are required to pass competency tests. Taxpayers and the tax system would benefit from requiring minimum standards of tax return preparers as well.

The following studies illustrate the extent of inaccurate return preparation:

Government Accountability Office (GAO). In 2006, GAO auditors posing as taxpayers made 19 visits to several national tax return preparation chains in a large metropolitan area. Using two carefully designed fact patterns, they sought assistance in preparing tax returns. On 17 of 19 returns, preparers computed the wrong refund amounts with variations of several thousand dollars. In five cases, the prepared returns reflected unwarranted excess refunds of nearly $2,000. In two cases, the prepared returns would have caused the taxpayer to overpay by more than $1,500. In five out of 10 cases in which the Earned Income Tax Credit (EITC) was claimed, preparers failed to ask where the auditor's child lived or ignored the auditor's answer to the question and consequently prepared returns claiming ineligible children.[32]

The GAO conducted a similar study in 2014. It again found that preparers computed the wrong tax liability on 17 of the 19 returns they prepared.[33]

Treasurer Inspector General for Tax Administration (TIGTA). In 2008, TIGTA auditors posing as taxpayers visited 12 commercial chains and 16 small, independently owned tax return preparation offices in a large metropolitan area. All preparers visited by TIGTA were non-credentialed. Of 28 returns prepared, 61 percent were prepared incorrectly. The average net understatement was $755 per return. Of seven returns involving EITC claims, *none* of the preparers exercised appropriate due diligence as required under IRC § 6695(g).[34]

32 GAO, GAO-06-563T, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors* (Apr. 4, 2006) (statement of Michael Brostek, Director – Strategic Issues, Before the Committee on Finance, U.S. Senate).

33 GAO, GAO-14-467T, *Paid Tax Return Preparers: In a Limited Study, Preparers Made Significant Errors* (Apr. 8, 2014) (statement of James R. McTigue, Jr., Director – Strategic Issues, Before the Committee on Finance, U.S. Senate).

34 TIGTA, Ref. No. 2008-40-171, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors* (Sept. 3, 2008).

New York State Department of Taxation and Finance. During 2008 and 2009, agents conducted nearly 200 targeted covert visits in which they posed as taxpayers and sought assistance in preparing income or sales tax returns. In testimony at an IRS Public Forum, the Acting Commissioner of the New York Department of Taxation and Finance testified that investigators found "an epidemic of unethical and criminal behavior."[35] At one point, the Department reported that it had found fraud on about 40 percent of its visits, and it had made more than 20 arrests and secured 13 convictions.[36]

IRS Study on EITC Noncompliance. The IRS conducted a study to estimate compliance with EITC requirements during the 2006-2008 period. Among the findings of the study, unaffiliated unenrolled preparers (*i.e.*, non-credentialed preparers who are not affiliated with a national tax return preparation firm) were responsible for "the highest frequency and percentage of EITC overclaims." The study found that half of the EITC returns prepared by unaffiliated unenrolled preparers contained overclaims, and the overclaim averaged between 33 percent and 40 percent.[37]

In 2002, before these studies were published, the National Taxpayer Advocate began recommending that Congress authorize the IRS to conduct preparer oversight based on her experience in private practice. Her proposal received widespread support from stakeholders and members of Congress. The Senate Committee on Finance twice approved legislation authorizing preparer oversight on a bipartisan basis under the leadership of Chairman Grassley and Ranking Member Baucus,[38] and on one occasion, the full Senate approved it by unanimous consent.[39] In 2005, the House Ways and Means Subcommittee on Oversight held a hearing at which representatives of five outside organizations expressed general support for preparer oversight.[40]

In 2009, the Commissioner of Internal Revenue concluded that the IRS had the authority under § 330 of Title 31 of the U.S. Code to impose minimum standards without statutory authorization. The IRS initiated an extensive series of hearings and discussions with stakeholder groups to receive comments and develop a system within which all parties believed they could operate.[41] The IRS began to implement the program in 2011, but it was terminated after a U.S. District Court rejected the IRS's legal position, concluding it does not have the authority to impose preparer standards without statutory authorization.[42]

Since that time, members of the House and Senate have introduced legislation that would provide the IRS with the statutory authorization to establish and enforce minimum standards. In the Senate, Senators Portman and Cardin sponsored bipartisan authorizing legislation in 2018,[43] and Senators Wyden and Cardin sponsored similar legislation in 2019.[44] In the House, Congressman Yoho and Congressman Panetta sponsored

35 Statement of Jamie Woodward, Acting Commissioner, New York Dept. of Taxation and Finance, before IRS Tax Return Preparer Review Public Forum (Sept. 2, 2009).

36 *Id.*; *see* Tom Herman, *New York Sting Nabs Tax Preparers*, Wall Street Journal (Nov. 26, 2008).

37 IRS Pub. 5162, Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns 24–26 (Aug. 2014).

38 Tax Administration Good Government Act, H.R. 1528 (incorporating Tax Administration Good Government Act, S. 882), 108th Cong. § 141 (2004); Telephone Excise Tax Repeal Act, S. 1321 (incorporating Taxpayer Protection and Assistance Act, S. 832), 109th Cong. § 203 (2006).

39 Tax Administration Good Government Act, H.R. 1528 (incorporating Tax Administration Good Government Act, S. 882), 108th Cong. § 141 (2004).

40 The organizations were the American Bar Association, the American Institute of Certified Public Accountants (AICPA), the National Association of Enrolled Agents, the National Society of Accountants, and the National Association of Tax Professionals. *See Fraud in Income Tax Return Preparation*: *Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. (2005).

41 *See* IRS Pub. 4832, Return Preparer Review (Dec. 2009).

42 *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

43 Protecting Taxpayers Act, S. 3278, 115th Cong. § 202 (2018).

44 Taxpayer Protection and Preparer Proficiency Act, S. 1192, 116th Cong. (2019).

bipartisan authorizing legislation in 2019,[45] and former Congresswoman Black and former Congressman Becerra, both members of the Ways and Means Committee, sponsored similar legislation in the recent past.[46]

The IRS's evolving "Future State" plan provides an important additional basis for establishing preparer standards. The IRS envisions giving preparers access to taxpayer information through online accounts. The security risks of this plan are significant, and if the IRS proceeds with it, steps must be taken to mitigate the risks. Minimum standards for preparers are one important step. Some have argued that requiring preparers to pass a competency test and take annual continuing education courses would address only the issue of competence and would not ensure preparers conduct themselves ethically. The National Taxpayer Advocate agrees that competency and ethical conduct are distinct issues. However, we think preparer standards would serve to raise ethical conduct as well as competency levels. A preparer who learns enough about tax return preparation to pass a competency test and takes annual continuing education courses would be demonstrating a commitment to return preparation as a profession. As such, the preparer would be more likely to understand and feel like a part of the tax system and would have more to lose if he or she is found to have engaged in misconduct.

In sum, the GAO, TIGTA, and other compliance studies described above suggest that tax returns prepared by non-credentialed preparers are often inaccurate. Minimum standards would directly improve preparer competency levels and are likely to raise ethical norms as well.

Recommendation

- Amend Title 31, § 330 of the U.S. Code to authorize the Secretary to establish minimum standards for federal tax return preparers.[47]

45 Taxpayer Protection and Preparer Proficiency Act, H.R. 3330, 116th Cong. (2019).

46 See Tax Return Preparer Competency Act, H.R. 4141, 114th Cong. § 2 (2015) (Cong. Black) and Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (Cong. Becerra).

47 For legislative language generally consistent with this recommendation, see Taxpayer Protection and Preparer Proficiency Act, S. 1192 & H.R. 3330, 116th Cong. (2019) and other bills cited herein.

#7 DIRECT THE IRS TO SET GOALS OF SUBSTANTIALLY INCREASING THE USAGE RATE AND THE RETENTION RATE OF THE FREE FILE PROGRAM BY FILING SEASON 2025 AND TO REPLACE FREE FILE WITH AN ALTERNATIVE APPROACH IF THOSE GOALS ARE NOT ATTAINED

Present Law

Section 2001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) directed the IRS to set a goal of increasing the e-file rate to at least 80 percent by 2007.[48]

Reasons for Change

In response to the RRA 98 directive, the IRS in 2002 entered into an agreement with a consortium of tax return preparation software providers known as the Free File Alliance.[49] Under the agreement, the software companies make their products available for free to, in the aggregate, 70 percent of all taxpayers, or about 105 million taxpayers in tax year (TY) 2018. In exchange, the IRS refrains from competing with these companies; therefore, the IRS does not develop or make its own software available to taxpayers. Eligibility for Free File software is based on adjusted gross income (AGI). Taxpayers with incomes currently below about $66,000 qualify. All taxpayers, including taxpayers with higher AGIs, may use Free File Fillable Forms, the electronic version of IRS paper forms.[50]

As presently organized and operated, the Free File program provides limited benefits to taxpayers and consumes IRS resources to administer. The program should be substantially improved or replaced.

While the IRS and the software industry often tout Free File as a model public-private partnership, the reality is the parties to this transaction have opposite objectives in key respects. The IRS is (or should be) aiming to make the filing process as painless and inexpensive for taxpayers as possible. Therefore, it should be advertising the Free File program and more actively evaluating and improving it on a regular basis to ensure it is taxpayer-friendly and widely used. By contrast, the software companies have a financial incentive to keep the usage rate low, because every taxpayer who uses Free File is a taxpayer who is not purchasing a paid product.[51]

From a taxpayer perspective, Free File has largely failed to achieve its objectives. Despite the fact that 70 percent of taxpayers qualify to use Free File software, less than two percent of taxpayers (2.5 million) used Free File software to file their returns during 2019.[52] Moreover, data on repeat usage suggests that taxpayers

48 *See* RRA 98, Pub. L. No. 105–206, § 2001, 112 Stat. 685, 723.

49 In 2014, the Free File Alliance formally changed its name to Free File, Inc. (FFI), and the new name is used on legal documents. However, the IRS and the organization itself continue to use the name "Free File Alliance" on their respective websites.

50 For a description of the program as well as access to all the associated Free File agreements and Memoranda of Understanding, see IRS, *Free File: About the Free File Alliance*, https://www.irs.gov/e-file-providers/about-the-free-file-alliance (last visited Nov. 11, 2019).

51 As noted below, software companies make their tax software products available for free to many taxpayers on their companies' websites. However, they can cross-sell ancillary products on their companies' websites and generally may not do so when taxpayers access tax software through Free File.

52 IRS response to TAS fact check (Dec. 20, 2019).

who have used Free File have generally been dissatisfied with it. Among taxpayers who used Free File software during the last four years, the majority did not use Free File software again in the following year.[53]

If Free File is discontinued, taxpayers would still have free e-filing options. Leading tax software companies have long offered their products to taxpayers at no charge. The Free File Alliance reports that its members provided free tax software to at least 17.7 million taxpayers outside the Free File program during the 2019 filing season.[54] It is therefore likely that most, if not substantially all, of the 2.5 million taxpayers who used Free File software last year would have been able to file for free through company websites if Free File did not exist.

The Free File program is also of questionable value to the IRS for two reasons. First, taxpayers enter the Free File program through the IRS's website, IRS.gov, and if they are dissatisfied with the program, it reflects poorly on the agency. Given the low repeat usage rate, it appears many taxpayers are not satisfied with the program. Second, the IRS incurs costs to administer the program. Particularly in an environment where IRS resources are tightly constrained, the costs of maintaining the program can only be justified if the usage rates and taxpayer satisfaction rates are increased.

While the Free File program provides only limited benefits to taxpayers and drains IRS resources, it is providing a valuable insurance policy for the software industry. Leading software companies understandably are concerned that their businesses could be adversely affected if taxpayers could e-file their returns directly with the IRS without going through a software company. For the tax software industry, the key provision in the Free File agreement provides: "[T]he federal government has pledged not to enter the tax [return] preparation software and e-filing services marketplace."[55]

Over the past decade, certain software companies have lobbied heavily for legislation that would make the Free File agreement permanent, effectively locking into place the current arrangement under which fewer than two percent of taxpayers are using free tax software that most could get from the members' websites directly, while permanently barring the IRS from allowing taxpayers to file returns directly with the government. A provision to codify Free File was included in a House-passed version of the Taxpayer First Act,[56] but was removed before enactment after a series of articles published in 2019 suggested that some members of the Free File Alliance had not acted in the best interests of taxpayers by steering them away from Free File software options.[57] Under congressional pressure, the IRS requested an independent assessment of the program from

53 IRS Compliance Data Warehouse, Electronic Tax Administration Research and Analysis System (ETARAS) MEF 1544 Table. For each year, TAS identified returns submitted through Free File and processed by the end of the fiscal year and then determined whether returns bearing the same taxpayer identification number (TIN) were submitted through Free File in the following year. Looking at all returns over the four-year period, only about 46 percent of taxpayers who used Free File in one year used it again the following year. However, for the most recent year (taxpayers who used Free File software in 2018 and then again in 2019), the percentage of repeat users rose to 54 percent.

54 MITRE, *Independent Assessment of the Free File Program x* (Oct. 3, 2019) (hereinafter "Free File Report"). To access the Free File Report, see IRS, *IRS Statement on Free File Program* (Oct. 11, 2019), https://www.irs.gov/newsroom/irs-statement-on-free-file-program.

55 Eighth Memorandum of Understanding on Service Standards and Disputes Between the Internal Revenue Service and Free File, Incorporated, Art. 2, at 5 (signed on Oct. 31, 2018 for a three-year term), https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf.

56 Taxpayer First Act, H.R. 1957, 116th Cong. § 1102 (2019).

57 *See, e.g.*, ProPublica, *The TurboTax Trap: How Tax Prep Industry Makes You Pay*, https://www.propublica.org/series/the-turbotax-trap (last visited Nov. 11, 2019).

MITRE.[58] The MITRE 2019 Free File Report found that five companies used a coding device to exclude their Free File landing page from organic searches on search engines such as Google or Bing.[59]

The National Taxpayer Advocate believes the Free File program should be significantly improved to meet taxpayer needs or should be replaced. Before entering into a new agreement with the Free File Alliance, the IRS should conduct research studies, develop actionable goals, create measures evaluating taxpayer awareness and satisfaction, test each member's software, provide options for English as a second language taxpayers, and conduct more outreach.[60] It should set a goal of increasing the Free File usage rate to a significantly higher yet attainable level, such as ten percent of the 70 percent of taxpayers eligible to use the program, and a goal of increasing the retention rate to 75 percent of taxpayers who used the program in the preceding year. If these targets are not attained, the IRS should avail itself of another private sector option; namely, entering into a sole-source or multi-source contract with tax software manufacturers to make tax software available to all taxpayers at no or low cost.

Recommendations

- Mandate that the IRS, in consultation with the National Taxpayer Advocate, submit a report to Congress by June 30, 2020, summarizing the actions it has taken to address the recommendations in the MITRE 2019 Free File report as well as recommendations made in the National Taxpayer Advocate's 2019 Annual Report to Congress to improve the Free File program by filing season 2021.
- Direct the IRS to set a goal of increasing the usage rate of the Free File program to a significantly higher yet attainable level (*e.g.*, 10 percent of the 70 percent of taxpayers eligible to use the program) and a goal of increasing the retention rate to 75 percent of taxpayers who used Free File in the preceding year and, if those goals are not attained by 2025, to replace Free File with an alternative approach to make tax software available to taxpayers at no or low cost, such as through the use of sole-source or multi-source contracts with tax software companies.

58 To access the MITRE 2019 Free File Report, see IRS, IRS Statement on Free File Program (Oct. 11, 2019), https://www.irs.gov/newsroom/irs-statement-on-free-file-program.

59 MITRE 2019 Free File Report, at vi-vii, 46. The members took the position that such practice keeps them in compliance with their agreement with the IRS to require the program software to be accessible only through IRS.gov. Despite the industry's stated rationale, the resulting practice of steering taxpayers away from program software appears deceptive in nature. To eliminate this seemingly deceptive practice, the IRS should consider proposing to change the next MOU so that IRS.gov is just one way to access program software.

60 For additional background, see FREE FILE: The Free File Program Is Failing to Achieve Its Objectives and Should be Substantially Improved or Eliminated, National Taxpayer Advocate Blog (Mar. 15, 2019), https://taxpayeradvocate.irs.gov/Free_File_Program_Is_Failing_to_Achieve_Objectives?category=Tax%20News; National Taxpayer Advocate 2019 Annual Report to Congress 46-54 (Most Serious Problem: *Free File: Substantial Free File Program Changes Are Necessary to Meet the Needs of Eligible Taxpayers*); Naomi Jagoda, Warren, Brown, *Press IRS on Study Reviewing Free File Program*, The Hill (Nov. 15, 2019), https://thehill.com/policy/finance/470601-warren-brown-press-irs-on-study-reviewing-free-file-program.

#8 REQUIRE THAT ELECTRONICALLY PREPARED PAPER TAX RETURNS INCLUDE A SCANNABLE CODE

Present Law

Present law does not address the treatment of tax returns that are prepared electronically but filed on paper.

Reasons for Change

In recent years, more than 85 percent of individual income tax returns have been submitted electronically. While this percentage is relatively high, almost 20 million returns are still submitted on paper. When the IRS cannot capture the data from a tax return electronically, IRS employees must enter the data from paper-filed returns manually. The manual transcription of millions of lines of return data is expensive, produces transcription errors, and delays return processing.

Scanning technology is available that would allow the IRS to scan paper returns prepared with tax return preparation software and capture the data in an efficient manner. Many states have been using scanning technology for paper-based returns for many years. To allow the IRS to utilize scanning technology, a horizontal or vertical bar code containing the return information would be imprinted on paper copies of a return prepared with tax return preparation software. Upon receiving the paper return, the IRS would scan it, capture the data, decode it, and process the return just as if it had been transmitted electronically.

While scanning technology does not convert taxpayers to e-file, it produces significant advantages over paper filing, including: (1) faster processing of tax returns; (2) more accurate recording of tax return information; and (3) cost savings due to the reduction in manual data transcription. Despite these benefits, the IRS has not fully availed itself of this or similar technology for individual income tax returns. The IRS can achieve savings by working with tax software companies to incorporate scannable bar codes into their individual tax return preparation software. The IRS already provides scanning technology as an option for filers of Schedules K-1 (Form 1065).[61] The IRS is also using character recognition software to capture data on some paper returns.[62] It is unclear whether character recognition software is more accurate than scanning technology in the context of tax return data.

Recommendation

- Require the IRS to report to Congress, within 180 days of enactment, on its plans to reduce the monetary costs and transcription errors associated with the processing of individual income tax returns prepared electronically but filed on paper.[63]

61 Internal Revenue Manual (IRM) 3.0.101.5.3, Substitute Schedule K-1 (Jan. 1, 2018).

62 IRM 3.41.275.1, Program Scope and Objectives (Nov. 14, 2017).

63 For legislative language that would impose this requirement, see Taxpayer First Act of 2018, S. 3246, 115th Cong. § 2104 (2018). *See also* Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals* 227 (Mar. 2014).

#9 EXTEND THE TIME FOR SMALL BUSINESSES TO MAKE SUBCHAPTER S ELECTIONS

Present Law

Internal Revenue Code (IRC) § 1362(b)(1) provides that a small business corporation ("S corporation") may elect to be treated as a passthrough entity by making an election at any time during the preceding taxable year or at any time on or before the 15th day of the third month of the current taxable year. The prescribed form for making this election is Form 2553, Election by a Small Business Corporation.

IRC § 6072(b) provides that income tax returns of S corporations made on a calendar-year basis must be filed on or before March 15 following the close of the calendar year and returns of S corporations made on a fiscal-year basis must be filed on or before the 15th day of the third month following the close of the taxable year.

Reasons for Change

Many small business owners are not familiar with the rules governing S corporations, and they learn about the effects of S corporation status for the first time when they hire a tax professional to prepare their corporation's tax return for its first year of operation. By that time, the deadline for electing S corporation status has passed. The failure to make a timely S corporation election can cause significant adverse tax consequences for businesses, such as incurring taxation at the corporate level and rendering shareholders ineligible to deduct operating losses on their individual income tax returns.[64] For context, more than 5.1 million S corporation returns were filed in fiscal year 2018, which accounted for about 71 percent of all corporate returns.

Taxpayers may seek permission from the IRS to make a late S corporation election under the provisions of Revenue Procedure 2013-30 or through a private letter ruling (PLR) request. Under the revenue procedure, a corporation that failed to timely file Form 2553 may request relief by filing Form 2553 within three years and 75 days of the date the election is intended to be effective. In addition, the corporation must attach a statement explaining its reasonable cause for failing to timely file the election and its diligent actions to correct the mistake upon its discovery.

Finally, all shareholders must sign a statement affirming they have reported their income on all affected returns as if the S election had been timely filed (*i.e.,* during the period between the date the S election would have become effective if timely filed and the date the completed election form is filed). If an entity is unable to comply with the requirements of the revenue procedure, it may request relief through a PLR, for which the IRS charges a user fee ranging from $5,800 to $30,000 per request.

The current S corporation election deadline burdens small businesses by requiring them to pay tax professionals and often IRS user fees to request permission to make a late election. It also burdens shareholders, because when the IRS rejects an S corporation return due to the absence of a timely election, the status of the corporation is affected, and that, in turn, may result in changes on the shareholders' personal tax returns. In addition, the current deadline and relief procedures require a commitment of significant resources on the part of the IRS to process late-election requests.

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64 The value of an S corporation election increased for many taxpayers with the passage of the Tax Cuts and Jobs Act, which generally allows an individual taxpayer to deduct 20 percent of domestic "qualified business income" (QBI) from a passthrough business, including an S corporation, effectively reducing the individual income tax rate on such income by 20 percent. The deduction is subject to certain income thresholds (first $315,000 of QBI for joint filers and $157,500 for single returns), phase-outs for professional services, and limitations based on W-2 wages paid or capital invested by a business owner for larger pass-through entities. *See* IRC § 199A, Pub. L. No. 115-97, § 11011 (2017); H.R. Rep. No. 115-466, at 205-224 (2017) (Conf. Rep.).

Because small business owners often consider the S corporation election for the first time in connection with the preparation of their company's first tax return, the burdens described above would be substantially eliminated if corporations could make an S election on their first timely filed tax return.

Recommendation

- Amend IRC § 1362(b)(1) to allow a small business corporation to elect to be treated as an S corporation by checking a box on its first timely filed (including extensions) Form 1120S, U.S. Income Tax Return for an S Corporation.[65]

65 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 304 (2018).

#10 ADJUST ESTIMATED TAX PAYMENT DEADLINES TO OCCUR QUARTERLY

Present Law

Under Internal Revenue Code (IRC) § 6654(c)(2), taxpayers are required to make estimated tax payments in four installments due on the following dates: April 15, June 15, September 15, and January 15.

Reasons for Change

Although estimated tax installment payments are sometimes referred to as "quarterly payments," they do not coincide with calendar year quarters and the payment dates are not evenly spaced. The April 15 and June 15 installments are due two months apart; the June 15 and September 15 installments are due three months apart; the September 15 and January 15 installments are due four months apart; and the January 15 and April 15 installments are due three months apart.

These dates are not intuitive and create compliance burdens. Small business owners and self-employed taxpayers are disproportionately affected by the estimated tax rules because their incomes generally are not subject to wage withholding. Yet small businesses are far more likely to keep their books on the basis of regular three-month quarters than on the basis of the seemingly random intervals prescribed by IRC § 6654.

These uneven intervals make it more difficult for many taxpayers to calculate net income and save appropriately to make payments. They also cause confusion as taxpayers struggle to remember the due dates. This confusion affects traditionally self-employed workers as well as workers in the gig economy. Setting due dates to fall 15 days after the end of each calendar quarter would make it substantially easier for taxpayers to remember and comply with the due dates.

Recommendation

- Amend IRC § 6654(c)(2) to set the estimated tax installment deadlines on April 15, July 15, October 15, and January 15.[66]

66 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 305 (2018); Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 2 (2017).

#11 HARMONIZE REPORTING REQUIREMENTS FOR TAXPAYERS SUBJECT TO BOTH THE REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS AND THE FOREIGN ACCOUNT TAX COMPLIANCE ACT BY ELIMINATING DUPLICATION AND EXCLUDING ACCOUNTS A U.S. PERSON MAINTAINS IN THE COUNTRY WHERE HE OR SHE IS A *BONA FIDE* RESIDENT

Present Law

The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as the Bank Secrecy Act) requires U.S. citizens and residents to report any foreign account with an aggregate value exceeding $10,000 at any time during the calendar year.[67] FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), has been prescribed for filing this report.

The Foreign Account Tax Compliance Act (FATCA)[68] added Internal Revenue Code (IRC) § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file a statement with their federal income tax returns to report foreign assets exceeding specified thresholds. Form 8938, Statement of Specified Foreign Financial Assets, has been prescribed for filing this statement. As codified by FATCA, IRC §§ 1471-1474 provide that foreign financial institutions (FFIs) that do not register with the IRS and agree to report certain information about their "United States accounts,"[69] including accounts held by U.S. persons and accounts of certain foreign entities with substantial U.S. owners, are subject to a 30 percent withholding tax on certain U.S. source payments they receive.

IRC § 1471(d)(1) authorizes the IRS to issue regulations to eliminate duplicative reporting requirements. IRC § 6038D similarly authorizes the IRS to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures.

Reasons for Change

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs as a result of FATCA reporting obligations that significantly overlap with the FBAR filing requirements.[70] The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if an asset is reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891).[71] It has also provided an exception from the reporting rules for financial accounts held in U.S. territories for *bona fide* residents of such territories.[72]

However, the IRS has repeatedly declined to adopt the recommendations of the National Taxpayer Advocate that are also supported by other stakeholders, including the Government Accountability Office, to eliminate duplicative FATCA reporting where assets have already been reported on an FBAR[73] and to provide a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident. These recommendations, if adopted, would reduce the compliance burdens on U.S. taxpayers, who

67 *See* 31 U.S.C. § 5314(b)(3) and 31 C.F.R. § 1010.306(c).

68 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

69 *See* IRC § 1471(d)(1) for a definition of "United States account."

70 IRS, Comparison of Form 8938 and FBAR Requirements, http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

71 Treas. Reg. § 1.6038D-7(a)(1).

72 Treas. Reg. § 1.6038D-7(c).

73 *See, e.g.*, Government Accountability Office, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified* (Feb. 2012).

now must file additional complex forms themselves or pay higher tax return preparation fees. They would also reduce the compliance burdens on FFIs, some of which are declining to do business with U.S. expatriates because of the significant costs and regulatory risks associated with ongoing FATCA compliance. In addition, the unwillingness of certain FFIs to do business with U.S. expatriates makes it difficult for U.S. citizens to open bank accounts in certain countries.

Recommendations

- Amend IRC § 6038D (i) to eliminate duplicative reporting of assets on Form 8938, Statement of Specified Foreign Financial Assets, where an asset is or has been reported or reflected on an FBAR and (ii) to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on Form 8938.[74]
- Amend IRC § 1471 to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the definition of "financial account" subject to reporting by FFIs.[75]

74 For legislative language similar to this recommendation, see H.R. 2136, 115th Cong. §§ 1 & 2 (2017) (providing an exception from certain reporting requirements with respect to the foreign accounts of individuals who are *bona fide* residents of the countries in which their accounts are maintained).

75 For additional information on the National Taxpayer Advocate's recommendations, see National Taxpayer Advocate 2015 Annual Report to Congress 353-363 (Legislative Recommendation: *Foreign Account Reporting: Eliminate Duplicative Reporting of Certain Foreign Financial Assets and Adopt a Same-Country Exception for Reporting Financial Assets Held in the Country in Which a U.S. Taxpayer Is a* Bona Fide *Resident*).

Improve Assessment and Collection Procedures

#12 CONTINUE TO LIMIT THE IRS'S USE OF "MATH ERROR AUTHORITY" TO CLEAR-CUT CATEGORIES SPECIFIED BY STATUTE

Present Law

Before assessing a deficiency, the IRS is ordinarily required by Internal Revenue Code (IRC) § 6213(a) to send the taxpayer a notice of deficiency that gives the taxpayer 90 days (150 days if addressed to a taxpayer outside the U.S.) to contest it by filing a petition with the U.S. Tax Court (known as "deficiency procedures"). The taxpayer's ability to appeal a deficiency determination to the Tax Court before paying is central to the taxpayer's *right to appeal an IRS decision in an independent forum*.

As an exception to standard deficiency procedures, IRC § 6213(b)(1) authorizes the IRS to summarily assess and collect tax after 60 days, without first providing the taxpayer with a notice of deficiency or access to the Tax Court, when it is addressing "mathematical and clerical" errors (known as "math error authority"). Taxpayers who do not contest a math error notice within this shorter period lose the right to do so in court before paying. Under current law, the IRS may summarily assess 17 types of "mathematical or clerical error," which are codified at IRC § 6213(g)(2) in subparagraphs A-Q.

Reasons for Change

Congress generally requires the IRS to follow deficiency procedures to provide taxpayers with notice and a reasonable opportunity to challenge an adverse IRS tax adjustment. Math error authority, which provides fewer taxpayer protections, was authorized as a limited exception to regular deficiency procedures to allow the IRS to make adjustments in cases of clear taxpayer error, such as where a taxpayer incorrectly adds numbers or incorrectly transcribes a number from one form to another. Because taxpayers have fewer protections under math error procedures, the procedures are not intended to be used where a substantive disagreement may exist. When Congress has expanded the IRS's math error authority, it has done so consistent with that principle.

