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A Note from the Editor-in-Chief—Firing IRS Workers in the Middle of Tax Season?

Every filing season seems to present new challenges to the Internal Revenue Service (IRS). But none quite like the current year. New York Times readers may have seen the Op Ed piece penned by seven former IRS Commissioners.[1]

> *If you were to ask the top chief executives in the world to name the best strategy to attack waste in their organizations and balance the books, there is one answer you would be very, very unlikely to hear: Take an ax to accounts receivable, the part of an organization responsible for collecting revenue.*
>
> *Yet the private sector leaders advising President Trump on ways to increase government efficiency are deploying this exact approach by targeting the Internal Revenue Service, which collects virtually all the receipts of the U.S. government — our nation's accounts receivable division.*

Nowhere was the current administration's freeze on agency interactions with their constituencies more visible than the ABA Tax Section meeting in Los Angeles on February 19–21. No government attendees were present to share insights into what was happening with rulings and regulation projects. As their lack of presence became more noticeable, we shortly learned why … *Agency heads were told to prohibit employees from "engaging in federally funded travel for conferences …*[2]

But wait, there's more. IRS issues weekly Filing Season Statistics, and as of February 28, 2025, receipt of individual returns were down over 4% compared to the prior year, and *IRS.gov* web visits were down 43.2%. My office even received an email from a client asking if he was "*required to file this year*" since he heard "*the new administration was going to eliminate the IRS.*"

Now turning to the content offered by our columnists and authors this edition:

Carol M. Luttati on **Collection** attempts to understand the psychology of *Taxpayers who Procrastinate in Addressing Their Tax Liabilities Do Themselves an Injustice.* Carol guides us through the missteps such taxpayers commit that serve to worsen their situation.

Kathy Petronchak and **Matthew Beddingfield** on **IRS Watch** comment on the NTA Providing an Update on Taxpayer Pain Points, the Fast-Track Settlement Pilot Program, Circular 230 Proposed Regulations, and TIGTA's Review of IRS Service Performance.

Robert J. Misey, Jr. on **Global View** examines how *The Trump Administration Impacts International Taxation.* Rob focuses his discussion on three areas:

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substantive changes to international tax provisions, reducing the IRS workforce, and reducing regulations.

Guest columnists **Cory Stigile**, **Sarah Green**, **Josh O. Ungerman**, **Rami Khoury**, and **Darianne De Leon** share our **Ethics** column this edition as they review *Ethical Standards and Proposed Amendments to Circular 230.* The group were presenters at the recent ABA Tax Section meeting in LA.

And a shout out to the authors of this edition:

Alison Gadoua provides practical advice for a not-so-infrequent situation in *Selling Your Home Without Satisfying an IRS Tax Lien*. Alison takes a step-by-step approach you may find of great help when you assist a client with this issue.

JTPP Advisor and frequent contributor **Hale E. Sheppard** writes on *The Power of $1: New Cases Showing "Qualified Offers" as a Tax Dispute Strategy*.[3]

On December 20, 2024, Treasury and IRS issued proposed regulations to update rules for tax professionals who can practice before the IRS as contained in Treasury Department Circular 230. One of the stated objectives was "the proposed regulations would incorporate new provisions that better align Circular 230 with the current practice environment, such as requiring that practitioners maintain technological competency as part of their practice before the IRS. The proposed regulations would also clarify some provisions, such as confirming that OPR retains jurisdiction over practitioners who have been suspended or disbarred from practice."[4]

The practitioner community took notice, and over 700 comments have been submitted prior to the official public hearing date. Practitioners particularly took notice of the proposals expanding prohibition regarding the charging of contingent fees and expansion of actions that constitute disreputable conduct. *See* Petronchak and Beddingfield's IRS Watch column for more coverage of this topic.

Office of Professional Responsibility (OPR) more recently released from their *IRS.Gov* website *Alerts from the Office of Professional Responsibility* on **Due Process Procedures in Circular 230 Matters**[5] (*see* Exhibit 1 below).

So many things are happening in our professional sphere; many with more speed and devastation to what had been a stable, predictable administration of our tax system functioning. Let us hope for calmer, more reasoned, and more positive changes at the IRS. After all, taxes are the price we pay for a civilized society.[6]

If you have thoughts to share on topics of interest to our peer professionals and our taxing profession, contact me at *claudia@taxmam.com.*

EXHIBIT 1. ALERTS FROM THE OFFICE OF PROFESSIONAL RESPONSIBILITY, MARCH 10, 2025

Issue Number: 2025-3

Inside This Issue

Due Process Procedures in Circular 230 Matters

The Office of Professional Responsibility (OPR) is taking the opportunity to highlight for the practitioner community the due process protections incorporated throughout the handling of a Circular 230 case, including an investigation and any disciplinary proceeding.

Referrals to the OPR alleging violations of Circular 230 (*Regulations Governing Practice before the Internal Revenue Service*) come from a variety of internal and external sources. When a referral[1] is received, the OPR first determines whether the office has jurisdiction over the tax professional who is the subject of the referral-that is, whether the individual is a practitioner or is otherwise regulated by Circular 230. "Practitioners," who are the focus of this article, are attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries. Appraisers who submit appraisals supporting tax positions and tax return preparers granted limited-practice privileges under the IRS's voluntary Annual Filing Season Program must also comply with Circular 230, as applicable. Assuming jurisdiction exists, the OPR independently determines whether the alleged violations concern a practitioner's fitness to practice before the IRS and, if so, whether the allegations merit further scrutiny through inquiry or investigation, the extent of which will depend on the facts and circumstances.

The OPR does so by evaluating the content of reports of suspected practitioner misconduct and any accompanying or supporting documentation sent to our office and through preliminary research and case development, based on the specific situation. The OPR then makes initial determinations on a course of action, and unless a case is closed at the outset, the case (assigned to an attorney or specialist, with a reviewer) will proceed forward and follow its natural progression.

EXHIBIT 1. ALERTS FROM THE OFFICE OF PROFESSIONAL RESPONSIBILITY, MARCH 10, 2025 *(Cont'd)*

Non-Sanctionable Conduct

The OPR may determine that alleged misconduct is not sanctionable, meaning, the alleged misconduct was or is not in violation of the practice regulations or does not warrant a Circular 230 sanction or a Deferred Discipline Agreement.[2] Sometimes the OPR receives a referral or complaint that does not contain sufficient or clear evidence that the practitioner acted willfully. The OPR may conclude that contacting the practitioner is nevertheless called for. If so, the office will often pursue a "Soft" letter process. This process gives the practitioner notice of the information we have received and an opportunity to be heard.

Under this process, the OPR, prior to case closing, corresponds with practitioners regarding referrals determined to be not actionable or that do not merit a sanction, such as a censure or suspension. An initial "Soft" letter informs a practitioner of the information referred and provides the practitioner 60 days to submit a written response and any supporting documentation, if the practitioner wishes to do so. Upon receipt of a response from the practitioner (or their authorized representative), the OPR will carefully consider the contents. After consideration or when the 60-day period has lapsed, the OPR will mail either a clearance letter or, more typically, a closing "Soft" letter. This second "Soft" letter notifies the practitioner that the OPR is not taking any further action on the referral, the associated case is closed, and the administrative file for the case will be retained by the OPR for the retention period prescribed in the applicable records control schedule.

The issuance of the "Soft" letters and any communications between the OPR and the practitioner (or their authorized representative) related to these letters is not made public.

Sanctionable Conduct

If the OPR determines one or more alleged violations are actionable and discipline is in order (including deferred discipline, when appropriate), the office will inform a practitioner of the purported misconduct by mailing a letter to the practitioner's "last known address" as defined in IRC 6212. This letter describes the allegations and gives the practitioner an opportunity to respond. Practitioners under investigation have the right to retain representation, to submit evidence or mitigating information, to request materials from the OPR's case file pursuant to IRC 6103, and to hold a conference with OPR's attorneys or Legal Administrative Specialists. This process, which precedes the commencement of any formal proceeding, allows a practitioner to access evidence supporting alleged violations of Circular 230 without submitting a Freedom of Information Act (FOIA) request. This process is designed to give the OPR and the practitioner a full and thorough understanding of the surrounding circumstances.

Most of the OPR's cases are resolved without the office filing a complaint with an administrative law judge (ALJ) that starts a formal disciplinary proceeding.[3]

Reprimands

Instead of pursuing a disciplinary sanction, the OPR may, for the same conduct, send the practitioner a written reprimand. Unlike censures, reprimand letters, which are solely at the discretion of OPR's Director, are private (*see* section 10.50(a) ("Censure is a public reprimand.").

Consent to be Sanctioned

In some instances, a practitioner may propose settlement during or at the end of an investigation, including consensual discipline. In response, the OPR will attempt to negotiate a suitable outcome, commensurate with the facts of the case, the seriousness of the violations, the practitioner's overall fitness to practice, and preventing future harm to taxpayers or federal tax administration, among other factors. Possible options include agreed-upon sanctions of censure, suspension, or disbarment from practice or the payment of a monetary penalty. All consensual sanctions are made public.

When the OPR believes a sanction is necessary yet is unable to negotiate a resolution with the practitioner, a formal "complaint" is drafted[4] and the case is referred to the Office of Chief Counsel, General Legal Services (GLS). GLS sends a letter to the practitioner offering a final opportunity to resolve the matter without a proceeding. If settlement is not reached, GLS files the complaint to commence a civil proceeding before an ALJ. The ALJ presides over the proceeding and decides the merits of the case that OPR and GLS have charged against the practitioner. The proceeding is generally governed by the Administrative Procedure Act (5 USC 500, *et seq.*). The ALJ may order a hearing to be held, during which the OPR (represented by GLS) and the practitioner (or their counsel) present each side's evidence and arguments. Although rare, the case may be settled by concurrence of both parties at any time prior to entry of a decision.

EXHIBIT 1. ALERTS FROM THE OFFICE OF PROFESSIONAL RESPONSIBILITY, MARCH 10, 2025 *(Cont'd)*

If a hearing is conducted, and after post-hearing briefs are submitted, the ALJ issues an Initial Decision and Order. The ALJ may find the OPR has proven the allegations pled in the complaint and find the practitioner committed violations of Circular 230 for which the practitioner should be sanctioned. The ALJ may find that the OPR met its burden of proof for some of the counts of the complaint but not others; the ALJ may find there are aggravating factors and/or mitigating factors. Whatever the breakdown (*e.g.,* in one case, all rulings may be favorable to OPR, while in another case, only some), the ALJ may then go on to impose the sanction that the OPR proposed. Alternatively, the ALJ may rule in the OPR's favor on the facts and law but increase or reduce the recommended sanction. Or the ALJ may reject both the OPR's version of events and its recommendation of a sanction, and thus dismiss the case.

After the ALJ's Decision and Order, either party may appeal the case to the Treasury Appellate Authority (an attorney in another division of the Office of Chief Counsel who had no previous involvement with the case). If neither party appeals within 30 days, the ALJ's Initial Decision and Order becomes the Final Agency Decision. If either party appeals, the Appellate Authority will, after receiving briefs from both parties and reviewing the record, render the Final Agency Decision. For the OPR, a decision by the Appellate Authority is a final determination in the case.

A practitioner who is not satisfied with the Appellate Authority's Final Agency Decision may file a complaint in U.S. district court to contest it. This proceeding is also conducted according to the Administrative Procedure Act, under which the federal district judge will review findings of facts based on the administrative record and review conclusions of law "*de novo*" (anew) and will set aside agency action found to be arbitrary or capricious, contrary to law, an abuse of discretion, or otherwise improper.

The OPR recognizes the enormous authority and trust vested in the office and the substantial impact disciplinary action can have on a practitioner, as well as taxpayers. The OPR takes its mission seriously. As such, the office follows a cautious and measured approach when acting on a referral and ensures practitioners are given proper due process during the life of a case, from beginning to end.

https://content.govdelivery.com/accounts/USIRS/bulletins/3d61f3f

ENDNOTES

1 "Referral" is used broadly in this article; it is intended to encompass those made by IRS employees on the prescribed form; taxpayer complaints (such as on Form 41157, Return Preparer Complaint, naming a practitioner); receipts from the Treasury Inspector General for Tax Administration (TIGTA), the Department of Justice, or other federal agencies; notices from state licensing authorities; and other sources.

