

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

Present Law

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

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

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

Reasons for Change

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

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

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

Written Managerial Approval

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

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

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

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

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

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

Tax Court Jurisdiction

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

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

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

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

83 See note 1, *supra*.

Recommendations

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