Because math error procedures are cheaper and simpler for the IRS than deficiency procedures, the Department of the Treasury on several recent occasions has requested that Congress grant it the authority to add new categories of "correctable errors" by regulation.[76]

The National Taxpayer Advocate is concerned about the impact on taxpayer rights of giving the IRS broad authority to add new categories of math error. In our reports to Congress, we have documented circumstances

76 See Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals* 245-246 (Feb. 2015); Joint Committee on Taxation, JCS-1-19, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2020 Budget Proposal* 62, 64 (July 8, 2019).

in which the IRS has used its existing math error authority to address discrepancies that go beyond simple arithmetic mistakes and have undermined taxpayer rights.[77]

If the IRS uses math error authority to address more complex issues that require additional fact finding, its assessments are more likely to be wrong, and the IRS's computer-generated notices, which confuse many taxpayers in the simplest of circumstances, are likely to become even more difficult to understand. Shorter deadlines and confusing notices will prevent some taxpayers from responding timely. As a result, these taxpayers will lose their right to challenge the adjustments in court before paying. The IRS may also waste resources responding to calls and letters, reviewing additional documentation, and processing abatement requests from taxpayers whose returns were correct as filed. Thus, expanding math error authority into more complicated areas will burden taxpayers unnecessarily, erode taxpayer rights, and sometimes waste IRS resources.

Math error authority may be appropriate to use in instances where required schedules are omitted, or annual or lifetime dollar caps have been exceeded. It also may be appropriate to use where there is a discrepancy between a return entry and data available to the IRS from a reliable government database, such as records maintained by the Social Security Administration. But the IRS should not be the arbiter of that reliability. Rather, Congress should retain full authority, as it has until now, to determine whether the administrative "efficiency" of using math error authority in these instances outweighs the loss of the significant taxpayer protections that deficiency procedures provide.

Recommendations

- Continue to limit the IRS's use of "math error authority" to clear-cut categories specified by statute. Because the standard deficiency procedures created by Congress provide important taxpayer protections, the IRS should not be authorized to add new math error categories by regulation.
- Amend IRC § 6213(g) to authorize the IRS to summarily assess a deficiency due to "clerical errors" only pursuant to congressional authorization and only where: (i) there is a discrepancy between a return entry and reliable government data; (ii) the IRS's notice clearly describes the discrepancy and how to contest it; (iii) the IRS has researched all information in its possession that could help reconcile the discrepancy; (iv) the IRS does not have to evaluate documentation to make a determination; and (v) there is a low abatement rate for taxpayers who respond.
- Amend IRC § 6213(g) to provide that the IRS is not authorized to use any new criteria or data to make summary assessments unless the Department of the Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported on the reliability of the criteria or data for that intended use.[78]

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77 *See, e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*); National Taxpayer Advocate 2014 Annual Report to Congress 163-171 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 5 (*Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 92-93 (*Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*); National Taxpayer Advocate 2011 Annual Report to Congress 74-92 (Most Serious Problem: *Expansion of Math Error Authority and Lack of Notice Clarity Create Unnecessary Burden and Jeopardize Taxpayer Rights*); National Taxpayer Advocate 2006 Annual Report to Congress 311 (Most Serious Problem: *IRS Implementation of Math Error Authority Impairs Taxpayer Rights*); National Taxpayer Advocate 2003 Annual Report to Congress 113 (Most Serious Problem: *Math Error Authority*); National Taxpayer Advocate 2002 Annual Report to Congress 25 (Most Serious Problem: *Math Error Authority*); National Taxpayer Advocate 2002 Annual Report to Congress 186 (Legislative Recommendation: *Math Error Authority*); National Taxpayer Advocate 2001 Annual Report to Congress 33 (Most Serious Problem: *Explanations on Math Error Authority*).

78 For a more limited recommendation, see National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*).

#13 REQUIRE INDEPENDENT MANAGERIAL REVIEW AND WRITTEN APPROVAL BEFORE THE IRS MAY ASSERT MULTI-YEAR BANS BARRING TAXPAYERS FROM RECEIVING CERTAIN TAX CREDITS AND CLARIFY THAT THE TAX COURT HAS JURISDICTION TO REVIEW THE ASSERTION OF MULTI-YEAR BANS

Present Law

Internal Revenue Code (IRC) §§ 24(g), 25A(b), and 32(k) require the IRS to ban a taxpayer from claiming the Child Tax Credit (CTC), the American Opportunity Tax Credit (AOTC), or the Earned Income Tax Credit (EITC) for two years if the IRS makes a final determination that the taxpayer improperly claimed the credit with reckless or intentional disregard of rules and regulations. The duration of the ban increases to ten years if the IRS makes a final determination that the credit was claimed fraudulently.

IRC § 6214 grants the Tax Court jurisdiction to redetermine a deficiency for the tax year(s) before the court, but it does not grant the Tax Court jurisdiction to redetermine deficiencies for other tax years.

IRC § 6213 authorizes the IRS to disallow credits claimed while a ban is in effect pursuant to its summary assessment procedures (sometimes known as "math error authority").

Reasons for Change

Congress directed the IRS to impose multi-year bans on CTC, AOTC, and EITC eligibility to deter and penalize certain taxpayers who improperly claim these credits. Multi-year bans are highly unusual because they mean taxpayers will be denied credits in future years even if the taxpayers otherwise satisfy all of the eligibility requirements.

These refundable credits, particularly the EITC, account in some cases for 20 percent or more of a taxpayer's annual income. Given the potentially devastating financial impact of multi-year bans, it is critical that there be adequate safeguards in place to ensure both that the IRS imposes a ban only when a taxpayer acts with the requisite state of mind and that taxpayers have access to meaningful review of an IRS final determination to assert the ban.

Presently, the IRS may disallow an examined year's credit and assert a multi-year ban against claiming the credit in future years when it issues a statutory notice of deficiency at the conclusion of an audit. A taxpayer may contest a notice of deficiency in the Tax Court, but it is uncertain whether the court has jurisdiction to review the IRS's assertion of the ban.[79] Once a ban on claiming a credit in future years takes effect, the IRS will disallow the credit if the taxpayer claims it through its summary assessment process. The IRS would issue a statutory notice of deficiency in that instance only if the taxpayer disputes the summary assessment.

Written Managerial Approval

The IRS's internal rules allow it to impose two-year bans *automatically* in some EITC cases.[80] In all other ban cases, IRS procedures require a manager to review the case independently and approve the assertion of a ban

79 Compare *Garcia v. Comm'r*, T.C. Summ. Op. 2013-28 (a nonprecedential case in which the Tax Court held a ban did not apply) with *Ballard v. Comm'r*, No. 03843-15S (T.C. Feb. 12, 2016), https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6783516 (an order in which the Tax Court declined to rule on the application of IRC § 32(k), noting that the application of the ban had no effect on the taxpayer's federal income tax liability for the year before it).

80 Internal Revenue Manual (IRM) IRM 4.19.14.7.1.5, Project Codes 0027 and 0028 – EITC Recertification with a Proposed 2 Year EITC Ban (Nov. 2, 2017).

in writing.[81] Significantly, two TAS research studies of two-year ban cases found that this required managerial approval is usually lacking.[82]

The National Taxpayer Advocate does not believe that automatic or systemic imposition of multi-year bans is ever appropriate. The law requires that the two-year ban be imposed only in cases where the IRS determines a taxpayer acted recklessly or with intentional disregard of rules and regulations and that the ten-year ban be imposed only in cases where the IRS determines a taxpayer's claim was fraudulent. The law does not permit the IRS to impose multi-year bans when an improper claim is due to inadvertent error or even due to negligence.

A computer is not capable of assessing a taxpayer's state of mind and therefore cannot determine whether an improper claim was made due to inadvertent error or due to reckless or intentional disregard of rules and regulations. This determination requires an independent facts-and-circumstances investigation by an employee. And in light of the harsh impact of multi-year bans, managerial approval should be required in all cases before they are imposed.

Tax Court Jurisdiction

IRC § 6214 restricts the Tax Court to determining the amount of tax owed in the tax year(s) before the court. Thus, the court may determine whether the taxpayer properly claimed credits for the year that is the subject of a notice of deficiency. By contrast, the court may not have jurisdiction to determine whether the IRS's asserted ban should apply to the future years that are not before it, even though the ban is proposed in the statutory notice of deficiency, because a ban has no effect on a taxpayer's liability in the tax year in which it is imposed (it affects only the following two or ten years).[83] If the Tax Court does not consider whether a ban was properly imposed and the ban is left intact, then if the taxpayer claims the banned credit on a subsequent return, the IRS will disallow the claim pursuant to its summary assessment procedures. The taxpayer would then be required to dispute the summary assessment and, once the IRS issues a statutory notice of deficiency, seek Tax Court review to determine whether the credits were properly claimed. However, the Tax Court has not held that it has jurisdiction to determine whether the ban was properly imposed initially (and if it lacks that jurisdiction, it may not have the authority to allow the credit in the ban years).

Transparency is a critical element of taxpayer rights and fairness, and taxpayers should understand clearly when they may seek Tax Court review of an adverse IRS determination. In most cases, the law is clear. Here, the law is not clear, and there appear to be four possible outcomes: (i) the Tax Court may have jurisdiction to review a ban both for the year in which it is imposed and for the year in which it is effective; (ii) the Tax Court may have jurisdiction to review a ban for the year in which it is imposed but not for the year in which it is effective; (iii) the Tax Court may not have jurisdiction to review a ban for the year in which it is imposed but may have jurisdiction to review it for the year in which it is effective; or (iv) the Tax Court may not have jurisdiction to review a ban at any time. These procedural uncertainties undermine the taxpayer's *right to appeal an IRS decision in an independent forum* and the taxpayer's *right to a fair and just tax system* and require clarification.

81 IRM 4.19.14.7.1(3), 2/10 year-ban Correspondence Guidelines for Exam Technicians (CET) (July 30, 2019).

82 *See* National Taxpayer Advocate 2019 Annual Report to Congress (Research Study: *Study of Two-Year Bans on the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit)*; National Taxpayer Advocate 2013 Annual Report to Congress 103 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*).

83 *See* note 1, *supra*.

Recommendations

- Amend IRC §§ 24(g), 25A(b), and 32(k) to require independent managerial review and written approval based on consideration of all relevant facts and circumstances before the IRS asserts a multi-year ban.
- Amend IRC § 6214 to grant the Tax Court jurisdiction (i) to review the IRS's final determination to impose a multi-year ban under IRC §§ 24(g), 25A(b), or 32(k) in any deficiency proceeding in which the statutory notice of deficiency asserts a multi-year ban or any subsequent deficiency proceeding in which the IRS disallows a claimed credit because a multi-year ban is in effect and (ii) to allow the affected credit if it finds a multi-year ban was improperly imposed.

#14 PROVIDE ADDITIONAL TIME FOR TAXPAYERS OUTSIDE THE UNITED STATES TO REQUEST ABATEMENT OF A MATH ERROR ASSESSMENT EQUAL TO THE TIME EXTENSION ALLOWED IN RESPONDING TO A NOTICE OF DEFICIENCY

Present Law

Internal Revenue Code (IRC) § 6213(b) authorizes the IRS to make a "summary assessment" of tax arising from mathematical or clerical errors as defined in IRC § 6213(g), thus bypassing otherwise-applicable deficiency procedures. A taxpayer has no right to file a petition with the U.S. Tax Court based on a math error notice. Under IRC § 6213(b)(2)(A), however, a taxpayer has 60 days after a math error notice is sent to file an abatement request with the IRS. If the taxpayer submits an abatement request within 60 days, the IRS must abate the summary assessment and then follow deficiency procedures under IRC § 6212 if it wishes to reassess an increase in tax. If the taxpayer does not submit an abatement request within 60 days, the taxpayer forfeits his or her right to file a petition in the Tax Court. No additional time to file an abatement request is allowed when the math error notice is addressed to a taxpayer outside the United States.

By contrast, a taxpayer outside the United States who receives a notice of deficiency is given additional time to respond. In general, a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days from the date the notice is mailed. However, when the notice of deficiency "is addressed to a person outside the United States," IRC § 6213(a) provides that the taxpayer has 150 days from the date the notice is mailed to file a Tax Court petition. The Tax Court has construed this language broadly, concluding among other things that the 150-day period for filing a petition applies not only when a notice of deficiency is mailed to an address outside the United States but also when a notice of deficiency is mailed to an address within the United States but the taxpayer is located outside the United States.[84]

Reasons for Change

Approximately nine million U.S. citizens live abroad, along with more than 170,000 U.S. military service personnel.[85] In addition, more than 330,000 U.S. students study overseas.[86] Taxpayers living abroad (temporarily or permanently) often require more time to respond to IRS notices than taxpayers living in the United States. Mail delivery takes longer in both directions — in some cases, depending on where the taxpayer is located, substantially longer. In addition, persons temporarily abroad often do not have access to their tax or financial records, making it difficult for them to respond immediately.

84 *See, e.g., Levy v. Comm'r*, 76 T.C. 228 (1981) (holding that the 150-day rule is applicable to a U.S. resident who is temporarily outside the country when the notice is mailed and delivered); *Looper v. Comm'r*, 73 T.C. 690 (1980) (holding that the 150-day rule is applicable where a notice is mailed to an address outside the United States); *Lewy v. Comm'r*, 68 T.C. 779 (1977) (holding that the 150-day rule is applicable to a foreign resident who is in the United States when the notice is mailed but is outside the United States when the notice is delivered); *Hamilton v. Comm'r*, 13 T.C. 747 (1949) (holding that the 150-day rule is applicable to a foreign resident who is outside the United States when the notice is mailed and delivered).

85 For Fiscal Year (FY) 2018, the Department of State estimates that about nine million U.S. citizens lived abroad. U.S. Department of State, Bureau of Consular Affairs, *Consular Affairs by the Numbers*, FY 2018 data (updated Dec. 2018), https://travel.state.gov/content/dam/travel/CA%20By%20the%20Numbers%202019_Q1.pdf. As of June 30, 2018, about 170,000 U.S. military service personnel were stationed abroad; this number does not include military family members or civilian military personnel stationed abroad. *See Understanding Military Assignment Dynamics in the US: A Look at the Data & Some Questions to Ponder* (July 26, 2018). Available at https://militaryfamilieslearningnetwork.org/2018/07/26/understanding-military-assignment-dynamics-in-the-u-s-a-look-at-the-data-some-questions-to-ponder/.

86 National Association for Foreign Student Affairs, Association of International Educators, *Study Abroad Participation by State: Academic Year 2016–2017*, https://www.nafsa.org/sites/default/files/ektron/files/underscore/study_abroad_by_state.pdf.

By giving taxpayers living abroad 60 additional days to file a petition with the Tax Court in response to a notice of deficiency, Congress recognized that holding overseas taxpayers to the same deadlines as taxpayers located in the United States would be unreasonable. The same logic applies with respect to math error notices. In fact, the need for additional time is arguably greater in the case of math error notices because the standard response deadline is 60 days (as opposed to 90 days for filing a Tax Court petition in response to a notice of deficiency).

Recommendation

- Amend IRC § 6213(b)(2)(A) to allow taxpayers 120 days to request an abatement of tax when a math error notice is mailed to them at an address outside the United States.

#15 REQUIRE THE IRS TO WAIVE USER FEES FOR TAXPAYERS WHO ENTER INTO LOW COST INSTALLMENT AGREEMENTS AND EVALUATE THE POTENTIAL COSTS OF OTHER USER FEE INCREASES

Present Law

In cases where a taxpayer is unable to pay the full amount of his or her tax liability in a single lump sum, Internal Revenue Code (IRC) § 6159(a) authorizes the IRS to enter into an installment agreement (IA) under which a taxpayer will pay the liability in monthly installments. A taxpayer can apply for an IA on paper or by using an online payment agreement (OPA).

The Independent Offices Appropriations Act (IOAA) of 1952 (31 U.S.C. § 9701) and Office of Management and Budget (OMB) Circular A-25 authorize the IRS to set user fees by regulation. In 2016, the IRS increased the IA fee.[87] Pursuant to Treas. Reg. § 300.1, it now charges $225 for entering into paper IAs and $149 for entering into OPAs. If a taxpayer authorizes the IRS to "direct debit" a bank account each month, the fee is reduced to $107 for paper IAs and $31 for OPAs. These fees are designed to enable the agency to recover the full costs of administering IAs. For low income taxpayers (*i.e.,* taxpayers whose incomes do not exceed 250 percent of the federal poverty level), Treas. Reg. § 300.1 caps the fee at $43. In addition, IRC § 6159(f)(2) waives the fee for direct-debit IAs and refunds it to taxpayers who cannot use a direct-debit IA (*e.g.*, because they do not have a bank account) but who pay the IA in full. In 2018, Congress amended IRC § 6159(f)(1) to prohibit the IRS from increasing the IA user fee without legislation.

Reasons for Change

Even a modest IA user fee may discourage taxpayers from applying for an IA and paying their taxes voluntarily. Some taxpayers cannot afford to pay a fee, even if they do not qualify as low income. Taxpayers who require IAs are, almost by definition, experiencing some level of financial hardship. In addition, even taxpayers who qualify as low income sometimes end up paying the full fee.[88] The cost to the IRS of OPAs and direct-debit IAs is so low that if the user fee discourages even a small percentage of taxpayers from paying voluntarily, this reduced compliance is likely to cost the government more — in lost tax revenue and increased enforcement costs — than the user fee brings in. For the same reasons, the IRS should evaluate the potential for lost revenue and increased enforcement costs before imposing or increasing any fees under the IOAA, not just the IA user fees.

Recommendations

- Amend IRC § 6159 to require the IRS to waive the user fee for all direct debit IAs.[89]
- Amend IRC § 7805 to prohibit the IRS from increasing a user fee unless it first determines, after considering public comments, that the increase will not (i) exacerbate financial hardship for taxpayers who are voluntarily trying to pay their tax liabilities, (ii) reduce government revenue by eroding voluntary tax compliance, or (iii) increase government expenses by requiring the IRS to take more costly collection actions against taxpayers who are discouraged by the user fee from complying voluntarily.[90]

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87 *See User Fees for Installment Agreements (IAs)*, T.D. 9798, 81 Fed. Reg. 86,955 (Dec. 2, 2016).

88 *See* American Bar Association Section of Taxation, *Comments Concerning User Fees for Processing Installment Agreements and Offers in Compromise* 2 (Oct. 1, 2013) ("many low-income taxpayers are charged the full user fee, despite qualifying for the reduced amount").

89 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 301 (2017); Taxpayer Protection and Assistance Act, S. 1321, 109th Cong. § 301 (2006).

90 For related recommendations, see National Taxpayer Advocate 2017 Annual Report to Congress 307-313 (Legislative Recommendation: *User Fees: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights*).

#16 IMPROVE OFFER IN COMPROMISE PROGRAM ACCESSIBILITY BY REPEALING THE PARTIAL PAYMENT REQUIREMENT AND RESTRUCTURING THE USER FEE

Present Law

Internal Revenue Code (IRC) § 7122(a) authorizes the IRS to settle a tax debt by accepting an offer in compromise (OIC). According to Policy Statement 5-100, the IRS will "accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential." Taxpayers whose offers are accepted must file and pay their taxes for the next five years, as stated on IRS Form 656, Offer in Compromise (2019) (items l and m), or the IRS may seek to collect the amounts it compromised.

IRC § 7122(c)(1)(A) requires a taxpayer who would like the IRS to consider a "lump-sum" offer—payable in five or fewer installments—to include a nonrefundable partial payment of 20 percent of the amount of the offer with the application. IRC § 7122(c)(1)(B) requires a taxpayer who would like the IRS to consider a "periodic payment" offer—an offer payable in six or more installments—to include the first proposed installment with the application and to continue to make installment payments while the IRS is considering it. In addition to these partial payments, Treas. Reg. § 300.3 requires most offer applications to include a $186 user fee. IRC § 7122(c)(3) provides that taxpayers with low incomes (*i.e.,* not more than 250 percent of the federal poverty level) are not subject to the fee or the partial payment requirement. They may apply for a waiver on Form 656.

Reasons for Change

By accepting an offer, the IRS collects money it generally would not otherwise collect and converts a noncompliant taxpayer into a compliant one by requiring the taxpayer, as a condition of the agreement, to timely file returns and pay taxes for the following five years. The Treasury Department's General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals acknowledged the benefit of offers by proposing to repeal the partial payment requirement, explaining that it "may substantially reduce access to the offer-in-compromise program.… Reducing access to the offer-in-compromise program makes it more difficult and costly to obtain the collectable portion of existing tax liabilities." The Treasury Department estimated that repealing the requirement would raise revenue.

A 2007 TAS study found that taxpayers above the low-income threshold were no better able to afford to make partial payments than those below it and that those below it frequently did not obtain a waiver. Similarly, a 2005 Treasury Inspector General for Tax Administration report found that when the IRS first imposed a $150 OIC fee in 2003, offer submissions declined by more than 20 percent among taxpayers at every income level. Thus, up-front payments such as the user fee and the partial payment requirement likely reduce collections and increase enforcement costs.

Recommendation

- Amend IRC § 7122(c) to remove the requirement that taxpayers include a partial payment with offer applications and restructure the user fee so that it is collected out of amounts otherwise due on accepted offers.[91]

91 For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 2171, 115th Cong. § 206 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 206 (2015); Taxpayer Assistance Act, H.R. 4994, 111th Cong. § 202 (2010). For additional background, see, *e.g.*, National Taxpayer Advocate 2006 Annual Report to Congress 507-519 (Legislative Recommendation: *Improve Offer in Compromise Program Accessibility*).

#17 MODIFY THE REQUIREMENT THAT THE OFFICE OF CHIEF COUNSEL REVIEW CERTAIN OFFERS IN COMPROMISE

Present Law

Internal Revenue Code (IRC) § 7122 authorizes the Secretary to enter into an agreement with a taxpayer that settles the taxpayer's tax liabilities for less than the full amount owed, as long as the taxpayer's case has not been referred to the Department of Justice. Such an agreement is known as an offer in compromise (OIC). Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability or doubt as to collectability, or to promote effective tax administration. The regulations further define these terms and describe instances when compromise is appropriate.

IRC § 7122(b) requires the Treasury Department's General Counsel to review and provide an opinion in support of accepted OICs in all criminal cases and in all civil cases where the unpaid amount of tax assessed (including any interest, additional amount, addition to tax, and assessable penalty) is $50,000 or more. This authority is exercised by the IRS Office of Chief Counsel.

Reasons for Change

The IRS receives tens of thousands of OIC applications every year and must verify that the legal and IRS policy requirements for compromise are met prior to proposing acceptance. The time Office of Chief Counsel employees spend learning the facts of every criminal OIC and civil OIC where the unpaid amount of tax assessed is $50,000 or more and writing supporting opinions creates significant delays in OIC processing and is often duplicative of work the IRS has already performed. It also requires a significant commitment of legal resources on the part of the IRS. The Office of Chief Counsel reports that it spends approximately 10,000 hours per year reviewing OICs.[92]

In addition, delays in OIC processing may impede a taxpayer's ability to make other financial decisions while awaiting a response and may even jeopardize the taxpayer's ability to pay the amount offered if his or her financial circumstances change.

The National Taxpayer Advocate believes the OIC process would be improved if Congress repeals the blanket requirement that Counsel review all OICs in civil cases where the unpaid tax assessed is $50,000 or more and replace it with language authorizing the Secretary to require Counsel review in cases that present significant legal issues.

Recommendation

- Amend IRC § 7122(b) to repeal the requirement that Counsel review all OICs in civil cases where the unpaid amount of tax assessed (including any interest, additional amount, addition to tax, or assessable penalty) is $50,000 or more and replace it with language authorizing the Secretary to require Counsel review of OICs in cases that he determines present significant legal issues.[93]

92 Email from IRS Office of Chief Counsel (Aug. 9, 2019).

93 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 303 (2017); Taxpayer Bill of Rights Enhancement Act of 2015, S. 1578, 114th Cong. § 403 (2015); Tax Administration Good Government Act, S. 882, 108th Cong. § 104 (2003); Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 304 (2004).

#18 REQUIRE THE IRS TO MAIL NOTICES AT LEAST QUARTERLY TO TAXPAYERS WITH DELINQUENT TAX LIABILITIES

Present Law

Internal Revenue Code (IRC) § 7524 requires the IRS, "[n]ot less often than annually," to send taxpayers with delinquent accounts a reminder notice that sets forth the amount of the tax delinquency as of the date of the notice.

Reasons for Change

The IRS satisfies the IRC § 7524 requirement by sending taxpayers with delinquent accounts Notice CP-71, Reminder Notice, once a year. However, the infrequency of IRS billing notices leaves collectible revenue uncollected and subjects taxpayers who would make payments if they received more frequent reminders to additional penalties and interest charges.

We recognize that sending more frequent notices after the IRS's initial notice stream would entail additional postage and processing costs. However, private sector businesses, including credit card issuers and retailers, face this same trade-off, and they almost uniformly send billing notices more frequently than once a year. Most send delinquency notices on at least a monthly basis. Thus, private businesses that depend on maximizing net revenue have consistently found that the collection costs of mailing more frequent notices more than pay for themselves.

We believe the IRS would similarly collect more revenue, net of costs, if it sends more frequent notices. In addition, taxpayers receiving more frequent notices would be more aware that penalties and interest charges continue to accrue, causing their balances to increase. This would provide an additional incentive for them to resolve their liabilities.

Recommendation

- Amend IRC § 7524 to require the IRS to mail notices at least quarterly to taxpayers with delinquent tax liabilities.[94]

94 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 201 (2018).

#19 CLARIFY WHEN THE TWO-YEAR PERIOD FOR REQUESTING RETURN OF LEVY PROCEEDS BEGINS

Present Law

Internal Revenue Code (IRC) § 6331(a) allows the IRS to levy on a taxpayer's property and rights to property that exist at the time the levy is served. Rights to property include fixed and determinable obligations to which the levy attaches, even if receipt of a payment arising from the obligation is deferred until a later date.

IRC § 6331(e) allows the IRS to serve a levy on the taxpayer's salary or wages that continues from the date the levy is first made until the levy is released under IRC § 6343.

IRC § 6331(h) allows the IRS to serve a levy on federal payments specified under that provision, such as Social Security benefits, which continues from the date the levy is first made until the levy is released. This levy is made by electronic means under the Federal Payment Levy Program (FPLP).

IRC § 6343(b) authorizes the IRS to return money levied upon or money received from the sale of levied property to third parties when it determines the levy was wrongful within the meaning of IRC § 7426(a)(1) if the third party requests the return within two years from the "date of levy."

IRC § 6343(d) authorizes the IRS to return money levied upon or money received from the sale of levied property to the taxpayer when it determines one of the circumstances specified in IRC § 6343(d)(2) exists if the taxpayer requests the return within two years from the "date of levy."[95] Neither IRC § 6343 nor the Treasury regulations promulgated thereunder define the term "date of levy."

However, the IRS takes the position that the "date of levy" for levies delivered by hand is the date of delivery.[96] Treasury Regulation § 301.6331-1(c) defines the term "date of levy" for mailed levies as the date the levy is delivered to the person in possession of the property. The Treasury regulations under IRC § 6331 do not define the term "date of levy" when the levy occurs through electronic means as used in the FPLP. The IRS has adopted a policy to return all or a portion of the FPLP proceeds it received during the two-year period preceding the date of request for their return.[97]

Reasons for Change

The IRS may issue levies to attach a taxpayer's assets, such as wages, pension benefits, annuities, or Social Security benefits, that result in multiple payments over many years. The IRS has the authority to return levy proceeds to a third party or the taxpayer if the person requests the proceeds within two years of the date of levy. The IRS generally interprets the "date of levy" to mean the date the IRS delivers by mail or by hand a notice of levy to the person in possession of the property levied. In the case of a continuous levy under IRC § 6331(e), the date of levy is the date the notice of levy is first served by hand or by mail on the person in possession of the taxpayer's salary or wages. If the taxpayer requests return of levy payments more than two years after the date the notice of levy was served, the IRS is not authorized to return any payments. In the case of FPLP levies under IRC § 6331(h), however, the IRS will return a levied payment if the payment was made

95 IRC § 6343(b) & (d) permits the IRS to return specific property levied upon at any time.

96 *Cf. American Honda Motor Co., Inc. v. United States*, 363 F. Supp. 988, 991-992 (S.D.N.Y. 1973) (holding that date of levy for purposes of timely filing suit under IRC § 6532(c)(1) is the date when the notice of levy is served upon the person in possession of the taxpayer's property).

97 *See* Internal Revenue Manual (IRM) 5.11.7.2.7, Returning FPLP Levy Proceeds (Oct. 3, 2018); IRM 5.19.9.3.8, Return of FPLP Levy Proceeds (Oct. 3, 2018).

within the two-year period before the date of the request for return. This interpretation results in similarly situated persons being treated differently and infringes upon a third party's or taxpayer's *right to a fair and just tax system*.