2 A Deferred Discipline Agreement is a written agreement entered into between the OPR and a practitioner in which the practitioner admits to specified violations of Circular 230 and the OPR and the practitioner agree that while the violations are subject to a sanction, the OPR will defer discipline for a probationary period of time, with the objective of closing the matter out at the end of the period with no further action. Conditions are invariably part of these agreements, including prospective compliance with Circular 230.

3 *See* Subpart D of Circular 230, *Rules Applicable to Disciplinary Proceedings*.

4 Captioned as:

DIRECTOR,
OFFICE OF PROFESSIONAL
RESPONSIBILITY,
Complainant,
v.
____
Respondent

ENDNOTES

1 Lawrence Gibbs, Fred T. Goldberg Jr., Charles Rossotti, Mark Everson, John Koskinen, Charles Rettig and Daniel Werfel, *Trump Just Fired 6700 I.R.S. Workers in the Middle of Tax Season. That's a Huge Mistake*, NEW YORK TIMES (Feb. 24, 2025).

2 The White House, Presidential Actions, *Implementing the President's "Department of Government Efficiency Cost Efficiency Initiative* (Feb. 26, 2025).

3 This article was originally published in TAXES, February 2025.

4 *www.irs.gov/newsroom/treasury-and-irs-propose-regulations-to-update-rules-for-tax-professionals-who-can-practice-before-the-irs.*

5 Alerts from the Office of Professional Responsibility, Issue Number 2025-3 (March 10, 2025).

6 This quotation is carved over the entrance of the national headquarters of the Internal Revenue Service in Washington, D.C. and is attributed to U.S. Supreme Court Justice Oliver Wendell Holmes.

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Collection

Taxpayers Who Procrastinate in Addressing Their Tax Liabilities Do Themselves an Injustice

By Carol M. Luttati

Overview

As I enter my fortieth year of practice, I still cannot fathom the psychology that drives taxpayers to persist in ignoring correspondence from the Internal Revenue Service ("IRS") about past due tax liabilities, since pursuing a course of inaction is illogical and detrimental. Step one in understanding what has procedurally and substantively transpired with a prospective new client before undertaking representation is to obtain and carefully review all relevant account transcripts. This is a must because unlike listening to a narrative explanation from the client, which may be neither accurate nor complete, transcripts unequivocally lay out the history of:

- why the taxpayer has a tax liability;
- what the liability consists of as between tax, penalty, and interest;
- what collection efforts the Service has taken; and
- what collection alternatives the taxpayer has proposed.

It is also important to obtain the collection statute expiration date ("CSED") for all pertinent years by calling the Practitioner Priority Service so as to then be in the best position to strategically weigh and consider viable alternative collection options.

The objective of this column is to set forth the various missteps taxpayers unwittingly commit that only serve to worsen their situation. These missteps include foregone opportunities as well as the loss of valuable taxpayer collection rights. Armed with the knowledge of how ineffective avoidance is in the collections arena, I hope taxpayers will be prompted to seek out competent representation early in the collection process in order not only to preserve their rights, but also to maximize their chance of achieving the best outcome possible.

Do Not Needlessly Incur a Late Filing Penalty

Aside from taxpayers whose tax liability is the result of an examination proposing a deficiency/increase in income tax, the back taxes owed by most of our clients are self-assessed straight from their own filed tax returns. Unfortunately, compounding matters, these tax returns are not always filed on time. Too often, taxpayers hold back on timely filing their return by the filing due date of the return when they realize that an amount, which they are unable to pay, is owed.

The decision to file a tax return with a balance due after the filing due date serves to trigger the imposition of the late filing penalty under subsection (a)(1) of Code Sec. 6651, *Failure to File Tax Return or to Pay Tax*. The late filing penalty costs the taxpayer 5% a month of the net amount of tax owed after taking into consideration credits and payments made,[1] and maxes out at 25% after just 5 months.[2] By contrast, had the taxpayer filed on time by the due date of the return but simply not paid the amount shown due with the return, the taxpayer would, under these circumstances, only be faced with imposition of the late payment penalty under Code Sec. 6651(a)(2) of .005% a month, which maxes out at 25% after 50 months. Filing on time, thus, reduces the overall combined late filing penalty and late payment penalty maximum of 47.5%[3] down to a maximum of 25%. So, it is clearly advantageous for a taxpayer to timely file to avoid the imposition of the late filing penalty rather than have the Service impose the late filing penalty because when the penalty is inevitably imposed, the taxpayer will then have only two choices:

- pay this hefty penalty on top of the taxes owed, or
- incur professional fees to request abatement of the late filing penalty either on the grounds of first-time abate,[4] if the taxpayer can avail himself/herself of this, or on the grounds that the late filing was due to reasonable cause and not willful neglect, if this can be satisfactorily established.

Do Not Ignore ACS Collection Notices and Forego the Opportunity to Enter into an Installment Agreement Without Preparing a Financial Statement

There are a series of notices in the collection stream that are generated by ACS—the Service's Automated Collection System—that are designed to inform taxpayers there is an unpaid tax/balance due and to secure payment. These notices provide details about the taxes owed, payments and credits made, and penalties imposed. The progression of notices serves as a reminder of the unpaid taxes and warns of possible collection actions that the Service is authorized, by law, to take. At the forefront of the available collection actions is the filing of a Notice of Federal Tax Lien, which serves to protect the Service's interest and priority as a creditor.

The collection notices unambiguously state that the failure to pay or make payment arrangements may further result in a levy on the taxpayer's property or rights to property—most notably a levy on the taxpayer's wages and bank accounts. In addition, the collection notices highlight that when the taxpayer owes a **"*seriously delinquent tax debt*,"** the Service can certify that debt to the State Department for it to then deny issuing or renewing a passport to the taxpayer, or to revoke the taxpayer's otherwise valid/unexpired passport.

All of the preliminary collection notices precede by several months the Service's ultimately issuing to the taxpayer the notices affording Collection Due Process ("CDP") Rights discussed below. During this interim period of time, taxpayers can greatly help themselves by proposing a collection alternative. Where the taxpayer's financial situation is so dire that they have no monthly disposable income after paying allowable living expenses to currently support making any monthly payments to the Service, they should immediately request to be placed into Currently Not Collectible ("CNC") status, if they meet the applicable criteria for CNC status.

If CNC status is not attainable, taxpayers who owe more than $250,000 should endeavor, if possible, to pay down their liability to just under $250,000 in order to secure for themselves the benefit of obtaining a ***Non-Streamlined*** Installment Agreement without having to submit a Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*. Time is of the essence in doing so, however, because ***Non-Streamlined*** Installment Agreements are only available where:

- the tax liability does not exceed $250,000;
- the case is still in ACS and has not yet been assigned to a Revenue Officer; and
- the monthly payment proposal is sufficient to fully pay the assessed liability within the remaining CSED.[5]

Absent satisfying the above criteria, taxpayers can, without providing a Form 433-A, apply online using the Service's Online Payment Agreement system to obtain either:

- a ***long-term Streamlined*** Installment Agreement sufficient to fully pay the assessed liability within 72 months or by the CSED, whichever is shorter, if they owe $50,000 or less in combined tax, penalties, and interest; or
- a ***short-term Streamlined*** Installment Agreement requiring payment in 180 days or less, if they owe less than $100,000 in combined tax, penalties, and interest.

Do Not Ignore Collection Notices that Afford CDP Rights, Stay Enforced Collection Action, and Preclude Passport Certification

The Service's statutorily mandated Notice of Federal Tax Lien Filing and Your Right to a Hearing, under Code Sec. 6320, *Notice and Opportunity for Hearing Upon Filing Notice of Lien*, and Final Notice—Notice of Intent to Levy and Notice of Your Right to a Hearing, under Code Sec. 6330, *Notice and Opportunity for Hearing before Levy*, both of which must be sent to the taxpayer at their last known address by certified mail, afford the taxpayer valuable CDP rights only if the taxpayer, within 30 days of the date on the notice, timely elects to invoke those rights by filing Form 12153, *Request for a Collection Due Process or Equivalent Hearing*, to contest the Service's collection action before the IRS Independent Office of Appeals. Significant among those CDP rights is that the timely filing of Form 12153 serves to automatically preclude the Service from taking any enforced collection action under Code Sec. 6330(e)(1), *Suspension of Collections and Statute of Limitations*. Further, taxpayers who avail themselves of their CDP rights by timely filing Form 12153 retain the ability to contest before the U.S. Tax Court an adverse Notice of Determination rendered by Appeals.[6] Last but not least, the timely filing of Form 12153 also serves to preclude the Service from certifying a tax debt as seriously delinquent to the State Department—regardless of the amount of the tax liability owed.[7]

On the other hand, taxpayers who miss the 30-day deadline for filing their Form 12153 are afforded, in lieu of a CDP Hearing, an Equivalent Hearing before Appeals provided that their Form 12153 is filed within one year of the day after the date of the CDP notice issued which they seek to challenge. However, for these tardy taxpayers, enforced collection action is not stayed and these taxpayers lose the opportunity for judicial review before the Tax Court of an unfavorable Decision Letter rendered by Appeals with which they take exception.[8] Their passport is also at risk.

Do Not Ignore Notices Warning of Potential Passport Action for a *"Seriously Delinquent Tax Debt"*

Virtually all of the collection notices in the ACS collection stream, as well as those statutorily affording CDP Rights, place taxpayers on notice that the Service can, at any time, certify their **"*seriously delinquent tax debt*"** to the State Department for purposes of denying or revoking their passport under Code Sec. 7345. Presently, a taxpayer who owes more than $64,000 has a ***"seriously delinquent tax debt."*** This figure is adjusted annually for inflation under Code Sec. 7345(f).

Before the Service issues to a taxpayer Notice CP508C, *Notice of Certification of Your Seriously Delinquent Federal Tax Debt to the State Department*, the taxpayer has the opportunity to pay down the liability to an amount below the threshold for a ***"seriously delinquent tax debt"*** to prevent the issuance of Notice CP508C and ensure that his/her passport is safeguarded against any adverse passport action. If, however, the taxpayer is unable to make a sufficient payment to come below the certification threshold, the taxpayer should then make every effort to:

- have the Service determine that their tax debt is CNC due to hardship;
- submit a pending request for an Installment Agreement;
- submit a pending request for an Offer-in-Compromise; or
- submit, where appropriate, an election requesting innocent spouse relief under Code Sec. 6015(b) (Innocent Spouse Relief), 6015(c) (Separation of Liability Relief), or 6015(f) (Equitable Relief),

because taking any one of the aforesaid measures will provide the taxpayer with either a recognized statutory or discretionary certification exclusion that will protect their passport.

Do Not Be Lulled into Complacency by the President's Hiring Freeze

Finally, taxpayers should not drag their feet in the hopes that the hiring freeze will provide them with a reprieve. Among the Executive Orders that President Donald J. Trump signed on January 20, 2025 was an Order imposing a freeze on the hiring of Federal civilian employees. In the relevant part, this Order states:

> "**As part of this freeze, no Federal civilian position that is vacant at noon on January 20, 2025, may be filled, and no new position may be created except as otherwise provided for in this memorandum** or other applicable law .... Within 90 days of the date of this memorandum, the Director of the Office of Management and Budget (OMB), in consultation with the Director of OPM [Office of Personnel Management] and the Administrator of the United States DOGE Service

(USDS), shall submit a plan to reduce the size of the Federal Government's workforce through efficiency improvements and attrition. **Upon issuance of the OMB plan, this memorandum shall expire for all executive departments and agencies, with the exception of the Internal Revenue Service (IRS). This memorandum shall remain in effect for the IRS until the Secretary of the Treasury, in consultation with the Director of OMB and the Administrator of USDS, determines that it is in the national interest to lift the freeze. Contracting outside the Federal Government to circumvent the intent of this memorandum is prohibited."** [Emphasis added.]