To illustrate, assume the IRS issues a continuous levy under IRC § 6331(e) to the taxpayer's employer in Year One, and the employer withholds and pays over to the IRS a portion of the taxpayer's paychecks for each month of the next four years. Then in Year Four, the taxpayer's dependent becomes ill, and as a result, his living expenses increase significantly due to large medical bills. The levy is now causing an economic hardship to the taxpayer. The taxpayer asks the IRS to release the levy and return a portion of the levy proceeds, and the IRS agrees that it is in the best interests of the taxpayer and the government to do so. However, the IRS is prohibited from returning the levy proceeds to the taxpayer because more than two years have elapsed since the date the levy was served on the employer. Contrast this result with a taxpayer whose Social Security benefits are levied under the FPLP. The IRS may return up to the last two years of levy payments even if the request occurs more than two years after the FPLP levies began.

Recommendation

- Amend IRC § 6343(b) to strike the term "date of such levy" and substitute "each date the IRS receives money from the levy or the date the IRS receives the money from the sale of levied property."

#20 PROTECT RETIREMENT FUNDS FROM IRS LEVIES, INCLUDING SO-CALLED "VOLUNTARY" LEVIES, IN THE ABSENCE OF "FLAGRANT CONDUCT" BY A TAXPAYER

Present Law

The IRS has wide discretion to exercise its levy authority. Internal Revenue Code (IRC) § 6331(a) provides that the IRS generally may "levy upon all property and rights to property," which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334. Under IRC § 6331(h), the IRS may place a continuing levy on a series of specified payments to or received by a taxpayer, which will run from the date the levy is first made until the date the levy is released.

As a policy matter, the IRS has decided it will not levy on a taxpayer's retirement savings unless it has determined that the taxpayer engaged in "flagrant conduct."[98] Neither the IRC, the regulations, nor internal IRS guidance defines the term "flagrant conduct" for purposes of this analysis.

Reasons for Change

There are strong public policy reasons to encourage retirement savings and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings for support. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to support.

For these reasons, Congress has provided significant tax incentives to encourage taxpayers to save for retirement. Similarly, the IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in "flagrant conduct." However, recent changes in IRS procedures have eroded these protections. Specifically, the IRS has adopted procedures that allow taxpayers to request or agree to "voluntary" levies on retirement accounts.[99] If a taxpayer agrees to a "voluntary" levy, the IRS bypasses the determination of "flagrant conduct."

Without protection from levy, taxpayers who have not engaged in "flagrant conduct" in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to "voluntary" levies out of fear or anxiety, and thus find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment and child support. These exceptions reflect policy determinations. Congress has determined that the IRS should not levy on child support payments, for example, because doing so would likely harm the children who rely on those benefits for support. For the reasons described above, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property absent "flagrant conduct," and that the term "flagrant conduct" should be defined in the statute.

Recommendations

- Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy if it is determined that (i) the levy would, in retirement, create an economic hardship within the meaning of Treas. Reg. § 301.6343-1(b)(4)(i) based on a review of the taxpayer's financial condition and (ii) the taxpayer has not engaged in "flagrant conduct."

98 Internal Revenue Manual (IRM) 5.11.6.3(5), Funds in Pension or Retirement Plans (July 8, 2019).

99 IRM 5.11.6.3(3), Funds in Pension or Retirement Plans (July 8, 2019).

- Amend IRC § 6331 to stop the accrual of penalties and interest when a levy has attached to a retirement account and the period of limitation in IRC § 6502 has elapsed (generally, ten years from the date of assessment of the liability). Consider a levy on retirement funds to be unenforceable after the period of limitations provided in IRC § 6502 has elapsed.
- Amend IRC § 6334 to define "flagrant conduct" as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any provision of chapters 1, 61, 62, 65, 68, 70, or 75 and that appears to a reasonable person to be a gross violation of any such provision.[100]

100 For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016) and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).

#21 TOLL THE TIME PERIODS FOR REQUESTING THE RETURN OF LEVY PROCEEDS WHILE THE TAXPAYER OR A PERTINENT THIRD PARTY IS FINANCIALLY DISABLED

Present Law

Under Internal Revenue Code (IRC) § 6331, the IRS is authorized to collect outstanding tax by levying against a taxpayer's nonexempt property and rights to property. In certain circumstances, under IRC § 6343 and the related regulations, levies must be released and money already levied upon may, or in some situations must, be returned to its owner. When the IRS has seized tangible property and it is in the IRS's possession, it can be returned at any time. With respect to the return of levied money, however, time limitations apply.

Return of Wrongfully Levied Money to Third Parties Under IRC § 6343(b)

An administrative wrongful levy claim under IRC § 6343(b) is a request, made by a person other than the taxpayer who owes the taxes being levied upon, for the return of money believed to be wrongfully levied upon or seized. Generally, the basis for a wrongful levy claim is that the third party believes the levied money belongs to him or her and not the taxpayer or that the third party believes he or she has a superior claim to the money that is not being recognized by the IRS.

There are strict time constraints for third parties to request the return of money wrongfully levied upon. The third party may file an administrative claim for the return of the levied money or bring a civil action against the United States in a U.S. District Court. If the third party files an administrative claim for the return of levied money, the claim must be made in writing to the appropriate IRS office within two years from the date of the levy. If the third party brings a civil action against the United States without having first filed an administrative claim, the third party has two years from the date of the levy to file the suit. If the third party files an administrative claim and the IRS rejects it, the third party can still file suit. In this circumstance, IRC § 6532(c)(2) provides that the deadline for filing suit will be extended for the shorter of the following two periods:

1. A period of 12 months from the date of filing the request, or
2. A period of six months from the date a notice of disallowance is mailed to the third party by registered or certified mail.

Return of Levied Money to the Taxpayer Under IRC § 6343(d)

If a taxpayer (as opposed to a third party) seeks the return of money levied upon, the taxpayer may request return of the levied money under IRC § 6343(d). Generally, the taxpayer making the request believes the IRS should return the levied money because one of the conditions in IRC § 6343(d)(2) has been met. These conditions include: (A) the levy was premature or otherwise not in accordance with administrative procedures; (B) the taxpayer has entered into an installment agreement to satisfy the liability for which the levy was imposed (unless the agreement provides otherwise); (C) the return of the levy proceeds will facilitate the collection of the tax liability; or (D) with the consent of the taxpayer or the National Taxpayer Advocate, return of the levy proceeds would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

A taxpayer seeking return of levied money faces the same time constraints as a third party (two years from the date of the levy) to file a written administrative claim. Unlike a third party, however, a taxpayer has no right to seek judicial review if a request for the return of levied money is denied by the IRS under IRC § 6343(d).

Reasons for Change

The law, as currently written, prevents the IRS from returning levied funds in situations where a taxpayer is unable, due to a physical or mental impairment, to manage his or her financial affairs and does not file a request for the return of levied money until after the two-year period. Likewise, a district court lacks jurisdiction over a wrongful levy suit filed by a third party if the deadline for filing the suit is missed due to a health problem of the third party.

To ensure that an impaired taxpayer or third party (who is an individual) can have his or her request for return of levied money considered by either the IRS or the courts, the two-year period should be tolled if the taxpayer or third-party can show that he or she was financially disabled during the period. Without this change, an impaired taxpayer or other third party who is prevented due to the impairment from requesting the return of levied funds in a timely manner will not be able to get back levied money that otherwise would be eligible for return under IRC § 6343(b) and (d), even in cases where the IRS violated the law.

Recommendation

- Amend IRC §§ 6343(b) and 6532(c) to toll the time periods for filing a claim for the return of levied money, a wrongful levy claim, and a wrongful levy suit during any period in which an individual is financially disabled.

#22 AUTHORIZE THE IRS TO RELEASE LEVIES THAT CAUSE ECONOMIC HARDSHIP FOR BUSINESS TAXPAYERS

Present Law

Internal Revenue Code (IRC) § 6343(a)(1)(D) requires the IRS to release a levy if "the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." Treasury Regulation § 301.6343-1(b)(4) provides that a levy is creating an economic hardship due to the financial condition of an individual taxpayer when "satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." The regulatory definition of economic hardship as the inability to pay reasonable basic living expenses means that only individuals (including individuals doing business as sole proprietors) can experience economic hardship and thereby qualify for a levy release.

Reasons for Change

When the IRS takes enforced collection action against a business, the enforcement action often forces the business into bankruptcy by reducing its available cash and preventing it from obtaining additional financing. In many cases, a business that is delinquent on its taxes is no longer viable. But in other cases, such as when a business is experiencing an economic hardship that is temporary, both the business and the government would benefit if the IRS could release outstanding levies and instead work with the business to resolve its tax debt through collection alternatives.

The IRS should have the discretion to release levies in cases where it determines a business is likely to remain viable. When a levy causes a viable business to terminate, employees may lose their jobs unnecessarily and the delinquent tax may never be collected. Moreover, lessening the harshness of IRS enforcement actions may avert noncompliance, because harsh enforcement actions sometimes force taxpayers into the cash economy.

Recommendation

- Amend IRC § 6343 to authorize the IRS to release a levy if it determines that the levy is creating an economic hardship due to the financial condition of the taxpayer's viable trade or business. The legislation should require the IRS, in determining whether to release a levy against a business on economic hardship grounds, to consider the economic viability of the business, the nature and extent of the hardship (including whether the taxpayer exercised ordinary business care and prudence), and the potential harm to individuals if the business is liquidated.[101]

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101 For language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 303 (2018); Small Business Taxpayer Bill of Rights Act of 2018, S. 2689, 115th Cong. § 16 (2018); Taxpayer Rights Act of 2015, H.R. 4128 114th Cong. § 304 (2015); S. 2333, 114th Cong. § 304 (2015); H.R. 4368, 112th Cong. § 1 (2012). This recommendation is also consistent with other areas of the law in which a business's financial condition may be relevant in interpreting a statute. In the antitrust context, for example, the "failing firm" defense may permit what could otherwise be an anticompetitive merger or acquisition under the Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1 (although courts tend to construe the defense narrowly). *See, e.g.*, *Citizen Pub. Co. v. United States*, 394 U.S. 131 (1969).

#23 PROVIDE TAXPAYER PROTECTIONS BEFORE THE IRS RECOMMENDS THE FILING OF A LIEN FORECLOSURE SUIT ON A PRINCIPAL RESIDENCE

Present Law

The IRS may follow either of two sets of procedures to seize the principal residence of a taxpayer to satisfy a delinquent tax liability: (i) an administrative seizure or (ii) a lien foreclosure suit. The two cannot be used concurrently.

Administrative Seizure. Internal Revenue Code (IRC) § 6334(a)(13) provides that the principal residence of a taxpayer is generally exempt from levy, except as provided in subsection (e). IRC § 6334(e) provides that a principal residence shall *not* be exempt from levy if a judge or magistrate of a U.S. District Court "approves (in writing) the levy of such residence." An administrative seizure is subject to significant taxpayer protections. Among them, IRC § 6343(a) requires the IRS to release a levy under certain circumstances, including where it determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."

Lien Foreclosure Suit. IRC § 7403 authorizes the Department of Justice (DOJ) to file a civil action against a taxpayer in U.S. District Court to enforce a tax lien and foreclose on a taxpayer's property, including on a taxpayer's principal residence. As compared with administrative seizures, statutory taxpayer protections are considerably more limited in lien foreclosure suits. For example, the Supreme Court has held that courts have essentially no discretion to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer.[102]

Reasons for Change

In enacting the IRS Restructuring and Reform Act of 1998, the Senate Finance Committee report stated that the "seizure of the taxpayer's principal residence is particularly disruptive to the occupants" and a principal residence therefore "should only be seized to satisfy tax liability as a last resort."[103]

Meaningful taxpayer protections are needed to protect not only the taxpayer himself but also family members, including a spouse and minor children, who may live in the house.

As described above, taxpayers have far fewer statutory protections in lien foreclosure suits under IRC § 7403 than in administrative seizures under IRC § 6334(e).

At the recommendation of the Office of the Taxpayer Advocate, the IRS has written procedures into its Internal Revenue Manual (IRM) that provide additional taxpayer protections before a case may be referred to the DOJ for the filing of a lien foreclosure suit. The IRM prescribes certain initial steps IRS employees must take, such as attempting to identify the occupants of a residence and advising the taxpayer about Taxpayer Advocate Service assistance options. It also sets forth an internal approval process prior to referring a lien enforcement case to the DOJ. However, the IRM is simply a set of instructions to IRS staff. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time.

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102 *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

103 S. Rep. No. 105-174, at 86-87 (1998).

Because of the devastating impact the seizure of a taxpayer's principal residence may have on the taxpayer and his or her family, the National Taxpayer Advocate believes taxpayer protections from lien foreclosure suit referrals should be codified and not left for the IRS to determine through IRM procedures.

Recommendations

- Amend IRC § 7403 to codify current IRM administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.
- Amend IRC § 7403 to preclude IRS employees from requesting that the DOJ file a civil action in U.S. District Court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence, except where the employee has determined that (1) the taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings and (2) the foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer.[104]

104 For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act, S. 2215, 113th Cong. § 8 (2014).

#24 PROVIDE COLLECTION DUE PROCESS RIGHTS TO THIRD PARTIES HOLDING LEGAL TITLE TO PROPERTY SUBJECT TO IRS COLLECTION ACTIONS

Present Law

Current law authorizes the IRS to file Notices of Federal Tax Lien (NFTLs) and issue levies against a taxpayer's property or rights to property, including property owned jointly, property owned by certain third parties, and property secured by certain creditors. However, these third parties are not considered "taxpayers" for purposes of the Collection Due Process (CDP) notice and hearing procedures described in Internal Revenue Code (IRC) §§ 6320 and 6330, and they are therefore not entitled to CDP rights. For that reason, the IRS does not issue CDP lien notices pursuant to IRC § 6320 or provide notice of proposed levies pursuant to IRC § 6330 to these third parties.[105]

Reasons for Change

Congress created the CDP notice and hearing procedures to give taxpayers the right to a meaningful hearing before the IRS levies their property or immediately after the IRS files an NFTL against their property. During a CDP hearing, a taxpayer has the right to raise defenses, challenge the appropriateness of collection actions, and propose collection alternatives.

However, affected third parties, such as joint owners or alleged nominees, alter egos, and transferees, do not have CDP rights. This may be an oversight.[106] Affected third parties would benefit from CDP hearings at least as much as the underlying taxpayer. Indeed, an affected third party may warrant additional protection because the underlying liability is generally not his or hers, and if the property at issue belongs strictly to the third party, the IRS may have no right to take its proposed collection action. Without the benefit of CDP protections, an affected third party against whom the IRS takes a collection action has comparatively limited remedies. For these reasons, the National Taxpayer Advocate believes affected third parties should be given the same CDP rights to raise defenses and propose collection alternatives as taxpayers who owe a liability.

Recommendation

- Amend IRC §§ 6320 and 6330 to extend CDP rights to "affected third parties" who hold legal title to property subject to IRS collection actions.[107]

105 *See generally* Internal Revenue Code (IRC) §§ 6321, 6322, 6323(a), (f) and (h)(6), and 6331(a).

106 In the context of explaining the CDP provisions, the Senate report accompanying its version of the IRS Restructuring and Reform Act of 1998 referred to "[t]he taxpayer (or *affected third party*)." S. Rep. No. 105-174, at 67 (1998) (emphasis added).

107 For more detail, see National Taxpayer Advocate 2012 Annual Report to Congress 544 (Legislative Recommendation: *Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions*).

#25 EXTEND THE TIME LIMIT FOR TAXPAYERS TO SUE FOR DAMAGES FOR IMPROPER COLLECTION ACTIONS

Present Law

Internal Revenue Code (IRC) § 7433(a) provides that if an IRS employee recklessly or intentionally, or by reason of negligence, disregards any provision of the IRC or any regulation in connection with the collection of federal tax, the taxpayer harmed by the improper collection action may sue the United States for damages. Under IRC § 7433(d)(3) and Treasury Regulation § 301.7433-1(g)(2), the suit must be brought in a U.S. District Court within two years from the date on which the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

Under IRC § 7433(d)(1), before bringing suit, the taxpayer must file an administrative claim with the IRS. Treasury Regulation § 301.7433-1(d) provides that a taxpayer generally may not file suit in court until the earlier of (i) the date six months after filing an administrative claim or (ii) the date on which the IRS renders a decision on the claim. However, if the claim is filed within the last six months of the two-year period for filing suit, the taxpayer may file suit in court at any time before expiration of the two-year period.

Reasons for Change

IRC § 7433(d)(1) reflects a policy decision that it is generally in the best interests of both the taxpayer and the government to allow the IRS to consider and render a decision on a taxpayer's claim before a case is brought to court. If a case is resolved at the administrative level, both parties are spared the time and expense of litigation. Treasury Regulation § 301.7433-1(d) reflects a complementary policy decision that where the IRS does not render a decision on an administrative claim within six months, taxpayers should be able to bring their cases to court without having to wait indefinitely for an IRS decision.

However, the existing rules do not always achieve the goal of allowing the IRS to consider and render a decision before suit is filed. For example, while a claim is pending at the administrative level, the two-year period for filing suit in a U.S. District Court continues to run. If a taxpayer files an administrative claim during the final six months of the two-year period, the taxpayer may be forced to file suit in a U.S. District Court before the IRS has an opportunity to render a decision on the administrative claim (or forfeit the right to do so).

To give the IRS an opportunity to render an administrative decision while preserving the taxpayer's right to challenge an adverse decision in court, the two-year period that commences when the right of action accrues should be pegged to the deadline for filing an administrative claim (rather than the deadline for filing suit). Specifically, if the IRS renders an adverse or partially adverse decision on a timely-filed administrative claim, the taxpayer should be allowed to file suit within two years from the date of the IRS's decision (*i.e.,* similar to the time period allowed for filing suit after a refund claim is denied).

At the same time, to ensure taxpayers do not have to wait indefinitely for an IRS decision, a taxpayer should be permitted to file suit in a U.S. District Court if a timely-filed administrative claim goes unanswered for six months. These rules would ensure the IRS has a full six-month period to consider and render a decision on a taxpayer's damages claim based on an alleged improper collection action, while preserving the taxpayer's right to file suit if the IRS does not render a timely decision.

Recommendation

- Amend IRC § 7433(d)(3) to allow taxpayers who file an administrative claim with the IRS within two years after the date a right of action accrues to file a civil action in a U.S. District Court any time after six months from the date the administrative claim was filed or, if the IRS renders a decision, within two years from the date the IRS mails its decision on the administrative claim to the taxpayer by certified mail or registered mail.[108]

108 The Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. § 201(c) (2017), and S. 1578, 114th Cong. § 301 (2015), would have amended IRC § 7433(d)(3) to replace the requirement that taxpayers bring suit within two years of the date the cause of action accrues with a requirement that a suit be commenced by "*the later of the date on which administrative remedies available within the Internal Revenue Service have been exhausted* or the date on which the taxpayer reasonably could have discovered that the actions of the officer or employee were done in disregard of a provision of this title or any regulation promulgated under this title." (Emphasis added.) This proposed change would prevent taxpayers from being forced to file suit before the IRS has had the opportunity to render a decision on the administrative claim and is thus generally consistent with this recommendation. However, the recommendation we are making would also preserve the IRC § 7433(d)(1) requirement that taxpayers must file an administrative claim before they can bring suit in a U.S. District Court and is thus more comprehensive.

#26 DIRECT THE IRS TO STUDY THE FEASIBILITY OF USING AN AUTOMATED FORMULA TO IDENTIFY TAXPAYERS AT RISK OF ECONOMIC HARDSHIP

Present Law

The Internal Revenue Code (IRC) contains several provisions that protect taxpayers experiencing economic hardship from IRS collection actions. IRC § 6330 authorizes a taxpayer in a collection due process hearing to propose collection alternatives, which may be based on an inability to pay the tax due to economic hardship. IRC § 6343 requires the IRS to release a levy if the IRS determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."

Under Treasury Regulation § 301.6343-1 and the Internal Revenue Manual, economic hardship exists when an individual is "unable to pay his or her reasonable basic living expenses." IRC § 7122(d) requires the IRS to develop and publish schedules of national and local allowances (known as allowable living expenses or ALEs) to ensure that taxpayers entering into offers in compromise are left with "an adequate means to provide for basic living expenses."

Reasons for Change

In general, the IRS is required to halt collection actions if a taxpayer demonstrates that he or she is in economic hardship. However, the IRS routinely enters into installment agreements (IAs) with taxpayers without undertaking the financial analysis required to make a hardship determination. For example, taxpayers need not submit any financial information to qualify for streamlined IAs and may enter into them online without interacting with an IRS employee. Many anxious or intimidated taxpayers seek to resolve their liabilities as quickly as possible and do not know the IRS is required to halt collection action if they are in economic hardship. As a result, taxpayers often agree to make tax payments they cannot afford.

TAS estimates that about 40 percent of taxpayers who entered into streamlined IAs through the IRS's Automated Collection System (ACS) in fiscal year (FY) 2018 had incomes at or below their ALEs. To emphasize the point: About four out of every ten taxpayers who agreed to streamlined IAs in ACS would have received the benefit of collection alternatives, such as offers in compromise or currently not collectible-hardship (CNC-Hardship) status, if they had known to call the IRS to explain their financial circumstances.

That is not a fair result. Whether a taxpayer is left with sufficient funds to pay for the basic living expenses for himself or herself and family should not depend on the taxpayer's knowledge of the IRS's procedural rules.

Furthermore, taxpayers with incomes below their ALEs are more likely than other taxpayers to default on installment agreements because they are unable to afford the payments. The default rate on streamlined IAs among taxpayers with incomes at or below their ALEs within ACS in FY 2018 was about 39 percent. A taxpayer who defaults on an installment agreement is subject to additional collection actions, which harms the taxpayer and creates rework for the IRS.

To address this problem, the TAS Research function has developed an automated algorithm that we believe can, with a high degree of accuracy, identify taxpayers whose incomes are below their ALEs. If the IRS validates this formula or develops an alternative formula that is reasonably accurate, it could place a "low-income" indicator on the accounts of all taxpayers whom the formula identifies as having incomes below their ALEs.

While the ALE standards represent only average expenses for taxpayers and should not be used to automatically close a case as CNC-Hardship, an ALE-based indicator would be a useful starting point for financial analysis in the collection context. It could be used to alert collection employees speaking with a taxpayer over the phone of the need to request additional financial information so the IRS could analyze the specific facts and circumstances of the taxpayer's case. The indicator could also be used to trigger a notification to taxpayers entering into IAs online that informs them of their right to contact the IRS collection function for assistance if they believe they cannot pay their tax debt without incurring economic hardship. The IRS could also use this algorithm to screen out these taxpayers from automated collection treatments such as the Federal Payment Levy Program, from selection for referral to private collection agencies, or for passport certification, unless and until the IRS has made direct personal contact with the taxpayer to verify his or her financial information.

In short, an automated economic hardship screen would benefit taxpayers and the IRS alike. It would help protect low-income taxpayers from agreeing to make payments that would leave them without adequate means to provide for their basic living expenses, and it would help the IRS avoid the rework that occurs when taxpayers default on IAs they cannot afford.

Recommendation

- Direct the IRS to study the feasibility of developing an automated formula to identify taxpayers who are at high risk of economic hardship and, if a reliable formula can be developed, to apply the formula for purposes of scoring cases for collection assignment, responding appropriately to taxpayers who contact the IRS regarding a balance due, alerting taxpayers at risk of economic hardship who seek to enter into streamlined IAs online of the resources available to them, and determining whether to exclude taxpayers' debts from automated collection treatments such as the Federal Payment Levy Program, selection for referral to private collection agencies, and passport certification, unless and until the IRS has been able to verify the taxpayers' financial information.

Reform Penalty and Interest Provisions

#27 CONVERT THE ESTIMATED TAX PENALTY INTO AN INTEREST PROVISION FOR INDIVIDUALS, TRUSTS, AND ESTATES

Present Law

Through the combination of wage withholding and the requirement that taxpayers make estimated tax payments, the Internal Revenue Code (IRC) aims to ensure that federal income and payroll taxes are paid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. IRC § 6654 generally requires taxpayers to pay at least the lesser of (i) 90 percent of the tax shown on a tax return for the current tax year or (ii) 100 percent of the tax shown on a tax return for the preceding tax year (reduced by the amount of wage withholding) in four installment payments that are due on April 15, June 15, September 15, and January 15 of the following tax year.[109]

IRC § 6654(a) provides that a taxpayer who fails to pay sufficient estimated tax will be liable for a penalty that is computed by applying (i) the underpayment rate established under IRC § 6621 (ii) to the amount of the underpayment (iii) for the period of the underpayment. IRC § 6621 is an interest provision. Therefore, the additional amount a taxpayer owes for failing to pay sufficient estimated tax is computed as an interest charge, even though it is denominated as a "penalty."

Reasons for Change

For a variety of reasons, taxpayers often have difficulty predicting how much tax they will owe. Self-employed taxpayers or taxpayers who own small businesses experience significant fluctuations in their incomes and expenses from year to year. Taxpayers with significant investment income may experience significant fluctuations. In addition, substantial changes in tax laws, such as those that took effect in 2018, affect tax liabilities in ways that taxpayers may not fully anticipate. As a result, millions of taxpayers do not satisfy the requirements of IRC § 6654 and are liable for penalties, even though many have attempted to comply.

The term "penalty" carries negative connotations, and the National Taxpayer Advocate believes it should be reserved for circumstances in which a taxpayer has failed to make reasonable efforts to comply with the law. Thus, she agrees with the assessment of the Ways and Means Committee when it wrote during a previous Congress: "Because the penalties for failure to pay estimated tax are calculated as interest charges, the Committee believes that conforming their title to the substance of the provision will improve taxpayers' perceptions of the fairness of the estimated tax payment system."[110] Along these lines, the Office of the Taxpayer Advocate has conducted research studies that have found "tax morale" has an impact on tax compliance.[111] Accordingly, we believe the failure to pay sufficient estimated tax is better characterized as an interest charge than a penalty for deficient taxpayer behavior.

109 If the adjusted gross income of a taxpayer for the preceding tax year exceeds $150,000, "110 percent" is substituted for "100 percent" in applying clause (ii). IRC § 6654(d)(1)(C).

110 H.R. Rep. No. 108-61, at 23-24 (2003).

111 *See* National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 1-13 (Research Study: *Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*).

Recommendation

- Convert the penalty for failure to pay sufficient estimated tax to an interest charge. Toward that end, relocate IRC § 6654 from part I of subchapter A of chapter 68 to the end of subchapter C of chapter 67 and make conforming modifications to the headings and text.[112]

112 For legislative language generally consistent with this recommendation, see Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003). If the additional charge for failure to pay estimated tax remains a penalty, then the National Taxpayer Advocate reiterates her prior recommendation that Congress enact a reasonable cause exception. *See* National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, at 34-36 (Analysis: *A Framework for Reforming the Penalty Regime*).

#28 APPLY ONE INTEREST RATE PER ESTIMATED TAX UNDERPAYMENT PERIOD FOR INDIVIDUALS, ESTATES, AND TRUSTS

Present Law

Internal Revenue Code (IRC) § 6654 provides that taxpayers who make estimated tax payments must submit those payments on or before April 15, June 15, September 15, and January 15 of the following tax year. Failure to do so results in a penalty that is determined by the underpayment rate, the amount of the underpayment, and the period of the underpayment. The underpayment rate is established by IRC § 6621(a)(2) to be the federal short-term interest rate, plus three percentage points. Under IRC § 6621(b)(1), the federal short-term interest rate is determined quarterly by the Secretary of the Treasury. If the Secretary determines a change in the federal short-term interest rate, the change is effective January 1, April 1, July 1, and October 1.

Reasons for Change

Under current law, more than one interest rate may apply for a single estimated tax underpayment period. For example, if a taxpayer fails to make an estimated tax payment due June 15 and the Secretary determines a change in the federal short-term interest rate effective July 1, one interest rate would apply for the period from June 16 through June 30, while another interest rate would apply for any continued delinquency from July 1 through September 15. The application of more than one interest rate for a single underpayment period causes unnecessary complexity and burden for taxpayers and the IRS alike. This complexity and burden would be reduced if a single interest rate were applied for each period.

Recommendation

- Amend IRC § 6654 to provide that the underpayment rate for any day during an estimated tax underpayment period shall be the underpayment rate established by IRC § 6621 for the first day of the calendar quarter in which the underpayment period begins.[113]

113 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 305 (2017). *See also* H.R. Rep. No. 108-61, at 25 (2003); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

#29 REDUCE THE FEDERAL TAX DEPOSIT PENALTY IMPOSED ON CERTAIN TAXPAYERS WHO MAKE TIMELY TAX DEPOSITS

Present Law

Internal Revenue Code (IRC) § 6656(a) imposes a penalty, computed as a percentage of a tax underpayment, for the failure to deposit (FTD) taxes in a manner prescribed by regulation, unless such failure is due to reasonable cause and not due to willful neglect.