While the Order imposes a hiring moratorium on the Service, which cannot be circumvented by the hiring of outside contractors, nothing in the Order changes the rules of engagement by which the Service operates and under which the taxpayer must be guided.

Take-Away

The lessons to be learned can be summarized as follows.

First, it benefits taxpayers to timely file their returns to avoid imposition of the late filing penalty.

Second, when taxpayers begin to receive the preliminary notices in the ACS collection stream, they should, based on their particular facts and circumstances:

- request to be placed into CNC status;
- pay down their tax liability to below $250,000 to secure a Non-Streamlined Installment Agreement, without having to do a financial statement;
- pay down their tax liability to below $100,000 to secure a short-term Streamlined Installment Agreement using the Online Payment Agreement system, without having to do a financial statement; or
- pay down their tax liability to $50,000 to secure a long-term Streamlined Installment Agreement using the Online Payment Agreement system, without having to do a financial statement.

Third, when taxpayers receive the statutorily mandated notices affording CDP rights, which are the—Notice of Federal Tax Lien Filing and Your Right to a Hearing, and the Final Notice—Notice of Intent to Levy and Notice of Your Right to a Hearing—they should invoke their CDP rights by timely filing Form 12153 in order to not only challenge the notice but also to: suspend enforced collection action; retain the ability to seek judicial review of the Notice of Determination rendered by Appeals; and preclude certification of their tax debt to the State Department. If the taxpayer misses the 30-day deadline for timely filing Form 12153, the taxpayer should within the one-year period prescribed, by law, file Form 12153 to request an Equivalent Hearing.

Fourth, the taxpayer should in addition strive, where possible, to pay down their tax liability to under $64,000 to avoid the Service from certifying their tax debt as seriously delinquent. If the taxpayer cannot do so, then in order to protect the taxpayer's passport, especially for those taxpayers who travel abroad for work or business purposes, the taxpayer should, where appropriate, secure CNC status; submit a request for an Installment Agreement, or an Offer-in-Compromise; or submit a request for Innocent Spouse Relief so as to come within a recognized statutory or discretionary certification exclusion.

The bottom line in everything discussed herein is that being proactive is the way to go.

ENDNOTES

1 *See* Code Sec. 6651(b), *Penalty imposed on Net Amount Due*.

2 The late filing penalty applies only if there is an underpayment of tax, and the penalty runs from the due date of the return (without extension) until the date the Service actually receives the late return. *See* Code Sec. 6651(b)(1). An extension of time to file a return that does not accurately report a taxpayer's estimated total tax liability, and balance due after payments—which must be remitted with the Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return*, renders the request for an extension of time to file invalid and subjects the taxpayer to imposition of the late filing penalty.

3 *See* Code Sec. 6651(c)(1), *Limitations and Special Rule—Additions under more than one paragraph*.

4 *See* IRM 20.1.1.3.3.2.1 (Mar. 29, 2023) which provides that First Time Abate is available for penalty abatement relief the first time a taxpayer is subject to one or more of the penalties referenced therein for a single return filed by the taxpayer.

5 *See* IR-2020-248, Nov. 2, 2020.

6 *See* Code Sec. 6330(d)(1), *Petition for review by Tax Court*.

7 *See* Code Sec. 7345(b)(1)(C)(i) which statutorily excludes from the definition of a seriously delinquent tax debt, a tax debt for which a Notice of Federal Tax Lien has been filed, or a Final Notice—Notice of Intent to Levy has been issued and CDP rights under Code Sec. 6320 or 6330, respectively, have not been exhausted or lapsed.

8 *See* Reg. §301.6330-1(i), *Equivalent hearing*.

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IRS Watch

NTA Provides Update on Taxpayer Pain Points, Fast-Track Settlement Pilot Program, Circular 230 Proposed Regulations, TIGTA Reviews of IRS Service Performance

By Kathy Petronchak and Matthew Beddingfield

I. Introduction

The National Taxpayer Advocate's recent Annual Report to Congress discussed a variety of topics, including the 10 most serious issues that American taxpayers are currently facing.[1] This column will provide a review of the Taxpayer Advocate's findings as they relate to taxpayer service, as well as other Internal Revenue Service ("IRS") updates relevant for tax practitioners, including Fast-Track Settlement ("FTS") Pilot Program guidance issued in Announcement 2025-6,[2] proposed regulations under Circular 230,[3] and the Treasury Inspector General for Tax Administration's ("TIGTA") recent report and findings on agency telephone service performance.[4]

II. 2024 National Taxpayer Advocate Report

The National Taxpayer Advocate's 2024 Annual Report to Congress ("ARC") identifies and discusses what the National Taxpayer Advocate ("NTA") believes to be the 10 most serious problems taxpayers faced during the past year in their dealings with the IRS, summarizes the tax issues most frequently litigated in the U.S. Tax Court and other federal courts, and makes administrative and legislative recommendations to mitigate taxpayer problems and improve the taxpayer experience.

The NTA noted that taxpayer experiences have improved with the IRS eliminating the mountain of paper returns and correspondence that piled up during the pandemic. It was also pointed out that taxpayers and practitioners experienced better service, generally received timely refunds, and faced shorter wait times to reach customer service representatives ("CSRs").

A. Processing and Refund Delays

Among the issues noted in the 10 most serious problems are processing and refund delays. This includes Employee Retention Credit ("ERC") claims, paper return filings, and identity theft cases.

With the slowdown in processing ERC claims, many employers depending on these refunds to stay in business are still in limbo. While the IRS processed several hundred thousand claims, it was noted by the NTA that the IRS was still sitting on a backlog of about 1.2 million claims as of October 26, 2024, and the processing time for these claims is now over one year (an average of 381 days based on Figure 2.1.3), noting that many claims were filed prior to September 14, 2023.[5]

Challenges noted include that taxpayers generally have no way to verify the status of their claims; IRS disallowance letters sent to some taxpayers have been confusing and have omitted critical information; the IRS has used an audit-like process to disallow claims but has not provided standard audit taxpayer protections; and businesses whose refund checks were stolen have had to wait months or longer to receive replacement checks.

The slow processing of ERC claims has not only created financial hardship for businesses, but it has also cost the government fisc. The IRS has issued a total of about $242 billion in ERC refunds and paid an estimated $8.1 billion in interest.[6] The IRS began processing ERC claims it identified ranging from very high to low risk and, on October 10, 2024, announced it had 400,000 claims processed or ready to process that taxpayers had filed prior to January 31, 2024. The 400,000 included 28,000 claims the IRS disallowed and 50,000 valid claims it had previously announced it was processing. For the over one million claims awaiting processing, it is unclear when these taxpayers can expect the IRS to act on their claims.

The NTA identifies concerns with the processes being used to address the ERC claims. This includes the streamlined "audits" being used in place of standard exams and the problems with letters issued to taxpayers not being correct in some instances. This may have included that appeal rights were not articulated for a taxpayer or the basis for disallowance based on risk analysis by the IRS was not reviewed prior to issuance.

The IRS offered disclosure programs in efforts to resolve ERC claims. The NTA provided an update on those efforts as summarized below:

A. October 19, 2023, Withdrawal Process for unprocessed claims, received 11,832 requests. As of September 30, 2024, 10,873 were closed and 959 were still awaiting processing.
B. December 21, 2023, a voluntary disclosure program ("VDP") for taxpayers who received their claimed refund but subsequently determined their ERC claim was invalid (the 80% offer). There were 2,609 applications, but as of September 30, 2024, it had only executed closing agreements for 782.
C. August 15, 2024, a second VDP that required taxpayers to pay back 85% of the credit. While the program was open until November 22, 2024, NTA reported that as of September 30, 2024, the IRS had only received 48 applications.

The IRS receives more than 10 million paper-filed Forms 1040 each year and more than 75 million paper-filed returns and forms overall. Until recently, IRS employees had to manually transcribe the data from these returns into IRS systems. The IRS has made significant strides toward automation, now scanning about 58% of them but with a lofty goal of scanning 99% of paper-filed tax forms and information returns by 2025.

Paper is not the only processing issue causing delays as IRS systems rejected nearly 18 million (about 12 %) e-filed Forms 1040 last year. While these returns are rejected due to rules designed to prevent fraud, most of them are valid returns requiring taxpayers to resubmit and jump through hoops to get them processed on paper.

Tax practitioners have raised concerns about whether it is legally permissible for the IRS to reject e-filed returns under many of the current rejection scenarios and the NTA shares these concerns. NTA thinks there are multiple options to accomplish that goal without the IRS rejecting valid e-filed returns, especially returns requesting refunds.

At the end of October 2024, the IRS had over four million pieces of correspondence requiring manual processing and over 72% of the inventory in Accounts Management exceeded normal processing timeframes.[7] A significant portion of the Total Unprocessed Accounts Management Inventory from 2021 forward result from ERC claims that business taxpayers primarily claimed on amended Forms 941 and are also a significant factor in the percentage classified as overage.

The average cycle time to work individual taxpayer correspondence between Fiscal Year ("FY") 2023 to FY 2024 fell by nearly 30 days and the overage percent stood at 56.6%. However, business correspondence did not recognize an improvement in these metrics. The average cycle time stayed at 147 days, but the overage percent increased to

85.1%. This is work that customer service representatives who are also working the phones are assigned.

The Purple Book made a recommendation to improve tax administration with regard to amended returns. Recommendation #2 is to require the IRS to timely process claims for refund or credit. Millions of taxpayers file refund claims with the IRS each year, and under current law, there is no requirement that the IRS pay or deny them. It may simply ignore them. The taxpayers' remedy is to file suit in a U.S. district court or the U.S. Court of Federal Claims, and for many taxpayers, this is not a realistic or affordable option.

While the IRS generally does process refund claims, the claims can and sometimes do spend months and even years in administrative limbo within the IRS. The NTA recommends Congress require the IRS to act on claims for credit or refund within one year and impose certain consequences for failing to do so.

Tax-related identity theft has long been a threat to tax administration, but victims are experiencing significant IRS processing and refund delays. During FY 2024, the time to resolve Identity Theft Victim Assistance ("IDTVA") cases grew to more than 22 months and affected nearly half a million taxpayers. The time to resolve has grown from 120 days in FY 2020 to 676 days in FY 2024.

The NTA notes that tax-related identity theft has been more prevalent, but the IRS' outdated practices and prioritization of other service areas contribute to the delays that victims experience. "Until the IRS prioritizes providing timely resolution in identity theft cases, it will continue to burden victims with significant delays that have real financial consequences."

Taxpayers often become aware they are identity theft victims when they attempt to electronically file a tax return that IRS systems reject because another filing already used their Social Security number. Other times, the IRS discovers and notifies taxpayers of suspected identity theft. At the end of FY 2024, the IRS had an inventory of over 470,000 cases.

The good news is that the IRS reports the average case resolution time after assignment to an employee is only 30–40 days thus confirming the need to look at the processes being employed in this unit that result in the extreme cycle time. The IRS indicated that it intends to keep fully skilled identity theft employees focused on closing the tens of thousands of cases where victims are awaiting refunds and not reassigning them to work the IRS phone lines.

B. Taxpayer Service

The IRS generally provides taxpayer service through three vehicles—telephone lines, Taxpayer Assistance Centers ("TACs"), and online.

While the IRS achieved an 88% Level of Service ("LOS") on its Accounts Management lines during the filing season, the LOS measure does not include calls to telephone lines that fall outside the "Accounts Management" umbrella (which accounted for about 30% of all calls in FY 2024), calls where a taxpayer hangs up before the IRS places them in a calling queue, or calls made outside of filing season. For the full FY, the LOS for all toll-free lines was 56%, and only 32% of taxpayers reached an assistor.

The NTA went on to state that "of the 6.2 million calls the IRS received from taxpayers whose returns the IRS' identity theft filters had stopped and who were calling to authenticate their identities, the IRS answered only about 20%."

The NTA advocates for the IRS to adopt new telephone measures that more accurately gauge the taxpayer experience, such as the number of taxpayer issues resolved during the first call and prioritize answering non-Accounts Management telephone lines that serve largely vulnerable taxpayer populations, including the Installment Agreement/Balance Due, Taxpayer Protection Program, and Automated Collection System telephone lines.

The number of face-to-face TAC contacts rose to nearly two million in FY 2024. The NTA observed that in-person TAC visits have steadily increased between FY 2022 and FY 2024, while individual and business correspondence inventories have fallen between FY 2023 and FY 2024. The IRS has 363 TAC locations, but the IRS had to close 17 of those locations during the 2024 filing season due to staffing shortages.[8]

The IRS trains TAC employees to provide select services, including account inquiries, basic tax law assistance, acceptance of payments, and identity authentication for potential victims of tax-related identity theft.

Other assistance options the IRS has begun offering are virtual TAC service through Virtual Service Delivery ("VSD") and Web Service Delivery ("WebSD"). When using VSD, a taxpayer receives face-to-face assistance *via* IRS-provided videoconferencing equipment at a community partner location, such as a public library. VSD was offered at 13 locations and held 570 appointments in FY 2024. Web service delivery, which allows taxpayers to meet in a virtual conference using personal devices, has completed 10,442 appointments in FY 2024.

III. Fast-Track Settlement ("FTS") Program Pilot

On January 15, 2025, Announcement 2025-6 was issued addressing an FTS program pilot initiative.[9] The pilot program is testing changes to FTS programs currently available to taxpayers under examination by the IRS. It also describes pilot program changes to Post Appeals Mediation ("PAM") procedures and introduces a "Last Chance FTS" pilot program for Small Business/Self-Employed ("SB/SE") taxpayers.[10]

The FTS program formally established in 2003 is a voluntary mediation program that enables taxpayers that have unagreed issues in at least one open taxable year under examination to work together with Exam and the IRS Independent Office of Appeals ("Appeals") to resolve outstanding disputed factual and legal issues while the case is still in Exam's jurisdiction. FTS is optional for taxpayers and does not eliminate or replace existing dispute resolution options.

Under the pilot program, FTS can be applied to one or more issues in a taxpayer's case. In the past, if one of the issues in a taxpayer's case was not eligible for the fast-track program, the entire case was ineligible. In addition, participation in FTS will not disqualify a taxpayer from PAM. PAM is available to taxpayers nationwide who have non-docketed cases before Appeals.

Importantly, requests to participate in FTS and PAM will not be denied without the approval of a first-line executive. If taxpayer requests are formally denied, they will now receive an explanation for the denial.

For SB/SE taxpayers, there will also be a limited-scope Last Chance FTS pilot program. When a taxpayer submits a protest in response to a 30-day or equivalent letter issued at the conclusion of an examination, the SB/SE Group Manager will ask Appeals to contact the taxpayer to inform the taxpayer of the FTS option. If the taxpayer and the SB/SE examination team consent to participate, the rules of traditional FTS apply. The program intended to further publicize the availability of FTS will initially be limited to select cases under examination by SB/SE revenue agents and tax compliance officers and will not impact a taxpayer's eligibility for FTS. The stated objective is to determine whether participation in FTS increases when taxpayers are reminded of their FTS options immediately prior to the case entering Appeals' jurisdiction.

These changes are intended to extend the provisions of the current programs to a wider range of cases and to increase usage and oversight of Alternative Dispute Resolution ("ADR"). The piloted changes will be evaluated during a two-year period to determine the degree to which the updates should be discontinued, adjusted, or made permanent.

Taxpayers are encouraged to submit written comments on these changes that could lead to improvements within the FTS program.

IV. Circular 230 Proposed Regulations

In December 2024, the Department of the Treasury and the IRS issued proposed regulations that seek to update rules contained in Circular 230 for tax professionals looking to practice before the IRS.

"The IRS Office of Professional Responsibility generally has responsibility for matters related to practitioner conduct, and exclusive responsibility for discipline, including disciplinary proceedings and sanctions. The proposed regulations, if finalized, would amend Circular 230 in various ways to account for changes in the law and the evolving nature of tax practice," the IRS said in a statement.[11]

The proposed regulations remove or update specific parts of Circular 230 that relate to registered tax return preparers and tax return preparation. Before 2011, individual tax return preparers were typically not subject to Circular 230 unless the preparer was an attorney, certified public accountant ("CPA"), or enrolled agent. In 2011, the IRS published final regulations that, in short, required tax preparers to become registered tax return preparers subject to Circular 230.

These regulations were challenged in Loving,[12] with the court ruling that practice before the IRS was limited to representing taxpayers before the IRS by assisting them in presenting their cases. This decision was later upheld.

The proposed regulations address a number of issues that resulted in 705 comments being submitted. Issues commented on include those related to contingent fees currently under §10.27 and in proposed §10.51 that proposes the charging of contingent fees in connection with the preparation of an original or amended return or claim for refund or credit constitutes unconscionable fees resulting in disreputable conduct.

According to the regulations, disreputable conduct would include "both charging contingent fees in connection with the preparation of an original or amended tax return or claim for refund or credit, and charging fees that, under the facts and circumstances, are unconscionable fees."

The regulations propose the assessment of Code Secs. 6694, 6700, 6701, and 6662 penalties as the standard for when a taxpayer is found to have engaged in disreputable conduct. Further, the authority to censure, suspend, or disbar practitioners engaged in disreputable conduct is expanded in the proposed regulations.

Likewise proposed §10.21 would require practitioners to explain actions a client should take to correct noncompliance, an error, or omission. Knowingly failing to inform the client would be considered disreputable conduct.

Proposed §10.33 addresses best practices that include addressing the creation of a data security policy, identification of mental impairment of the tax practitioner, and establishment of a business continuity and succession plan.

Rules related to appraisers, including the standards for disqualification, are also included in the proposed regulations.

V. February 2025 TIGTA Report

TIGTA Report Number 2025-IE-R007 released on February 10, 2025 detailed a series of unfortunate findings regarding the IRS' phone services. As tax practitioners enter a new filing season, many are curious about the IRS' phone service capabilities. Based on the TIGTA Report from last filing season, tax practitioners were certainly hoping for improvements.[13]

In 2024, the Secretary set an expectation for the IRS to provide an average level of service of 85%, reduce the average wait time to five minutes or less, and provide nearly all callers with the ability to take advantage of a callback option.

TIGTA's analysis included the testing of 103 telephone lines, making a total of 412 test calls from February 22 through April 19, 2024. During the test calls, TIGTA was placed on hold for 30 minutes or more on 18 of the 103 telephone lines, and calls were disconnected on 28 of the 103 telephone lines.

When provided the option for a callback, the Customer Callback feature worked well for the test calls. However, according to the TIGTA Report, the IRS needs to clarify that this option is available only in certain situations. For example, the callback option is not offered until the wait time to speak to an IRS representative is 15 minutes or more.

In an April 15, 2024 press release, the IRS indicated it offered a customer callback option on 97% of the telephone lines during the 2024 Filing Season.[14] This option was offered to over four million taxpayers during the 2024 filing season, more than doubling the 1.8 million taxpayers provided the option during the 2023 Filing Season.

"According to IRS management, the call volume of the Accounts Management telephone lines during the 2024 Filing Season was more than 28 million calls (72 percent) of the overall call volume on all telephone lines totaling more than 39 million calls," the report said.

The IRS reported the average level of service at 87.6% and a wait time of 3.4 minutes, which met the Secretary's expectations. TIGTA noted that while most of the call volume is on the Accounts Management telephone lines, the limitation of reporting on only these telephone lines is not being clearly communicated to the public.

TIGTA's evaluation also identified that disconnected calls (where the IRS terminates a call before talking to a taxpayer) continued to be a problem for taxpayers. They noted that in addition to their experience during the test calls with disconnects, taxpayers have been sending complaints *via* their website expressing frustration with the IRS' telephone service and calls being automatically disconnected.

"If a taxpayer had been put on hold for two hours, the IRS used to place the taxpayer back in the queue, which enabled them to remain eligible for service. However, the IRS stopped this practice. As a result, a taxpayer could now be on hold for up to two hours and then get a voice notification that their call was being automatically disconnected," the TIGTA report said.

IRS management advised there were 259,878 callers during FY 2023 and 84,323 callers during the first quarter of FY 2024 (October through December) who were disconnected.

While the number of disconnected calls is low compared to the overall number of telephone calls received each year, taxpayers may be frustrated to wait on hold for two hours and get disconnected without speaking to an IRS representative and getting the assistance they need.

In terms of recommendations, TIGTA suggested that the IRS ensure all telephone lines providing information regarding identity theft and scams provide a Spanish language option as well.

"Additionally, the IRS should conduct an analysis of the disconnects and provide more context regarding the customer callback feature in public communications," the report said.

IRS management agreed with the recommendations, adding that it plans to take corrective actions, while also noting that high customer demand and availability of trained agents sometimes prevents the IRS from connecting callers to IRS representatives.

ENDNOTES

1. *See* National Taxpayer Advocate-Annual Report to Congress 2024, link available at *www.taxpayeradvocate.irs.gov/reports/2024-annual-report-to-congress/full-report/*.
2. *See* Announcement 2025-6, Pilot Program Changes to Fast Track Settlement, link available at *www.irs.gov/pub/irs-drop/a-25-06.pdf*.
3. *See* Regulations Governing Practice Before the Internal Revenue Service, Published Document 2024-29371 (89 FR 104915), link available at *www.federalregister.gov/documents/2024/12/26/2024-29371/regulations-governing-practice-before-the-internal-revenue-service*.
4. *See* TIGTA Report Number 2025-IE-R007, Limited Testing Showed Taxpayers May Not Receive the Service They Expect When Calling the IRS Toll-Free Telephone Lines, link available at *www.tigta.gov/sites/default/files/reports/2025-02/2025ier007fr_0.pdf*.
5. As of February 28, 2025, the website indicates that 941X paper returns, except ERC, are currently being processed for those filed in February 2024. Link available at *www.irs.gov/help/processing-status-for-tax-forms*.
6. *See* Figure 2.1.2 from NTA Report on page 9 of full report.
7. *See* Figure 2.2.3 (page 30 of full report).
8. In a recent announcement, it was noted that 110 TACs will be closed when their leases expire.
9. *See* Announcement 2025-6, IRB 2025-5, Pilot Program Changes to Fast Track Settlement, link available at *www.irs.gov/pub/irs-drop/a-25-06.pdf*.
10. *See* Rev. Proc. 2014-63, IRB 2014-53, 1014, link available at *www.irs.gov/irb/2014-53_IRB#RP-2014-63*.
11. *See* Treasury and IRS propose regulations to update rules for tax professionals who can practice before the IRS, link available at *www.irs.gov/newsroom/treasury-and-irs-propose-regulations-to-update-rules-for-tax-professionals-who-can-practice-before-the-irs*.
12. DC-DC, 2013-1 USTC ¶50,156, 917 FSupp2d 67.
13. *See* TIGTA Report Number 2025-IE-R007, Limited Testing Showed Taxpayers May Not Receive the Service They Expect When Calling the IRS Toll-Free Telephone Lines, link available at *www.tigta.gov/sites/default/files/reports/2025-02/2025ier007fr_0.pdf*.
14. *See* IRS delivers strong 2024 tax filing season; expands services for millions of people on phones, in-person and online with expanded funding, link available at *www.irs.gov/newsroom/irs-delivers-strong-2024-tax-filing-season-expands-services-for-millions-of-people-on-phones-in-person-and-online-with-expanded-funding*.

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Global View

The Trump Administration Impacts International Taxation

By Robert J. Misey, Jr.*

The beginning of the Trump Administration has brought a whirlwind of activity in the tax arena. This column will focus on the three changes that impact international tax the most—substantive changes to international tax provisions, reducing the Internal Revenue Service ("IRS") workforce, and reducing regulations.