Treasury Regulation § 31.6302-1(h) requires that federal tax deposits be made electronically via electronic funds transfer. To comply with this requirement, most taxpayers use the Electronic Federal Tax Payment System (EFTPS), a free service offered by the Department of the Treasury. The penalty rate for FTD varies, depending on the length of the taxpayer's delay in making the deposit. IRC § 6656(b)(1) provides that the penalty is two percent for an FTD of not more than five days, five percent for an FTD of more than five days but not more than 15 days, and ten percent for an FTD of more than 15 days. Thus, taxpayers must make deposits on time, in full, and in the correct manner to avoid a penalty for FTD.[114]

Reasons for Change

The IRS has taken the position that the maximum ten percent penalty rate automatically applies if a deposit is not made in the manner prescribed by the regulation.[115] As a result, taxpayers who timely remit full payment to the IRS but who do not do so in the manner prescribed are subject to a higher penalty rate than taxpayers who do not make a timely payment at all. The National Taxpayer Advocate believes it is inappropriate to penalize taxpayers who make timely payments more harshly than taxpayers who do not. Moreover, the Ways and Means Committee has observed that this approach "does not reflect the intent of the Congress."[116]

Recommendation

- Amend IRC § 6656 to establish a penalty rate of two percent for FTDs that are fully and timely paid, but not in the manner prescribed by the Secretary of the Treasury.[117]

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114 *See F.E. Schumacher Co. v. United States*, 308 F. Supp.2d 819, 830 (N.D. Ohio 2004) ("penalties assessed pursuant to Section 6656 are appropriate even where taxes are timely paid, albeit by means other than [Electronic Funds Transfer]").

115 Rev. Rul. 95-68, 1995-2 C.B. 272; IRM 20.1.4.2.2.1, Electronic Funds Transfer (EFT) (Feb. 9, 2018).

116 H.R. Rep. No. 108-61, at 36 (2003).

117 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 309 (2017); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 108 (2003).

#30 EXTEND REASONABLE CAUSE ABATEMENT OF THE FAILURE-TO-FILE PENALTY TO TAXPAYERS WHO RELY ON RETURN PREPARERS TO E-FILE THEIR RETURNS

Present Law

Internal Revenue Code (IRC) § 6651 imposes an addition to tax when a taxpayer fails to file a return by the return due date, unless the taxpayer can show the failure was due to reasonable cause and not to willful neglect (hereinafter, the "failure-to-file penalty").[118] Reasonable cause exists when a taxpayer has exercised ordinary business care and prudence but was unable to file the return within the prescribed time.[119]

In *United States v. Boyle*, the Supreme Court held that a taxpayer's reliance on an agent to file a return did not constitute "reasonable cause" for late filing.[120] In *Boyle*, the tax return at issue was filed on paper. Recently, at least two U.S. district courts have ruled that the *Boyle* holding applies in the e-filing context as well.[121]

In the IRS Restructuring and Reform Act of 1998, Congress adopted a policy that "paperless filing should be the preferred method and most convenient means of filing Federal tax and information returns" and gave the Secretary broad authority to incentivize taxpayers to file returns electronically.[122]

IRC § 6011(e)(3) authorizes the Secretary to require tax return preparers to file returns electronically unless they reasonably expect to file ten or fewer individual income tax returns during a calendar year. Treasury Regulation § 301.6011-7 implements this requirement.

Reasons for Change

At the time *Boyle* was decided, all tax returns were filed on paper. Taxpayers generally could fulfill the basic responsibility of mailing returns to the IRS themselves, even when they engaged tax professionals to prepare them. In ruling that the taxpayer in *Boyle* was not entitled to "reasonable cause" abatement as a matter of law, the Supreme Court stated that "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met."[123]

In effect, the *Boyle* decision concluded that the duty to file a return is non-delegable. While that rule may make sense in a paper-filing context, it is not reasonable to apply the rule in the e-filing context.

Today, most taxpayers effectively delegate the electronic filing of their returns to preparers or use software providers. Particularly when a taxpayer uses a preparer, the taxpayer is generally several steps removed from the filing process. When a preparer e-files a tax return, he or she must transmit it through an electronic return originator (typically, a software company) to the IRS. Thus, there are four parties sequentially involved in this chain: (i) the taxpayer; (ii) the preparer; (iii) the software company; and (iv) the IRS. If the IRS rejects an e-filed tax return, it generally sends a notification back through the software company to the preparer, but

118 IRC § 6651(a)(1), (b)(1). The penalty amount is five percent of the tax due for each month or partial month the return is late, up to a maximum of 25 percent. The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f).

119 Treas. Reg. § 301.6651-1(c)(1). *See also* IRM 20.1.1.3.2, Reasonable Cause (Nov. 21, 2017).

120 *Boyle*, 469 U.S. 241 (1985).

121 *See, e.g.*, *Haynes v. United States*, 119 A.F.T.R.2d (RIA) 2017-2202 (W.D. Tex. 2017), *vacated and remanded*, *Haynes v. United States*, 760 F. App'x 324 (5th Cir. 2019); *Intress v. United States*, 124 A.F.T.R.2d (RIA) 5420 (M.D. Tenn. 2019).

122 Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998); IRC § 6011(f).

123 *Boyle*, 469 U.S. at 252.

it will not notify the taxpayer directly.[124] In these circumstances, there is no practical way for a taxpayer to ensure his or her return has been properly submitted by the preparer and accepted by the IRS. In addition, the IRS rejects e-filed returns before processing for a wide variety of reasons, and unlike with paper filling, a return that is e-filed with the IRS but rejected is not treated as timely filed.

We note that Treasury regulations exempt paid preparers from the e-filing requirements if a taxpayer provides a preparer with "a hand-signed and dated statement" that says the taxpayer chooses to file a paper return.[125] This "opt-out" will reduce a taxpayer's risk of incurring a failure-to-file penalty. In light of the congressional directive to incentivize e-filing, however, it makes little sense for the government to tell taxpayers, in effect, that the only way they can limit their risk of incurring a failure-to-file penalty is by filing their returns on paper.[126]

In *Haynes v. United States*, a married couple employed a certified public accountant to prepare and file their joint tax return.[127] The preparer timely e-filed the return, but the IRS did not accept it for processing because a taxpayer identifying number was listed on the wrong line. The preparer did not receive a rejection notice from the IRS. The preparer notified the taxpayers that their return had been timely filed. Ten months later, the IRS notified the taxpayers that their return had not been received and asserted the failure-to-file penalty.

The taxpayers requested penalty abatement for reasonable cause, asserting that they had sought to file their return timely, that their preparer had transmitted the return timely, and that both the preparer and the taxpayers believed the return had been received. The taxpayers argued that *Boyle* should not apply in the context of electronic filing because the complexities of e-filing vastly exceed the comparatively simple and verifiable task of mailing a letter. The IRS rejected the taxpayers' position, and the taxpayers then paid the penalty and filed a refund suit in a U.S. district court. The district court concluded that the holding in *Boyle* applies to e-filed returns to the same extent as paper-filed returns and ruled in the government's favor as a matter of law.[128] A different U.S. district court reached a similar conclusion during 2019.[129]

The issue in these cases is not whether the failure-to-file penalty is applicable. There is no doubt that it is applicable if the return is filed late; rather, the issue is whether taxpayers are entitled to request abatement of the penalty on "reasonable cause" grounds. Because the *Boyle* decision used relatively sweeping language, lower courts have seemingly felt bound to apply its holding in the context of e-filed returns, notwithstanding the significant differences between paper filing and electronic filing.

124 We are recommending separately that the IRS be required to provide notice of e-filed return rejections to taxpayers directly. *See* National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Revise E-Filing Procedures So That Taxpayers Are Informed of E-Filing Errors and Are Not Subject to Failure-to-File Penalties When Those Errors Are Timely Corrected*), *supra*.

125 Treas. Reg. § 301.6011-7(a)(4)(ii).

126 For context, more than half of all tax returns filed during 2018 were prepared by professionals and e-filed (80 million returns). See IRS 2018 Filing Season Statistics (week ending Nov. 23, 2018), https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-november-23-2018.

127 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017).

128 The U.S. Court of Appeals for the Fifth Circuit vacated and remanded the district court's decision on the ground that there was a genuine issue of material fact about whether it was reasonable for the preparer to assume, based on the IRS's silence, that it had accepted the taxpayers' return. The appeals court did not take a position on the *Boyle* issue of whether a taxpayer's reliance on a preparer to e-file a tax return may constitute reasonable cause for a failure to file. *Haynes v. United States*, 760 F. App'x 324 (5th Cir. 2019). The government subsequently conceded the case, but it has not conceded the *Boyle* issue. *See* Keith Fogg, *Reliance on Preparer Does Not Excuse Late E-Filing of Return*, Procedurally Taxing Blog (Sept. 4, 2019), https://procedurallytaxing.com/reliance-on-preparer-does-not-excuse-late-e-filing-of-return.

129 *Intress v. United States*, 124 A.F.T.R.2d (RIA) 5420 (M.D. Tenn. 2019).

While the bright-line rule embodied in *Boyle* is convenient for the IRS to administer, the nearly automatic assessment of the failure-to-file penalty for e-filed returns deemed late (often where the return was submitted by the taxpayer or preparer but rejected by the IRS) is grossly unfair and undermines the congressional policy that e-filing be encouraged. The American College of Tax Counsel shares this view and submitted a compelling *amicus curiae* brief in the appeal of the *Haynes* decision.[130]

Recommendation

- Amend IRC § 6651 to specify that reasonable cause relief may be available to taxpayers that use return preparers to submit their returns electronically and direct the Secretary to issue regulations specifying what constitutes ordinary business care and prudence for e-filed returns.

130 *See* Brief of American College of Tax Counsel (Nov. 27, 2017), https://www.actconline.org/wp-content/uploads/2018/02/ACTC_Amicus_Brief_Haynes.pdf.

#31 AUTHORIZE A PENALTY FOR TAX RETURN PREPARERS WHO ENGAGE IN FRAUD OR MISCONDUCT BY ALTERING A TAXPAYER'S TAX RETURN

Present Law

Internal Revenue Code (IRC) § 6694 authorizes the IRS to impose a penalty when a tax return preparer has understated a tax liability on a "return or claim for refund" and the understatement is due to willful or reckless conduct.[131] IRC § 6695(f) imposes a $500 penalty on a preparer who negotiates a taxpayer's refund check.[132]

Reasons for Change

TAS has handled hundreds of cases involving return preparer fraud or misconduct. In the most common scenario, a taxpayer visits a preparer to get his tax return prepared, the preparer completes the return while the taxpayer is present, and the preparer alters the return after the taxpayer leaves before submitting it to the IRS. In some cases, the items of income, deduction, and credit are accurate, but the preparer alters the direct deposit routing information so the entire refund is directed to his account instead of the taxpayer's account. In other cases, the preparer increases the refund amount and elects a "split refund,"[133] so the taxpayer receives the refund amount he expects and the additional amount goes to the preparer.

The Department of Justice (DOJ) may bring criminal charges against preparers who alter tax returns, but resource constraints generally preclude criminal charges except in cases of widespread schemes. In addition, the dollar amount of a refund obtained by a preparer in these cases often will determine whether the DOJ pursues an erroneous refund suit under IRC § 7405, as resources again constrain the number of suits that can be brought each year. It is therefore important that the IRS have the authority to impose sizeable civil tax penalties against preparers who alter tax returns without the knowledge or consent of taxpayers.

Under current law, the IRS has very limited authority to impose civil penalties in instances of preparer fraud. The IRC § 6694 penalty generally will not apply to either of the scenarios described above for the following reasons:

- When a preparer has altered items of income, deduction, or credit in an attempt to increase a taxpayer's refund after the taxpayer has reviewed and approved the return for filing, the IRS Office of Chief Counsel has concluded that the resulting document is not a valid "return or claim for refund."[134] As a consequence, the IRC § 6694 penalty does not apply.
- When a preparer has altered only the direct deposit information on the return and has not changed the tax liability, there is no understatement of tax.

In addition, it is unclear whether the IRC § 6695(f) penalty applies. The IRS and the Treasury Department have interpreted the IRC § 6695(f) penalty as applicable to a preparer who negotiates "a check (including an

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131 The amount of the penalty is per return or claim for refund and is equal to the greater of $5,000 or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

132 Similarly, Section 10.31 of Circular 230 (31 C.F.R. Part 10) prohibits a tax practitioner who prepares tax returns from endorsing or negotiating a client's federal tax refund check.

133 Taxpayers can split their refunds among up to three accounts at a bank or other financial institution. *See* IRS Form 8888, Allocation of Refund (Including Savings Bond Purchases). The instructions to Form 8888 specifically advise taxpayers not to deposit their refunds into their tax return preparer's account.

134 Program Manager Technical Advice (PMTA) 2011-20, Tax Return Preparer's Alteration of a Return (June 27, 2011); PMTA 2011-13, Horse's Tax Service (May 12, 2003).

electronic version of a check)."[135] It is not clear whether a "direct deposit" is legally identical to an "electronic version of a check." Therefore, when a preparer diverts a taxpayer's refund via direct deposit but the return is otherwise accurate, it is not clear whether the preparer's misconduct is subject to the IRC § 6695(f) penalty. Moreover, even if the penalty is applicable, the penalty amount is typically small in relation to the size of refunds that some preparers have misappropriated.

The National Taxpayer Advocate believes the IRS should have the authority to impose civil penalties on tax return preparers who engage in fraud or misconduct by altering the return of a taxpayer for personal financial gain.

Recommendations

- Amend IRC § 6694 so the penalty the IRS may assess against a tax return preparer for understating a taxpayer's liability is broadened beyond tax returns and claims for refund by adding the words "and other submissions."
- Amend IRC § 6695 to explicitly cover a preparer who misappropriates a taxpayer's refund by changing the direct deposit information and increase the dollar amount of the penalty to deter preparers from engaging in this type of fraud or misconduct. To make the public fisc whole, the penalty should be equal to 100 percent of the amount a preparer has improperly converted to his own use through fraud or misconduct by altering a taxpayer's tax return.

135 Treas. Reg. § 1.6695-1(f)(1).

#32 CLARIFY THE PARAMETERS FOR WRITTEN MANAGERIAL APPROVAL REQUIRED FOR PENALTY ASSESSMENTS UNDER IRC § 6751(B)

Present Law

A taxpayer who submits a return that understates the amount of tax due may be subject to an accuracy-related penalty under Internal Revenue Code (IRC) § 6662. In particular, a penalty for "negligence or disregard of rules or regulations" may be imposed under IRC § 6662(b)(1). IRC § 6662(c) defines "negligence" as "any failure to make a reasonable attempt to comply with the provisions of this title" and defines "disregard" to include "any careless, reckless, or intentional disregard."

As a taxpayer protection, IRC § 6751(b)(1) requires that the immediate supervisor of an employee making the initial determination of a penalty assessment must personally approve the determination in writing.[136] However, penalties "automatically calculated through electronic means" are not required to receive managerial approval.[137]

Reasons for Change

The purpose of penalties is to encourage voluntary compliance and deter noncompliance. Unlike penalties that can be assessed by answering a simple yes or no question (for example, the penalty for failing to file a return under IRC § 6651), the determination of whether to assess a negligence penalty requires knowledge of what actions the taxpayer took to comply with the tax laws, as well as his or her motivations for taking those actions. Negligence cannot reasonably be determined by a computer, because a computer cannot assess whether a taxpayer made a "reasonable attempt" to comply with the law.

Nevertheless, the IRS has programmed its computers to apply negligence penalties automatically as part of its Automated Underreporter (AUR) program. More specifically, the AUR program identifies discrepancies between the amounts taxpayers report on their returns and the amounts payors report via Forms W-2, Forms 1099, and other information returns, and it generally assesses penalties automatically based on discrepancies it detects. If the negligence penalty is assessed through the AUR program without an employee independently determining its appropriateness, there is no requirement for managerial approval.

An IRS employee will review a penalty assessment to make a determination of "negligence" only if a taxpayer responds to initial notices issued by AUR. There are many reasons why a taxpayer may not respond to a notice. A taxpayer may not receive it if he or she has moved and does not receive the notice. A taxpayer may put the notice aside and not get back to it before the response deadline. Or a taxpayer may accept the proposed tax adjustment but not realize he or she must respond to avoid the penalty assessment. In these and other circumstances, taxpayers may be assessed a penalty for negligence without any analysis into their reasonable

136 This area of law has been the focus of recent litigation. In 2016, a majority of the U.S. Tax Court ruled that the written approval for an accuracy-related penalty could be given at any time prior to assessment, including while a case was in litigation before the Tax Court. As a result, the Tax Court held it was premature for it to consider an argument under IRC § 6751(b). *Graev v. Comm'r*, 147 T.C. No. 16 (2016), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017). However, the decision in *Graev v. Comm'r* has since been vacated, because shortly after the decision was issued, the U.S. Court of Appeals for the Second Circuit (to which *Graev* would have been appealed) came to a different conclusion. In *Chai v. Commissioner*, the Second Circuit ruled that managerial approval for penalty assessments must be obtained before the IRS issues a notice of deficiency. *Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017). These two rulings initially suggested a split between the majority of the Tax Court and the Second Circuit. Following the ruling in *Chai*, however, the Tax Court reversed course in a subsequent ruling in *Graev*. Taking *Chai* into account, the Tax Court ruled that it is not premature to consider an argument under IRC § 6751(b) in a deficiency proceeding, and the IRS bears the burden of production under IRC § 7491(c) to show the penalty received managerial approval. *Graev v. Comm'r*, 149 T.C. No. 23 (2017).

137 IRC § 6751(b)(2)(B).

attempts to comply with tax laws (or lack thereof). This result undermines the protections afforded in IRC § 6751(b).

The National Taxpayer Advocate believes strongly that a computer cannot determine "negligence" — *i.e.,* whether a taxpayer has failed to "make a reasonable attempt to comply with the provisions of this title." Therefore, when Congress authorized the IRS to impose certain penalties "automatically calculated by electronic means" without managerial approval, we do not believe Congress intended that exception to apply to negligence penalties.

In response to several judicial decisions, the IRS Office of Chief Counsel recently issued a notice instructing IRS attorneys to submit evidence of compliance with IRC § 6751(b)(1) when addressing penalty disputes.[138] If an attorney cannot find sufficient evidence of compliance, the notice says the attorney must concede the penalty. We commend the Office of Chief Counsel for taking this step, but a Counsel notice does not have the force of law and can be reversed at any time.

Recommendation

- Amend IRC § 6751(b)(2)(B) to clarify that written managerial approval is required prior to the assessment of the accuracy-related penalty imposed on the portion of an underpayment attributable to negligence or disregard of rules or regulations under IRC § 6662(b)(1) and consider clarifying which penalties or facts-and-circumstances result in penalties "automatically calculated through electronic means" that are exempt from the managerial-approval requirement.

138 IRS Office of Chief Counsel, Notice CC-2018-006, Section 6751(b) Compliance Issues for Penalties in Litigation (June 6, 2018).

#33 COMPENSATE TAXPAYERS FOR "NO CHANGE" NATIONAL RESEARCH PROGRAM AUDITS

Present Law

There is no provision under present law that authorizes compensation of taxpayers who are audited under the IRS's National Research Program (NRP) or provides relief from the assessment of tax, interest, and penalties that may result from an NRP audit.

Reasons for Change

Through the NRP, the IRS conducts audits of randomly selected taxpayers. The NRP benefits tax administration by gathering strategic information about taxpayer compliance behavior as well as information about the causes of reporting errors. This information helps the IRS update its workload selection formulas and thereby enables it to focus its audits on returns with relatively high likelihood of errors. It also helps the IRS to estimate the "tax gap." In addition, NRP studies benefit Congress by providing taxpayer compliance information that is useful in formulating tax policy.

For the tens of thousands of individual taxpayers (or businesses) that are subject to NRP audits, however, they impose significant burden. In essence, these taxpayers, even if fully compliant, serve as "guinea pigs" to help the IRS improve the way it does its job. They must contend with random and intensive audits that consume their time, drain resources (including representation costs), and may impose an emotional and reputational toll.

In 1995, the House Ways and Means Subcommittee on Oversight held a hearing on the NRP's predecessor, the Taxpayer Compliance Measurement Program (TCMP).[139] Testimony provided during the hearing and subsequent witness responses to questions-for-the-record indicated that TCMP audits imposed a heavy burden on taxpayers and reflected a strong view that audited taxpayers were bearing the brunt of a research project intended to benefit the tax system as a whole. Proposals raised at the hearing included compensating taxpayers selected for TCMP audits as well as possibly waiving tax, interest, and penalties assessed during the audits.

Subsequent to the hearing, the House Budget Committee included a proposal in its 1995 budget reconciliation bill to compensate individual taxpayers by providing a tax credit of up to $3,000 for TCMP-related expenses.[140] Ultimately, this proposal was not adopted. Instead, the IRS was pressured to stop conducting TCMP audits. The inability to perform regular TCMP audits, however, undermined effective tax administration because it prevented the IRS from updating its audit formulas. Using older formulas likely meant that more compliant taxpayers faced (unproductive) audits and that audit revenue declined.

About a decade later, the IRS reinstated the TCMP under the new NRP name. Some procedures were changed, but the random selection of taxpayers and the burden on many of these taxpayers remained substantially unchanged. For the same reasons identified during the 1995 House hearing, the National Taxpayer Advocate believes it is appropriate to recognize that taxpayers audited under the NRP are bearing a heavy burden to help the IRS improve the effectiveness of its compliance activities. A tax credit or authorized payment would alleviate the monetary component of the burden. Further relief could be provided by waiving any assessment of tax, interest, and penalties resulting from an NRP audit. Such a waiver might also improve the accuracy of the NRP audits, as taxpayers might be more likely to be forthcoming with an auditor if they

139 *Taxpayer Compliance Measurement Program: Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Ways and Means*, 104th Cong. (1995).

140 *See* H.R. Rep. No. 104-280, vol. 2, at 28 (1995).

were assured they would not face additional assessments. However, this waiver should not apply where tax fraud or an intent to evade is uncovered in an NRP audit.

Recommendation

- Amend the IRC to compensate taxpayers for no change NRP audits through a tax credit or other means. Consider waiving the assessment of tax, interest, and penalties resulting from an NRP audit, absent fraud or an intent to evade federal taxes.

Strengthen Taxpayer Rights Before the Office of Appeals

#34 REQUIRE THAT AT LEAST ONE APPEALS OFFICER AND ONE SETTLEMENT OFFICER BE LOCATED AND PERMANENTLY AVAILABLE IN EACH STATE, THE DISTRICT OF COLUMBIA, AND PUERTO RICO

Present Law

Section 3465(b) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) provides: "The Commissioner of Internal Revenue shall ensure that an appeals officer is regularly available within each State."

Reasons for Change

Twelve states and Puerto Rico currently have no Appeals or Settlement Officers with a post of duty within their borders.[141] These states are Alaska, Arkansas, Delaware, Idaho, Kansas, Montana, North Dakota, New Mexico, Rhode Island, South Dakota, Vermont, and Wyoming. The IRS takes the position that its current staffing satisfies the statutory requirement by providing for "circuit riding" on at least a quarterly basis to states lacking a permanent Appeals field office.

As a legal matter, the National Taxpayer Advocate believes "circuit riding" does not satisfy the statutory requirement, because Appeals Officers engaged in "circuit riding" among multiple states are not "regularly available" in any one state. As a practical matter, "circuit riding" does not provide taxpayers who request in-person hearings with timely service and does not ensure that Appeals Officers are familiar with local conditions. Taxpayers and their representatives regularly complain about the difficulty of obtaining convenient and timely in-person access to Appeals and Settlement Officers. During fiscal year 2018, for example, non-docketed cases involving in-person conferences remained in Appeals' inventory for more than twice as long (394 days) as Appeals cases overall (194 days).[142]

In addition, Appeals' ability to effectively pursue administrative case resolutions often depends on the Appeals Officer's familiarity with prevailing economic circumstances and other local factors impacting taxpayers in a given geographic region. Appeals Officers who live elsewhere and visit a state for an occasional hearing often do not have this familiarity.

Recommendation

- Amend Internal Revenue Code § 7803(e) to require that at least one Appeals Officer and one Settlement Officer be located and permanently available in each state, the District of Columbia, and Puerto Rico.[143]

141 Generally, Appeals Officers are assigned to cases associated with the IRS Examination function, whereas Settlement Officers are assigned to Collection cases.

142 Appeals response to TAS fact check request (Nov. 21, 2018).

143 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. § 502 (2017).

#35 REQUIRE TAXPAYERS' CONSENT BEFORE ALLOWING IRS COUNSEL OR COMPLIANCE PERSONNEL TO PARTICIPATE IN APPEALS CONFERENCES

Present Law

Present law does not directly address the inclusion of personnel from the IRS Office of Chief Counsel or IRS compliance functions in conferences held by the Office of Appeals.

Reasons for Change

Until recently, the Office of Appeals only occasionally invited personnel from the Office of Chief Counsel or the IRS compliance functions to participate in taxpayer conferences.[144] In October 2016, the Office of Appeals revised provisions of the Internal Revenue Manual to allow Appeals Officers to include personnel from the Office of Chief Counsel and/or the IRS compliance functions in Appeals conferences as a matter of routine. Under the new procedures, an Appeals Officer may invite these additional participants regardless of whether taxpayers agree or object to their presence.

Including Counsel and Compliance personnel over taxpayer objections contravenes the purpose of an Appeals conference, which is neither to give Compliance personnel another bite at the apple nor to transform Appeals into a mediation forum. Instead, the mission and credibility of Appeals rests on its ability to undertake direct and independent settlement negotiations with taxpayers and their representatives.

This change in conference procedures in some cases is having far-reaching negative consequences for Appeals' effectiveness in resolving cases with taxpayers. Taxpayers are less likely to feel that their cases have been fully heard, that they have been treated fairly, and that the outcome of the proceedings ought to be respected. As a result, taxpayers are more likely to come away disillusioned with the Appeals process, more likely to pursue their cases in court, and potentially less likely to comply voluntarily with the tax laws in the future. Over time, practitioners will be less likely to advise clients to pursue the Appeals process.

In addition, the expansion of Appeals conferences to routinely involve Counsel and Compliance personnel alters the relationship between taxpayers and Appeals Officers. It makes interactions less negotiation-based and transforms the conference into a more contentious and one-sided proceeding. This approach is also seemingly inconsistent with Congress's intent in creating an independent Office of Appeals as part of the Taxpayer First Act.[145]

Recommendation

- Amend Internal Revenue Code § 7803(e) to provide: "A taxpayer shall have the right to a conference with the Office of Appeals that does not include personnel from the Office of Chief Counsel or the compliance functions of the Internal Revenue Service unless the taxpayer specifically consents to the participation of those parties in the conference."[146]

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144 For a more detailed discussion of this topic, see National Taxpayer Advocate 2019 Annual Report to Congress 63-69 (Most Serious Problem: *Appeals: The Inclusion of Chief Counsel and Compliance Personnel in Taxpayer Conferences Undermines the Independence of the Office of Appeals*).

145 Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981 (2019); H.R. Rep. No. 116-39, pt. 1, at 29 (2019).

146 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 601 (2018).

Enhance Confidentiality & Disclosure Protections

#36 AUTHORIZE THE TREASURY DEPARTMENT TO ISSUE GUIDANCE SPECIFIC TO IRC § 6713 REGARDING THE DISCLOSURE OR USE OF TAX RETURN INFORMATION BY PREPARERS

Present Law

Internal Revenue Code (IRC) §§ 7216 and 6713 impose criminal and civil sanctions, respectively, on preparers who, with the requisite level of intent,[147] disclose or use tax return information for any purpose other than preparing or assisting in the preparation of a tax return, except as expressly permitted by statute or regulation.

Exceptions to the broad prohibition in IRC § 6713 are provided in IRC § 6713(c), which states that the rules of IRC § 7216(b) apply. IRC § 7216(b) authorizes the Secretary to create regulatory exceptions to the criminal penalty statute. Thus, the current statutory framework seemingly requires that exceptions be made either to both the criminal and civil statutes or to neither.

Reasons for Change

IRC § 6713 has historically been identified as the civil counterpart to the criminal penalty imposed on tax return preparers under IRC § 7216. As one would expect, the criminal penalty regime under IRC § 7216 is substantially harsher than the civil penalty regime under IRC § 6713.[148] For that reason, the Treasury Department is understandably reluctant to subject preparers to criminal sanctions except for egregious conduct, so it has used its regulatory authority to carve out broad exceptions from the general prohibition on the disclosure or use of tax return information set forth in IRC § 7216.[149]

Because the exceptions under IRC § 7216 (criminal statute) are deemed to apply to IRC § 6713 (civil statute), there is no room for the Treasury Department and the IRS to designate the disclosure or use of tax return information for certain questionable business practices or the sale of certain products with high abuse potential as civil violations without also making them criminal violations. Therefore, disclosures and uses with high abuse potential are generally permitted. The Treasury Department and the IRS would be more likely to strengthen taxpayer protections against the improper disclosure or use of taxpayer return information by return preparers if they are given the flexibility to promulgate separate regulations applicable to the civil penalty, without concern that the criminal penalty would also apply.[150]

Recommendation

- Amend IRC § 6713 to authorize the Secretary to prescribe regulations under IRC § 6713.

147 Unlike Internal Revenue Code (IRC) § 7216, IRC § 6713 does not require that the disclosure or use be knowing or reckless.

148 IRC § 6713 imposes a $250 penalty for each improper disclosure or use, with total penalties not to exceed $10,000. The penalty amount increases to $1,000 for each disclosure and use related to identity theft, with total penalties not to exceed $50,000. In contrast, IRC § 7216 makes the preparer guilty of a misdemeanor, and upon conviction, the preparer will be fined not more than $1000 ($100,000 if the disclosure or use is related to identity theft) or imprisoned not more than one year, or both, and liable for the costs of prosecution.

149 *See* Treas. Reg. § 301.7216-2.