I. International Tax Provisions

This column has spent minimal time discussing Pillars One and Two of the Base Erosion Profit Shifting ("BEPS") from a Global Tax Deal because the chances of it becoming U.S. law were very minimal. The Global Tax Deal that the Biden Administration executed was merely an Executive Order—it did not have the effect of substantive tax law as a treaty or a Code Section would have. Moreover, it was obvious that the Biden Administration did not have the votes in Congress to solidify BEPS as U.S. tax law *via* either a Code Section or a treaty. President Trump has indicated that BEPS is not the law of the land and, accordingly, BEPS appears to be dead.

In addition to effectively killing BEPS, President Trump told the Secretary of the Treasury to investigate the possibility of applying Code Sec. 891 against foreign taxpayers whose countries have tax systems that either discriminate or impose extraterritorial taxes on U.S. citizens or corporations. Never before applied, Code Sec. 891 permits the President to double taxes on foreign persons. As a result, if, for example, President Trump found a foreign country's taxes to be discriminatory, he could automatically double the tax rate on that foreign country's individuals from 37% to 74% and corporations from 21% to 42%.

As a candidate, President Trump promised a 15% tax on exports, without any specifics on how to achieve that rate. As of the date of this writing, there is still not any *indicia* how his Administration will do this. A simple way to effectuate this would be to refine the deduction for Foreign-Derived Intangible Income ("FDII") so that the effective rate for a corporate exporter is 15% and decrease the individual tax rate on a dividend received from an interest charge domestic international sales corporation ("IC-DISC") from 23.8% to 15%.

II. Reducing the IRS Workforce

The Trump Administration's designs to reduce the size of the IRS (as well as all governments) will have a disproportionately large impact on international taxation.

Every IRS employee has a one-year probationary period. Once the probationary period ends, the IRS has difficulty firing employees. Before the probationary period ends, the IRS can fire employees without cause.

The IRS has put great emphasis on hiring into the Large Business & International ("LB&I") Division.[1] In fact, LB&I has held numerous job fairs and other hiring activities in the last year. Because these new LB&I employees will still be in the probationary period, they will be the easiest for the IRS to fire.

III. Reducing Regulations

President Trump has taken steps to reduce the regulatory burden. In his first Administration, he required eliminating two regulations for every newly promulgated regulation. Now, he has increased the ratio of eliminated regulations from two to one to ten to one. Unfortunately, the problem with IRS regulations is not just the number of regulations but the size of each regulation.

My favorite book to show other tax professionals is entitled *Canadian Income Tax Act and Regulations*. That single volume contains the Canadian Income Tax Act (Canada's version of the Internal Revenue Code), Canada's Tax Regulations, and Canada's income tax treaties with the United States and with the United Kingdom. In contrast, the United States has a two-volume set of the Internal Revenue Code and eight volumes of tax regulations containing over 13,160 pages.

In addition to the number of regulation projects that the army of IRS attorneys in Washington draft, the excruciating level of detail in each newly issued regulation leads to undue length and complexity. In 1995, when my branch of the IRS Chief Counsel (International) issued 67 pages of transfer pricing regulations, we were lambasted by the tax press. Now, the IRS rarely issues regulations that are less than 100 pages in length.

Moreover, three regulatory projects show the increased length and complexity of regulations. The FDII statute is two pages long. However, the final FDII regulations are 155 pages long plus a 154-page preamble. The Global Intangible Low-Taxed Income ("GILTI") statute is three pages long. However, the final GILTI regulations are 138 pages long plus a 188-page preamble. Finally, the IRS just issued 190 pages of previously taxed earnings and profits regulations with a 142-page preamble.

In addition to the traditional criticisms of the regulatory burdensome impact on business, the extremely long regulations greatly impact the quality of the knowledge of tax advisors. Only the largest law firms and accounting firms will have the resources to learn and understand these extremely long regulations, creating a barrier to entry into the profession.

In addition to the traditional criticisms of the regulatory burdensome impact on business, the extremely long regulations greatly impact the quality of the knowledge of tax advisors. Only the largest law firms and accounting firms will have the resources to learn and understand these extremely long regulations, creating a barrier to entry into the profession. Accordingly, smaller firms, who represent and advise the majority of small businesses, will not have those resources, and smaller businesses will lose out on tax-saving opportunities and be caught in traps for the unwary.

ENDNOTES

* Robert J. Misey previously worked for the IRS Chief Counsel (International) in Washington, DC.

[1] Dan Werful, former IRS Commissioner, speaking at the GWU-IRS International Tax Conference, December 14, 2023.

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Ethics

General Ethical Considerations for Tax Controversy Attorneys and Proposed Amendments to Circular 230—Implications for Tax Practitioners

By Cory Stigile, Sarah Green, Josh O. Ungerman, Rami Khoury, and Darianne De Leon*

Maintaining strict ethical standards is essential for all tax practitioners. The Office of Professional Responsibility oversees the professional conduct of attorneys, Certified Public Accountants (CPAs), and enrolled agents who practice before the Internal Revenue Service (IRS). In recognition of increasingly complex professional obligations, the Department of Treasury has recently proposed amendments to Circular 230 that refine ethical requirements and underscore the importance of integrity, competence, diligence, and confidentiality. Below are a few examples.

Under the American Bar Association's Model Rule 1.6, attorneys are required to protect client information from unauthorized disclosure, except when clients give informed consent or when the law compels disclosure. Although Code Sec. 7525 extends a similar privilege to non-attorney tax practitioners, it does not apply in criminal matters or in cases involving tax shelters. Circular 230 §10.20 mandates that practitioners provide requested information to the IRS unless a valid claim of privilege exists, and any claim of privilege must be made in good faith and based on reasonable grounds. Tax practitioners are further expected to maintain "fitness to practice" by demonstrating good character, a strong professional reputation, and the requisite qualifications for competent representation before the IRS.

Tax practitioners must also avoid conflicts of interest as outlined in ABA Rule 1.7 and Circular 230 §10.29, which define conflict as a material limitation on representation due to competing obligations to another client or the practitioner's own interests. Before representation proceeds in such instances, the practitioner must obtain informed consent from each affected client, and if the conflict remains irreconcilable, the practitioner is obliged to withdraw. It is important to address these issues upfront because other rules will bring potential conflicts to the surface. For instance, in Tax Court proceedings, Tax Court Rule 24 sets forth that if counsel represents more than one person with differing interests with respect to any issue in a case, then that counsel must either secure the client's informed written consent, withdraw from the case, or take other appropriate steps. For instance, the court may inquire regarding how counsel addressed a conflict issue when an innocent spouse issue is before the court. This interaction will put a spotlight on whether counsel appropriately addressed conflicts during the engagement process, and before the Petition was filed with the court.

Under Circular 230 §10.22, practitioners must use due diligence to ensure that representations made to clients and to the IRS are accurate and well-supported, requiring reasonable inquiry into any information that appears inconsistent or incomplete. Due diligence includes the practitioner identifying whether a statement withstands the "smell test" and makes sense considering other disclosures and return filings by the client. For instance, a practitioner should think twice when evaluating an employee retention credit claim if the company claiming the credit did not reflect wages for employees on their income tax filings.

The standards found in Circular 230 §10.34 require practitioners to advise clients about potential penalties associated with tax and to ensure that any positions taken are supported by appropriate factual and legal foundations. If a position contains significant uncertainty, disclosure through Form 8275 or Form 8275-R may mitigate potential penalties. Non-compliance with these ethical and procedural rules can result in severe sanctions, particularly where practitioners rely on other professionals' work or on artificial intelligence (AI)-generated tax analysis without exercising reasonable care.

In recently proposed amendments to Circular 230, the Department of the Treasury addresses multiple areas that heighten ethical responsibility. These changes include stricter parameters governing contingent fees in tax representation, clarification of a practitioner's duty to address and correct errors in filings, broader requirements for factual analysis and evaluating assumptions, and explicit obligations to advise clients on penalty mitigation strategies. Particularly, with respect to the proposed Circular 230 changes relating to providing advice relating to past or general non-compliance (Section 10.21), tax practitioners have expressed concern over the proposed changes as the proposed changes may require the practitioner to render advice that would be detrimental to the best interests of their clients.

There is also a new emphasis on the proposed Circular 230 changes relating to maintaining proficiency with evolving technologies and AI-driven tax tools. Additional proposals seek to deter misleading or overly aggressive tax positions, raise qualification standards for tax-related appraisals, and enable more rapid disciplinary action when practitioners engage in egregious ethical breaches. Therefore, the proposed amendments to Circular 230 impose more rigorous ethical requirements, increasing the responsibilities placed on practitioners with respect to diligence and accountability.

Non-compliance with these ethical and procedural rules can result in severe sanctions, particularly where practitioners rely on other professionals' work or on artificial intelligence (AI)-generated tax analysis without exercising reasonable care.

As highlighted by the proposed Circular 230 changes, tax professionals must regularly update their knowledge of evolving ethical guidelines to uphold their professional duties. These and other standards will enable practitioners to meet heightened expectations and continue fulfilling their ethical obligations in an evolving environment.

ENDNOTE

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Selling Your Home Without Satisfying an IRS Tax Lien

By Alison Gadoua*

"We cannot support our family in our current home but cannot sell it because of the IRS lien." Have you ever heard such frustration/dejection by a family facing Internal Revenue Service ("IRS") debt and a very tight financial budget? They theorize that they can live more inexpensively month-to-month if they could only sell their house and get out of paying its high costs. However, the IRS liens prevent them from doing so.

The family's frustrations and conclusions are unfounded, and the real estate can be sold without satisfying the IRS lien. See the section below on Lien Discharges.

The IRS Lien

An IRS lien filing is a daunting challenge for many individuals and businesses. If your client (the "Taxpayer") owes money to the IRS, then it is very likely that the IRS has filed or will file a Notice of Federal Tax Lien ("NFTL") against your client to secure the debt.

With respect to real estate, the NFTL protects the government's interest in the equity in all existing real property of the Taxpayer in the county in which the NFTL is filed. In simpler terms, it is the IRS' way of ensuring they get their due should you decide to liquidate your assets.

In order for the IRS to have an effective lien on the Taxpayer's property, the county and name must match. That is, the NFTL is effective only on property of the Taxpayer in the county in which the NFTL is filed. In some instances, the IRS will (as they should) file the NFTL in multiple counties knowing that the Taxpayer had properties in multiple counties. Note that a NFTL against a Taxpayer does not impact real property in the name of an LLC or corporation owned in whole or in part by the Taxpayer.

A common misconception is that the IRS NFTL appears on an individual's credit report. In years past, this was true. However, in April 2018, IRS NFTLs were no longer reported to the credit bureaus.

The IRS will advise taxpayers of the filing of a NFTL *via* certified mail to the taxpayer's last known address. However, if one is uncertain whether or not a NFTL

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has been filed, they can check their IRS transcripts or do a title search at the county clerk's office.

IRS Release of Lien

The fastest way to have the tax lien released is to pay your debt in full. IRS liens are self-releasing which means that the IRS lien will automatically be released within 45 days of the debt being paid in full. A Certificate of Release of Lien will then be mailed to the county clerk's office where the lien was filed to be recorded and removed from the taxpayer's record.

A lien discharge is one of many avenues available to taxpayers dealing with the weight of an IRS lien.

If a taxpayer is in the process of selling a property that is encumbered by an IRS lien and there will be sufficient proceeds from the sale to satisfy the lien, then a lien payoff letter should be obtained from the IRS. You can obtain a lien payoff letter by contacting the Centralized Lien Operation unit at 800-913-6050. It is important that the payoff figure is calculated through the date of the scheduled closing or even a week after the scheduled closing date to provide a little extra cushion in case of delays. The IRS will typically provide the payoff letter the same day it is requested. The payment for the IRS will be issued at closing and should be sent to the IRS along with a copy of the payoff letter to the address at the bottom of the letter. The lien will then be released within 30 days after the IRS receives the payment and the Certificate of Release will be sent to the county clerk's office where the NFTL was originally filed. Alternatively, an immediate Certificate of Release of the lien can be obtained by visiting a local IRS office that can accept the payment.

IRS Lien Discharge Request

The IRS will discharge a property from its lien if you agree to pay the IRS the value of their interest, which may at times be $0.[1] A discharge does not remove the lien from the taxpayer. Rather, the discharge removes the lien from a specific property so that the new owner can receive the property free of the IRS lien.

Form 14135, *Application for Certificate of Discharge of Property from Federal Tax Lien*, is utilized to secure lien discharges. The form requires you to provide supporting documentation proving that there is no leftover equity (after payment of mortgages and debt having priority over the IRS, as well as closing costs) for the IRS. Let us break down what supporting documents are needed in your submission for an IRS lien discharge request and why they are needed.

Sales Contract. This requirement is an obvious one as you cannot request a lien discharge on a property without proof that there is an active deal on the table! The IRS is also looking to confirm that the buyer of the property being sold is unrelated to the taxpayer. Be sure to provide any amendments that have been made to the original sales contract with your submission.

Deed of Property Being Sold. Providing the Deed to the property being sold is a requirement in your lien discharge request package as it provides proof that the taxpayer is the current and rightful owner of the home and provides the full legal description of the property so that the IRS can independently value the property.

Settlement Statement (formerly known as the HUD-1). The settlement statement, at the time of submission, will be in draft form. This document is crucial for the IRS as it breaks down, in detail, all of the settlement costs needed to close on the property and outlines what proceeds the IRS will receive from the sale. Often, the professionals involved in the purchase and sale of the property are hesitant to provide a draft settlement statement as it requires an additional title search some 30–60 days prior to actual closing. It sometimes takes a little finessing to ease their concerns but the most important message you need to convey to these professionals is that it is crucial not to overstate what the IRS will receive.

Comment. You can (and should) build in an amount for your fees for handling the lien discharge request to the draft settlement statement so long as the IRS deems the amount "reasonable." Your fees must be related only to the services in securing the discharge and must be paid out of the closing proceeds.

Appraisal of Property Being Sold. Submitting a formal appraisal with your lien discharge request provides proof to the IRS that the sales price on the sales contract is fair. In order for the IRS to agree to release this property as security on their debt, they need to know that you are not undervaluing the property. In addition to the appraisal, the IRS requests that you send a county valuation of the property, an informal valuation of the property by a disinterested third party, or a document showing the proposed selling price if the property is being sold at auction.

Comment. If you are in a time crunch and are unable to obtain a true appraisal by the time you submit the lien discharge package, you can submit the request anyway! In this case, I recommend submitting a "comp sale" report prepared by a realtor who is not directly involved in the sale of the home.

In addition to the "comp sale" report, we recommend submitting the most recent real estate tax bill as well as the county equalization table for the property being sold. The property tax bill will reflect the net taxable value of the property being sold. Dividing the taxable value by the equalization rate will yield the county's interpretation of the property's fair market value ("FMV"). For example, a property with a taxable value of $200,000 and an equalization rate of 80% would have a FMV of $250,000 (200,000 divided by 0.8). We have found success in submitting these documents in lieu of the appraisal, which allows the IRS to begin reviewing the request package. However, be prepared to follow up with a true appraisal while the lien discharge request package is under review as the IRS will usually require this.

Title Report. The Title Report is the lien/judgment search discussed earlier in this article. The title agency that is involved in the sale of the property will obtain this report which will show all encumbrances on the property. The IRS is looking to ensure that debts you claim as being senior to that of the IRS are clearly indicated as such on the title report.

Mortgage & Senior Lien/Judgments Payoff. If there is an existing mortgage on the property that was obtained prior to the filing of an IRS lien, the mortgage balance will be paid in full at the time of the sale. One of the line items on the draft settlement statement is saved for the mortgage payoff so that it is captured in the overall calculation of the proceeds left over in the transaction. You will need either an official payoff letter from the mortgage company or a recent mortgage statement that shows the current balance of the mortgage. This mortgage balance/payoff figure MUST match what is listed on the draft settlement statement. If there is more than one mortgage on the property, you will need to obtain this same documentation for each existing mortgage and submit it with your request. In addition, if there are any other liens/judgments that were filed prior to the NFTL, you would need to provide payoffs for those in your submission as well.

Copy of the Federal Tax Lien. You may be thinking, cannot the IRS look up their own lien? I am sure that they could, but it is a required supporting document as per Form 14135. If you do not have a true copy of the NFTL, you can just refer the IRS to the Title Report as the lien will be listed there.

The Cover Letter and Logistics

So, now that you have your completed form and all supporting documentation that is required you would assume you are ready to submit your lien discharge request package to the IRS, right? Wrong! Well, you could go ahead and submit, but we have heard directly from IRS agents at our local IRS Advisory office that they very much appreciate our detailed cover letter that we submit along with our request. This cover letter reiterates all of the information that can be found on Form 14135 as well as the supporting documents but provides all of this in one clear and concise letter, which computes the ultimate payment that will be made to the IRS upon the sale.

Our cover letter provides the full details behind the disbursements/adjustments of the transaction and deducts those disbursements/adjustments from the net sales price to further show the IRS exactly what proceeds will be left over for the IRS, if any. If you wish to request an expedited discharge, state so in your cover letter. The bottom line is: the more complete and detailed your original submission is, the faster you receive a response from the IRS.

Having a knowledgeable representative with a proven track record assisting taxpayers in determining which avenue will work best to combat the IRS lien is truly essential.

IRS Publication 4235 provides the address and telephone/fax numbers for the centralized unit within the IRS that handles the assignment of your lien discharge request. You cannot submit your request package directly to your local IRS Advisory office. We recommend submitting your request *via* facsimile, rather than mailing, to the centralized unit. Their fax number is 844-201-8382. After submitting your request, the centralized unit will typically assign your request to the local IRS Advisory office within several days of receiving your request. Your request will be assigned to an IRS agent within the local office who will review and verify the information provided and determine whether a Certificate of Discharge should be issued. Our standard practice is to contact our local IRS Advisory office within 10 days of submission of the discharge request to the centralized unit to see who has been assigned.

Next Steps After Making a Lien Discharge Request

The agent assigned will usually contact you with any questions they have on the request submitted and/or may request additional information/documentation to support your request. If everything in your request is in order, the agent will send you a Letter 403, which is the Conditional Commitment to Discharge Certain Property from Federal Tax Lien ("Conditional Commitment"). This Conditional Commitment letter confirms that the IRS will discharge their lien so long as they receive proceeds that are not less than what is reflected on the draft settlement statement. This is why we mentioned above how important it is to not overstate the IRS proceeds on the draft settlement statement. This letter will also clearly state that the seller(s) of the property is to receive NO proceeds from the sale of the property. Moral of the story … the IRS wants (and is entitled to) every leftover penny of that sale to apply to the tax debt in excess of senior liens and closing costs.

Due to the nature of real estate sales, the IRS works through these cases quickly. Our experience is that they turn the cases around within 30 days of our providing a complete package. However, the IRS has 45–60 days to respond to your request.

The Conditional Commitment letter is valid for 30 days. However, the IRS may extend or renew the Conditional Commitment if appropriate supporting documentation is submitted that meets the criteria for renewal or extension. In a recent case at our firm, the sale of a property was delayed due to an underground oil tank that had to be removed from the property. The IRS agent assigned to our matter provided an additional three weeks for the tank to be removed and for the sale to be completed.

After the closing takes place, you will need to send full payment of the proceeds of the sale to the IRS along with a copy of the deed or other document showing that the taxpayer is divested of rights, title, or interest in the property and a copy of the final settlement statement for the transfer of the property. The payment is required to be in the form of a check. You cannot wire the sale proceeds to the IRS. The IRS will apply the payment in a manner that is in the best interest of the IRS, which is usually the debt of the oldest tax period. You cannot direct the funds to be applied elsewhere.

If you are unable to complete the sale within 30 days and do not request an extension of time from the IRS agent assigned, the IRS Advisory office will deny your discharge request. If your request is denied, you will receive a letter from the IRS explaining why the discharge request was denied and providing you with a Form 9423, *Collection Appeal Request*, allowing you to appeal the denial. Alternatively, you can request to speak to the Advisory Manager in the local office to see if you can come to a resolution without having to go to IRS Appeals.

Lien Discharge with Zero Proceeds for the IRS

But what happens if there are no proceeds leftover for the IRS after all allowable expenses and senior encumbrances are paid at the sale? Will the IRS still provide approval for a request to discharge their lien? Yes! You may be wondering why the IRS would agree to anything if there were nothing in it for them. Well, they have to! Code Sec. 6325(b)(2)(B) provides that a discharge can be issued when it is determined that the government's interest in the property has no value. Often, a taxpayer can no longer afford their home and getting out of that mortgage payment could allow the taxpayer to increase the amount of their monthly payments to the IRS if they are in an existing installment agreement. This is not a requirement for the lien discharge but helps to "sweeten the deal."

Conclusion

A lien discharge is one of many avenues available to taxpayers dealing with the weight of an IRS lien. Having a knowledgeable representative with a proven track record assisting taxpayers in determining which avenue will work best to combat the IRS lien is truly essential.

For more information, please *see* IRS Publication 783, which further details how to apply for a Certificate of Discharge from Federal Tax Lien.

ENDNOTES

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[1] Code Sec. 6325(b)(2).

The Power of $1: New Cases Showing Qualified Offers as a Tax Dispute Strategy

By Hale E. Sheppard*

I. Introduction

People of a certain age are fond of saying that $1 does not buy what it used to. That might be true in many contexts, but $1 still has tremendous power when it comes to tax disputes. One problem is that lots of taxpayers and tax professionals are oblivious to this reality. Specifically, they are unaware of a tool called the "Qualified Offer," and even if they know of its existence, they do not appreciate the tricky substantive and procedural details. Among other things, they have not heard of two cases, one decided as recently as November 2024, holding that taxpayers can submit Qualified Offers of merely $1 in an effort to convince the Internal Revenue Service ("IRS") or Department of Justice ("DOJ") to settle a case before litigation. This article, which builds on several earlier ones by the same author, describes the principal mechanisms taxpayers can use to seek fee reimbursement and explores two key cases analyzing the validity of nominal Qualified Offers.[1]

II. General Method for Cost Recovery—Be the Prevailing Party

Taxpayers who defeat the IRS ordinarily escape additional taxes, penalties, and interest. Depending on the circumstances, they also might recoup from the government some of the costs of defending themselves. This possibility derives from Code Sec. 7430, several aspects of which are described below.

A. Purpose

Legislative history indicates that the objective of Code Sec. 7430 is to "deter abusive actions or overreaching by the [IRS] and … enable individual taxpayers

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to vindicate their rights, regardless of their economic circumstances."[2] In other words, Congress wanted to prevent the IRS from surpassing its authority and give taxpayers the ability to make the IRS pay, literally and figuratively, for its excesses.

B. Overview

Code Sec. 7430 generally provides that the "prevailing party" in any administrative proceeding before the IRS, or in any litigation brought by or against the government in connection with the determination, collection, or refund of any tax, penalty, or interest may be awarded reasonable administrative and/or litigation costs.[3]

People of a certain age are fond of saying that $1 does not buy what it used to. That might be true in many contexts, but $1 still has tremendous power in tax disputes.