150 As a general matter, IRC § 7805(a) grants the Secretary the broad authority to promulgate regulations under the Internal Revenue Code. However, because IRC § 6713(c) provides that exceptions to IRC § 6713 are governed by the rules of IRC § 7216(b), it is not clear the IRS may establish separate sets of exceptions for the two Code provisions.

#37 ALLOW A PERIOD OF NOTICE AND COMMENT ON NEW INTERGOVERNMENTAL AGREEMENTS AND REQUIRE THAT THE IRS NOTIFY TAXPAYERS BEFORE THEIR DATA IS TRANSFERRED TO A FOREIGN JURISDICTION

Present Law

Present law does not require a period for notice and comment before the U.S. government enters into new intergovernmental agreements (IGAs) and does not provide for the notification of taxpayers before their data is transferred to foreign jurisdictions.

Reasons for Change

The Foreign Account Tax Compliance Act generally requires foreign financial institutions (FFIs) to provide the U.S. with information regarding foreign accounts held by U.S. taxpayers. Typically, this information exchange occurs via IGAs, under which FFIs furnish the information to their local tax authority, which in turn transfers it to the U.S. These IGAs also generally incorporate reciprocity, pursuant to which the U.S. agrees to provide the foreign jurisdiction with information regarding accounts maintained in the U.S. by its citizens.

We are concerned that the IRS cannot ensure the data on U.S. taxpayers transferred by FFIs is used properly by IGA partners. We are also concerned that the data transfers to foreign recipients do not conform to cybersecurity standards established by the National Institute of Standards and Technology.

The IRS has identified the risks inherent in its data transfers to IGA partners, but has determined that these risks are acceptable. The data being disclosed and potentially breached, however, relate to taxpayers, not to the IRS. Taxpayers, rather than the IRS, are exposed to the consequences of data theft or misuse potentially arising during or after information transfers to foreign partners pursuant to IGAs. These taxpayers could, among other things, become the victims of identity theft or the targets of persecution within foreign jurisdictions, with outcomes ranging from substantial inconvenience to serious economic damage to harassment, and even physical danger. Currently, taxpayers have no voice in these IGAs and receive no specific notification that their personal information is being transferred outside of U.S. jurisdiction. If informed that IGA negotiations or data transfers were pending, taxpayers would have an opportunity to provide the U.S. government with potentially important information to minimize risks to their property and physical safety.

Recommendation

- Amend Internal Revenue Code § 1474 to add (i) a new subsection (g)(1) to require the public announcement of IGAs for notice and comment by taxpayers; (ii) a new subsection (g)(2) to require that, as part of this announcement, the IRS specify the extent to which the proposed IGA partner jurisdiction complies with the cybersecurity standards to which U.S. federal agencies are held and the taxpayer privacy standards that govern the IRS; and (iii) a new subsection (g)(3) to require that, barring unique and compelling circumstances, taxpayers be informed prior to the transfer of their individual information pursuant to the terms of an IGA.

Strengthen the Office of the Taxpayer Advocate

#38 CLARIFY THAT THE NATIONAL TAXPAYER ADVOCATE MAY HIRE LEGAL COUNSEL TO ENABLE HER TO ADVOCATE MORE EFFECTIVELY FOR TAXPAYERS

Present Law

Per 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department, and the IRS Chief Counsel is the chief law officer for the IRS. In light of the implication that all attorneys in the Treasury Department must report to these officials,[151] 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482 specifically authorize Treasury's inspectors general and Office of the Comptroller of the Currency (OCC), respectively, to hire and supervise attorneys.[152] No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys.

Internal Revenue Code (IRC) § 7803(c) makes clear, however, that TAS is expected to operate independently of the IRS. IRC § 7803(c)(2)(A) directs TAS to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers have problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(4)(A) requires TAS to notify taxpayers that its offices "operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate." IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate submit Reports to Congress directly "without any prior review or comment from … the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget." This provision is nearly identical to the one that applies to the OCC (12 U.S.C. § 250).

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: "The National Taxpayer Advocate shall have the responsibility and authority to … appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate."[153] In explaining the provision, Senator Grassley said: "In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel."[154]

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151 The Treasury Department has formalized this interpretation in Treasury Order 107-04, which states:

> With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, and the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel.

152 The Inspector General Act of 1978, as amended (codified at 5 U.S.C. App. III § 3(g)), provides:

> Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General.

Similarly, 12 U.S.C. § 482 provides:

> Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency.

153 H.R. 2676, 105th Cong. § 1102(a) (as passed by Senate, May 7, 1998).

154 144 Cong. Rec. S4460 (May 7, 1998). The provision was added to the bill as an amendment on the Senate floor sponsored by Senator Grassley.

This provision was eliminated in the conference agreement without explanation. However, the conference report stated that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate."[155]

Reasons for Change

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorney-advisors. The National Taxpayer Advocate requires independent attorney-advisors because she often takes positions, both in working taxpayer cases and in systemic advocacy, that are directly contrary to the position of the IRS and the Office of Chief Counsel. Once attorneys in the Office of Chief Counsel have adopted a legal position interpreting a law or regulations for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect that those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation. It would also create an untenable conflict of interest. TAS attorney-advisors enable the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney positions due to attrition. It cited Treasury Department General Counsel Directive No. 2, which states: "Except for positions in the Inspectors General offices or within the Office of the Comptroller of the Currency, attorney positions shall not be established outside of the Legal Division" unless the General Counsel or Deputy General Counsel(s) provides a waiver. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a "waiver" be granted, as provided in the directive. In the fall of 2018, TAS submitted another hiring request, and it was again denied by the IRS.

The inability of the National Taxpayer Advocate to hire attorney-advisors extends to announcing higher graded positions for attorneys currently working in TAS. Therefore, TAS is not only barred from hiring new attorneys, but well-performing attorneys cannot be promoted to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS's ability to advocate for taxpayers both individually and systemically and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will rapidly decline.

The National Taxpayer Advocate and her staff have met with the General Counsel and his staff to discuss this issue. The National Taxpayer Advocate believes the conference report language stating that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate" provides a sufficient legal basis for her to hire attorneys that report to her. The General Counsel has disagreed, opining that a statutory change would be required.

155 H.R. Rep. No. 105-599, at 216 (1998) (Conf. Rep.).

Recommendation

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel that report directly to him or her.[156]

156 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*) (recommending that Congress "[a]uthorize the National Taxpayer Advocate to appoint independent counsel who report directly to the National Taxpayer Advocate, provide independent legal advice, help prepare *amicus curiae* briefs and comments on proposed or temporary regulations, and assist the National Taxpayer Advocate in preparing the Annual Report to Congress and in advocating for taxpayers individually and systemically"); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (same); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (same). The Taxpayer and Fairness Protection Act, H.R. 1661, 108th Cong. § 335 (2003), would have authorized the National Taxpayer Advocate to "appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate."

#39 CLARIFY THE AUTHORITY OF THE NATIONAL TAXPAYER ADVOCATE TO MAKE PERSONNEL DECISIONS TO PROTECT THE INDEPENDENCE OF THE OFFICE OF THE TAXPAYER ADVOCATE

Present Law

The IRS Restructuring and Reform Act of 1998 (RRA 98) included several provisions to protect TAS's independence from the IRS, such as those that provide the National Taxpayer Advocate with the authority to make independent personnel decisions. Internal Revenue Code (IRC) § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they "operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate." To bolster this independence, IRC § 7803(c)(2)(D) provides the National Taxpayer Advocate with the authority to "appoint" Local Taxpayer Advocates in each state and to "evaluate and take personnel actions (including dismissal) with respect to any employee of any local office." IRC § 7803(c)(2)(C)(iv) also provides that the Commissioner and the National Taxpayer Advocate will "develop career paths for local taxpayer advocates."

The RRA 98 conference report states that the National Taxpayer Advocate "has the responsibility to evaluate and take personnel actions (including dismissal) with respect to any Local Taxpayer Advocate *or any employee in the Office of the Taxpayer Advocate*."[157] However, the statutory language does not include the final italicized clause.

Reasons for Change

IRC § 7803(c) directs the National Taxpayer Advocate to operate independently in advocating for systemic change, as well as in advocating on behalf of specific taxpayers. For example, the National Taxpayer Advocate is required by IRC § 7803(c)(2) to propose administrative and legislative changes to mitigate problems that taxpayers encounter in their dealings with the IRS and to provide "full and substantive" analyses of a wide range of issues in reports to Congress. Moreover, IRC § 7803(c)(2)(B)(iii) requires these reports to be submitted "without any prior review or comment from … the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget." Thus, the National Taxpayer Advocate is required to hire and retain qualified and independent employees in both her case advocacy and systemic advocacy operations to fulfill TAS's statutory mission.

As noted above, the RRA 98 conference report expressed congressional intent to give the National Taxpayer Advocate personnel authority over "any employee" in the Office of the Taxpayer Advocate. However, IRC § 7803(c)(2)(D) grants the National Taxpayer Advocate personnel authority only over employees of "any local office." It does not grant the National Taxpayer Advocate the authority to make independent personnel decisions with respect to TAS's senior leadership, TAS attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees, even though those employees are also charged with engaging in independent advocacy on behalf of taxpayers and are subject to the same potential conflicts and potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

Recommendation

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate has the responsibility to evaluate and take personnel actions with respect to all employees of the Office of the Taxpayer Advocate.

157 H.R. Rep. No. 105-599, at 214 (1998) (Conf. Rep.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. Rep. No. 105-599, at 216 (1998) (Conf. Rep.). Because this provision was not modified, the language quoted above reflects the conference agreement.

#40 CLARIFY THE TAXPAYER ADVOCATE SERVICE'S ACCESS TO FILES, MEETINGS, AND OTHER INFORMATION

Present Law

Internal Revenue Code (IRC) § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and annually report to Congress. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that "returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes."

Because TAS employees are required to review tax return information to fulfill their statutory duties, they are authorized by IRC § 6103(h) to do so. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees, and obtain other information from the IRS. Similarly, the National Taxpayer Advocate needs information to analyze systemic problems and provide Congress with a "full and substantive analysis" of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with other IRS employees, or obtain other information from the IRS.

Reasons for Change

In general, the National Taxpayer Advocate has significant access to IRS systems and data both in the context of specific cases and systemic advocacy; however, the IRS periodically has declined to provide TAS with access to: (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when the taxpayer has requested TAS's attendance; (3) advice that Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for purposes of the Annual Report to Congress.

Recommendations

- Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, and legal advice provided by Counsel to any IRS employee with respect to cases open and pending in TAS, and shall have the right to participate in meetings between taxpayers and the IRS when asked to do so by a taxpayer.
- Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by Counsel to any IRS employee, and documents necessary to perform a "full and substantive analysis" of the issues, as required by IRC § 7803(c)(2)(B).[158]

158 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34-36 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*). Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with "statistical support" for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS's broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS's need for access to information required to report on systemic issues.

#41 AUTHORIZE THE NATIONAL TAXPAYER ADVOCATE TO FILE *AMICUS* BRIEFS

Present Law

Internal Revenue Code (IRC) § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to "identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes."

Although the National Taxpayer Advocate must report on litigation and recommend legislative changes to address problems that give rise to litigation and that litigation creates, 28 U.S.C. § 516 provides that only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury "shall be represented by the Chief Counsel" or his delegate in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. By contrast, the National Taxpayer Advocate, who is often referred to as "the voice of the taxpayer" both within the IRS and before Congress, is not authorized to represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

Reasons for Change

While the conduct of trials is best left to trial lawyers equipped to advocate zealously on behalf of clients to win individual cases, precedential issues that could potentially affect many taxpayers sometimes come before the judiciary with no one representing the interests of taxpayers in general.

Just as the SBA Chief Counsel for Advocacy may file briefs to help ensure the federal courts are informed about the impact of regulations on small businesses, TAS could be more effective in protecting taxpayer rights if the National Taxpayer Advocate were granted comparable authority to file *amicus curiae* briefs in cases implicating taxpayer rights. It is anticipated that this authority would be used sparingly, as is the case with the SBA Chief Counsel for Advocacy.

Recommendation

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs in federal litigation as an *amicus curiae* on matters relating to the protection of taxpayer rights.[159]

159 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File* Amicus *Briefs in Litigation Raising Taxpayer Rights Issues*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File* Amicus *Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*). *See also* Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), https://www.irs.gov/pub/lanoa/pmta00566_7189.pdf.

#42 REQUIRE THE IRS TO ADDRESS THE NATIONAL TAXPAYER ADVOCATE'S COMMENTS IN FINAL RULES

Present Law

Internal Revenue Code (IRC) § 7805(f) requires the Secretary of the Treasury to submit certain proposed or temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact such regulations may have on small businesses and to discuss any response to such comments in the preamble to the final regulations. Yet despite the fact that the National Taxpayer Advocate is required by IRC § 7803(c)(2)(A) to assist taxpayers in resolving problems with the IRS and to identify administrative and legislative solutions, there is no comparable provision that requires the Secretary to seek comments from the National Taxpayer Advocate on proposed or temporary regulations or to discuss any response to such comments in the preamble to the final regulations.

Reasons for Change

The requirement that the IRS solicit and respond to comments from the SBA benefits tax administration because it forces the agency to consider and respond to the SBA's concerns about the impact of regulations on small businesses. Similarly, tax administration would benefit if the IRS were required to consider and respond to the National Taxpayer Advocate's concerns about the impact of regulations on taxpayer rights and taxpayer burden. While the National Taxpayer Advocate currently provides comments to the IRS on an informal basis, a requirement that the IRS provide a written public response would ensure the agency considers the National Taxpayer Advocate's comments carefully, and would be informative for the public and interested stakeholders.

Recommendation

- Amend IRC § 7805 to require the IRS to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any such comments in the preamble to the final rule.[160]

160 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1578, 114th Cong. § 404 (2015) (except, as a timing matter, this bill would require the IRS to solicit comments from the National Taxpayer Advocate *before* publication of proposed or temporary regulations rather than *after* publication of such regulations, as the statute currently requires for SBA comments). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File* Amicus *Briefs in Litigation Raising Taxpayer Rights Issues*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File* Amicus *Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

#43 AUTHORIZE THE OFFICE OF THE TAXPAYER ADVOCATE TO ASSIST CERTAIN TAXPAYERS DURING A LAPSE IN APPROPRIATIONS

Present Law

Article I of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[161] The Anti-Deficiency Act implements this provision.[162] Specifically, 31 U.S.C. § 1341(a)(1)(B) forbids any officer or employee of the United States government or the District of Columbia government to involve his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. A significant exception to this rule is provided in 31 U.S.C. § 1342, which permits such government activity "for emergencies involving the safety of human life or the protection of property."

Internal Revenue Code (IRC) § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected individual when the Secretary has determined the levy "is creating an economic hardship due to the financial condition of the taxpayer."

IRC § 7803(c)(2)(A) directs the Office of the Taxpayer Advocate to "assist taxpayers in resolving problems with the Internal Revenue Service," among other things. IRC § 7811 authorizes the National Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) where a "taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary." Significant hardship includes "an immediate threat of adverse action" and "irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted." A TAO may require the Secretary "within a specified time period … to release property of the taxpayer levied upon."

Reasons for Change

Past IRS shutdown contingency plans have interpreted the exception under 31 U.S.C. § 1342 as applicable to activities necessary to safeguard human life or protect the property of the federal government, but not to protect the property of U.S. taxpayers. Thus, lien and levy activities carried out by automation can continue. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on financial accounts of individuals and businesses, on wages, and on Social Security and other government benefits because these notices were pre-programmed into the IRS's computer systems before the shutdown began. During the 2018-2019 shutdown, more than 16,500 scheduled appointments at Taxpayer Assistance Centers were cancelled, approximately 3.8 million calls from taxpayers to the IRS went unanswered, and the IRS received more than five million pieces of taxpayer correspondence.[163]

Yet despite the requirement under IRC § 6343(a)(1)(D) that the IRS release any levy that creates an economic hardship for a taxpayer, and the explicit charge in IRC § 7811(b)(1) that the National Taxpayer Advocate may issue a TAO "to release property of the taxpayer levied upon" where the taxpayer is experiencing significant hardship, no IRS or TAS employee, including the National Taxpayer Advocate, was excepted to work these

161 U.S. Const. art. I, § 9, cl. 7.

162 Pub. L. No. 97-258, 96 Stat. 923 (1982).

163 *IRS Oversight: Treasury Inspector General for Tax Administration, Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 116th Cong. (Sept. 24, 2019) (statement of J. Russell George, Treasury Inspector General for Tax Administration).

cases during a shutdown.[164] As a result, taxpayers facing economic hardship were unable to obtain assistance from TAS to request or obtain release of these levies.[165] Additionally, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who had requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardship and irreparable injury.

Recommendations

- Clarify that the emergency exception to the Anti-Deficiency Act for the protection of property includes taxpayer property as well as government property.
- Alternatively, clarify that (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

164 *See* IRS SERP Alert #19A0017, Release of Levy and Release of Lien (Jan. 23, 2019) ("While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened."). In reaching its conclusion that TAS may not assist taxpayers with collection issues during the shutdown, the IRS Office of Chief Counsel reasoned as follows:

> My office reviewed the Plan that we discussed in our conference call on Tuesday. We have determined that TAS may continue to issue manual refunds and enter into streamlined installment agreements, because TAS has authority to take these actions on behalf of IRS.
>
> In contrast, there are a number of functions listed in the Plan where TAS acts derivatively, serving as a conduit or advocate for action by other business units. This includes, for example, fixing refund issues and assisting with general collection processes. As to these derivative functions, we have concluded that there is insufficient evidence that Congress intended for the functions to continue during a lapse in appropriations. In reaching this conclusion, we relied on guidance from the Office of Legal Counsel. OLC has stated that there is implied authority for an unfunded function to continue during a lapse if the function is "necessary to the effective execution of" a function that has funding or is excepted, "such that suspension of the [unfunded] function [] … would prevent or significantly damage the execution of [the funded or excepted] function []." OLC, *Effect of Appropriations for Other Agencies*, 19 Op. OLC 337, 338 (Dec. 13, 1995). Upon considering TAS's role and its statutory mandates, we do not believe that Congress has implied that suspension of TAS's derivative functions would prevent or significantly damage IRS's execution of its tax collection and refund issuance functions.

Email from Senior Counsel, General Legal Services, to Deputy National Taxpayer Advocate (Jan. 17, 2019).

165 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardship was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79-91 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*) and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*).

#44 REPEAL STATUTE SUSPENSION UNDER IRC § 7811(D) FOR TAXPAYERS SEEKING ASSISTANCE FROM THE TAXPAYER ADVOCATE SERVICE

Present Law

Internal Revenue Code (IRC) § 7811(d) suspends the statutory period of limitations for any action with respect to which a taxpayer is seeking assistance from TAS. The period is only suspended, however, if the taxpayer submits a written application for assistance.[166]

Reasons for Change

Suspension of the assessment or collection period disadvantages the taxpayer because it gives the IRS more time to take enforcement actions. If the IRS has caused a problem that the taxpayer is working with TAS to resolve, statute suspension effectively punishes the taxpayer for coming to TAS.

Further, there is no compelling reason for the suspension, as evidenced by the fact that the IRS itself has never implemented it. It is unnecessary to protect the government's interests because an application for TAS assistance generally does not prevent the IRS from taking enforcement action while the taxpayer is working with TAS. IRC § 7811(d) is also impossible for the IRS to administer using its existing computer systems.

Moreover, if IRC § 7811(d) were ever to be implemented, it would create an elective trap for the unwary. As noted above, it applies only when a taxpayer submits a written request for TAS assistance. The provision does not apply when taxpayers request TAS assistance by phone, which is the method by which most taxpayers seek TAS's assistance. Thus, this provision — apart from being unnecessary and unutilized — would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

Recommendation

- Repeal IRC § 7811(d).[167]

166 Treas. Reg. § 301.7811-1(e)(4).

167 For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316-328 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*). In informal discussions, IRS officials have noted that a Taxpayer Assistance Order (TAO) may direct the IRS to refrain from taking collection action pending resolution of the case and that, as a result, the period of limitations for taking collection action might expire before the TAS case is resolved. We think this concern is unfounded because (i) the IRS has never implemented statute suspension despite having the legal authority to do so and (ii) we are not aware of a single case in which a TAO caused a period of limitations to expire before the IRS could take collection action.

Strengthen Taxpayer Rights in Judicial Proceedings

#45 AUTHORIZE THE TAX COURT TO ORDER REFUNDS OR CREDITS IN COLLECTION DUE PROCESS PROCEEDINGS

Present Law

Internal Revenue Code (IRC) § 6512(b) grants the Tax Court jurisdiction in deficiency suits to determine that a taxpayer made an overpayment of income tax for the period at issue and that such amount must be refunded or credited to the taxpayer.[168] IRC § 6511(a) generally requires a taxpayer to file a claim for credit or refund by the later of three years from the time a return was filed, or if no return was filed, two years from the time the tax was paid.

IRC § 6330 allows a taxpayer in certain instances to challenge the underlying liability in a Collection Due Process (CDP) proceeding. Unlike in deficiency cases, however, it does not grant the Tax Court jurisdiction to determine the extent to which a taxpayer has made an overpayment and is entitled to a refund or credit.[169] For a taxpayer in a CDP proceeding to receive a refund, the taxpayer must first fully pay the assessed tax for the taxable year(s) at issue, file a timely administrative refund claim with the IRS under IRC § 6511, and if the claim is denied, timely file a refund suit in a U.S. district court or the Court of Federal Claims.

Reasons for Change

The limitation on the Tax Court's jurisdiction to determine an overpayment and order a refund in CDP cases prevents taxpayers from obtaining resolution of their tax disputes in one forum and imposes unnecessary financial and administrative burdens on taxpayers and the court system. The Tax Court, unlike other federal courts, is a pre-payment forum that ordinarily allows taxpayers to dispute their liabilities without having to first full-pay them. In a CDP proceeding, only taxpayers who did not otherwise have an opportunity to dispute their underlying liability are permitted to contest it.

CDP taxpayers who may challenge the existence or amount of the underlying tax liability pursuant to IRC § 6330(c)(2)(B) should, similar to taxpayers in deficiency proceedings, have the opportunity to obtain a refund in a pre-payment forum, rather than be required to full-pay the liability and then incur additional time and expense to dispute the liability in another forum. A taxpayer disputing the underlying liability in a CDP case is subject to limitations similar to those that apply to taxpayers in deficiency proceedings. The court reviews the amount of the tax liability on a *de novo* basis,[170] and the scope of its review extends to evidence introduced at the trial that was not a part of the administrative record.[171] Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and issue refunds in CDP cases will protect taxpayers' *right to finality*, reduce taxpayer burden, and better ensure the IRS collects the correct amount

168 IRC § 6401 provides that the term "overpayment" includes "that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." The Supreme Court has stated that an overpayment occurs "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *United States v. Dalm*, 494 U.S. 596, 609 n. 6 (1990). *See also Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

169 *See Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006); *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015); *McLane v. Comm'r*, T.C. Memo. 2018-149 (2018).

170 Under a *de novo* standard of review, the Tax Court will consider all relevant evidence introduced at trial. *Jordan v. Comm'r*, 134 T.C. 1, 8 (2010).

171 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. Rep. No. 105-599, at 266 (1998). *See also* IRS Chief Counsel Notice CC-2014-002, Proper Standard of Review for Collection Due Process Determinations (May 5, 2014).

of tax. Furthermore, the Tax Court could apply to CDP proceedings its long-established procedures for determining an overpayment in deficiency cases.

Refund claims in CDP cases should be subject to the limitations of IRC §§ 6511(a) and 6512(b)(3). If the claim was filed by the taxpayer within three years from the time a return was filed, the amount of the refund would be limited to the amount paid in the three-year period (plus extensions) before the notice of deficiency was mailed and the amount paid after the notice of deficiency was mailed.

Recommendation

- Amend IRC § 6330(d)(1) to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits, subject to the limitations of IRC §§ 6511(a) and 6512(b)(3), if the court determines the amount of the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.

#46 REPEAL *FLORA*: GIVE TAXPAYERS WHO CANNOT PAY THE SAME ACCESS TO JUDICIAL REVIEW AS THOSE WHO CAN

Present Law

Internal Revenue Code (IRC) § 6212 requires the IRS to issue a "notice of deficiency" before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days if the notice is addressed to a person outside the U.S.) to review the IRS determination.

IRC §§ 6201 and 6671(a) authorize the IRS to assess other liabilities, including so-called "assessable" penalties (*e.g.*, penalties codified in IRC §§ 6671-6725), without first issuing a notice of deficiency. Assessable penalties are not computed by reference to a tax deficiency. For example, penalties under IRC §§ 6721 and 6707 for failure to file various information returns are assessable penalties. A taxpayer generally may not obtain judicial review of assessable penalties in the Tax Court.

A taxpayer may sue in a U.S. District Court or the U.S. Court of Federal Claims under 28 U.S.C. § 1346(a)(1) to recover "any sum" that the taxpayer believes has been erroneously assessed or collected. In *Flora v. United States*, 362 U.S. 145 (1960), however, the U.S. Supreme Court held that, with limited exceptions, a taxpayer must have "fully paid" the assessment (called the "full payment rule") before suing in these courts. In contrast, IRC § 7422(j) provides that the U.S. District Courts and the U.S. Court of Federal Claims "shall not fail to have jurisdiction" to determine the "estate tax liability of such estate (or for any refund with respect thereto) solely because the full amount of such liability has not been paid by reason of an election under section 6166" to pay the liability in installments.

Under IRC § 7422(a) the taxpayer must make a timely administrative claim for refund before filing suit. Assuming the claim is timely, IRC § 6511(b)(2) generally limits a taxpayer's recovery to amounts paid within two years (or, in some cases, within three years plus any extension of time to file) before the date of the claim.[172]

Under IRC §§ 6330 and 6320, the Tax Court may review an assessed liability if the IRS issues levies or liens to collect an assessment and the taxpayer requests a Collection Due Process (CDP) hearing. However, IRC §§ 6330(c)(2)(B), 6320(c), and Treas. Reg. §§ 301.6320-1(e)(3)A-E2 and 301.6330–1(e)(3)A–E2, provide that the Tax Court may do so only if the taxpayer did not receive a notice of deficiency and did not have an opportunity to raise the dispute in an administrative appeal. In practice, the IRS generally provides an opportunity for an administrative appeal.

Under 11 U.S.C. § 505(a)(1), a bankruptcy court "may" review a tax dispute, but it generally will not do so unless resolution of the dispute would benefit the taxpayer's other creditors.

Under IRC § 7803(a)(3), the Commissioner is required to ensure that IRS employees act in accord with certain rights (known as the "Taxpayer Bill of Rights"), including the *right to appeal an IRS decision in an independent forum*.

172 To be timely, IRC § 6511(a) generally requires that an administrative claim must be filed within the later of (i) three years from the date the original return was filed or (ii) two years from the date the tax was paid. If the claim is filed within the three-year period, then IRC § 6511(b)(2)(A) provides that the taxpayer can only recover amounts paid within three years, plus any extension of time to file, before the date of the claim. Otherwise, IRC § 6511(b)(2)(B) provides that the taxpayer can only recover amounts paid within two years before the date of the claim.

Reasons for Change

Consistent with the Taxpayer Bill of Rights, all taxpayers should have an opportunity to obtain judicial review of adverse IRS determinations. Moreover, taxpayers who cannot pay what the IRS says they owe in order to challenge an adverse determination should have the same opportunities as wealthier taxpayers who can pay.

Under current law, there are circumstances in which taxpayers do not have a right to judicial review. Significantly, assessable penalties are not subject to judicial review unless the taxpayer is wealthy enough to fully pay.

Even taxpayers who fully pay may lose the opportunity to recover a portion of their payments if they pay in installments. Payments made more than two years before a taxpayer fully pays and files a refund claim generally cannot be recovered. Thus, a taxpayer who is not affluent enough to pay his or her alleged debt within two years will lose the right to request a refund of the early payments, even if he or she eventually pays in full and the court agrees with him or her on the merits of the refund claim.

Even when the IRS sends a notice of deficiency to low-income taxpayers, they may not have a realistic opportunity for judicial review. A TAS study found that when the IRS sent an audit notice to those claiming the Earned Income Tax Credit (EITC), a refundable tax credit for the working poor, almost 40 percent did not understand what the IRS was questioning, and only about half of the respondents felt that they knew what they needed to do. Thus, many are also unlikely to understand whether and how to timely petition the Tax Court.

Although the Supreme Court once feared that giving the relatively few wealthy persons who were subject to tax the option to litigate rather than pay could threaten the solvency of the government, the U.S. tax base is much broader today, and as a result, whether judicial review occurs before or after payment in individual cases is not nearly as important to the government as it once was. Moreover, since the *Flora* case was decided in 1960, the problems created by the full payment rule have grown. In 1960, there were only four assessable penalties. Today, there are more than 50. Thus, the IRS's authority to assess penalties that cannot be reviewed has increased. In addition, the EITC was not enacted until 1975. It brought the working poor into the tax system by giving them tax benefits. Thus, the full payment rule increasingly erodes the *right to appeal an IRS decision in an independent forum* for tens of millions who were not a part of the tax system in 1960.

The National Taxpayer Advocate recommends that Congress provide all taxpayers with a realistic opportunity to obtain judicial review of adverse IRS determinations without regard to their ability to pay.