C. Standards

To recoup costs under the normal rules, taxpayers must be the "prevailing party." This generally means the party in any tax-related administrative proceeding or litigation that has largely succeeded with respect to *either* the amount in dispute *or* the most significant issue, *and* has a net worth that does not exceed certain thresholds.[4]

D. Administrative Remedies

A taxpayer might not be able to recover costs from the government, even if it prevails and meets the net worth requirement. Other obstacles exist. The taxpayer, for instance, must exhaust all administrative remedies available.[5] According to the IRS, this duty mandates that a taxpayer participate in a conference with the Appeals Office if offered, regardless of the stage at which this occurs.[6] IRS guidance explains the following on this topic:

> If appeal rights are given prior to the [notice of deficiency] then the [taxpayer] must request a conference with Appeals prior to filing a petition with the tax court to exhaust administrative remedies. If for varying reasons the [taxpayer] is not given appeal rights prior to the [notice of deficiency] then the [taxpayer] is excused from exhausting administrative remedies prior to petitioning the tax court.
>
> However, if after filing a petition with the tax court counsel refers the case to Appeals or gives the [taxpayer] the opportunity to go to Appeals, then the [taxpayer] must participate in an Appeals conference to exhaust administrative remedies.[7]

E. Delays

To preserve eligibility for cost recovery, the taxpayer cannot "unreasonably protract" the proceedings with the government.[8]

F. Substantial Justification

As explained earlier, the term "prevailing party" normally means a party in any tax-related administrative proceeding or litigation that has been victorious when it comes to either the amount in dispute or the most significant issue and has an acceptable net worth.[9] Even if the taxpayer meets these criteria, it nonetheless will *not* be the "prevailing party" in situations where the government establishes that its positions were "substantially justified."[10] Put differently, in cases where the government manages to prove that its positions, although losers, were substantially justified, the taxpayer cannot recover costs. Figuring out what "substantially justified" means for purposes of Code Sec. 7430, therefore, is critical. Details follow.

1. Evolution Favoring Taxpayers

The burden initially was on the taxpayer to demonstrate that the government's position was *not* substantially justified. This changed with the enactment of the Taxpayer Bill of Rights 2, which shifted the responsibility to the government.[11] According to legislative history, "the successful taxpayer will receive an award of attorney's fees unless the IRS satisfies its burden of proof."[12]

The Taxpayer Bill of Rights 2 introduced another major change. It stated that a position adopted by the IRS during a dispute would be unjustified if it was contrary to guidance disseminated to the general public or to private guidance supplied to a particular taxpayer.[13] Now, there is a rebuttable presumption that the government's position is *not* substantially justified if it fails to follow its "applicable published guidance."[14] This includes temporary or final regulations, revenue rulings, information releases, notices, and announcements.[15] It also encompasses various items issued to the specific taxpayer involved in a dispute, such as private letter rulings, technical advice memoranda, and determination letters.[16]

Congress introduced additional measures favoring taxpayers when it passed the Taxpayer Bill of Rights 3.[17] That legislation empowered the courts to take into account whether the government has lost on similar issues in appellate courts for other circuits.[18] Congressional reports highlight the purpose for this increased pressure: Congress was concerned that the IRS would continue to litigate issues in multiple circuits with hopes of obtaining a positive outcome somewhere.[19] That practice, say the reports, places an undue burden on taxpayers.[20]

2. Standards Reflected Regulations and Cases

The regulations help clarify what constitutes a substantial justification. Specifically, they explain that the government's position passes muster only if it has a reasonable basis in both fact and law.[21] A significant factor in making this determination is whether the taxpayer presented all relevant information under its control to the appropriate IRS personnel.[22]

Caselaw, likewise, is helpful in identifying what represents a substantial justification when it comes to cost recovery under Code Sec. 7430. Certain courts have developed a non-exhaustive list of items to evaluate. Among them are the (i) stage at which the issue or litigation is resolved, (ii) opinions of other courts on the same issue, (iii) legal merits of the government's position, (iv) clarity of applicable law, (v) foreseeable length and complexity of the litigation, and (vi) consistency of the government's position.[23] Other courts have utilized a different approach, scrutinizing whether the position taken by the IRS was reasonable.[24] These courts hold that a position is adequate if it is "justified to a reasonable degree that could satisfy a reasonable person or that has a reasonable basis in both law and fact."[25] Still other courts employ a different test. They frame the question as whether the government knew, or should have known, that its position was invalid.[26]

3. Looking at the Entire Picture

Another key issue is whether, when dealing with a tax dispute involving *multiple* claims by the IRS, a court should evaluate the IRS' position as a whole or on an issue-by-issue basis. Several cases have held that the latter method is best.[27] One noteworthy case is *Johnson*, where the government filed suit in the District Court to collect federal estate taxes from the children of a deceased taxpayer based on several legal theories.[28] The District Court initially ruled for the children on the substantive issues, while also awarding them legal fees.

The fighting continued, and the Tenth Circuit Court of Appeals later held for the government in certain respects and for the children in others. When it came to the question of fee recoupment, the first chore for the Tenth Circuit was determining whether the term "position," as used in Code Sec. 7430, means the government's "overall contention" or the "individual arguments" it makes as to each underlying theory. The Tenth Circuit concluded that the District Court had erred "by improperly focusing on the correctness of the government's argument on each claim for relief, rather than properly focusing on whether there was a reasonable basis both in law and fact for the government's overall position in the litigation." The Tenth Circuit went on to explain that, in a multi-issue lawsuit, the holistic approach requires considering the reasonableness of the government's position in initiating and continuing litigation, not merely the government's success or failure on a particular theory.

III. Special Method for Cost Recovery—Make a Qualified Offer

The preceding segment of this article explained how a taxpayer, who becomes the "prevailing party" and meets other criteria, might recover costs from the government. There is another way to seek reimbursement; it starts with making a Qualified Offer.

A. Overview

In a nutshell, a Qualified Offer is a written settlement proposal, made by the taxpayer, to the government, during the so-called "Qualified Offer period," which specifies the amount offered (by stating either a precise dollar amount or a percentage of the proposed adjustments at issue), and is properly designated.[29]

B. Duration

A Qualified Offer remains open for acceptance by the government during a period that starts when it is made and ends when the government rejects the offer, the trial starts, or 90 days pass, whichever happens first.[30]

C. Demands on Taxpayer Diminished

A taxpayer ordinarily is treated as the prevailing party if his liability, as determined by a court, is the same as or less than the liability the taxpayer would have incurred if the IRS had just accepted the Qualified Offer in the first place.[31] Thus, a taxpayer who is deemed the victor because he made a Qualified Offer does not need to win on the amount in dispute or the most significant issue. Moreover, whether the government's positions during the audit, administrative appeal, or litigation were "substantially justified" is irrelevant.[32]

D. Dispute Involving Taxes

The Qualified Offer rule does not apply to a proceeding in which the amount of a tax liability is not an issue, such as court actions to obtain a declaratory judgment, enforce or quash a summons, *etc.*[33]

E. Resolution Through Litigation

The Qualified Offer rule is also inapplicable where parties settle a case before the court issues its judgment.[34] Stated differently, taxpayers can only recoup fees from the government if they make a Qualified Offer, the government ignores or rejects it, and the case is resolved later through litigation, with the court issuing a decision. Thus, making a Qualified Offer might convince the government to reevaluate the strength of its position and agree to a pre-trial settlement. In such circumstances, the taxpayer would enjoy a lower tax liability, but not necessarily fee recoupment, too.[35] The regulations contain an example describing this situation:

> Taxpayer D receives a notice of proposed deficiency (30-day letter) proposing to disallow both a personal interest deduction in the amount of $10,000 (Adjustment 1), and a charitable contribution deduction in the amount of $2,000 (Adjustment 2), and to include in income $4,000 of unreported interest income (Adjustment 3). D timely files a protest with Appeals. At the Appeals conference, D presents substantiation for the charitable contribution and presents arguments that the interest paid was deductible mortgage interest and that the interest received was held in trust for Taxpayer E. At the conference, D also provides the Appeals officer assigned to D's case a written offer to settle the case for a deficiency of $2,000, exclusive of interest. The offer states that it is a qualified offer for purposes of Section 7430(g) and that it will remain open for acceptance by the IRS for a period in excess of 90 days. After considering D's substantiation and arguments, the Appeals Officer accepts the $2,000 offer to settle the case in full. Although D's offer is a qualified offer, because all three adjustments contained in the qualified offer were settled, the qualified offer rule is inapplicable.[36]

F. Court Ruling Followed by Settlement

The regulations raise a related issue, which is what happens when there is a court ruling on a substantive tax issue, followed by a settlement by the parties. This would happen, for example, where a court grants a Motion for Partial Summary Judgment resolving a tax issue covered by a Qualified Offer, but leaves open a key matter, such as valuation. The preamble to the regulations provides the following guidance for these types of situations:

> [I]f one or more adjustments covered by a Qualified Offer are settled following a ruling by the court that substantially resolves those adjustments, then those adjustments will *not* be treated as having been settled prior to the entry of the judgment by the court and *instead* will be treated as amounts included in the judgment as a result of the court's determinations.[37]

G. Multiple Qualified Offers

Where a taxpayer makes more than one Qualified Offer during a dispute, the analysis is based on the last Qualified Offer, and the bills do not start accumulating against the government until after the date of the last Qualified Offer.[38]

H. Period for Seeking Settlement

The "Qualified Offer period" starts the date on which the "first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review" is sent. This normally means when the Revenue Agent issues an Examination Report, or when the Revenue Agent or Appeals Officer issues a Notice of Deficiency, depending on the circumstances. The Qualified Offer period ends 30 days before the date on which the case is first set for trial.[39] The preamble to the proposed regulations elucidates the Qualified Offer period, as follows:

The qualified offer period ends on the date which is thirty days before the date the case is first set for trial. In cases that are pending in the United States Tax Court, cases are placed upon a calendar for trial. Each case appearing on a trial calendar is to be called at the time and place scheduled. In determining when the qualified offer period ends for cases in the Tax Court and other courts of the United States using calendars for trial, a case is considered to be set for trial on the date scheduled for the calendar call. Cases may be removed from a trial calendar at any time. Thus, a case may be removed from a calendar before the date that precedes by thirty days the date scheduled for that calendar. To promote the settlement of such cases, the qualified offer period does not end until the case remains on a calendar for trial on the date that precedes by 30 days the scheduled date of the calendar call for that trial session.[40]

IV. Size Does Not Matter

It is time to get to the good stuff. Unbeknownst to many taxpayers and their advisors, the Qualified Offer rules do not require a minimum amount, do not define the size of a reasonable offer, do not mandate that an offer be for a certain percentage of the proposed liability, *etc.* Consequently, when taxpayers are confident that they ultimately will persuade a court that their liability is $0 or that they are due a refund, they can make a Qualified Offer of merely $1. This reality has been confirmed by just two cases, one very recent. These critical rulings are summarized below.

A. First Case

The first case, which involved the legendary Son-of-BOSS transaction, was *BASR Partnership*.[41]

The partnership engaged in the relevant transaction, the IRS audited and issued a notice of final partnership administrative adjustment (“FPAA”), the partnership filed a Complaint in federal court arguing that the IRS could not pursue the partnership because it issued the FPAA after the assessment-period had expired, and the court ruled in favor of the partnership.[42] Later, the partnership filed a Motion for litigation costs under Code Sec. 7430, maintaining that it made a Qualified Offer of $1, the government rejected it, and the partnership ultimately won, with the court ruling that the tax liability was $0.

The DOJ presented several counterarguments to the partnership’s demand for fees. One was that the supposed Qualified Offer, of merely $1, was a “sham,” specifically made for purposes of shifting litigation costs to the government, and not done in good faith. The court rebuffed the DOJ’s contention. In doing so, it emphasized that the applicable tax provision only demands that the ultimate tax liability be equal to, or less than, the amount of the Qualified Offer.[43] It explained the following:

> [Section 7430] does not require any minimum amount or define the parameters of a “reasonable” offer, nor does it require that an offer be for a certain percentage of the taxpayer’s purported tax liability… Indeed, the government has offered no amount that [the partnership] could have offered that would have been “reasonable.” In this case, the final judgment of the court not to sustain the FPAA on the basis that the FPAA was untimely issued resulted in $0 tax liability for [the] partners. Because $1 is more than $0, the court has determined that [the partnership’s] “qualified offer” complied with [Section 7430].

Qualified Offers have always been a powerful tool for taxpayers; making them puts significant pressure on the IRS and DOJ, forces them to candidly analyze the strength of their case, and positions taxpayers for potential victory and fee reimbursement.