Recommendations[173]

While a simple solution might be to repeal the full payment rule, Congress should also consider one or more of the following options:[174]

- Amend 28 U.S.C. § 1346(a)(1) to clarify that the full payment rule only applies in cases where the taxpayer has received a notice of deficiency.
- Treat a taxpayer as having fully paid a disputed amount for purposes of the full payment rule when the taxpayer has paid some of it (including by refund offset) and either (a) the IRS has classified the

173 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress 364 (Legislative Recommendation: *Fix the* Flora *Rule: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).

174 The doctrines of *res judicata* and *collateral estoppel* should help ensure the IRS does not re-litigate the same issues with respect to unpaid liabilities. *See, e.g.*, CCDM 34.5.1.1.2.2.4 (Aug. 11, 2004).

account as currently not collectible due to economic hardship or (b) the taxpayer has entered into an agreement to pay the liability in installments.[175]

- Authorize the U.S. Tax Court to review liabilities where the taxpayer has not received a deficiency notice (*e.g.,* assessable penalties) in a manner that parallels the deficiency process. Alternatively, expand the Tax Court's jurisdiction to review these liabilities in connection with CDP appeals, even if the taxpayer has had an opportunity for an *administrative* appeal.

175 As noted above, a similar rule applies to estates that elect to pay in installments. *See* IRC § 7422(j).

#47 PROVIDE THAT THE TIME LIMITS FOR BRINGING TAX LITIGATION ARE SUBJECT TO THE JUDICIAL DOCTRINES OF FORFEITURE, WAIVER, ESTOPPEL, AND EQUITABLE TOLLING

Present Law

Various provisions in the Internal Revenue Code (IRC) authorize proceedings or suits against the government, provided such actions are brought timely. These actions are generally brought in the U.S. Tax Court, a U.S. District Court, or the U.S. Court of Federal Claims.[176]

Equitable doctrines that, if available, might excuse an untimely filing include equitable tolling (applicable when it is unfair to hold a plaintiff to a statutory deadline because of an extraordinary event that impeded the plaintiff's compliance); equitable estoppel (applicable when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit); forfeiture (applicable when the parties have acted as if the case need not operate under the statutory deadlines); and waiver (applicable when the parties have agreed explicitly that a case need not operate under legal deadlines).

U.S. Tax Court

For some types of tax controversies, the U.S. Tax Court is the only judicial forum in which taxpayers, by filing a petition within a specified period, may litigate their tax liability without first paying the tax asserted. Examples of these types of controversies include deficiency proceedings, collection due process (CDP) proceedings, and "standalone" innocent spouse cases (*i.e.*, where innocent spouse relief is sought other than in response to a statutory notice of deficiency or as part of a CDP proceeding).

Other types of cases brought in the Tax Court include interest abatement cases, worker classification cases, and whistleblower claims.

IRC § 7442, which describes the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are not subject to equitable doctrines.

In the absence of a timely filed petition, however, the Tax Court has held it does not have jurisdiction to redetermine deficiencies, hear appeals from IRS CDP proceedings, consider standalone innocent spouse claims, or decide whistleblower claims.

With respect to deficiency cases and standalone innocent spouse cases, several U.S. Courts of Appeal have agreed with the Tax Court that the time limits for filing a Tax Court petition are jurisdictional requirements that cannot be modified by applying equitable doctrines. In addition, one appellate court agreed with the Tax Court that the deadline for filing a petition in a CDP case is not subject to equitable tolling.[177] However, a different appellate court, interpreting language in IRC § 7432 (the whistleblower statute) that is "nearly

176 Some tax claims may also be heard by U.S. bankruptcy courts. For a fuller discussion of this recommendation, see National Taxpayer Advocate 2017 Annual Report to Congress 283 (Legislative Recommendation: *Equitable Doctrines: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case*).

177 *Duggan v. Comm'r*, 879 F.3d 1029, 1034 (9th Cir. 2018).

identical in structure" to the language in IRC § 6330 (the CDP statute), reversed a Tax Court dismissal and held that the filing deadline for whistleblower cases is not jurisdictional and is subject to equitable tolling.[178]

Other Federal Courts

In some cases, taxpayers have the right to obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. For example, a refund suit can generally be brought in the U.S. District Courts or in the U.S. Court of Federal Claims within two years after the IRS denies the claim. There is a split between circuits regarding whether the statutory period for seeking refunds is subject to equitable doctrines.[179]

Similarly, taxpayers may sue in a U.S. District Court to enjoin enforcement of a wrongful levy or sale or to recover property (or proceeds from the sale of the property) if they do so within a specified period (generally, within two years of levy). Several federal courts have held that the applicable period is not subject to equitable tolling,[180] but at least one appellate court has held that it is.[181]

Taxpayers may also bring suit, if they do so within the specified periods, to seek civil damages in a U.S. District Court or bankruptcy court with respect to unauthorized actions by the IRS. Courts have differed on whether equitable doctrines can toll the applicable period for bringing suit.[182]

Reasons for Change

The sanction for failing to commence suit in the Tax Court or another federal court within the time limits prescribed by the IRC is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim. Treating the IRC time limits for bringing suit as jurisdictional, and not subject to equitable doctrines, leads to unfair outcomes.

Unrepresented taxpayers, in particular, may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation. The IRS itself occasionally provides inaccurate information regarding the filing deadline to a taxpayer, and taxpayers have been harmed by relying on that erroneous information.[183]

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178 *Myers v. Comm'r*, 928 F.3d 1025, 1036 (D.C. Cir. 2019), *reh'g en banc denied*, No. 18-1003 (D.C. Cir. Oct. 4, 2019). At least one other taxpayer, relying on the *Myers* decision, has argued that the CDP deadlines are not jurisdictional (see Opening Brief of Petitioner-Appellant, *Boechler v. Comm'r*, Docket No. 19-2003, 2019 WL 3384248 (8th Cir. 2019)).

179 *Compare RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to IRC § 6352) with *Wagner v. United States*, 2018-2 U.S.T.C. (CCH) ¶50,496 (E.D. Wash. 2018) (the time limits set forth in IRC § 6532 are not jurisdictional; furthermore, plaintiff's petition was timely filed) and *Howard Bank v. United States*, 759 F. Supp. 1073, 1080 (D. Vt. 1991), *aff'd*, 948 F.2d 1275 (2d Cir. 1991) (applying equitable principles to IRC § 6352 and estopping the IRS from raising the limitations period as a bar to suit).

180 *See Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000) and cases cited therein (holding that the IRC § 6532(c) period is not subject to equitable tolling).

181 *See*, *e.g.*, *Volpicelli v. United States*, 777 F.3d 1042, 1047 (9th Cir. 2015) (holding that the IRC § 6532(c) period is subject to equitable tolling); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995) (same).

182 *Compare Aloe Vera of America, Inc. v. United States*, 580 F.3d 867, 871-872 (9th Cir. 2009) (time for bringing suit under IRC § 7431 is not subject to equitable tolling) *with United States v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) (doctrine of equitable tolling is an extraordinary remedy that did not apply in an IRC § 7433 action), *Ramos v. United States*, 2002-2 U.S.T.C. (CCH) ¶50,767 (N.D. Cal. 2002) (denying motion to dismiss because doctrine of equitable tolling might apply to an IRC § 7433 action), and *Bennett v. United States*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (whether equitable tolling applies to IRC §§ 7432 and 7433 actions has not been definitively determined, but it is an extraordinary remedy and did not apply in this case).

183 *See*, *e.g.*, *Nauflett v. Comm'r*, 892 F.3d 649, 652-654 (4th Cir. 2018) (doctrine of equitable tolling did not apply to innocent spouse case despite reliance on erroneous IRS advice regarding the filing deadline); *Rubel v. Comm'r.*, 856 F.3d 301, 306 (3d Cir. 2017) (same).

The right to a fair and just tax system requires that equitable doctrines be available to taxpayers in the rare cases they would apply. Taxpayers would still be required to demonstrate that an equitable doctrine applies in their cases, and courts could still dismiss petitions or complaints as untimely.

Recommendation

- Enact a new section of the IRC, or amend IRC § 7442, to provide that the periods set forth in the IRC within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling.[184]

184 If this change to the IRC were enacted, late-filed claims would no longer be dismissed for lack of jurisdiction, which would mean that the taxpayer would have no right to pursue a refund suit. As a result, we are also recommending that IRC § 7459(d) be amended to make clear that a dismissal based on timeliness is not a decision on the merits.

#48 PROVIDE THAT THE SCOPE OF JUDICIAL REVIEW OF DETERMINATIONS UNDER IRC § 6015 IS *DE NOVO*

Present Law

Taxpayers who file joint federal income tax returns are jointly and severally liable for any deficiency or tax due with respect to their joint returns. Internal Revenue Code (IRC) § 6015, sometimes referred to as the "innocent spouse" rules, provides relief from this joint and several liability. If "traditional" relief from a deficiency is unavailable under subsection (b) and "separation of liability" from a deficiency is unavailable under subsection (c), a taxpayer may qualify for "equitable" innocent spouse relief from deficiencies and underpayments under subsection (f). Relief under IRC § 6015(f) is appropriate when, taking into account all the facts and circumstances of a case, it would be inequitable to hold a joint filer liable for the unpaid tax or deficiency. If the IRS denies relief under any subsection of IRC § 6015, or a request for relief has gone unanswered for six months, the taxpayer may petition the Tax Court.

In 2008, the Tax Court held that the scope of its review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is *de novo*, meaning that it may consider evidence introduced at trial that was not included in the administrative record.[185] In 2009, the Tax Court held that the standard of review in IRC § 6015(f) cases is also *de novo*, meaning that the Tax Court will consider the case anew, without deference to the IRS's determination.[186]

In 2009, the IRS Office of Chief Counsel (Chief Counsel) issued guidance to its attorneys instructing them to argue, contrary to the Tax Court's holdings, that the scope of review in all IRC § 6015(f) cases is limited to issues and evidence presented before the IRS Appeals or Examination functions and that the proper standard of review is abuse of discretion.[187] In 2011, the National Taxpayer Advocate recommended that Congress amend IRC § 6015 to reflect the Tax Court's holdings.

In June 2013, following an appellate court decision affirming the Tax Court's holdings, Chief Counsel issued guidance instructing its attorneys to cease arguing that the scope and standard of review in IRC § 6015(f) cases are not *de novo*.[188] In June 2013, Chief Counsel also issued an Action on Decision stating that although the IRS disagrees that section 6015(e)(1) provides for both a *de novo* standard of review and a *de novo* scope of review, the IRS would no longer argue that the Tax Court should limit its review to the administrative record or review section 6015(f) claims solely for an abuse of discretion.[189]

In 2019, Congress added paragraph (7) to IRC § 6015(e). It provides that "any review of a determination made under this section is de novo by the Tax Court."[190] However, this *de novo* review is limited to consideration of "(A) the administrative record established at the time of the determination, and (B) any

185 *Porter v. Comm'r*, 130 T.C. 115 (2008).

186 *Porter v. Comm'r*, 132 T.C. 203 (2009) (a continuation of the same case that produced the 2008 holding, discussed above, that Tax Court review of denials of relief under IRC § 6015(f) is not limited to the administrative record).

187 Notice CC-2009-021, Litigating Cases Involving Claims for Relief from Joint and Several Liability Under Section 6015(f): Scope and Standard of Review (June 30, 2009).

188 Notice CC-2013-011, Litigating Cases That Involve Claims for Relief from Joint and Several Liability Under Section 6015 (June 7, 2013).

189 Action on Decision (AOD) 2012-07, I.R.B. 2013-25 (June 17, 2013), issued in response to *Wilson v. Comm'r*, 705 F.3d 980 (9th Cir. 2013), *aff'g* T.C. Memo. 2010-134. An AOD is a formal memorandum prepared by Chief Counsel that announces the future litigation position the IRS will take with regard to the issue addressed in the AOD.

190 Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019).

additional newly discovered or previously unavailable evidence." The provision does not define the terms "newly discovered" or "previously unavailable."

Reasons for Change

IRC § 6015(e)(7), which limits the Tax Court's scope of review, applies to determinations made "under this section" (*i.e.*, IRC § 6015). Thus, the provision supersedes Tax Court jurisprudence with respect to the scope of review not only in IRC § 6015(f) cases, but also in IRC § 6015 (b) and (c) cases.

The provision may be intended to encourage the IRS and taxpayers to compile a complete administrative record or resolve cases without litigation. In some cases, however, taxpayers — and particularly taxpayers not represented by counsel — may not appreciate the significance of certain evidence or the consequences of failing to present it to the IRS. In other cases, taxpayers may be willing to present relevant evidence during trial to a neutral third party — the judge — that they are reluctant to share with the IRS, such as evidence of the other joint filer's domestic violence or abuse.[191]

Moreover, some taxpayers could be deprived of meaningful Tax Court review — particularly taxpayers who filed Tax Court petitions when their requests for relief went unanswered for six months — because the administrative record may consist of little more than the taxpayer's skeletal responses to the information solicited by Form 8857, Request for Innocent Spouse Relief, and the IRS may argue that the taxpayer's evidence is not "newly discovered" or "previously unavailable."[192] If the court accepts the IRS's argument that under IRC § 6015(e)(7) the taxpayer's evidence should not be considered because it was available but not presented at the time of the IRS's determination, the court may decide the case *de novo* on the basis of the scant evidence contained in the administrative record.[193] To enable the Tax Court to make the correct decision based on the merits of the case, the National Taxpayer Advocate believes the court should be permitted to consider all relevant evidence, whether or not it could have been provided to the IRS in a prior administrative proceeding.

Finally, some taxpayers who wish to obtain review by a federal court that is *de novo* in scope may choose to pay the asserted tax and bring a refund suit before a U.S. district court or the U.S. Court of Federal Claims. But this approach carries the risk that these courts may conclude they lack jurisdiction to hear innocent spouse claims.[194] To address these cases, the National Taxpayer Advocate recommends the statute be amended to allow courts to consider all relevant evidence in IRC § 6015 cases.

191 Abuse that prevented a taxpayer from challenging the treatment of an item on the joint return out of fear the other spouse might retaliate would weigh in favor of granting relief. *Stephenson v. Comm'r*, T.C. Memo. 2011-16, is an example of a case in which the Tax Court's finding that the petitioner was physically and verbally abused by her husband was largely based on evidence produced at trial because the issue of abuse was not fully developed administratively.

192 Chief Counsel has not yet issued guidance to its attorneys about what arguments to make in cases in which IRC § 6015(e)(7) may apply.

193 Where the IRS did not answer the taxpayer's request for relief for more than six months, the court may remand the case and direct the IRS to do so, which may prolong resolution of the case.

194 The National Taxpayer Advocate recommends that Congress address this risk. *See Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*.

Recommendation

- Remove IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: "The standard and scope of any review of a determination made under this section by the Tax Court or other court of competent jurisdiction shall be *de novo*."[195]

195 This recommendation averts the possibility that the language in IRC § 6015(e)(7) that "[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court" could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would preclude innocent spouse relief in collection, bankruptcy, and refund cases litigated in other federal courts and would be inconsistent with IRC § 6015(e)(1)(A) (conferring Tax Court jurisdiction "in addition to any other remedy provided by law"). Such an interpretation would also be inconsistent with the legislative recommendations *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases, infra,* and *Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*.

#49 CLARIFY THAT TAXPAYERS MAY RAISE INNOCENT SPOUSE RELIEF AS A DEFENSE IN COLLECTION PROCEEDINGS AND IN BANKRUPTCY CASES[196]

Present Law

Married taxpayers who file joint returns are jointly and severally liable for any deficiency or tax due. Spouses who live in community property states and file separate returns are generally required to report half the community income on their separate returns. Internal Revenue Code (IRC) §§ 6015 and 66, sometimes referred to as the "innocent spouse" rules, provide relief from joint and several liability and from the operation of community property rules. Taxpayers seeking innocent spouse relief generally file Form 8857, Request for Innocent Spouse Relief. After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part.

If a taxpayer files a petition within 90 days from the date the IRS issues its final notice of determination, the United States Tax Court has jurisdiction to determine the appropriate relief. The Tax Court's jurisdiction to decide innocent spouse claims does not appear to be exclusive; IRC § 6015(e)(1)(A) provides that an individual may petition the Tax Court for review of an innocent spouse determination "in addition to any other remedy provided by law."

However, the scope of the Tax Court's review is not *de novo*, but is limited to "(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence."[197]

The Tax Court does not have jurisdiction over collection suits arising under IRC §§ 7402 or 7403 or over bankruptcy proceedings arising under Title 11 of the United States Code. Some federal courts with jurisdiction over these cases have considered taxpayers' innocent spouse claims and determined that they are entitled to innocent spouse relief, which is consistent with IRC § 6015(e)(1)(A).[198] These courts have not limited the scope of their consideration of the innocent spouse claim.

However, other federal courts have held that the Tax Court's jurisdiction to decide innocent spouse claims is exclusive and have declined to consider such claims in collection or bankruptcy cases.[199]

Reasons for Change

Inconsistent decisions about whether taxpayers may raise innocent spouse relief as a defense in collection suits and bankruptcy proceedings have created confusion and resulted in different treatment of similarly situated taxpayers. Moreover, the effect of treating the Tax Court as having exclusive jurisdiction over innocent spouse claims may create economic hardships. If the federal courts that decide collection suits and bankruptcy

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196 Our recommendation that Congress clarify taxpayers may seek innocent spouse relief in collection proceedings and bankruptcy cases addresses issues similar to those discussed in our recommendation that Congress clarify taxpayers may seek innocent spouse relief in refund cases.

197 IRC § 6015(e)(7). This provision was enacted by the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019). The National Taxpayer Advocate recommends revising IRC § 6015(e)(7) to remove this limitation on the Tax Court's scope of review. *See Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is* De Novo, *supra*.

198 *See, e.g.*, *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1976), *aff'd per curiam*, 586 F.2d 1080 (5th Cir. 1978) (IRC § 7402 suit to reduce an assessment to judgment); *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017) (bankruptcy proceeding).

199 *United States v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) (IRC § 7402 suit to reduce an assessment to judgment); *United States v. Cawog*, 97 A.F.T.R.2d (RIA) 3069 (W.D. Pa. 2006), *appeal dismissed* (3d Cir. 2007) (IRC § 7403 suit to foreclose on federal tax liens); and *In re Mikels*, 524 B.R. 805 (Bankr. S.D. Ind. 2015) (bankruptcy proceeding).

proceedings cannot consider innocent spouse claims, taxpayers in those cases may be left without any forum in which to seek innocent spouse relief before a court enters a financially damaging judgment or, in rare cases, the taxpayer loses his or her home to foreclosure. In some cases, taxpayers who are forced to raise their innocent spouse claims in Tax Court will be deprived of a *de novo* scope of review that would be available in other federal courts.

Legislation is needed to clarify that the statutory language of IRC § 6015 conferring Tax Court jurisdiction "in addition to any other remedy provided by law" does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims and that U.S. district courts and bankruptcy courts are also authorized to consider whether innocent spouse relief should be granted.[200]

Recommendation

- Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief as a defense in a proceeding brought under any provision of Title 26 (including §§ 6213, 6320, 6330, 7402, and 7403) and in cases arising under Title 11 of the United States Code.

200 Related to this recommendation, the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019) added subsection (7) to IRC § 6015(e), which provides that "[a]ny review of a determination under this section shall be reviewed de novo by the Tax Court." The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the new provision could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). Such an interpretation would also be inconsistent with this recommendation relating to raising innocent spouse as a defense in collection suits and bankruptcy proceedings and with the recommendation to *Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*. For this reason, the National Taxpayer Advocate recommends clarifying that the scope and standard of review are *de novo* in innocent spouse cases adjudicated by the Tax Court "or other court of competent jurisdiction," thereby avoiding the inference that the Tax Court has exclusive jurisdiction over innocent spouse claims. *See Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is* De Novo*, supra.*

#50 CLARIFY THAT TAXPAYERS MAY SEEK INNOCENT SPOUSE RELIEF IN REFUND SUITS[201]

Present Law

Internal Revenue Code (IRC) §§ 6015 and 66, sometimes referred to as the "innocent spouse" rules, provide relief from the joint and several liability that arises from filing a joint federal income tax return and from the operation of community property rules. Taxpayers may request that the IRS grant innocent spouse relief, and if a request is denied, they may seek judicial review.

United States Tax Court

Under IRC § 6015(e), the Tax Court has jurisdiction to review the IRS's denial of a claim for innocent spouse relief and to determine the appropriate relief. There is no right to a jury trial in Tax Court, and the scope of the Tax Court's review of a denial of a claim for innocent spouse relief under IRC § 6015 is limited to "(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence."[202]

Other Federal Courts

Taxpayers who pay a proposed deficiency before filing a Tax Court petition and whose administrative claims for tax refunds have been denied by the IRS cannot bring refund suits in the Tax Court, but they may seek refunds by filing suit in a U.S. District Court or in the U.S. Court of Federal Claims.

IRC § 6015(e) states that a taxpayer's right to petition the Tax Court for innocent spouse relief is provided "[i]n addition to any other remedy provided by law." Despite the quoted language, a U.S. District Court recently concluded in the case of *Chandler v. United States* that it lacked jurisdiction to consider a taxpayer's innocent spouse claim in a refund suit arising under IRC § 7422.[203]

A jury trial is available if a refund suit is brought in a U.S. District Court, and the scope of the court's review in a refund suit is *de novo* (*i.e.*, not limited, for example, to the administrative record).[204]

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201 This recommendation that Congress clarify that taxpayers may seek innocent spouse relief in refund cases addresses issues similar to those discussed in our recommendation *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases*, *supra*.

202 IRC § 6015(e)(7). This provision was enacted as part of the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019). The National Taxpayer Advocate recommends revising IRC § 6015(e)(7) to remove this limitation on the Tax Court's scope of review. *See Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is* De Novo*, supra.*

203 *Chandler v. United States*, 2018 U.S. Dist. LEXIS 173880 (N.D. Tex. 2018) *adopting* 2018 U.S. Dist. LEXIS 174482 (N.D. Tex. 2018). The decision quoted *United States. v. Elman*, 2012 U.S. Dist. LEXIS 173026, at *8 (N.D. Ill. 2012), which stated that "although the statute itself does not address whether the Tax Court's jurisdiction is exclusive, courts interpreting the statute have concluded that it is."

204 See *Vons Companies v. United States*, 51 Fed. Cl. 1, 5-6 (2001), noting "the axiomatic principle that tax refund cases are *de novo* proceedings" in which the court's determination of the taxpayer's tax liability is "based upon the facts and merits presented to the court and does not require (or even ordinarily permit) this court to review findings or a record previously developed at the administrative level." (citations omitted).

Reasons for Change

The *Chandler* decision is inconsistent with decisions by other federal courts that for decades have allowed taxpayers to seek innocent spouse relief in refund suits.[205] The decision in *Chandler*, by foreclosing district court review of innocent spouse claims, leaves taxpayers with only one forum — the Tax Court — in which to seek review of an adverse IRS determination. Taxpayers are thus deprived of judicial review of their cases that is *de novo* in scope. Because there is no right to a jury trial in the Tax Court, the *Chandler* decision also undermines taxpayers' right to have their cases decided by a jury.

Moreover, a refund suit may involve issues other than innocent spouse relief over which the court would clearly have jurisdiction. Requiring taxpayers to litigate the innocent spouse claim in Tax Court and other issues in a different federal court imposes an unreasonable burden on taxpayers and undermines judicial economy.

Legislation is needed to clarify that the statutory language of IRC § 6015 conferring Tax Court jurisdiction "in addition to any other remedy provided by law" does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims and that U.S. District Courts and the U.S. Court of Federal Claims are also authorized to consider whether innocent spouse relief should be granted in refund suits. Clarification will prevent further confusion as to whether seeking innocent spouse relief is allowable in those courts and will provide uniformity among all federal courts.[206]

Recommendation

- Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to assert a claim for innocent spouse relief in refund suits arising under IRC § 7422.

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205 *See, e.g.*, *Sanders v. United States*, 509 F.2d 162 (5th Cir. 1975) *aff'g* 369 F. Supp. 160 (N.D. Ala. 1973); *Mlay v. IRS*, 168 F. Supp. 2d 781 (S.D. Ohio 2001); *Flores v. United States*, 51 Fed. Cl. 49 (2001); and *Hockin v. United States*, 2019 U.S. Dist. LEXIS 137972, at *15 n. 2 (D. Or. 2019), in which the court distinguished the *Chandler* case, observing that "notably the plaintiff [in the Chandler case] did not respond to the motion to dismiss, so that district court was deprived of the benefit of reasoned argument on the issue from both parties."

206 Related to this recommendation, the Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019) added subsection (7) to IRC § 6015(e), providing that "[a]ny review of a determination under this section shall be reviewed de novo by the Tax Court." The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the new provision could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). Such an interpretation would also be inconsistent with this recommendation relating to seeking innocent spouse relief in refund suits and with the recommendation to *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases*, *supra*. For this reason, the National Taxpayer Advocate recommends clarifying that the scope and standard of review are *de novo* in innocent spouse cases before the Tax Court "or other court of competent jurisdiction," thereby precluding any implication that the Tax Court has exclusive jurisdiction over innocent spouse claims. *See Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is* De Novo*, supra.*

#51 FIX THE DONUT HOLE IN THE TAX COURT'S JURISDICTION TO DETERMINE OVERPAYMENTS BY NON-FILERS WITH FILING EXTENSIONS

Present Law

Internal Revenue Code (IRC) § 6511(a) provides that the limitations period for filing a claim for refund generally expires two years after paying the tax or three years after filing the return, whichever is later. The amount a taxpayer can recover is limited to amounts paid within the applicable lookback period provided by IRC § 6511(b)(2). If a return is filed, then the lookback period is three years, plus any filing extension. Otherwise, the lookback period is two years. IRC § 6513(b) provides that withholding and other pre-payments are deemed paid on the due date of the return without regard to extensions. Thus, taxpayers who have overpaid on or before the original return filing deadline generally cannot claim a credit or refund more than two years later unless they file a return.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the taxable year at issue to the same extent the IRS could have considered a claim for refund filed on the date the IRS mailed the notice of deficiency. In the absence of a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency after the two-year lookback period.

IRC § 6512(b)(3)(flush) provides such a special rule. It extends the limitations and lookback periods if the IRS mails a notice of deficiency *before* the taxpayer files a return. Specifically, it provides that if the IRS mails the notice of deficiency "during the third year after the due date (*with extensions*) for filing the return," then the limitations and lookback periods are three years (not two), even though the taxpayer has not filed a return. Because the Tax Court's general refund jurisdiction lapses after the second year following the original due date (*without regard to extensions*) and the special rule does not apply unless the IRS mails the notice after the second year (*with regard to extensions*), there is a six-month "donut hole" during which the IRS can send a notice of deficiency without triggering the Tax Court's jurisdiction to consider the taxpayer's claim for refund.

An example may help to illustrate these rules. Assume John Doe was over-withheld on April 15, 2016, the original filing deadline for a 2015 tax return. He requested a six-month extension of time to file, but did not get around to filing before July 1, 2018, when the IRS mailed him a notice of deficiency. He responded to the notice by petitioning the Tax Court to claim his refund. Under the general rule, Mr. Doe's overpayment could only be refunded within two years of the due date of the return, *without regard to extensions* (*i.e.*, April 15, 2018). Thus, he can only recover his overpayment if the special rule extends this period.

The special rule only applies if the IRS mails the deficiency notice during the third year after the due date of his return (*with extensions*) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his deficiency notice before the beginning of the third year, the special rule does not apply, and Mr. Doe cannot get his refund.

Reasons for Change

According to H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.), Congress enacted the special rule of IRC § 6512(b)(3)(flush) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns on the same day the IRS mailed the notice of deficiency. The special rule was supposed to allow non-filers "who receive a notice of deficiency and file suit to contest it in

Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice."

However, the statute as written may not fully fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer's overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date — *after* the second year following the due date (*without extensions*) and *before* the third year following the due date (*with extensions*).[207] Thus, the court found that the special rule of IRC § 6512(b)(3)(flush) leaves a donut hole in its jurisdiction. Although the U.S. Court of Appeals for the Second Circuit reversed the Tax Court's decision in this case, the Tax Court is not required to follow the Second Circuit's decision in cases arising in other circuits.[208] Thus, unless the Tax Court revisits its decision, a legislative fix is still needed.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return, Congress felt it was important to provide them with this special rule. For that reason, we believe it is important to highlight this unintended result and recommend a solution.

Recommendation[209]

- Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (*without regard to extensions*), the limitations and lookback periods for filing a claim for refund or credit are at least three years from the due date of the return (*without regard to extensions*).

207 *Borenstein v. Comm'r*, 149 T.C. 263 (2017), *rev'd*, 919 F.3d 746 (2d Cir. 2019).

208 *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

209 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Tax Court Jurisdiction: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions*); National Taxpayer Advocate, *The Second Circuit in Borenstein Helped to Close the Gap in the Tax Court's Refund Jurisdiction, but Only for Taxpayers in that Circuit*, NTA Blog (Apr. 27, 2019), https://taxpayeradvocate.irs.gov/news/nta-blog-the-second-circuit-in-borenstein-helped-to-close-the-gap-in-the-tax-court-s-refund-jurisdiction-but-only-for-taxpayers-in-that-circuit.