The DOJ elevated matters to the appropriate Court of Appeals.[44] It raised five challenges, among them that the trial court allegedly abused its discretion when it awarded litigation costs to the taxpayer based on an offer of $1 that “was not made in a good faith attempt to produce a settlement.” The Court of Appeals, like the trial court before it, held in favor of the taxpayer. It explained that, in order to reach an abuse of judicial discretion, the government would have to prove that the earlier decision by the trial court was clearly unreasonable, arbitrary, fanciful, or based on findings of fact or law that were patently erroneous. That did not occur.

B. Second Case

The most recent case addressing the classification of minimal offers is *Mann Construction, Inc*.[45] It was decided in November 2024. The dispute was procedurally complex, with issues going before the trial court, federal court of appeals, a magistrate judge, and back again. Getting into the nitty gritty is unnecessary for the purposes of this article. The crux of the matter was that the IRS penalized the taxpayer for not filing a Form 8886 (*Reportable Transaction Disclosure Statement*) to reveal its participation in a particular employee-benefit plan identified as a "listed transaction" in Notice 2007-83.

At a relatively early point in the dispute, shortly after the IRS asserted penalties and the taxpayer reluctantly paid them and filed a Claim for Refund, the taxpayer offered to settle matters for $1. The IRS, confident (yet wrong) in its position, did not respond. In other words, the IRS ignored the settlement offer and allowed the Qualified Offer period of 90 days to lapse.

The case eventually made its way to the court of appeals. It held that the IRS could not sanction the taxpayer because, well, the IRS had messed up years ago. In particular, it failed to comply with the requirements of the Administrative Procedures Act ("APA") when it issued Notice 2007-83. The logic was that if the so-called "listing notice" was invalid from inception, the IRS could not castigate taxpayers for ignoring it.[46]

The taxpayer, riding the wave of this victory, filed a Motion seeking reimbursement of the legal fees associated with this long battle. The court of appeals referred the matter to a magistrate judge. She issued a Report and Recommendation ("R&R"), suggesting that the taxpayer did not tender a valid Qualified Offer because an amount of $1 was not reasonable. The taxpayer objected to the reasoning in the R&R and sought review by the court of appeals, as was its right.

The court began by announcing that the parties had conceded various points, such that only a couple of items remained in dispute. Among the contentious issues was whether the taxpayer's bid of $1 constituted a Qualified Offer for purposes of Code Sec. 7430.

The court first turned to the tax provision describing the term Qualified Offer. It determined that the proposal of $1 met the statutory definition because it was done in writing, submitted to the IRS, made during the Qualified Offer period, specified a particular amount, and labeled itself a Qualified Offer. The court quickly arrived at the following conclusion: "The statute's definition requires nothing else for Qualified Offers—not a minimum amount nor a good faith reasonableness requirement—full stop, end of inquiry." It later added that a "settlement offer must satisfy those elements—nothing more, nothing less."

The court next noted that the IRS and the R&R do not challenge the fact that the $1 proposal met the statutory definition. Instead, they simply grumble about the consequences. The R&R suggested that the court add a "reasonableness" requirement into the existing definition "to avoid tax litigants gaming the Qualified Offer rule with nominal offers." It warned that, if the court were unwilling to make such an addition, widespread chaos would ensue. The R&R admonished that a plain reading of the text of Code Sec. 7430 would make it "in the best interest of every taxpayer to immediately make a nominal Qualified Offer as soon as [the taxpayer] receives a Notice of Deficiency." The IRS, likewise, predicted that accepting "$1 sham offers" would create "an incentive for every taxpayer to make a $1 offer under Code Sec. 7430 as soon as any audit or tax litigation begins." In support of their position, the IRS and R&R could only point to *dicta* from the Supreme Court case, which dealt with an entirely different fee-shifting provision found in the Federal Rules of Civil Procedure.

The court of appeals acknowledged the concerns raised by the IRS and the R&R, but explained that they "do not warrant disregarding the text Congress chose in enacting Code Sec. 7430 and reading a reasonableness or good-faith requirement into the statute." The court then put some meat on the bones, so to speak, expanding on its reasoning. First, it explained that the dire warnings by the IRS and R&R that "every" taxpayer will be motivated to file an offer of $1 is misguided and overstated. Because a taxpayer must obtain a judgment equal to or less than the Qualified Offer as a precondition to recovery, it is incentivized to submit a "realistic settlement," and "rational taxpayers" will only make nominal offers when they anticipate a court judgment with a very low tax liability. The court concluded that the supposed "ruinous risk of sham offers" simply does not exist under Code Sec. 7430.

Second, the Supreme Court decision to which the IRS and R&R refer actually works against them. Why? That ruling was issued in 1981, and Code Sec. 7430 was not inserted into the Internal Revenue Code until seven years later. Congress, which presumably was aware of all relevant judicial precedent, did not include a "reasonableness" requirement in Code Sec. 7430. The court explained that such omission must have been intentional.

Third, even if the court agreed with the concerns highlighted by the IRS and R&R about the benefit of a "reasonableness" requirement, it does not have the authority to rewrite the text of Code Sec. 7430. The court vaguely alluded to the separation-of-powers doctrine, noting that it is part of the judicial branch, not the legislative one. It also cited another case to support the idea that "no amount of policy talk can overcome a plain statutory command."

Fourth, the court declined the invitation by the IRS to ignore the explicit language of Code Sec. 7430 and use its discretion instead. The court pointed out that the IRS supplied no evidence of bad faith by the taxpayer, other than the fact that its offer was $1. The court also emphasized that the taxpayer made the $1 offer because it believed, and the court later confirmed, that it had no tax liability whatsoever.

Finally, the court stated that accepting the IRS' invitation would cause it to be hypocritical, explaining that "it would at once admonish potential statutory gamesmanship of the Qualified Offer rule [by taxpayers] while expressly using its [judicial] discretion to circumvent Code Sec. 7430's statutory definition of a Qualified Offer."

Based on the logic outlined above, the IRS not only was unable to assert penalties for an unfiled Form 8886, but it also had to reimburse the taxpayer approximately $222,000 in fees and costs.

V. Conclusion

Qualified Offers have always been a powerful tool for taxpayers; making them puts significant pressure on the IRS and DOJ, forces them to candidly analyze the strength of their case, and positions taxpayers for potential victory and fee reimbursement. This article shows that Qualified Offers are more formidable than previously thought because the courts have confirmed the validity of settlement proposals of just $1. Serious tax controversy attorneys already file Qualified Offers, early and often, as part of their overall strategy to achieve the best possible result for their taxpayer-clients. The two recent decisions, particularly *Mann Construction, Inc.*, likely will cause this practice to increase in the future.

ENDNOTES

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1 For earlier coverage of various Qualified Offer issues, *see* Hale E. Sheppard, *New Tax Court Case Explores Boundaries of "Qualified Offers" to the IRS*, 24, 2 J. Tax Pract. Proc. 19 (2022); republished in 100, 7 Taxes 41 (2022); Hale E. Sheppard, *Partnerships, "Qualified Offers," and Conservation Easement Disputes: Analyzing Problems with the IRS's Positions, Now and Later*, 22, 4 J. Tax Pract. Proc. 33 (2020); Hale E. Sheppard, *Making "Qualified Offers" in Partnership Disputes: Extreme Positions by the IRS in Conservation Easements Cases Might Backfire*, 22, 5 J. Passthrough Entities 71 (2019).

2 H.R. Rep. No. 97-404, 97th Cong., 1st Sess. at 11 (1981).

3 Code Sec. 7430(a).

4 Code Sec. 7430(c)(4)(A).

5 Code Sec. 7430(b)(1).

6 CCA 200919037 (May 8, 2009).

7 *Id.*

8 Code Sec. 7430(b)(3).

9 Code Sec. 7430(c)(4)(A).

10 Code Sec. 7430(c)(4)(B)(i).

11 P.L. 104-168.

12 H.R. Rept. 104-506, 104th Cong., 2d Sess. 1996, pg. 37.

13 P.L. 104-168, §701; H.R. Rept. 104-506, 104th Cong., 2d Sess. 1996, pgs. 36 and 37.

14 Code Sec. 7430(c)(4)(B)(ii).

15 Code Sec. 7430(c)(4)(B)(iv)(I); Reg. §301.7430-5(c)(3).

16 Code Sec. 7430(c)(4)(B)(iv)(II); Reg. §301.7430-5(c)(3).

17 P.L. 105-206.

18 P.L. 105-206, §3101, codified as Code Sec. 7430(c)(4)(B)(iii).

19 H.R. Rept. 105-364, 105th Cong., 1st Sess. 1997, pg. 58; Sen. Rept. 105-174, 105th Cong., 2d Sess., 1998, pg.48.

20 H.R. Rept. 105-364, 105th Cong., 1st Sess. 1997, pg. 58; Sen. Rept. 105-174, 105th Cong., 2d Sess., 1998, pg.48.

21 Reg. §301.7430-5(c)(1).

22 Reg. §301.7430-5(c)(1); Reg. §301.7430-5(h) Ex. 1.

23 *National Federation of Republican Assemblies*, DC-AL, 2003-1 USTC ¶50,249, 263 FSupp2d 1372, 1378.

24 *R.C. Kennedy, Sr.*, 89 TC 98, Dec. 44,046 (1987) (holding that the IRS' position was unreasonable where it was contrary to its own regulations, inconsistent with case law, and lacking factual support).

25 *N.R. Wilkes, Jr.*, CA-11, 2002-1 USTC ¶60,438, 289 F3d 684, 688.

26 *See, e.g., M.J. Downing*, 89 TCM 1009, Dec. 55,983(M), TC Memo. 2005-73.

27 *See, e.g., Roanoke River Basin Associates v. North Carolina et al.*, CA-4, 991 F2d 132 (1993), *S. Johnson*, CA-10, 920 F3d 639 (2019), and *J.C. Morreale*, 122 TCM 80, Dec. 61,902(M), TC Memo. 2021-90.

28 *S. Johnson*, CA-10, 920 F3d 639 (2019).

29 Code Sec. 7430(g)(1); Reg. §§301.7340-7(c)(1) and 301.7430-7(c).

30 *Id.*

31 Code Sec. 7430(c)(4)(E)(i); Reg. §§301.7430-7(a), 301.7430-7(b)(1), and 301.7430-7(b)(2).

32 T.D. 8922 (Jan. 4, 2001), Preamble (emphasis added); *See also* Reg. §301.7430-7(b)(1).

33 Code Sec. 7430(c)(4)(E)(ii); Reg. §301.7430-7(a).

34 T.D. 8922 (Jan. 4, 2001), Preamble; *See also* Code Sec. 7430(c)(4)(E)(ii); Reg. §301.7430-7(a).

35 Reg. §301.7430-7(e), Example 8.

36 *Id.*

37 T.D. 9106 (Dec. 24, 2003), Preamble (emphasis added). Court rulings relating to discovery, admissibility of evidence, and burden of proof are not treated as rulings that substantially resolve adjustments covered by a Qualified Offer. *Id.*

38 Code Sec. 7430(c)(4)(E)(iii).

39 Code Sec. 7430(g)(2); Reg. §301.7430-7(c)(7); T.D. 8922 (Jan. 4, 2001), Preamble.

40 T.D. 8922 (Jan. 4, 2001), Preamble.

41 *BASR Partnership*, FedCl, 2017-1 USTC ¶50,144, 130 FedCl 286, 119 AFTR 2d 2017-614.

42 *BASR Partnership*, FedCl, 2013-2 USTC ¶50,527. 113 FedCl 181, 112 AFTR 2d 2013-6313.

43 The court referenced Code Sec. 7430(c)(4)(E)(i).

44 *BASR Partnership*, CA-FC, 2019-1 USTC ¶50,152, 915 F3d 771 (2019).

45 *Mann Construction, Inc.*, Dist. Ct., Eastern District of Michigan, Northern Division, Case No. 1:20-cv-11307, Opinion and Order (Nov. 1, 2024); Erin McManus, "Mann Construction Gets Attorney Fees in Listed Transaction Case," 2024 Tax Notes Today Federal 213-6 (Nov. 5, 2024).

46 *Mann Construction, Inc.*, CA-6, 2022-1 USTC ¶50,122, 27 F4th 1138.