Miscellaneous Recommendations

#52 EXCLUDE TAXPAYERS IN SPECIFIED CIRCUMSTANCES FROM THE REQUIREMENT TO PROVIDE A SOCIAL SECURITY NUMBER FOR THEIR CHILDREN TO CLAIM THE CHILD TAX CREDIT

Present Law

The Tax Cuts and Jobs Act (TCJA) amended Internal Revenue Code (IRC) § 24 to require taxpayers claiming the Child Tax Credit (CTC) to provide a Social Security number (SSN) for all qualifying children.[210]

IRC § 1402(g) exempts members of certain religious faiths from the requirement to pay self-employment tax. An individual may apply for an exemption from the self-employment tax requirements:

> … if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

To claim the exemption, the individual must file an application on IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits.[211]

Reasons for Change

The requirement under IRC § 24 that children claimed for purposes of the CTC have SSNs was intended to prevent taxpayers whose children do not have SSNs from improperly or fraudulently claiming the CTC. However, the provision is having the unintended effect of disqualifying several taxpayer populations whose dependents do not have SSNs due to unique circumstances but who otherwise meet the requirements for the credit, including:

- Taxpayers who do not apply for SSNs due to their deeply held religious beliefs, most notably the Amish;
- Taxpayers whose adopted children have not yet received SSNs; and
- Taxpayers who were unable to obtain SSNs because their child was born and died in the same or consecutive tax years.

Prior to the TJCA amendment, IRC § 24 only required the taxpayer to provide a taxpayer identification number for a qualifying child to claim the CTC, and the IRS provided administrative relief to allow the credit for individuals who did not have a taxpayer identification number for their dependent(s) due to their deeply held religious beliefs. Specifically, taxpayers whose dependents did not have SSNs due to the parents' deeply held religious beliefs were allowed the credit if they indicated on the return that they had an approved Form 4029 establishing that they met the requirements under IRC § 1402(g).

210 TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017) (codified at IRC § 24(h)(7)).
211 IRC § 1402(g).

In certain circumstances, the IRS would request additional information from the taxpayer to prove the age, relationship, and residence of the dependent. Further, the language in the CTC prior to the TCJA permitted the IRS to allow the credit for taxpayers whose adopted child only had an Adoption Taxpayer Identification Number (ATIN), which is a tax identification number issued for use while waiting to receive an SSN. Now, the IRS is no longer providing administrative relief to allow the CTC if the qualifying child lacks an SSN, unless the taxpayer's child was born and died in the same or consecutive tax years.[212]

Recommendation

- Amend IRC § 24(h)(7) to allow a taxpayer to claim the CTC with respect to a child who does not have an SSN if the child meets all other eligibility requirements for the credit, and if the taxpayer:
    - Is a member of a recognized religious group and meets the requirements under IRC § 1402(g);
    - Adopted a child and provides an ATIN for the qualifying child; or
    - Had a child that was born and died in the same or consecutive years.

212 The IRS Office of Chief Counsel has opined that the IRS is legally prohibited from allowing the CTC if a qualifying child lacks an SSN because of religious or conscientious based objections. *See* Program Manager Technical Advice (PMTA), Administration of the Child Tax Credit for Objectors to Social Security Numbers, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019). For an in-depth discussion regarding TAS's disagreement with this advice, see *The Tax Filing Season: Hearing Before the H. Subcomm. on Government Oversight of the H. Comm. on Ways and Means*, 116th Cong. 22-27 (2019) (testimony of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2020 Objectives Report to Congress 48 (Area of Focus: *TAS Will Urge the IRS to Reconsider Its Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under IRC § 24(h)(7), Which Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups)*; and National Taxpayer Advocate, NTA Blog, *The IRS's Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under Internal Revenue Code § 24(h)(7) Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups* (June 26, 2019), https://taxpayeradvocate.irs.gov/IRS_Position_on_the_Application_of_the_Religious_Freedom_Restoration_Act_to_the_Social_Security_Requirement_Has_the_Effect_of_Denying_Child_Tax_Credit_Benefits_to_Amish_and_Other_Religious_Groups?category=Tax News. *See also* Internal Revenue Manual 3.12.3.26.17.6, TIN Requirements (EC 287) (Apr. 15, 2019).

#53 ALLOW MEMBERS OF CERTAIN RELIGIOUS SECTS THAT DO NOT PARTICIPATE IN SOCIAL SECURITY AND MEDICARE TO OBTAIN REFUNDS OF THEIR REMITTED EMPLOYMENT TAXES

Present Law

Internal Revenue Code (IRC) § 3101 imposes a tax on wages paid to employees to fund old-age, survivors, and disability insurance (Social Security) and hospital insurance (Medicare) pursuant to the Federal Insurance Contributions Act (FICA).[213] FICA tax is paid half by the employer and half by the employee.

IRC § 1401 imposes a comparable tax on self-employed individuals pursuant to the Self-Employment Contributions Act (SECA). SECA tax is paid entirely by the self-employed individual.

Members of the Amish community sought exclusions from these taxes because the tenets of their religion prohibit them from accepting social insurance benefits. In response, Congress enacted IRC § 1402(g), which exempts self-employed individuals who are members of certain religious faiths from the requirement to pay SECA tax. An individual may apply for an exemption from paying SECA tax by filing IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits:

> … if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

Congress subsequently enacted IRC § 3127 to exempt employers from paying their portion of FICA tax under IRC § 3111, provided that both the employer and the employee are members of the same recognized religious sect, both the employer and the employee are adherents of established tenets or teachings of the sect, and both the employer and employee file and receive approval for exemption from their respective portions of FICA tax.[214] The employer and employee each may receive approval by filing IRS Form 4029.[215]

IRC § 6413(b) requires the IRS to refund any overpayment of a taxpayer's FICA tax.

Reasons for Change

The current exemptions under IRC §§ 1402(g) and 3127 do not extend to members of recognized religious sects who work for employers that are not members of the same or any religious sect. As a result, members of these sects pay for Social Security and Medicare benefits that their religious beliefs prohibit them from

213 Under IRC § 3101, a tax of 6.2 percent is imposed on employee wages to fund old age, survivors and disability insurance, and an additional tax of 1.45 percent is imposed to fund hospital insurance. In certain circumstances, employee wages are subject to an additional 0.9 percent tax to further fund hospital insurance (Additional Medicare Tax). Employers are generally required to withhold FICA taxes from their employees' wages under IRC § 3102(a).

214 IRC § 3127 establishes the requirements for employers and employees who are members and adherents of the same religious sect to be exempt from their respective FICA tax obligations as required under IRC §§ 3101 and 3111. If the employer is a partnership, all partners of that partnership must be members of and adhere to the tenets of the same recognized religious sect. All partners of the partnership must apply and be approved individually for the exemption. Treas. Reg. § 31.3127-1(a).

215 For more information regarding the Form 4029 exemption application for members of recognized religious sects, see IRS Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers (Jan. 17, 2019).

accepting. The National Taxpayer Advocate believes that result is inequitable. The rationale for exempting self-employed Amish workers and Amish employees of Amish employers, as the law currently provides, applies equally with respect to Amish employees who are working for non-Amish employers.

This inequity can be resolved by amending IRC § 6413 to allow employees who are members of a recognized religious group and work for an employer who is *not* a member of a recognized religious group to file a refund claim for their portion of remitted FICA tax. Amish leaders have expressed a preference for allowing Amish employees of non-Amish employers to recover the employee's portion of the FICA tax through a refund claim, rather than by exempting the employee from paying the FICA tax in the first instance, to avoid imposing an additional recordkeeping burden on employers.[216]

Recommendation

- Amend IRC § 6413 to allow employees who meet the definition of "a member of a recognized religious sect or division thereof" in IRC § 1402(g) to claim a credit or refund of the employee's portion of FICA taxes withheld from their wages.[217]

216 Meeting between TAS and Amish leaders (Aug. 16, 2019).

217 For legislative language generally consistent with this recommendation, see AMISH Act, H.R. 2714, 116th Cong. (2019).

#54 REQUIRE THE IRS TO SPECIFY THE INFORMATION IT NEEDS IN THIRD PARTY CONTACT NOTICES

Present Law

Internal Revenue Code (IRC) § 7602(c)(1) generally requires the IRS to give taxpayers notice before contacting third parties (*e.g.*, banks, employers, employees, vendors, customers, friends, and neighbors) about them. The IRS may provide this third-party contact (TPC) notice only if it intends to make a TPC during the period specified in the notice, which may not exceed one year. Generally, the IRS must send the notice at least 45 days before making the TPC.

IRC § 7602(c)(3) waives the TPC notice requirement if (i) the taxpayer has authorized the contact; (ii) the IRS determines for good cause that notice would jeopardize the IRS's tax collection efforts or may involve reprisal against any person; or (iii) there is a pending criminal investigation. No law expressly requires the IRS to let the taxpayer know what specific information it needs (or needs to verify) before contacting third parties.

Reasons for Change

The TPC notice requirement was enacted as part of the IRS Restructuring and Reform Act of 1998 (RRA 98). The Senate report accompanying the bill explained that "taxpayers should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties."[218] The House-Senate conference report accompanying RRA 98 noted that "in general" the TPC notice could "be provided as part of an existing IRS notice."[219] On the basis of the conference report, the IRS believed it could satisfy the TPC notice requirement by including generic language in Publication 1, Your Rights As a Taxpayer, even if it sent the taxpayer Publication 1 long before it intended to make a TPC.[220]

Section 1206 of the Taxpayer First Act (TFA) amended IRC § 7602(c) to require that the IRS provide the TPC notice only when it intends to make a TPC and that it provide the notice at least 45 days in advance of making the contact.[221] In a section entitled "Reasons for Change," a House report to the TFA quoted testimony from a former IRS official who noted that the then-existing TPC notice requirement was "useless and does not effectively apprise taxpayers that such contact will be made, to whom it will be made, or that the taxpayer can request a third party contact report from the IRS." The House report said TPCs "may have a chilling effect on the taxpayer's business and could damage the taxpayer's reputation in the community." It said the change would "provide taxpayers more of an opportunity to resolve issues and volunteer information before the IRS contacts third parties."[222] Indeed, if the TPC notice were included "as part of an existing IRS notice" such as Form 4564, Information Document Request, which requests information from the

218 S. Rep. No. 105-174, at 77 (1998).

219 H. Rep. No. 105-599, at 277 (1998) (Conf. Rep.).

220 Pub. 1 provides, in relevant part, "we sometimes talk with other persons if we need information that you have been unable to provide or to verify information we have received." The U.S. Court of Appeals for the Ninth Circuit held that Pub. 1 did not satisfy the requirement in the case before it and doubted whether, standing alone, it could ever satisfy the former statutory requirement that the IRS provide "*reasonable notice in advance*." *J.B. v. United States*, 916 F.3d 1161, 1172 n.15 (9th Cir. 2019). The court noted: "Congress specifically referred to Publication 1 three times in the 1998 Restructuring Act … However, it did not refer to Publication 1 by name in § 7602(c)." *Id*. at 1170. The Ninth Circuit also stated that the exceptions to the TPC notice requirement would have been unnecessary if the IRS were not required to reveal enough information to permit the taxpayer to "impede the contact by jeopardizing tax collection efforts, retaliating against third parties, or interfering in a pending criminal investigation." *Id*. at 1168.

221 Pub. L. No. 116-25, 133 Stat. 981 (2019).

222 H. Rep. No. 116-39, at 44-45 (2019).

taxpayer, the new 45-day period would give the taxpayer a realistic opportunity to avoid a TPC that seeks new information by providing the information requested on the form.

However, the IRS does not specify what information it needs with the TPC notice.[223] Thus, the way the IRS has implemented the provision does not give taxpayers more of an opportunity to volunteer information than before the TFA was enacted. In fact, because the TFA removed a prior requirement that the notice be reasonable, the IRS seems to interpret the TFA as having watered down the notice requirements[224] — which we believe is the opposite of what Congress intended. Consistent with the Senate report accompanying RRA 98, the House report accompanying the TFA, and the taxpayer's *right to confidentiality*, the National Taxpayer Advocate believes the IRS's request for information should be included with the TPC notice, which is how the IRS implemented the requirement for a time after the enactment of RRA 98 for some types of TPCs.[225]

Recommendation

- Amend IRC § 7602(c) to clarify that the IRS must tell the taxpayer what information it needs (or needs to verify), if any, and give the taxpayer a reasonable opportunity to provide the information (or verification of it) before contacting a third party, unless doing so would be pointless or an exception applies.

223 *See, e.g.*, IRS, Interim Guidance on Third-Party Contact Notification, SBSE-04-0719-0034 (July 26, 2019).

224 Although the House report suggests Congress intended to strengthen the TPC notice requirement rather than weaken it, we understand the IRS believes it is no longer required to provide "reasonable notice in advance," as interpreted by the Ninth Circuit, because those words were deleted by the Taxpayer First Act.

225 For further discussion, see National Taxpayer Advocate 2015 Annual Report to Congress 123 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*); National Taxpayer Advocate 2018 Objectives Report to Congress 98 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*).

#55 INCREASE THE INDIVIDUAL LOW INCOME TAXPAYER CLINIC GRANT CAP AND INDEX IT FOR INFLATION

Present Law

Internal Revenue Code (IRC) § 7526 authorizes the Secretary, subject to the availability of appropriated funds, to make grants to provide matching funds for the development, expansion, or continuation of Low Income Taxpayer Clinics (LITCs). The LITC program was authorized as part of the IRS Restructuring and Reform Act of 1998 (RRA 98) to provide representation to low-income taxpayers involved in controversies with the IRS, including audits, appeals, collection matters, and tax litigation, and to provide education about taxpayer rights and responsibilities in multiple languages for taxpayers who speak English as a second language.[226] If a clinic charges a fee, it must not charge more than a nominal amount for services.

IRC § 7526(c)(1) imposes an annual aggregate limitation of $6 million for LITC grants "[u]nless otherwise provided by specific appropriation."

IRC § 7526(c)(2) imposes an annual limitation on grants to a single clinic of $100,000.

IRC § 1(f) prescribes rules for the annual indexing of tax brackets based on the Consumer Price Index for all-urban consumers (CPI) and the Chained Consumer Price Index for All Urban Consumers (C-CPI-U).

Reasons for Change

The LITC program has proven to be an effective and low-cost means to provide assistance to low-income taxpayers. During grant year 2019, the LITC Program Office awarded grants to 131 organizations in 46 states and the District of Columbia.[227] Many clinics recruit attorneys and certified public accountants to accept cases on a *pro bono* basis. By using their grants to coordinate and leverage the volunteer contributions of tax professionals in this way, these clinics often provide services worth far more than the dollar value of the grants they receive. In 2019, volunteers provided over 56,000 hours of service to LITCs.[228]

As a result, the LITC program has attracted broad bipartisan support since its inception, and Congress increased the annual funding level by specific appropriation since 1998. In fiscal year 2019, the funding level was set at $12 million — double the amount specified in IRC § 7526(c)(1).[229]

However, the annual limitation of $100,000 on grants to individual clinics has never been increased. Since RRA 98 was enacted in July 1998, inflation has increased by about 58 percent.[230] Therefore, despite the increase in aggregate program funding, clinics are effectively operating with substantially less grant money today than they were in 1998. Some clinics, such as clinics that are responsible for large geographic areas or sizeable taxpayer populations, could make productive use of additional funds.

In relative terms, the doubling of aggregate program funding without any increase in the amounts that may be provided to individual clinics is undermining Congress's original intent and preventing the efficient allocation of grant dollars. To ensure congressional intent is met now and in the future, the National Taxpayer Advocate

226 Pub. L. No. 105-206, § 3601, 112 Stat. 685, 774 (1998).

227 IRS Pub. 5066, Low Income Taxpayer Clinics December 2019 Program Report 5 (Dec. 2019).

228 *Id*.

229 Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. D, Title I, 133 Stat. 13, 144 (2019).

230 *See* Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Dec. 11, 2019).

recommends Congress increase the per-clinic annual cap from $100,000 to $150,000 and index it for inflation in future years.[231]

Recommendation

- Amend IRC § 7526(c)(2) to increase the annual clinic funding limitation to $150,000 and index the limitation to rise with inflation in future years pursuant to the rules prescribed in IRC § 1(f).

231 The recently enacted Taxpayer First Act of 2019 added IRC § 7526A, authorizing a funding program for the Volunteer Income Tax Assistance program. *See* Pub. L. No. 116-25 (2019). The statute is modeled after IRC § 7526 but does not contain an annual limitation on grants to a single program.

#56 ESTABLISH THE POSITION OF IRS HISTORIAN WITHIN THE INTERNAL REVENUE SERVICE TO RECORD AND PUBLISH ITS HISTORY

Present Law

The IRS, as a federal agency, is required to properly maintain and manage its records under the Federal Records Act[232] and to provide access to these records to the public under the Freedom of Information Act.[233] However, the IRS is not required to publish a historical analysis of its tax administration programs and policies.

Reasons for Change

A documented history of the IRS's programs and policies would assist Congress, the agency itself, and the public. It would assist Congress by helping Members and staff gain a fuller understanding of the IRS's successes and failures, so future legislation can be developed in a manner that plays to the agency's strengths and helps to address the agency's weaknesses. It would help the IRS more effectively assess its programs, reduce redundant efforts, and share knowledge within the agency. In addition, an IRS historian could assist the public by promoting a more accountable and transparent IRS.[234]

During the early 1990s, the IRS made an administrative decision to hire an IRS historian. However, the relationship was tense, and the individual who held the position subsequently told Congress that the IRS undermined her work and fought transparency, concluding that "the IRS shreds its paper trail, which means there is no history, no evidence, and ultimately no accountability."[235] The IRS eliminated the position and never hired a historian again.

There are at least 29 federal offices of history operating in the executive, judicial, and legislative branches.[236] Government historians serve various roles, such as researching and writing for publication and internal use, editing historical documents, preserving historical sites and artifacts, and providing historical information to the public through websites and other media.[237] Historians are generally required to be objective and accurate in preparing histories that can be controversial.[238] For example, the Historian of the Department of State is required to publish a documentary history of the foreign policy decisions and actions of the United States, including facts providing support for, and alternative views to, policy positions ultimately adopted without omitting or concealing defects in policy.[239] Historians in federal agencies serve an important role, and because more U.S. citizens interact with the IRS than with any other federal agency, the public interest and potential benefit in learning from the agency's successes and failures are particularly high.

232 44 U.S.C. §§ 3101-3107.

233 5 U.S.C. § 552.

234 *See, e.g.*, 22 U.S.C. § 4351(a), which states in pertinent part: "Volumes of this publication [Foreign Relations of the United States historical series] shall include *all records* needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States government, including the facts which contributed to the formulation of policies and records providing supporting and alternative views to the policy position ultimately adopted." (Emphasis added).

235 *See Practices & Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. 35 (Sept. 23-25, 1997) (statement of Shelley Davis, former IRS Historian).

236 Society for History in the Federal Government, *History at the Federal Government*, http://www.shfg.org/history-at-fedgov#agencies (last visited on Nov. 13, 2018).

237 *Id.*

238 *Id.*

239 *Id.*

Recommendation

- Add a new subsection to Internal Revenue Code (IRC) § 7803 to establish the position of IRS historian within the IRS. The IRS historian should have expertise in federal taxation and archival methods, be appointed by the Secretary of the Treasury in consultation with the Archivist of the United States, report to the Commissioner of Internal Revenue, and have access to IRS records, including tax returns and return information (subject to the confidentiality and disclosure provisions of IRC § 6103). The IRS historian should be required to report IRS history objectively and accurately, without omitting or concealing defects in policy.[240]

240 For additional background, see National Taxpayer Advocate 2011 Annual Report to Congress 582-586 (Legislative Recommendation: *Appoint an IRS Historian*).

#57 AMEND THE COMBAT-INJURED VETERANS TAX FAIRNESS ACT OF 2016 TO ALLOW VETERANS OF THE COAST GUARD TO FILE CLAIMS FOR CREDIT OR REFUND FOR TAXES IMPROPERLY WITHHELD FROM DISABILITY SEVERANCE PAY

Present Law

Internal Revenue Code (IRC) § 61(a)(1) provides that compensation for services is includable in gross income. Severance payments generally are treated as compensation and therefore subject to taxation.

IRC § 104(a)(4) provides an exclusion from gross income for payments received for personal injuries or sickness resulting from active service in the armed forces.

IRC § 104(b)(2) clarifies that the exclusion from gross income in IRC § 104(a)(4) applies to an amount received by reason of a combat-related injury, or if the individual, upon application, would be entitled to receive disability compensation from the Department of Veterans Affairs. IRC § 104(b)(3) defines "combat-related injury" as a personal injury or sickness that occurred "as a direct result of armed conflict, while engaged in extrahazardous service, or under conditions simulating war; or which is caused by an instrumentality of war."

To obtain a credit or refund, a taxpayer must file a timely claim. IRC § 6511(a) provides generally that a taxpayer must file a claim for credit or refund within three years from the time the tax return was filed or two years from the time the tax was paid, whichever period expires later.

In 2016, Congress passed the Combat-Injured Veterans Tax Fairness Act (the "Act").[241] In a findings section, the Act states: "Since 1991, the Secretary of Defense has improperly withheld taxes from severance pay for wounded veterans, thus denying them their due compensation and a significant benefit intended by Congress." Recognizing that the period of limitation for filing a claim for credit or refund to recover overwithheld tax had long since expired for most tax years since 1991, the Act created an exception from the general period of limitation.

Specifically, the Act directed the Secretary of Defense (i) to identify disability severance pay (DSP) that was not considered gross income pursuant to IRC § 104(a)(4) and from which the Secretary improperly withheld tax and (ii) to send notices to all affected veterans notifying them of their eligibility to receive credits or refunds and providing instructions for filing amended tax returns. It further provided that veterans who received DSP from the Department of Defense may file timely claims for credit or refund within one year from the date of the notice sent by the Secretary of Defense or by the date the period of limitations described in IRC § 6511(a) expires, whichever is later.

IRC § 7701(a)(15) defines the terms "military or naval forces of the United States" and "Armed Forces of the United States" to include "all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force [as well as] the Coast Guard."

241 Pub. L. No. 114-292, 130 Stat. 1500 (2016).

Reasons for Change

Notwithstanding that the IRC's definition of "military or naval forces of the United States" includes the Coast Guard, the Act was drafted in a manner that excludes veterans of the Coast Guard from its scope. More specifically, Section 3(a) of the Act directed the Secretary of Defense to identify DSP paid after January 17, 1991, that should have been excluded from gross income, but it did not direct the Secretary of Homeland Security, to whom the Coast Guard reports, to identify affected Coast Guard veterans and DSP amounts from which taxes were withheld.

Like members of the services within the Department of Defense, members of the Coast Guard often face perilous circumstances and potential injuries as they perform their mandated duties. For example, the Coast Guard is responsible for maintaining a "state of readiness to assist in the defense of the United States, including when functioning as a specialized service in the Navy pursuant to [14 USC] section 103."[242] We believe the exclusion of Coast Guard veterans was inadvertent and that members of the Coast Guard should be provided the same additional time to file a claim for credit or refund as other veterans of the "military or naval forces of the United States."

Recommendation

- Amend Section 3(a) of the Combat-Injured Veterans Tax Fairness Act of 2016 to provide that the severance payments specified under Section 3(a) include those paid by the Secretary of Homeland Security (or predecessor) and to require the Secretary of Homeland Security to notify veterans of the Coast Guard about disability severance pay from which taxes were withheld.

242 14 USC § 102.

#58 AUTHORIZE INDEPENDENT CONTRACTORS AND SERVICE RECIPIENTS TO ENTER INTO VOLUNTARY WITHHOLDING AGREEMENTS WITHOUT RISK THAT THE AGREEMENTS WILL BE USED TO CHALLENGE WORKER CLASSIFICATION DETERMINATIONS

Present Law

Under Internal Revenue Code (IRC) § 3402(p), the IRS is authorized to accept withholding agreements. Specifically, IRC § 3402(p)(3) authorizes the Secretary to promulgate regulations to provide for withholding from any type of payment that does not constitute wages if the Secretary finds withholding would be appropriate and the payor and recipient of the payment agree to such withholding.[243] However, the provision specifically states that the Secretary must find the withholding would be appropriate "under the provisions of [IRC chapter 24, *Collection of Income Tax at Source on Wages*]."

IRC chapter 24 addresses collection of taxes at the source with respect to employees (*e.g.,* wage withholding). Although current regulations provide that the Secretary may issue guidance by publication in the Internal Revenue Bulletin describing other payments for which withholding under a voluntary withholding agreement would be appropriate,[244] the only such guidance that has been issued to date is Notice 2013-77, dealing with dividends and other distributions by an Alaska Native Corporation.[245]

Reasons for Change

Unlike employees, whose wage payments are subject to federal income tax withholding, independent contractors are generally responsible for paying their own income taxes. Independent contractors are required to make four estimated tax payments during the year. However, many contractors fail to make estimated tax payments for a variety of reasons and therefore face penalties under IRC § 6654. Some have difficulty saving money and finish the year with substantial tax liabilities they cannot afford to pay. As a result, they face additional penalties and interest charges, and they may face IRS collection action, including liens and levies.

The absence of withholding on payments to independent contractors also has a negative impact on revenue collection. IRS National Research Program studies show that tax compliance is substantially lower among workers whose income taxes are not withheld.[246]

This problem may be increasing as more workers are choosing to work in the so-called "gig economy." To reduce the risk that they will not save enough money to pay their taxes, some independent contractors would prefer that taxes be withheld throughout the year, as they are for employees. There is a legitimate debate about the circumstances under which withholding should be required. However, the National Taxpayer Advocate believes workers and businesses should have the option to enter into voluntary withholding agreements when both parties agree to do so.

For many businesses, withholding on payments to independent contractors will not impose additional burden. In addition to paying independent contractors, most large companies have full-time employees, such as administrative staff, so they already have procedures in place to withhold. We understand some businesses are reluctant to withhold due to concern the IRS may use the existence of a withholding agreement to challenge

243 Payments made when a voluntary withholding agreement is in effect are treated as if they are wages paid by an employer to an employee for purposes of the income tax withholding provisions and related procedural provisions of subtitle F of the IRC.

244 *See* Treas. Reg. § 31.3402(p) -1(c).

245 Notice 2013-77, 2013-50 I.R.B. 632.

246 Government Accountability Office (GAO), GAO-17-371, *Timely Use of National Research Program Results Would Help IRS Improve Compliance and Tax Gap Estimates* (Apr. 18, 2017), https://www.gao.gov/products/GAO-17-371.

the worker classification arrangement. This concern would be addressed if the IRS is restricted from citing the existence of a voluntary withholding agreement as a factor in worker classification disputes. Indeed, the IRS could, on a case-by-case basis, provide a safe-harbor worker classification in which it affirmatively agrees not to challenge the classification of workers who are a party to such agreements at all, since these agreements will ensure the IRS collects the full amount of income taxes due.

Recommendations

- Amend IRC § 3402(p) to clarify that when voluntary withholding agreements are entered into by parties who do not treat themselves as engaged in an employer-employee relationship, the IRS may not consider the existence of such agreements as a factor when challenging worker classification arrangements.
- Direct the Secretary to evaluate the benefits of agreeing not to challenge worker classification arrangements when voluntary withholding agreements are in place.[247]

247 For legislative language generally consistent with this recommendation, see Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 9 (2017).

APPENDIX 1: Additional Reference Materials for Legislative Recommendations in This Volume

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
Strengthen Taxpayer Rights			
1	Codify the Taxpayer Bill of Rights, a Taxpayer Rights Training Requirement, and the IRS Mission Statement as Section 1 of the Internal Revenue Code	NTA 2017 Annual Report 93; NTA 2016 Annual Report 15; NTA 2016 Annual Report 98; NTA 2013 Annual Report 51; NTA 2013 Annual Report 5; NTA 2011 Annual Report 493; NTA 2007 Annual Report 478	**S. 3278**, 115th Cong. § 102(2) (2018) (taxpayer rights training requirement); **S. 2333**, 114th Cong. § 308 (2015) (same); **H.R. 4128**, 114th Cong. § 308 (2015) (same)
2	Provide the IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance	NTA 2019 Annual Report 14; NTA 2019 Annual Report 22; NTA 2019 Annual Report 33	N/A
3	Require the IRS to Provide Taxpayers With a “Receipt” Showing How Their Tax Dollars Are Being Spent	NTA 2011 Annual Report 469; NTA 2010 Annual Report 368	**H.R. 3855**, 114th Cong. § 2 (2015); **H.R. 3039**, 113th Cong. § 2 (2013); **S. 437**, 112th Cong. § 2 (2012); **H.R. 1527**, 112th Cong. § 2 (2012)
Improve the Filing Process			
4	Revise e-Filing Procedures So That Taxpayers Are Informed of e-Filing Errors and Are Not Subject to Failure-to-File Penalties When Those Errors Are Timely Corrected	N/A	N/A
5	Treat Electronically Submitted Tax Payments and Documents as Timely If Submitted Before the Applicable Deadline	N/A	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
6	Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers	NTA 2009 Annual Report 41; NTA 2008 Annual Report 423	**S. 1192**, 116th Cong. § 2(c) (2019); **S. 1138**, 116th Cong. § 5(c) (2019); **H.R. 3157**, 116th Cong. § 5 (2019); **H.R. 3330**, 116th Cong. § 2 (2019); **H.R. 3466**, 116th Cong. § 1 (2019) (allows the Department of Treasury to rescind ID numbers of tax return preparers); **H.R. 4751**, 116th Cong. § 2 (2019) (adds penalties for tax return preparers who are not representatives practicing before the Department of Treasury); **S. 3278**, 115th Cong. § 202 (2018); **H.R. 4912**, 114th Cong. § 401 (2016); **S. 676**, 114th Cong. § 406 (2015); **S. 2333**, 114th Cong. § 202 (2015); **H.R. 4128**, 114th Cong. § 202 (2015); **S. 137**, 114th Cong. § 2 (2015); **H.R. 4141**, 114th Cong. § 2 (2015); **H.R. 1528**, 108th Cong. § 141 (2004) (passed by Senate); **S. 882**, 108th Cong. § 141 (2003) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 108-257**, at 30-31 (2003)
7	Direct the IRS to Set Goals of Substantially Increasing the Usage Rate and the Retention Rate of the Free File Program by Filing Season 2025 and to Replace Free File With an Alternative Approach If Those Goals Are Not Attained	NTA 2019 Annual Report 53	N/A
8	Require That Electronically Prepared Paper Tax Returns Include a Scannable Code	NTA 2013 Annual Report vol. 2, 70, 91 & 96	**S. 3246**, 115th Cong. § 2104 (2018); **S. 606**, 115th Cong. § 205 (2017); **S. 3157**, 114th Cong. § 205 (2016) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 114-299**, at 20-21 (2016); **S. 2736**, 113th Cong. § 4 (2014)
9	Extend the Time for Small Businesses to Make Subchapter S Elections	NTA 2010 Annual Report 410; NTA 2004 Annual Report 390; NTA 2002 Annual Report 246	**S. 3278**, 115th Cong. § 304 (2018); **S. 711**, 115th Cong. § 7 (2017); **H.R. 1696**, 115th Cong. § 7 (2017); **H.R. 1**, 113th Cong. § 3606 (2014); **S. 2271**, 112th Cong. § 2 (2012); **H.R. 3629**, 109th Cong. § 2 (2005); **H.R. 3841**, 109th Cong. § 302 (2005)
10	Adjust Estimated Tax Payment Deadlines to Occur Quarterly	N/A	**H.R. 593**, 116th Cong. § 2 (2019); **S. 3278**, 115th Cong. § 305 (2018); **H.R. 3717**, 115th Cong. § 2 (2017)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
11	Harmonize Reporting Requirements for Taxpayers Subject to Both the Report of Foreign Bank and Financial Accounts and the Foreign Account Tax Compliance Act by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a *Bona Fide* Resident	NTA 2015 Annual Report 353	**S. 869**, 115th Cong. § 1 (2017) (pertaining to FATCA reporting requirements repeal); **H.R. 2054**, 115th Cong. § 1 (2017) (same); **H.R. 2136**, 115th Cong. § 1 (2017) (same); **H.R. 5935**, 114th Cong. § 1 (2016) (same); **S. 663**, 114th Cong. § 1 (2015) (same); **S. 887**, 113th Cong. § 1 (2013) (same)
Improve Assessment and Collection Procedures			
12	Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute	NTA 2015 Annual Report 329; NTA 2014 Annual Report 163; NTA 2011 Annual Report 74	N/A
13	Require Independent Managerial Review and Written Approval Before the IRS May Assert Multi-Year Bans Barring Taxpayers From Receiving Certain Tax Credits and Clarify That the Tax Court Has Jurisdiction to Review the Assertion of Multi-Year Bans	N/A	N/A
14	Provide Additional Time for Taxpayers Outside the United States to Request Abatement of a Math Error Assessment Equal to the Time Extension Allowed in Responding to a Notice of Deficiency	NTA 2016 Annual Report 393	N/A
15	Require the IRS to Waive User Fees for Taxpayers Who Enter Into Low-Cost Installment Agreements and Evaluate the Potential Costs of Other User Fee Increases	NTA 2017 Annual Report 307; NTA 2015 Annual Report 14; NTA 2007 Annual Report 66	**S. 1793**, 115th Cong. § 301 (2017); **S. 3471**, 114th Cong. § 504 (2016) (reported by Sen. Fin. Comm.) (low-income fee waiver provisions and limitation on future increase), *see also* **S. Rep. No. 114-375**, at 84 (2016); **S. 3156**, 114th Cong. § 114 (2016) (low-income fee waiver provisions and limitation on future increase), *see also* **S. Rep. No. 114-298**, at 17-19 (2016); **S. 1321**, 109th Cong. § 301 (2006); **H.R. 1528**, 108th Cong. § 101 (2004) (passed by Senate); **S. 882**, 108th Cong. § 101 (2003), *see also* **S. Rep. No. 108-257**, at 5-6 (2003)
16	Improve Offer in Compromise Program Accessibility by Repealing the Partial Payment Requirement and Restructuring the User Fee	NTA 2006 Annual Report 507	**S. 2689**, 115th Cong. § 17 (2018); **H.R. 5444**, 115th Cong. § 11203 (2018) (low income waiver); **S. 3278**, 115th Cong. § 504 (2018) (low income waiver); **H.R. 2171**, 115th Cong. § 206 (2017); **H.R. 4912**, 114th Cong. § 206 (2015)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
17	Modify the Requirement That the Office of Chief Counsel Review Certain Offers in Compromise	N/A	**S. 1793**, 115th Cong. § 303 (2017); **S. 1578**, 114th Cong. § 403 (2015); **H.R. 1528**, 108th Cong. § 304 (2004) (passed by Senate); **S. 882**, 108th Cong. § 104 (2003), *see also* **S. Rep. No. 108-257**, at 8-9 (2003); **H.R. 1528**, 108th Cong. § 304 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 43-44 (2003)
18	Require the IRS to Mail Notices at Least Quarterly to Taxpayers With Delinquent Tax Liabilities	N/A	**S. 3278**, 115th Cong. § 201 (2018)
19	Clarify When the Two-Year Period for Requesting Return of Levy Proceeds Begins	N/A	N/A
20	Protect Retirement Funds From IRS Levies, Including So-Called "Voluntary" Levies, in the Absence of "Flagrant Conduct" by a Taxpayer	NTA 2015 Annual Report 340; NTA 2006 Annual Report 527	**H.R. 2171**, 115th Cong. § 203 (2017); **H.R. 3340**, 115th Cong. § 204 (2017); **H.R. 4912**, 114th Cong. § 203 (2016); **S. 2333**, 114th Cong. §§ 306 & 307 (2015); **H.R. 4128**, 114th Cong. §§ 306 & 307 (2015)
21	Toll the Time Periods for Requesting the Return of Levy Proceeds While the Taxpayer or a Pertinent Third Party Is Financially Disabled	NTA 2015 Annual Report 368	**H.R. 2171**, 115th Cong. § 204 (2017); **H.R. 4912**, 114th Cong. § 204 (2016)
22	Authorize the IRS to Release Levies That Cause Economic Hardship for Business Taxpayers	NTA 2011 Annual Report 537	**S. 3278**, 115th Cong. § 303 (2018); **S. 2689**, 115th Cong. § 16 (2018); **S. 2333**, 114th Cong. § 304(a) (2015); **H.R. 4128**, 114th Cong. § 304(a) (2015); **H.R. 4368**, 112th Cong. § 1 (2012)
23	Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence	NTA 2019 Annual Report 176; NTA 2012 Annual Report 537	**S. 949**, 114th Cong. § 16 (2015); **H.R. 1828**, 114th Cong. § 16 (2015); **S. 2215**, 113th Cong. § 8 (2014)
24	Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions	NTA 2019 Annual Report 176; NTA 2012 Annual Report 544	**S. Rep. No. 105-174**, at 68 (1998) (Senate report accompanying its version of the RRA 98 legislation referred to "[t]he taxpayer (or affected third party).")
25	Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions	N/A	**S. 1793**, 115th Cong. § 201(c) (2017) (extends the time limit, though not by the recommended amount); **S. 1578**, 114th Cong. § 301(c) (2015) (same)
26	Direct the IRS To Study the Feasibility of Using an Automated Formula to Identify Taxpayers at Risk of Economic Hardship	N/A	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
Reform Penalty and Interest Provisions			
27	Convert the Estimated Tax Penalty Into an Interest Provision for Individuals, Trusts, and Estates	N/A	**H.R. 1528**, 108th Cong. § 101 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 23-24 (2003)
28	Apply One Interest Rate Per Estimated Tax Underpayment Period for Individuals, Estates, and Trusts	N/A	**S. 1793**, 115th Cong. § 305 (2017); **S. 1578**, 114th Cong. § 405 (2015); **H.R. 1528**, 108th Cong. § 101 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 25 (2003)
29	Reduce the Federal Tax Deposit Penalty Imposed on Certain Taxpayers Who Make Timely Tax Deposits	NTA 2001 Annual Report 222	**S. 1793**, 115th Cong. § 309 (2017); **S. 1578**, 114th Cong. § 409 (2015); **S. 1321**, 109th Cong. § 405 (2005), *see also* **S. Rep. No. 109-336**, at 48-49 (2005); **H.R. 1528**, 108th Cong. § 207 (2004) (passed by Senate); **S. 882**, 108th Cong. § 208 (2003), *see also* **S. Rep. No. 108-257**, at 45 (2004); **H.R. 1528**, 108th Cong. § 108 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 35-36 (2003)
30	Extend Reasonable Cause Abatement of the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to e-File Their Returns	N/A	N/A
31	Authorize a Penalty for Tax Return Preparers Who Engage in Fraud or Misconduct by Altering a Taxpayer's Tax Return	NTA 2011 Annual Report 558	**S. 2333**, 114th Cong. § 203 (2015); **H.R. 4128**, 114th Cong. § 203 (2015)
32	Clarify the Parameters for Written Managerial Approval Required for Penalty Assessments Under IRC § 6751(b)	NTA 2019 Annual Report 157	N/A
33	Compensate Taxpayers for "No Change" National Research Program Audits	N/A	**S. 2689**, 115th Cong. § 14 (2018); **H.R. Rep. No. 104-280**, vol. 2, at 28 (1995)
Strengthen Taxpayer Rights Before the Office of Appeals			
34	Require That at Least One Appeals Officer and One Settlement Officer Be Located and Permanently Available in Each State, the District of Columbia, and Puerto Rico	NTA 2016 Annual Report 203; NTA 2014 Annual Report 46, 311; NTA 2009 Annual Report 346	**S. 1793**, 115th Cong. § 502 (2017); **S. 2333**, 114th Cong. § 309(c) (2015); **H.R. 4128**, 114th Cong. § 309(c) (2015); **S. 1578**, 114th Cong. § 602 (2015)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
35	Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences	NTA 2017 Annual Report 203	**S. 3278**, 115th Cong. § 601 (2018); **S. 2689**, 115th Cong. §7 (2018); **S. 949**, 114th Cong. § 7 (2015) (bans *ex parte* communications between Appeals and other IRS employees on matters before Appeals); **H.R. 1828**, 114th Cong. § 7 (2015) (same); **S. 725**, 113th Cong. § 7 (2013) (same); **H.R. 3479**, 113th Cong. § 7 (2013) (same); **S. 2291**, 112th Cong. § 7 (2012) (same); **H.R. 4375**, 112th Cong. § 7 (2012) (same)
Enhance Confidentiality and Disclosure Protections			
36	Authorize the Treasury Department to Issue Guidance Specific to IRC § 6713 Regarding the Disclosure or Use of Tax Return Information by Preparers	NTA 2007 Annual Report 547	N/A
37	Allow a Period of Notice and Comment on New Intergovernmental Agreements and Require That the IRS Notify Taxpayers Before Their Data Is Transferred to a Foreign Jurisdiction	NTA 2018 Annual Report 395; NTA 2013 Annual Report 238	N/A
Strengthen the Office of the Taxpayer Advocate			
38	Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573; NTA 2002 Annual Report 198	**H.R. 1528**, 108th Cong. § 306 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 44-45 (2003); **H.R. 1661**, 108th Cong. § 335 (2003)
39	Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate	N/A	N/A
40	Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information	NTA 2016 Annual Report 34	**S. 2333**, 114th Cong. § 403 (2015) (addressing case-related file and meeting access); **H.R. 4128**, 114th Cong. § 403 (2015) (addressing case-related file and meeting access)
41	Authorize the National Taxpayer Advocate to File *Amicus* Briefs	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573; NTA 2002 Annual Report 198	N/A
42	Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules	NTA 2016 Annual Report 37; NTA 2011 Annual Report 573	**S. 1578**, 114th Cong. § 404 (2015) (require the IRS to solicit NTA comments before publication rather than after)
43	Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations	NTA 2011 Annual Report 552	**S. 2333**, 114th Cong. § 404 (2015) (TAS may provide assistance to taxpayers facing enforcement actions during a lapse in appropriations); **H.R. 4128**, 114th Cong. § 404 (2015) (same)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
44	Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service	NTA 2015 Annual Report 316	**H.R. 2171**, 115th Cong. § 202 (2017); **H.R. 4912**, 114th Cong. § 202 (2016)
Strengthen Taxpayer Rights in Judicial Proceedings			
45	Authorize the Tax Court to Order Refunds or Credits in Collection Due Process Proceedings	N/A	N/A
46	Repeal *Flora*: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can	NTA 2018 Annual Report 364	N/A
47	Provide That the Time Limits for Bringing Tax Litigation Are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling	NTA 2017 Annual Report 283	N/A
48	Provide That the Scope of Judicial Review of Determinations Under IRC § 6015 Is *De Novo*	NTA 2011 Annual Report 531	**H.R. 5444**, 115th Cong. § 11303 (2018); **S. 3246**, 115th Cong. § 1003 (2018); **H.R. 3340**, 115th Cong. § 202 (2017); **S. 3156**, 114th Cong. § 113 (2016); **H.R. 4128**, 114th Cong. § 303 (2015); **S. 2333**, 114th Cong. § 303 (2015)
49	Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases	NTA 2010 Annual Report 377; NTA 2009 Annual Report 378; NTA 2007 Annual Report 549	N/A
50	Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits	NTA 2018 Annual Report 387	N/A
51	Fix the Donut Hole in The Tax Court's Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions	NTA 2018 Annual Report 392	N/A
Miscellaneous Recommendations			
52	Exclude Taxpayers in Specified Circumstances From the Requirement to Provide a Social Security Number for Their Children to Claim the Child Tax Credit	N/A	**S. 1150**, 116th Cong. § 2 (2019) (credit allowed with respect to children who were born and died in the same tax year)
53	Allow Members of Certain Religious Sects That Do Not Participate in Social Security and Medicare to Obtain Refunds of Their Remitted Employment Taxes	N/A	**H.R. 2714**, 116th Cong. § 2 (2019)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
54	Require the IRS to Specify the Information It Needs in Third Party Contact Notices	N/A	N/A
55	Increase the Individual Low Income Taxpayer Clinic Grant Cap and Index It for Inflation	N/A	N/A
56	Establish the Position of IRS Historian Within the Internal Revenue Service to Record and Publish Its History	NTA 2011 Annual Report 582	N/A
57	Amend the Combat-Injured Veterans Tax Fairness Act of 2016 to Allow Veterans of the Coast Guard to File Claims for Credit or Refund for Taxes Improperly Withheld From Disability Severance Pay	N/A	N/A
58	Authorize Independent Contractors and Service Recipients to Enter Into Voluntary Withholding Agreements Without Risk That the Agreements Will Be Used to Challenge Worker Classification Determinations	NTA 2016 Annual Report 322; NTA 2012 Annual Report 19; NTA 2010 Annual Report 371; NTA 2008 Annual Report 375	**H.R. 593**, 116th Cong. § 9 (2019); **H.R. 1625**, 116th Cong. § 2(b) (2019); **H.R. 3717**, 115th Cong. § 9 (2017)

APPENDIX 2: Prior National Taxpayer Advocate Legislative Recommendations Enacted Into Law

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
Strengthen Taxpayer Rights			
1	Enact a Taxpayer Bill of Rights.	NTA 2014 Annual Report, Legislative Recommendation #1, 275-310; and NTA 2013 Annual Report, Most Serious Problem #1, 1-5.	Pub. L. No. 114-113, Division Q, Title IV, § 401 (2015) (codified at IRC § 7803(a)(3)).
2	Require the IRS to Provide Annual Taxpayer Rights Training to Employees.	2017 Purple Book #2, 5-7.	Pub. L. No. 116-25, § 2402 (2019).
3	Improve Customer Service by Meeting the Preferences of Taxpayers and Stakeholders.	NTA 2008 Annual Report, Most Serious Problem #6, 95-113.	Pub. L. No. 116-25, § 1101(a) (2019).
Improve the Filing Process			
4	Authorize the Volunteer Income Tax Assistance (VITA) Grant Program.	2019 Purple Book #3, 8-10; and 2017 Purple Book #5, 12-13.	Pub. L. No. 116-25, § 1401 (2019) (codified at IRC § 7526A).
5	Authorize the IRS to Work With Financial Institutions to Reverse Misdirected Deposits.	2019 Purple Book #9, 20-21; and 2017 Purple Book #11, 24-25.	Pub. L. No. 116-25, § 1407 (2019) (codified at IRC § 6402(n)).
6	Provide Victims With Notice of Suspected Identity Theft.	NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2007 (2019) (codified at IRC § 7529).
7	Give All Taxpayers the Option to Receive and Use an Identity Protection Personal Identification Number.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; and NTA 2015 Annual Report, Most Serious Problem #16, 180-187.	Pub. L. No. 116-25, § 2005 (2019).
8	Provide Identity Theft Victims With a Single Point of Contact at the IRS.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; NTA 2015 Annual Report, Most Serious Problem #16, 180-187; NTA 2013 Annual Report, Most Serious Problem #6, 75-83; and NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2006 (2019).
9	Develop and Implement Guidelines for Managing Stolen Identity Refund Fraud Cases.	NTA 2017 Annual Report, Most Serious Problem #19, 211-218; NTA 2015 Annual Report, Most Serious Problem #16, 180-187; NTA 2013 Annual Report, Most Serious Problem #6, 75-83; and NTA 2011 Annual Report, Most Serious Problem #3, 48-73.	Pub. L. No. 116-25, § 2008 (2019).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
10	Collaborate With the Public and Private Sectors to Protect Taxpayers From Identity Theft and Refund Fraud.	NTA 2017 Annual Report to Congress, Most Serious Problem #20, 219-226.	Pub. L. No. 116-25, § 2001 (2019).
11	Require Employers Filing More Than Five Forms W-2, 1099-MISC, and 941 to File them Electronically.	2019 Purple Book #8, 17-19; and 2017 Purple Book #10, 21-23.	Pub. L. No. 116-25, § 2301 (2019) (codified at IRC § 6011(e)(2)(A)).
12	Increase Preparer Penalties.	NTA 2003 Annual Report, Key Legislative Recommendation 270-301.	Pub. L. No. 114-113, § 501 (2011) (codified at IRC § 6695(g)).
13	Allow Married Co-owners of a Business to Elect to File as Sole Proprietors Rather Than as Partners.	NTA 2002 Annual Report, Key Legislative Recommendation 172-184.	Pub. L. No. 110-28, Title VIII, § 8215 (2007) (codified at IRC § 761(a)).
14	Tax a Child's Income at Rates That Do Not Depend on the Parent's (*i.e.*, Fix the "Kiddie Tax").	NTA 2002 Annual Report, Key Legislative Recommendation 231-242.	Pub. L. No. 115-97, § 11001 (2017) (codified at IRC § 1).
15	Authorize the IRS to Require Brokers to Report Basis Information Upon the Sale of Securities.	NTA 2005 Annual Report, Key Legislative Recommendation #5, 433-441.	Pub. L. No. 110-343, § 403 (2008) (codified at IRC § 6045(g)).
16	Accelerate the Filing Deadline for Certain Information Returns.	NTA 2013 Annual Report, vol. 2, 68-96.	Pub. L. No. 114-113, Division Q, Title II § 201 (2015) (codified at IRC § 6071).
17	Do Not Require Correction of *De Minimis* Errors on Certain Information Returns.	NTA 2013 Annual Report, vol. 2, 68-96.	Pub. L. No. 114-113, Division Q, Title II § 202 (2015) (codified at IRC § 6721(c)).
18	Accelerate the Filing Deadline for Certain Partnerships and Trusts.	NTA 2003 Annual Report, Key Legislative Recommendation 302-307.	Pub. L. No. 114-41, § 2006(a) (2015) (codified at IRC § 6072).
19	Change the Deadline for Filing FinCEN Report 114 (Relating to Report of Foreign Bank and Financial Accounts) to Match the Deadline for Filing Federal Income Tax Returns and Form 8938 (Including Extensions).	NTA 2014 Annual Report, Legislative Recommendation #6, 331-345.	Pub. L. No. 114-41, § 2006(b)(11) (2015).
20	Eliminate Tax Strategy Patents.	NTA 2007 Annual Report, Legislative Recommendation #4, 512-524.	Pub. L. No. 112-29, § 14(a) (2011).
Improve Assessment and Collection Procedures			
21	Extend the Period for a Third Party to Request a Return of Levied Proceeds From Nine Months to Two Years.	NTA 2001 Annual Report, Key Legislative Recommendation 202-208.	Pub. L. No. 115-97, § 11071 (2017) (codified at IRC § 6343).
22	Allow Taxpayers to Request Equitable Innocent Spouse Relief Under IRC § 6015(f) Any Time Before Expiration of the Period of Limitations on Collection.	2019 Purple Book #26, 48-49; and 2017 Purple Book #16, 33.	Pub. L. No. 116-25, § 1203 (2019) (codified at IRC § 6015(f)(2)).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
23	Prevent the Debts of Low Income Taxpayers From Being Assigned to Private Collection Agencies.	2019 Purple Book #28, 52-53.	Pub. L. No. 116-25, § 1205 (2019) (codified at IRC § 6306(d)(3)).
24	Hold Taxpayers Harmless When the IRS Returns Funds Levied From a Retirement Plan or Account.	2017 Purple Book #22, 41-42.	Pub. L. No. 115-123, § 41104 (2018) (codified at IRC § 6343(f)).
25	Authorize the IRS to Enter Partial Payment Installment Agreements.	NTA 2001 Annual Report, Key Legislative Recommendation 210-214.	Pub. L. No. 108-357, § 843 (2004) (codified at IRC § 6159(a)).
26	Send Change of Address Notices to an Employer's Old and New Addresses and Promote the Use of Offers in Compromise for Victims of Payroll Tax Fraud.	NTA 2012 Annual Report, Most Serious Problem #23, 426-444.	Pub. L. No. 113-76, Division E, Title I, § 106 (2014) and subsequent appropriations acts.
Reform Penalty and Interest Provisions			
27	Clarify That a Reasonable Cause Exception Applies to the Penalty for Erroneous Refund or Credit Claims Under IRC § 6676.	NTA 2014 Annual Report, Legislative Recommendation #8, 351-356; and NTA 2011 Annual Report, Legislative Recommendation #6, 544-547.	Pub. L. No. 114-113, Division Q, Title II, § 209(c) (2015) (codified at IRC § 6676(a)).
28	Notify Exempt Organizations When They Have Failed to File Two Consecutive Returns or Notices Before Their Exemption Is Automatically Revoked.	NTA 2011 Annual Report, Status Update #2, 437-450.	Pub. L. No. 116-25, § 3102 (2019) (codified at IRC § 6033(j)(1)).
29	Reduce the Disproportionate Penalty for Failure to Make Special Disclosures of "Listed Transactions" Under IRC § 6707A.	NTA 2008 Annual Report, Legislative Recommendation #10, 419-422.	Pub. L. No. 111-240, § 2041 (2010) (codified at IRC § 6707A(b)).
Strengthen Taxpayer Rights Before the Office of Appeals			
30	Codify the Independent Office of Appeals and Allow Those Denied Access to Appeals to Protest to the IRS Commissioner.	2019 Purple Book #35, 64.	Pub. L. No. 116-25, § 1001(a) (2019) (codified at IRC § 7803(e)).
Enhance Confidentiality and Disclosure Protections			
31	Limit Redisclosures and Unauthorized Uses of Tax Returns and Tax Return Information Obtained Through IRC § 6103-Based "Consent" Disclosures.	2019 Purple Book #38, 67; and 2017 Purple Book #39, 66.	Pub. L. No. 116-25, § 2202 (2019) (codified at IRC § 6103(c)).
32	Penalize Unauthorized Disclosures of Return Information by Tax Whistleblowers.	NTA 2015 Annual Report, Legislative Recommendation #14, 413-418.	Pub. L. No. 116-25, § 1405(a)(2) (2019) (codified at IRC § 7213(a)(2)).
33	Provide Status Updates Sufficient to Allow a Whistleblower to Monitor the Progress of the Claim.	NTA 2015 Annual Report, Most Serious Problem #13, 143-158.	Pub. L. No. 116-25, § 1405(a)(1) (2019) (codified at IRC § 6103(k)(13)).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
Strengthen the Office of the Taxpayer Advocate			
34	Codify the TAD Appeal Process and Require the NTA to Report to Congress on Any TAD Not Honored by the IRS.	2019 Purple Book #43, 75-76; 2017 Purple Book #41, 68-69; and NTA 2016 Annual Report, Special Focus 39-40.	Pub. L. No. 116-25, § 1301(a) (2019) (codified at IRC § 7803(c)(5) and IRC § 7803(c)(2)(B)(ii)).
35	Establish the Compensation of the NTA by Statute.	2019 Purple Book #49, 83-84; and 2017 Purple Book #49, 79-80.	Pub. L. No. 116-25, § 1301(c) (2019) (codified at IRC § 7803(c)(1)(B)(i)).
Strengthen Taxpayer Rights in Judicial Proceedings			
36	Clarify That IRS Employees May Refer Taxpayers to a Specific Low Income Taxpayer Clinic.	2019 Purple Book #14, 29-30; 2017 Purple Book #8, 18; and NTA 2007 Annual Report, Additional Legislative Recommendation #4, 551-553.	Pub. L. No. 116-25, § 1402 (2019) (codified at IRC § 7526(c)(6)).
37	Consolidate Judicial Review of Collection Due Process (CDP) Hearings in the Tax Court.	NTA 2005 Annual Report, Key Legislative Recommendation #7, 447-470.	Pub. L. No. 109-280, § 855 (2006) (codified at IRC § 6330(d)(1)).
38	Clarify That the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) Is *De Novo.*	2019 Purple Book #52, 91-93; and NTA 2011 Annual Report, Legislative Recommendation #4, 531-536.	Pub. L. No. 116-25, § 1203(a)(1) (2019) (codified at IRC § 6015(e)(7)).
39	Clarify That the Tax Court Has Jurisdiction to Review Stand Alone Equitable Innocent Spouse Relief Determinations Under IRC § 6015(f).	NTA 2001 Annual Report, Key Legislative Recommendation 159-165.	Pub. L. No. 109-432, Division C, Title IV, § 408 (2006) (codified at IRC § 6015(e)(1)).
40	Allow Taxpayers Seeking Exemption Under IRC § 501(c)(4) and Certain Others to Seek a Declaratory Judgment Just Like Those Seeking Exemption Under IRC § 501(c)(3).	NTA 2014 Annual Report, Legislative Recommendation #12, 371-379.	Pub. L. No. 114-113, Division Q, Title IV, § 406 (2015) (codified at IRC § 7428(a)(1)).
41	Protect Tax Whistleblowers From Retaliation.	NTA 2015 Annual Report, Legislative Recommendation #13, 409-412.	Pub. L. No. 116-25, § 1405(b) (2019) (codified at IRC § 7623(d)).
Miscellaneous Provisions			
42	Generally, Avoid Forfeiture or Seizure of Deposits Structured to Avoid Currency Reporting When They Are From a Legal Source.	IRS Reform: Perspectives From the National Taxpayer Advocate, Hearing Before the H. Comm. on Oversight, 115th Cong. (May 19, 2017) (statement of Nina E. Olson, National Taxpayer Advocate) (p. 23).	Pub. L. No. 116-25, § 1201 (2019) (codified at 31 USC § 5317(c)(2)).
43	Provide Commercial Fishermen the Benefit of Income Averaging Currently Available to Commercial Farmers.	NTA 2001 Annual Report, Additional Legislative Recommendation 226.	Pub. L. No. 108-357, § 314 (2004) (codified at IRC § 1301(a)).

LR #	Legislative Recommendations	Selected National Taxpayer Advocate (NTA) Report References	Public Laws Adopting the Recommendations (in Whole or in Part)
44	Allow Self-Employed Individuals a Deduction for Health Insurance Premiums.	NTA 2001 Annual Report, Additional Legislative Recommendation 223.	Pub. L. No. 111-240, § 2042 (2010) (codified at IRC § 162(l)).
45	Clarify That Attorney Fees for Discrimination Suits Are Deductible by Victims.	NTA 2002 Annual Report, Key Legislative Recommendation 161-171.	Pub. L. No. 108-357, § 703 (2004) (codified at IRC § 62(a)(19) and then subsequently renumbered).
46	Create a Uniform Definition of “Qualifying Child” for Tax Provisions Relating to Children and Family Status.	NTA 2001 Annual Report, Key Legislative Recommendation 78-100.	Pub. L. No. 108-311, § 201 (2004) (codified at IRC § 152).

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